

1995

Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests

Mark Strasser

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 Fordham L. Rev. 921 (1995).

Available at: <https://ir.lawnet.fordham.edu/flr/vol64/iss3/13>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests

Cover Page Footnote

Assistant Professor, Capital University Law School. B.A., Harvard university, Ph.D., University of Chicago, J.D., Stanford Law School. I would like to thank George Cronheim for his helpful discussion of these and related issues and the Capital University Law School for providing a Faculty Summer Research Grant.

DOMESTIC RELATIONS JURISPRUDENCE AND THE GREAT, SLUMBERING *BAEHR*: ON DEFINITIONAL PRECLUSION, EQUAL PROTECTION, AND FUNDAMENTAL INTERESTS

Mark Strasser*

INTRODUCTION

SAME-sex marriage poses a particularly thorny problem for domestic relations jurisprudence. Courts upholding state refusals to recognize such marriages must ignore or reinterpret a whole host of related precedents if they are going to justify their positions. For example, in *Loving v. Virginia*,¹ the Court struck down prohibitions on interracial marriage, despite a longstanding belief that such marriages were immoral and contrary to natural law.² When the Court in *Turner v. Safley*³ articulated the various interests served by marriage, the Court did *not* imply that marriage was only instrumentally important to facilitate the having and raising of children⁴—on the contrary, it made clear that the right to marry is itself fundamental.⁵ In *Zablocki v. Redhail*,⁶ the Court recognized that “the right to marry is of fundamental importance for *all* individuals”⁷—the Court did not suggest that the right was only important for straight people.

In *Baehr v. Lewin*,⁸ Hawaii’s refusal to allow same-sex individuals to marry was challenged. A plurality of the Hawaii Supreme Court held that the marriage law violated the Equal Protection Clause of the state constitution because it facially discriminated on the basis of sex⁹—it allowed men to marry women but not men and allowed women to marry men but not women. The court rejected the argument that substantive due process issues were also implicated, reasoning

* Assistant Professor, Capital University Law School. B.A., Harvard University, Ph.D., University of Chicago, J.D., Stanford Law School. I would like to thank George Cronheim for his helpful discussion of these and related issues and the Capital University Law School for providing a Faculty Summer Research Grant.

1. 388 U.S. 1 (1967).

2. *Id.* at 3 (discussing trial court’s view that God did not intend such marriages); see also *Naim v. Naim*, 87 S.E.2d 749, 752 (Va.) (discussing with approval a holding that “the natural law which forbids their [racial] intermarriage and the social amalgamation which leads to a corruption of races is as clearly divine as that which imparted to them different natures”), *vacated on procedural grounds*, 350 U.S. 891 (1955).

3. 482 U.S. 78 (1987).

4. See *id.* at 95-96.

5. *Id.* at 95.

6. 434 U.S. 374 (1978).

7. *Id.* at 384 (emphasis added).

8. 852 P.2d 44 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

9. *Id.* at 59-60 (plurality opinion).

that there is no fundamental right of persons of the same sex to marry¹⁰ because same-sex marriage was neither "so rooted in the traditions and collective conscience of Hawaii's people that failure to recognize it would violate the fundamental principles of liberty and justice"¹¹ nor "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed."¹² The court failed to appreciate that analogous reasoning might have been used by the *Loving* Court to establish that there is no fundamental right of persons of different races to marry.

Courts refusing to recognize that same-sex couples have a fundamental right to marry have offered either cramped interpretations or, in some cases, radical recreations of the relevant case law. Unless these decisions are overruled, they may result in the trampling of rights, previously considered fundamental, of both gay and straight people. Courts must stop pretending that they can avoid substantive positions by citing spurious definitional bars, must stop reinventing case law to substantially limit what qualifies as a fundamental interest, and must stop exaggerating particular state interests while turning a blind eye to others in order to justify what cannot in good faith be justified.

Part I of this Article discusses the claim that same-sex marriage is precluded by definition. The argument is fallacious insofar as it implies that the legislature is not itself responsible for the legal definition of marriage or insofar as it implies that definitions (as opposed to other types of classifications) can escape judicial scrutiny. Part II discusses the equal protection issues implicated by a refusal to recognize same-sex marriage. Such a policy is invidious because it involves discrimination on the basis of gender as well as on the basis of sexual orientation, and because it imposes unfair burdens on children. Part III discusses the due process issues implicated by state refusals to recognize same-sex unions. The reasons that the right to marry is fundamental apply with equal force to all people, regardless of sexual orientation. The refusal of states to recognize same-sex marriages cannot pass constitutional muster and must be changed.

I. DEFINITIONS

Courts have used definitions in a variety of ways to preclude lesbian, bisexual, and gay people from marrying or from having families. Sometimes, definitions are used to absolve legislatures from responsibility for their unwillingness to countenance same-sex unions.¹³ At other times, legislative definitions are arbitrarily modified so that

10. *Id.* at 56-57 (plurality opinion).

11. *Id.* at 57 (plurality opinion).

12. *Id.* (plurality opinion).

13. See *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974).

same-sex couples will not be considered family and will not receive the benefits that other similarly situated couples may receive.¹⁴ Not only do these verbal manipulations deprive lesbian, gay, and bisexual individuals of the immediate rights at issue, but they may also create precedents that can be used to deprive all individuals of their rights, regardless of their sexual orientation. Further, these decisions undermine the public's confidence that courts will examine issues fairly and in good faith. Courts must stop offering casuistic reasoning to avoid substantive issues.

A. Marriage

A variety of courts have suggested that same-sex marriages are precluded by definition and thus there is no need to consider any of the possible substantive issues raised by a state's refusal to recognize such marriages. In *Singer v. Hara*,¹⁵ the court held that two men unable to secure a marriage license had not been denied a fundamental right; instead, they had been "denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex."¹⁶ In *Jones v. Hallahan*,¹⁷ the court rejected the argument that either the state or the county clerk had discriminated against two women by refusing to issue them a marriage license; rather, the court held, these individuals were by definition incapable of marrying each other: "[A]ppellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined."¹⁸

When the *Hallahan* court asserted that the appellants could not marry because they were unable to meet the definitional requirements, the court implied that the legislature was not itself responsible

14. See *Rovira v. AT&T*, 817 F. Supp. 1062, 1064 (S.D.N.Y. 1993) (denying death benefits for partner and her children even though she and deceased had gone through a formal ceremony); *Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410, 411-12 (Ct. App. 1985) (denying partner dental benefits); *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121, 123 (Wis. Ct. App. 1992) (denying partner insurance benefits).

15. 522 P.2d 1187 (Wash. Ct. App. 1974).

16. *Id.* at 1192 (footnote omitted).

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

18. *Id.* at 589; see also *Dean v. District of Columbia*, 653 A.2d 307, 361 (D.C. 1995) (Terry, J., concurring) ("[T]he word 'marriage,' when used to denote a legal status, refers *only* to the mutual relationship between a man and a woman as husband and wife, . . . same-sex 'marriages' are legally and factually—*i.e.*, definitionally—impossible."); *In re Estate of Cooper*, 564 N.Y.S.2d 684, 686 (Sur. Ct. 1990) ("[T]he terms 'marriage' and 'spouse' necessarily and exclusively involve a contract between persons of different sexes."), *aff'd*, 592 N.Y.S.2d 797 (App. Div.), *appeal dismissed*, 624 N.E.2d 696 (N.Y. 1993); G. Sidney Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. Dayton L. Rev. 541, 560 (1985) ("Definitionally, two persons of the same sex are not fit for the function of participating in opposite-sex marriage.").

for the legal definition of marriage, as if the legislature were subject to the commands of some Higher Power. If the legislature could not recognize same-sex marriages because the "God of nature made it otherwise"¹⁹ and the legislature was bound by God's rule, then one could understand how the legislature would have to be held blameless and the statutory classification would have to be upheld. Yet, the argument that God's Law prohibits certain marital unions has not been successful in the past. For example, it has long been argued that God rejects the proposition that the races should be allowed to intermarry.²⁰ Insofar as legislatures must "impose such restraints upon the [marriage] relation as the laws of God, and the laws of propriety, morality and social order demand,"²¹ and insofar as God and morality demand that interracial marriages not be recognized, legislatures would seem bound not to recognize them. Yet, states must recognize interracial marriages, demands of "morality" notwithstanding.

The argument that individuals wishing to marry someone of their own sex are definitionally precluded from doing so is mistaken for at least two reasons. First, the argument is fallacious insofar as it allegedly describes current speaking practices. In everyday speech, people use the term "marriage" to refer to long-term, same-sex relationships.²² Not only do journalists, theorists, and everyday speakers talk about same-sex marriages, but some religions recognize them.²³ Indeed, the state of Hawaii implicitly, if not explicitly, recognized that religious groups sanctify same-sex marriages when it refused to impose sanctions on religious organizations that solemnified such unions.²⁴ Thus, if usage of the term was the relevant consideration, courts could not dispose of the relevant issues by appealing to the

19. *Scott v. State*, 39 Ga. 321, 326 (1869); see also *Naim v. Naim*, 87 S.E.2d 749, 752 (Va.) (discussing with approval a case holding that "the natural law which forbids their intermarriage and the social amalgamation which leads to a corruption of races is as clearly divine as that which imparted to them different natures"), *vacated on procedural grounds*, 350 U.S. 891 (1955).

20. See *Dean*, 653 A.2d at 359 (Ferren, J., concurring in part and dissenting in part) (discussing "the premise of the trial court opinion the Supreme Court rejected in *Loving*: that a divine natural order forbids racial intermarriage" (footnote omitted)).

21. *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 862 (1878).

22. *Dean*, 653 A.2d at 315 (Ferren, J., concurring in part and dissenting in part) ("[T]he terms 'marriage' and 'gay marriage' are used colloquially today to refer to long-term same-sex relationships between gays and between lesbians.").

23. See Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 Suffolk U. L. Rev. 981, 987 (1991) (noting that journalists, speakers, theorists, and some religions include same-sex relationships within the notion of marriage); James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. Rev. 93, 96 (1993) ("Some churches perform ceremonies uniting same-sex couples.").

24. See Haw. Rev. Stat. § 572-1.6 (Supp. 1994) ("Nothing in this chapter shall be construed to render unlawful, or otherwise affirmatively punishable at law, the solemnization of same-sex relationships by religious organizations . . .").

definition of the term "marriage."²⁵ Second, even if the description were accurate, the argument would still have very little, if any, legal weight.²⁶ Dictionary entries do not justify the abridgement of fundamental rights.

Perhaps courts are not appealing to everyday speech, but are instead appealing to the definitions of marriage that the state legislatures have adopted.²⁷ Certainly, courts may legitimately look at statutory definitions for certain purposes, such as to discern legislative intent. If discerning legislative intent is the court's purpose, however, the court would not be looking at the definition to absolve the legislature from responsibility but, instead, merely to help interpret the legislature's enactment.

Courts will have no difficulty in interpreting the intent of those state legislatures that have explicitly specified that individuals of the same sex may not marry each other,²⁸ but courts should consider at least two implications of these enactments. First, these legislatures are not bound by these definitions of who may marry whom—the legislatures could repeal the prohibition of same-sex marriage should they so desire (although, of course, they are extremely unlikely to do so). Second, those legislatures that explicitly reject same-sex marriage are themselves implicitly indicating that they do not believe that same-sex marriages are definitionally precluded—if such unions were definitionally precluded, pronouncements declaring them void would be unnecessary. By indicating that they understand that such marriages are possible, the legislatures imply that they are refusing to recognize such unions for reasons of public policy rather than for reasons of definitional preclusion.²⁹

Some states have not explicitly rejected same-sex marriages but instead have said that only marriages between a man and a woman will be considered valid.³⁰ These state legislatures have also made their

25. For a related discussion concerning whether courts must recognize that marriage includes same-sex unions, see *infra* notes 54-60 and accompanying text.

26. For an extended discussion of these issues, see generally Strasser, *supra* note 23 (criticizing definitional preclusion arguments).

27. See *Singer v. Hara*, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974) ("Washington statutes . . . are clearly founded upon the presumption that marriage, as a legal relationship, may exist only between one man and one woman . . ." (emphasis added) (citations omitted)).

28. See La. Civ. Code Ann. art. 89 (West 1952 & Supp. I 1992) ("Persons of the same sex may not contract marriage with each other."); Tex. Fam. Code Ann. § 1.01 (West 1993) ("A license may not be issued for the marriage of persons of the same sex."); Utah Code Ann. § 30-1-2(5) (1995) ("[M]arriages are prohibited and declared void . . . between persons of the same sex."); Va. Code Ann. § 20-45.2 (Michie 1995) ("A marriage between persons of the same sex is prohibited.").

29. See *infra* notes 428-64 and accompanying text for a discussion of some of the public policy considerations implicated by such legislative action.

30. See Haw. Rev. Stat. § 572-1 (Supp. 1994) ("[T]he marriage contract . . . shall be only between a man and a woman . . ."); Ind. Code § 31-7-1-2 (1987) ("Only a female may marry a male. Only a male may marry a female."); Md. Code Ann., Fam. Law

intentions sufficiently clear: if only a marriage between a man and a woman is valid, then a marriage between a man and a man or between a woman and a woman is not valid. Implicitly, if not explicitly, these legislatures also considered whether to recognize same-sex marriages. While they have also decided that they do not wish to recognize such marriages, it is clear that the reason that such unions are definitionally precluded is that the legislatures *themselves* have created the exclusionary definitions.

Perhaps it will be thought that legislatures have explicitly precluded same-sex marriages statutorily because courts have had some difficulty in the past interpreting marriage statutes that lacked an explicit exclusion. On the contrary, courts have had no difficulty inferring legislative desires even when states have not included language that either explicitly precluded same-sex individuals from marrying or that explicitly limited marriage to opposite-sex individuals. In *Baker v. Nelson*,³¹ a Minnesota court interpreted the Minnesota statute to exclude same-sex marriages even though no language suggested that only a marriage contract between a man and a woman would be considered valid.³²

Two different issues should not be conflated. One issue is whether legislatures intend to allow same-sex marriages. Another issue is whether legislatures *could* include same-sex relationships within the definition of marriage. While it is plausible to believe that legislatures have not intended to allow same-sex marriages,³³ it is simply wrong to suggest that a legislature would be prohibited from allowing such a union if it so desired.³⁴ Legislatures are not prevented from recognizing same-sex marriages because of some externally imposed definition of the term, and courts must stop implying that legislative bodies are not responsible for the definitions they create.

The importance of the difference between a legislature's choosing not to recognize same-sex marriages and the legislature's being precluded from recognizing same-sex marriages has not been appreciated. The legal analysis of the relevant issues is very different if the nonrecognition is a legislative choice rather than something that would be *ultra vires* for the legislature to change.³⁵ When the *Halla-*

§ 2-201 (1991) ("Only a marriage between a man and a woman is valid in this State."); Minn. Stat. Ann. § 517.01 (West 1990) ("Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman . . .").

31. 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

32. *Id.* at 185-86.

33. See Strasser, *supra* note 23, at 983 n.5 (suggesting that the *Baker* court correctly inferred that the Minnesota legislature had not intended to allow same-sex marriages).

34. See *Adams v. Howerton*, 486 F. Supp. 1119, 1125 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); *Singer v. Hara*, 522 P.2d 1187, 1192 n.8 (Wash. Ct. App. 1974).

35. For example, insofar as localities are prohibited from granting domestic partnership benefits because doing so would be *ultra vires*, the localities cannot be blamed

han court wrote that the appellants could not marry because of their "own incapability of entering into a marriage as that term is defined,"³⁶ the court implied that the state of Kentucky could not be blamed *even if such a prohibition was discriminatory*.³⁷ Yet, if the state of Kentucky was the entity responsible for defining the term for legal purposes, then the court's analysis was at best simply question-begging.³⁸

Where the state itself is the entity defining the relevant term, the definition must be viewed in the same way that any other legislative classification would be viewed—to be valid, it must be reasonably related to the promotion of a legitimate goal.³⁹ Legislatures cannot avoid having their statutes subject to judicial review simply by using definitions to accomplish their legislative aims. Otherwise, a legislature unable to justify a prohibition on interreligious or interracial marriages might avoid judicial review simply by defining marriage in such a way that interreligious or interracial marriages were not "true" marriages.⁴⁰

In *Loving v. Virginia*,⁴¹ the Supreme Court struck down Virginia's ban on interracial marriages. If Virginia currently wanted to ban such marriages, it could not do so by simply offering a definition of marriage that did not include such unions,⁴² as it has done with respect to same-sex marriages.⁴³

One might conclude that Virginia can definitionally preclude intrasexual marriages, but not interracial ones, because it has already recognized some of the latter unions but none of the former. Yet, this analysis would be faulty. Were the Supreme Court to overrule *Loving*, the state could grandfather those marriages that had been recognized between 1967 (when the Court decided *Loving*) and the date

for failing to do so. See *City of Atlanta v. McKinney*, 454 S.E.2d 517, 520 (Ga. 1995) ("[C]ities in this state may not enact ordinances defining family relationships."); *Lilly v. City of Minneapolis*, No. MC 93-21375, 1994 WL 315620, at *10 (Minn. Dist. Ct. June 3, 1994) (holding that the legislature did not intend to allow cities "to give the same benefits to employees with domestic partners as to employees who are married"), *aff'd*, 527 N.W.2d 107 (Minn. Ct. App. 1995); see also Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 Colum. L. Rev. 1164, 1198-99 (1992) (discussing home-rule limits for localities).

36. *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973).

37. A judge on the D.C. Court of Appeals adopted a similar tack. See *Dean v. District of Columbia*, 653 A.2d 307, 361 (D.C. 1995) (Terry, J., concurring).

38. See Sherryl E. Michaelson, Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. Rev. 301, 307 (1984) ("This reasoning, however, merely begs the question because the state is ultimately responsible for the particular definition of marriage it chooses to adopt.")

39. See *infra* notes 109-212 and 230-416 and accompanying text for a discussion of whether heightened or strict scrutiny is required for such a classification.

40. See Strasser, *supra* note 23, at 984-86.

41. 388 U.S. 1 (1967).

42. See Strasser, *supra* note 23, at 985-89.

43. See Va. Code Ann. § 20-45.2 (Michie 1995).

that its definitional preclusion of interracial marriages would go into effect, but prevent Virginia residents from making such marriages in the future.⁴⁴

In *Baehr v. Lewin*,⁴⁵ a plurality of the Supreme Court of Hawaii held that Hawaii's prohibition of same-sex marriage involved sex discrimination, and could only be justified if it promoted a compelling state interest.⁴⁶ On remand, the lower court will decide whether the state's interest is sufficiently compelling and narrowly tailored to justify this statutory distinction. The lower court will *not* be deciding whether same-sex individuals are definitionally precluded from marrying—that question, which is logically prior to the question of whether the statute will survive strict scrutiny,⁴⁷ has already been answered in the negative.

It might be expected that no post-*Baehr* court would hold that same-sex marriages are precluded by definition, because Hawaii may actually come to recognize same-sex marriages. Further, it might be expected that when other states pass legislation explicitly refusing to recognize same-sex marriages, they implicitly accept that such unions are not definitionally precluded. This might induce courts to realize that they cannot in good faith simply dispose of the relevant substantive issues by appealing to the definitional preclusion argument. These points notwithstanding, one judge in *Dean v. District of Columbia*⁴⁸ concluded that it makes no "difference that the District of Columbia, or any agency of its government, discriminates against these two appellants by refusing to allow them to enter into a legal status which the sameness of their gender prevents them from entering in the first place."⁴⁹ Yet, it is difficult to understand how a judge could conclude that "appellants cannot enter into a marriage because the very nature of marriage makes it impossible for them to do so"⁵⁰ when

44. See *In re Paquet's Estate*, 200 P. 911, 913 (Or. 1921). In this case, the court quoted the then applicable statutory authority:

Hereafter it shall not be lawful within this state for any white person male, or female, to intermarry with any Negro, Chinese, or any person having one-fourth or more negro, Chinese, or Kanaka blood, or any person having more than one-half Indian blood; and all such marriages, or attempted marriages, shall be absolutely null and void.

Id. (quoting 1921 Or. Laws § 2163 (repealed by 1951 Or. Laws ch. 455, § 2)).

45. 852 P.2d 44 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

46. *Id.* at 67 (plurality opinion).

47. See *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (suggesting that the conceptual definition of marriage is logically prior to equal protection and due process analyses), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982).

48. 653 A.2d 307 (D.C. 1995).

49. *Id.* at 361 (Terry, J., concurring). *But see* William M. Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 Yale L.J. 1495, 1496 (1994) ("There is nothing intrinsic to the legal institution of marriage that excludes same-sex couples from it.").

50. *Dean*, 653 A.2d at 362 (Terry, J., concurring).

the state of Hawaii may actually come to recognize such marriages. It is even more difficult to understand such a position when the *Baehr* decision was cited by a different judge in the very opinion using the definitional preclusion argument.⁵¹

At the time the Hawaii Supreme Court was deciding *Baehr*, the Hawaii legislature had not explicitly limited marriage to opposite-sex couples. The court had to decide whether the Hawaii legislature (a) had intended to permit same-sex marriages because they had not been expressly precluded, or (b) had not intended to permit same-sex marriage despite their not having been explicitly precluded. The *Baehr* court rightly inferred that the legislature had not intended to permit same-sex marriages⁵² and, instead, held that the state's refusal to recognize same-sex marriages involved discrimination on the basis of sex.⁵³

In *Dean*, Judge Ferren recognized that the *Baehr* decision was based on state constitutional grounds rather than on a recognition that, absent specific language to the contrary, the evolving definition of marriage *mandated* that same-sex couples be allowed to marry.⁵⁴ Presumably, this was important to Judge Ferren because he had to decide how to interpret the relevant local statutes. The D.C. statutes were silent as to whether same-sex marriages were permissible,⁵⁵ although the Code did include certain unions that would not be recognized.⁵⁶

Judge Ferren may have believed that if the evolving notion of marriage clearly included same-sex unions, then the District of Columbia would have to recognize same-sex marriages based on a *plain meaning* interpretation of the relevant statutes.⁵⁷ Because the *Baehr* decision was based on state constitutional grounds, Judge Ferren may have felt bolstered in his belief that the evolving notion of marriage did not clearly include same-sex unions and thus that he should look at other factors to determine legislative intent.⁵⁸

The important issue here is not what the plain meaning of marriage includes nor whether plain meaning jurisprudence should incorporate

51. See *id.* at 316 n.13 (Ferren, J., concurring in part and dissenting in part).

52. In 1994, the Hawaii Legislature manifested its intention that the marriage laws permit only unions between opposite-sex couples. See 1994 Haw. Sess. Laws 217.

53. See *Baehr*, 852 P.2d at 64.

54. *Dean*, 653 A.2d at 316 n.13 (stating that the *Baehr* decision was "premised on state constitutional grounds, not on statutory interpretation applying an evolving definition of marriage").

55. The relevant D.C. statutes do not address whether same-sex marriages are permitted. See D.C. Code Ann. § 30-101 to § 30-121 (1981).

56. See D.C. Code Ann. § 30-101 (1981) (specifying incest restrictions only).

57. See *Dean*, 653 A.2d at 312 (Ferren, J., concurring in part and dissenting in part) ("Citing our well-known interpretive criteria, appellants stress that we should focus, first, on the plain words of the statute.").

58. See Strasser, *supra* note 23, at 986 (suggesting that where definitions will not help determine legislative intent, other factors should be considered).

the common understanding of the relevant terms at the time the legislation was enacted⁵⁹ rather than at the time the legislation is to be enforced.⁶⁰ Rather, the points here are simply that plain meaning can no longer be used to exclude same-sex marriages and that courts must stop using the definitional preclusion argument if they wish to preserve even an appearance of acting or judging in good faith.

B. Family

Closely connected to the issue of how to define marriage is the issue of how to define family. Often, this issue has arisen in the context of zoning regulations, although more recently it has arisen in a variety of other contexts.⁶¹

Courts have often been unsympathetic to attempts by localities to prevent groups of individuals from living together in certain geographical areas by saying that such groups are not families. For example, in *Berger v. State*,⁶² the Supreme Court of New Jersey had to decide whether a group composed of a married couple and several children who were neither biologically related to the adults nor to each other nonetheless constituted a family. The court decided that they did.⁶³

The Supreme Court of New Jersey recognized that zoning regulations incorporating a one-family requirement often work irrational harms.⁶⁴ Such harms may be avoided by using a functional definition

59. Judge Ferren discussed the legislative history behind the District of Columbia marriage statute. *Dean*, 653 A.2d at 310-12 (Ferren, J., concurring in part and dissenting in part).

60. If one uses the former method, one may be more likely to capture the intent behind the legislation. By incorporating anachronistic meanings, however, one may not be giving adequate notice to individuals regarding what they may or may not do.

61. See *infra* notes 62-105 and accompanying text.

62. 364 A.2d 993 (N.J. 1976).

63. *Id.* at 998 ("That these children are unrelated in a biological way to each other and to these parents does not negate the fact that they live and function as a family entity."); see also *City of White Plains v. Ferraioli*, 313 N.E.2d 756, 758-59 (N.Y. 1974) ("[A]n ordinance may restrict a residential zone to occupancy by stable families occupying single-family homes, but neither by express provision nor construction may it limit the definition of family to exclude a household which in every but a biological sense is a single family.").

64. *Kirsch Holding Co. v. Borough of Manasquan*, 281 A.2d 513, 518 (N.J. 1971) ("[T]hese 'family' definitions and prohibitory ordinance provisions preclude so many harmless dwelling uses . . . that they must be held to be so sweepingly excessive, and therefore legally unreasonable, that they must fall in their entirety."). Similarly, a lower New Jersey court held that:

A general municipal restriction of occupancy of dwelling units to groups of persons all of whom are related to each other by blood, marriage or adoption is unreasonably restrictive of the ordinary and natural utility of such property as dwellings for people, and of the right of unrelated people in reasonable number to have recourse to common housekeeping facilities in circumstances free of detriment to the general health, safety and welfare.

Gabe Collins Realty, Inc. v. City of Margate City, 271 A.2d 430, 434 (N.J. App. Div. 1970).

of family.⁶⁵ The functional approach was used by courts holding that the following groups constituted a family for zoning purposes: ten nonbiologically related students,⁶⁶ a group of nurses,⁶⁷ a group of priests,⁶⁸ and a group of nuns.⁶⁹

It should not be thought that individuals who qualify as family for one purpose will therefore qualify as family for other purposes as well. In *Braschi v. Stahl Associates Co.*,⁷⁰ the New York Court of Appeals characterized two individuals who had a long-term gay relationship as constituting a family. The court discussed a "more realistic, and certainly equally valid, view of a family [that] includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."⁷¹ Because the two individuals constituted a family, Miguel Braschi could not be evicted when his life partner, Leslie Blanchard, died, even though Blanchard was the sole tenant of record.

Courts have declined to use this functional definition of family in a variety of other contexts. In a New York case, Sandra Rovira and her two children sought to be declared beneficiaries of a life insurance policy when Rovira's life partner, Marjorie Forlini, died.⁷² As in *Braschi*, this relationship was "characterized by an emotional and financial commitment and interdependence"⁷³—the two had pooled their resources, shared responsibility for important decisions, jointly owned their home, and taken vacations together.⁷⁴ They had been together for twelve years and had formalized their relationship in a ceremony in which they had exchanged rings and vows.⁷⁵ Nonetheless, because the court used a legal rather than a functional definition of family, the benefits were denied.⁷⁶ Other courts have denied life partners dental

65. Cf. Donald L. Beschle, *Defining the Scope of the Constitutional Right to Marry: More Than Tradition, Less Than Unlimited Autonomy*, 70 Notre Dame L. Rev. 39, 55 (1994) (The core of family "can be rather simply stated as a sense of commitment and duty to another or a group of others, transcending duty to the community at large.").

66. See Borough of Glassboro v. Vallorosi, 568 A.2d 888 (N.J. 1990).

67. See Robertson v. Western Baptist Hospital, 267 S.W.2d 395 (Ky. Ct. App. 1954).

68. See Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 66 N.W.2d 627, 630 (Wis. 1954).

69. See Carroll v. City of Miami Beach, 198 So. 2d 643 (Fla. Dist. Ct. App. 1967).

70. 543 N.E.2d 49 (N.Y. 1989).

71. *Id.* at 53-54; see also *In re Adult Anonymous II*, 452 N.Y.S.2d 198, 201 (App. Div. 1982) ("[T]he best description of a family is a continuing relationship of love and care, and an assumption of responsibility . . .").

72. *Rovira v. AT&T*, 817 F. Supp. 1062 (S.D.N.Y. 1993); see also *In re Cooper*, 592 N.Y.S.2d 797, 799 (App. Div. 1993) (rejecting the argument that *Braschi* requires that the "traditional definition of the term 'surviving spouse' must be rejected, and replaced with a broader definition which would include the petitioner").

73. *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 54 (N.Y. 1989).

74. *Rovira*, 817 F. Supp. at 1064.

75. *Id.*

76. *Id.* at 1072.

benefits,⁷⁷ insurance benefits,⁷⁸ sick leave,⁷⁹ or the right to elect against a will.⁸⁰

When individuals seek to marry their partners (whether of the same or opposite sex), they do so for a variety of reasons.⁸¹ Some do so for the economic benefits or, perhaps, for the security that comes from knowing that one's partner will be provided for should one die. While same-sex couples have alternative ways to achieve some of these benefits,⁸² for example, by naming each other in their wills or by making other legal agreements, there is no guarantee that such wills will sur-

77. *Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410, 412 (Ct. App. 1985).

78. *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121, 123 (Wis. Ct. App. 1992).

79. *Ross v. Denver Dep't of Health & Hosps.*, 883 P.2d 516, 521, 522 (Colo. Ct. App. 1994).

80. *In re Estate of Cooper*, 564 N.Y.S.2d 684, 685 (Sur. Ct. 1990) (holding that same-sex partner does not "have any right or standing to elect against decedent's will"), *aff'd*, 592 N.Y.S.2d 797 (App. Div.), *appeal dismissed*, 624 N.E.2d 696 (N.Y. 1993).

Federal courts have sometimes upheld classifications based on the family unit and have sometimes struck them down. *Compare* *Village of Belle Terre v. Boras*, 416 U.S. 1, 7-9 (1974) (upholding zoning ordinances that prohibited more than two unrelated individuals from living in certain areas) *with* *City of Edmonds v. Oxford House, Inc.*, 115 S. Ct. 1776, 1783 (1995) (holding that a zoning ordinance based on the family unit was not exempt from the Fair Housing Act prohibition of discrimination against the handicapped); *Moore v. City of East Cleveland*, 431 U.S. 494, 505-06 (1977) (striking down a zoning ordinance that defined family in such a way that extended families might not be allowed to live together) *and* *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (holding that a statutory classification denying food stamp benefits to households containing unrelated persons was unconstitutional).

81. *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw.) (plurality opinion) (specifying a number of marital rights and benefits), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993); Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 Gonz. L. Rev. 91, 92 (1990) ("Marriage confers certain legal and economic benefits on the partners including property rights, tax breaks, veterans' and social security benefits, testamentary benefits, recovery for loss of consortium, employment benefits, lower insurance premiums, spousal testimonial privileges, financial support upon separation, and status as next-of-kin to make medical decisions or burial arrangements."); Mary F. Gardner, Note, *Braschi v. Stahl Associates Co.: Much Ado About Nothing?*, 35 Vill. L. Rev. 361, 366-67 (1990) (discussing benefits extended to family members); John Charles Hayes, Note, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick*, 31 B.C. L. Rev. 375, 390-91 (1990) (discussing various marital benefits); Trosino, *supra* note 23, at 96 (discussing legal and economic benefits of marriage); *Developments in the Law—Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1604 (1989) (discussing the repercussions of the same-sex marriage ban) [hereinafter *Developments*]; Note, *Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. Pa. L. Rev. 193, 198-99 (1979) (discussing the disabilities that result from the inability of gays and lesbians to marry).

82. *But see* Lisa R. Zimmer, Note, *Family, Marriage, and the Same-Sex Couple*, 12 Cardozo L. Rev. 681, 683 (1990) ("Until gay and lesbian couples are allowed entry into the status of marriage, they will be forced to turn to inadequate legal mechanisms that may answer some of their legal dilemmas, but, ultimately, do not provide the status and legal recognition such couples need.").

vive a challenge by distant relatives⁸³ or that contractual agreements will be held legally enforceable.⁸⁴

Individuals seeking to marry their same-sex partners may also be seeking numerous nonmaterial benefits.⁸⁵ For some couples, these benefits are more important than the material ones.⁸⁶ The couple may wish to make a public commitment and to obtain public recognition of that commitment.⁸⁷ Indeed, the public nature of that commitment may be precisely what is most unsettling for opponents of same-sex marriage.⁸⁸ Thus, it would be inaccurate to describe cavalierly the

83. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 192 ("When gay people provide for their life partners through wills, courts often uphold challenges by distant relatives.").

84. Ruthann Robson & S.E. Valentine, *Lo(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 Temp. L. Rev. 511, 522 (1990).

85. Buchanan, *supra* note 18, at 571 ("[N]onrecognition of same-sex marriage deprives such couples of the material, emotional, and psychological benefits that legal recognition of their relationship would bring."). As one commentator noted,

Perhaps most important to gays, legal marriage may provide a measure of social acceptance by legitimizing the relationship, and facilitating the kind of social support—from families, friends, colleagues, and employers—traditionally accorded heterosexual married couples. Same-sex couples are often denied this external support because of societal attitudes that generally disapprove of gay relationships.

Trosino, *supra* note 23, at 97; *see also* Note, *The Legality of Homosexual Marriage*, 82 Yale L.J. 573, 580 (1973) ("[T]he formal status of marriage might reasonably be viewed as enhancing the stability, respectability, and emotional depth of any relationship between two individuals, regardless of whether the relationship is homosexual or heterosexual.").

86. Kenneth L. Karst, *Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective*, 24 U.C. Davis L. Rev. 677, 693 (1991) ("What matters most . . . is the state's official expression, recognizing the couple as a couple.").

87. *See* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 651, 684 (1980). Professor Karst notes that:

The homosexual couple who wish to enter a formal marriage will . . . be looking for . . . the opportunity to say something about who they are and to obtain community recognition of their relationship.

• • • •

. . . Such a status would mean not only that they would have the same opportunity as heterosexual couples to make the public self-identifying statements implicit in marriage, but also that the state recognized their status as an acceptable one in society rather than one deserving of stigma.

Id.

88. Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 Va. L. Rev. 1643, 1659 (1993) ("An attempt to marry may be the most threatening form of gay coupling . . . Marriage is a demand on the part of a gay couple that the society do even more than tolerate them, that it affirmatively give recognition to their coupled status."). As another commentator noted,

Recognizing same-sex marriages would require society not only to admit that gay men and lesbians *do* have committed relationships, but also would place a positive societal value on those bonds. In addition, even some progressive heterosexuals shrink in horror from 'gay marriage,' because the fact that same-sex relationships are recognized by the state means that those bonds are, a fortiori, 'flaunted' (which merely means publicly displayed).

state's ban on same-sex marriage as an instance in which the "government *merely* refuses to bestow its 'blessing' on [same-sex] relationships by officially designating them 'marriages.'"⁸⁹ Numerous interests of great importance are at stake and thus same-sex marriage should not be thought a "mere" benefit that the state may refuse to confer at will.⁹⁰

C. Adult Adoptions

Because of the inability of gays and lesbians to enter into a marriage recognized by the state, some have tried to adopt their lovers by making use of the mechanism of adult adoption, thereby legally assuring that the adoptee will be entitled to *some* of the benefits of family. If the partner has been legally adopted, other family members may be prevented from later contesting a will that names the partner as a beneficiary.⁹¹ There are certain difficulties with this option, however, even if one is able to overcome a variation of the definitional preclusion attack.

The concept of one individual adopting his lover might seem to be an abuse of the adoption process.⁹² That would be true were adoption reserved for relationships that involved some kind of parent-child relationship.⁹³ Adult adoptions, however, have long "served as a legal mechanism for achieving economic, political and social objectives rather than the stereotype parent-child relationship."⁹⁴ It is difficult to imagine what kind of adult adoption would be better qualified to fulfill economic, political, and social objectives than a gay or lesbian adult adoption—it would serve economic goals (assuring that the partner would get economic benefits that might otherwise be difficult to assure), political goals (promoting equal rights for gays and lesbians), and social goals (both on a societal and a personal level).

William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 Yale L.J. 333, 378 (1992).

89. Beschle, *supra* note 65, at 85 (emphasis added).

90. For a discussion of a related argument that the military's exclusionary policy towards gay, lesbian, and bisexual people involves a mere denial of a privilege to serve one's country, see Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. Colo. L. Rev. 375, 453-54 (1995).

91. See *In re Adoption of Adult Anonymous*, 435 N.Y.S.2d 527, 528 (Fam. Ct. 1981) ("[T]he adoptee testified that his family did not approve of the relationship, and he apparently feared that attempts might be made to set aside property arrangements between the parties if they were not legally adoptive father and adopted son.").

92. *In re Adult Anonymous II*, 452 N.Y.S.2d 198, 200 (App. Div. 1982) (suggesting that it may at first seem "a perversion of the adoption process for lovers to adopt one another").

93. See Ohio Rev. Code. Ann. § 3107.02 (Anderson 1989) (stating that an adult may be adopted only if totally and permanently disabled, mentally retarded, or had child-parent relationship as minor).

94. *Adult Anonymous II*, 452 N.Y.S.2d at 200.

In New York, the law "is well settled that adoption of an adult by an adult is permissible so long as the parties' purpose is neither insincere nor fraudulent."⁹⁵ Notwithstanding the permissibility of adults adopting adults for economic, political, and social objectives, some courts have been reluctant to approve a gay adult adoption because they are unwilling to appear to be condoning gay families.⁹⁶ The Court of Appeals of New York has held that adult adoption is "not a quasi-matrimonial vehicle to provide nonmarried partners with a legal imprimatur for their sexual relationship, be it heterosexual or homosexual,"⁹⁷ suggesting that the New York Legislature must amend the adoption statute if lovers are to be able to adopt one another.⁹⁸ Yet, there is good reason to believe that the court was misrepresenting the then-current law,⁹⁹ especially considering that such adoptions had already taken place.¹⁰⁰ Nonetheless, New York no longer allows such adoptions, although Delaware does.¹⁰¹

Even had the Court of Appeals not pretended that the legislature had defined adoption to be reserved for parent-child relationships,¹⁰² and thus even had the court not made use of a nonexistent definition to prevent lesbians and gays from adopting their lovers, there would be other problems with using adult adoption to create gay and lesbian families. Because certain benefits may only be available to spouses or dependent *minors*, those benefits would not be available to adult adoptees who, although family, would not be characterized as

95. *Id.* at 199.

96. *In re Adoption of Adult Anonymous*, 435 N.Y.S.2d 527, 527 (Fam. Ct. 1981) ("The admitted homosexual relationship gave the Court reason to pause. The Court does not wish to allow the adoption statute to be used as a shield for the protection of homosexuality, or even to give the appearance of approving or encouraging such practice, much less express approval."). *But see In re The Adoption of Swanson*, 623 A.2d 1095, 1096 (Del. 1993) ("The adoption had two purposes—to formalize the close emotional relationship that had existed between them for many years and to facilitate their estate planning."); *Adult Anonymous II*, 452 N.Y.S.2d at 201 ("[T]he parties . . . wish to formalize themselves as a family unit, for the purposes of publicly acknowledging their emotional bond and more pragmatically to unify their property rights.").

97. *In re Adoption of Robert Paul P.*, 471 N.E.2d 424, 425 (N.Y. 1984).

98. *Id.* at 427. The court held that:

If the adoption laws are to be changed so as to permit sexual lovers, homosexual or heterosexual, to adopt one another for the purpose of giving a nonmatrimonial legal status to their relationship, or if a separate institution is to be established for the same purpose, it is for the Legislature, as a matter of State public policy, to do so.

Id.

99. *See id.* at 428-29 (Meyer, J., dissenting).

100. *See Adult Anonymous II*, 452 N.Y.S.2d 198; *Adult Anonymous*, 435 N.Y.S.2d 527.

101. *See In re The Adoption of Swanson*, 623 A.2d 1095 (Del. 1993).

102. *See Robert Paul P.*, 471 N.E.2d at 428 (Meyer, J., dissenting) (stating that "no other conclusion is possible than that the Legislature has not conditioned adult adoption upon there being a parent-child relationship").

spouses.¹⁰³ Insofar as one of the reasons to create a family is to assure that one's partner will receive certain benefits, one may be unable to achieve that result through adult adoption.

Another factor to consider when deciding whether an adult adoption would be an appropriate option is that adoptions are irrevocable.¹⁰⁴ While those considering becoming a family (whether through marriage or adoption) would look forward to spending a long time together, current divorce statistics for heterosexual couples suggest that an irrevocable arrangement may not be prudent.¹⁰⁵

Courts have used definitions in a variety of ways to prevent lesbian and gay individuals from creating families with their same-sex partners. Sometimes, courts have used definitions as shields to deflect blame from legislatures, as if dictionaries rather than legislative bodies are responsible for legally defining who may marry whom.¹⁰⁶ At other times, courts have recognized that legislatures are responsible for definitions and then have imputed intentions to legislators regarding particular definitions when there has been no basis for such an imputation.¹⁰⁷

It should not be thought that all difficulties will cease once courts stop using definitions illicitly. On the contrary, difficulties may increase because courts will then be forced to deal with substantive issues, for example, analyzing any implicated equal protection issues. These enterprises are much more subtle, and erroneous analyses may be much more difficult to recognize. Happily, the Hawaii Supreme Court has recognized that a state refusal to recognize same-sex marriages implicates the Equal Protection Clause.

II. EQUAL PROTECTION

The *Baehr* plurality held that Hawaii's same-sex marriage ban had to be subjected to strict scrutiny because the prohibition discriminated on the basis of sex.¹⁰⁸ To understand this holding, it is necessary to understand some key elements of equal protection jurisprudence.

103. See *Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410, 415 (Ct. App. 1985) (noting that under California law, "a homosexual's same-sex partner can never be a 'spouse'"); Jennifer L. Heeb, Comment, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 Seton Hall L. Rev. 347, 357-58 (1993) ("[A]dult adoption does not assure employment benefits because most benefits are available only to the worker's minor children.").

104. Heeb, *supra* note 103, at 358 ("[A]dult adoption is an inadequate marriage alternative because of its irrevocability."); Zimmer, *supra* note 82, at 692 ("The greatest disadvantage of adult adoption is its irrevocable nature.").

105. See Jonathan Peterson, *GOP Puts Family Values in Spotlight*, L.A. Times, Aug. 19, 1992, at A4 ("[H]alf of all first marriages now end in divorce.").

106. See *supra* notes 15-26 and accompanying text.

107. See *supra* notes 27-32 and accompanying text.

108. *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw.) (plurality opinion) ("[Haw. Rev. Stat.] § 572-1, on its face and as applied, regulates access to the marital status and its con-

A. Suspect Classes

The Supreme Court has made clear that it will carefully examine statutory classifications that adversely affect suspect classes or fundamental interests.¹⁰⁹ A suspect class is a group of individuals meeting certain criteria. The class should be "discrete and insular."¹¹⁰ The defining characteristic of the group must be something that cannot readily be controlled¹¹¹ and that the state may not legitimately disadvantage.¹¹² Moreover, the characteristic must be stigmatizing.¹¹³ The group must have been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."¹¹⁴

If a group is designated as a suspect class, any statutes picking out that class for adverse treatment will be examined with strict scrutiny. Usually, a court's strict scrutiny of a classification will result in its invalidation,¹¹⁵ because classifications based on suspect criteria must be "narrowly tailored"¹¹⁶ and "supported by a compelling interest."¹¹⁷

The Supreme Court has already recognized several groups as having suspect status: race,¹¹⁸ nationality,¹¹⁹ religion,¹²⁰ and alienage.¹²¹ The Court has also recognized that certain classes are quasi-suspect. These classes have the same indicia as do the suspect classes, although not to the same extent. Women¹²² and individuals born out-of-wed-

comitant rights and benefits on the basis of the applicants' sex."), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

109. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting) ("If a statute invades a 'fundamental' right or discriminates against a 'suspect' class, it is subject to strict scrutiny."). For a discussion of whether same-sex marriage involves a fundamental right, see *infra* notes 212-416 and accompanying text.

110. See *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938)).

111. See, e.g., *Parham v. Hughes*, 441 U.S. 347, 353 (1979) (holding that it is inappropriate to punish a child for illegitimacy when the child is not responsible for being illegitimate).

112. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (holding that legislation must not be "arbitrary or without reasonable relation to some purpose within the competency of the State to effect").

113. See *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (separating children solely because of their race may cause "a feeling of inferiority . . . unlikely ever to be undone"); Karst, *supra* note 86, at 728 (suggesting that the function of the sodomy law is "to stigmatize lesbians and gay men for their sexual orientation").

114. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

115. *Id.* at 319 (Marshall, J., dissenting).

116. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995).

117. *Shapiro v. Thompson*, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting).

118. *Loving v. Virginia*, 388 U.S. 1 (1967).

119. *Korematsu v. United States*, 323 U.S. 214 (1944).

120. See *Burlington N. R.R. v. Ford*, 504 U.S. 648, 651 (1992) (discussing "suspect lines like race or religion"); *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (discussing "inherently suspect distinctions such as race, religion, or alienage").

121. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

122. See *Craig v. Boren*, 429 U.S. 190 (1976).

lock¹²³ each constitute quasi-suspect classes. Classifications implicating quasi-suspect classes "must serve important governmental objectives and must be substantially related to achievement of those objectives."¹²⁴

The Court seems unlikely to recognize new suspect classes,¹²⁵ although there remain "classes, not now classified as 'suspect', that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members."¹²⁶ Indeed, although not recognized as deserving heightened or strict scrutiny, the class composed of gay, lesbian, and bisexual individuals seems to have the relevant indicia of suspectness, at least insofar as one can infer what those indicia are by examining the classes that have already been recognized as suspect or quasi-suspect.¹²⁷ Regrettably, courts have used criteria to exclude lesbians and gays from suspect or quasi-suspect status which, if applied to groups already recognized as having that status, would have precluded these groups from being so recognized.¹²⁸ In *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*,¹²⁹ the Sixth Circuit Court of Appeals denied that lesbians and gays "comprise an identifiable class,"¹³⁰ arguing that they "are not identifiable 'on sight' unless they elect to be so identifiable."¹³¹ The *Equality Foundation* court failed to notice that the same criterion might have prevented religion, nationality, or illegitimacy from receiving heightened or strict scrutiny.

The point here is not to discuss the merits of the indicia, but merely to demonstrate that they should be applied consistently by the courts. It is difficult to understand how the courts considering whether bisexuals, gays, and lesbians comprise a class meriting heightened or strict scrutiny can claim to be judging in good faith when the standards chosen, if applied consistently in the past, would have precluded the recognition of any suspect or quasi-suspect classes.¹³²

123. See *Trimble v. Gordon*, 430 U.S. 762 (1977).

124. *Craig*, 429 U.S. at 197.

125. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318-19 (1976) (Marshall, J., dissenting) (The Court "has apparently lost interest in recognizing further 'fundamental' rights and 'suspect' classes.").

126. *Id.* at 320 (1976) (Marshall, J., dissenting).

127. See Strasser, *supra* note 90, at 390-427; see generally Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 Temp. L. Rev. 937 (1991) (arguing that homosexuals more closely meet the suspect class criteria than other groups recognized as suspect or quasi-suspect).

128. See Strasser, *supra* note 90, at 390-91 ("[T]he reasons often cited to establish why gay and lesbian people do not comprise such a class, if applied to those who currently enjoy that status, would entail that *no* currently recognized classes 'deserve' that status.").

129. 54 F.3d 261 (6th Cir. 1995).

130. *Id.* at 267.

131. *Id.*

132. See *Jantz v. Muci*, 759 F. Supp. 1543, 1550 (D. Kan. 1991) ("The standard implicitly adopted by the Ninth Circuit would disqualify every group from suspect or

The lack of good faith is especially disappointing in an area where good faith is so essential. The Supreme Court has recognized that it would "be impracticable and unwise to attempt to lay down any general rule or definition on the subject [deciding what the Equal Protection Clause protects] that would include all cases."¹³³ Yet, the lack of an easily applied general rule does not imply that courts are free to ignore those implicit standards that have already been adopted—courts have a responsibility to apply standards that at the very least might credibly account for the Supreme Court's suspect class jurisprudence. When courts claim to apply the appropriate standards but offer an analysis that, if applied generally, would do away with suspect and quasi-suspect classes, the courts undermine confidence both in their decisions in particular and in their integrity generally.

When classifications involving nonfundamental interests do not adversely affect a suspect or quasi-suspect class, the classification must merely be "rationally based."¹³⁴ In *F. S. Royster Guano Co. v. Virginia*,¹³⁵ the Court explained that classifications must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."¹³⁶

The Court tends to be deferential when deciding whether a statutory classification meets the rational basis test. Because the "machinery of government would not work if it were not allowed a little play in its joints,"¹³⁷ the Court has held that a "classification having some reasonable basis does not offend against [the Equal Protection Clause] merely because it is not made with mathematical nicety or because in practice it results in some inequality."¹³⁸

Yet, even if a court should be deferential, that does not mean that it should abdicate its responsibility to judge.¹³⁹ In *Louisville Gas & Electric Co. v. Coleman*,¹⁴⁰ the Court made clear that "the equal protection clause means that the rights of all persons must rest upon the

quasi-suspect status. Blacks, women, aliens, or any group which has obtained some form of legislative protection would forfeit the benefits of heightened scrutiny."), *rev'd*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993).

133. *Bell's Gap R.R. v. Pennsylvania*, 134 U.S. 232, 237 (1890).

134. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

135. 253 U.S. 412 (1920).

136. *Id.* at 415.

137. *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931).

138. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

139. *See Buttino v. FBI*, 801 F. Supp. 298, 301 (N.D. Cal. 1992) ("[D]eference . . . does not require the Judiciary to abdicate its authority under Article III to decide whether or not an individual's right to equal protection under the Federal Constitution has been violated." (quoting *Dubbs v. CIA*, 769 F. Supp. 1113, 1116 n.3 (N.D. Cal. 1990)). The Supreme Court has used the rational basis test to invalidate state actions. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (using the rational basis test to overturn denial of zoning permit for home for mentally handicapped).

140. 277 U.S. 32 (1928).

same rule under similar circumstances."¹⁴¹ Thus, "mere difference is not enough"¹⁴² to justify treating one group differently from another if the two are similarly situated. The Court recognized in *Gulf, Colorado & Santa Fé Railway v. Ellis*¹⁴³ that it is always possible to find some basis upon which to distinguish between two similar but non-identical groups—"the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment."¹⁴⁴ As the Court explained in *Ellis*, "[A]rbitrary selection can never be justified by calling it classification."¹⁴⁵ This is especially true where the classification involves "clear and hostile discriminations against particular persons and classes,"¹⁴⁶ and even more true when that classification is "of an unusual character."¹⁴⁷

In *Baxstrom v. Herold*,¹⁴⁸ the Court wrote, "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made."¹⁴⁹ If indeed the "Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation,"¹⁵⁰ courts must be vigilant "lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."¹⁵¹

Statutory classifications raise several issues. Courts must determine whether the asserted state interest itself is legitimate. As the Court made clear in *Palmore v. Sidoti*,¹⁵² "The Constitution cannot control . . . prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."¹⁵³ Where bias is playing a role, the result is more likely to reflect "prejudice than legitimate public concerns."¹⁵⁴

Even if the asserted interest is legitimate, a court will have to determine whether that interest is in fact promoted by the classification. Unless courts are willing to examine the relation between the statute and the asserted interest, "the mere incantation of a proper state purpose"¹⁵⁵ will make the statute immune from judicial review. Thus,

141. *Id.* at 37.

142. *Id.* (emphasis omitted).

143. 165 U.S. 150 (1897).

144. *Id.* at 165.

145. *Id.* at 159.

146. *Bell's Gap R.R. v. Pennsylvania*, 134 U.S. 232, 237 (1890).

147. *Id.*

148. 383 U.S. 107 (1966).

149. *Id.* at 111.

150. *Plyler v. Doe*, 457 U.S. 202, 213 (1982).

151. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

152. 466 U.S. 429 (1984).

153. *Id.* at 433.

154. *Id.* at 432.

155. *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

promotion of the public welfare—a clearly legitimate purpose—could be used to justify any statutory classification. The Supreme Court has held that in addition to assuring that the state's interests are legitimate, courts must determine whether the "classifications drawn in a statute are reasonable in light of its purpose."¹⁵⁶ In *Mississippi University for Women v. Hogan*,¹⁵⁷ the Court explained why it is necessary to examine the link between the asserted interest and the method selected to promote it: "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about . . . proper roles."¹⁵⁸

Even if the classification is reasonable in light of the state's purpose, and even if the state's purpose is legitimate, courts must assure that the statutes are applied fairly. A rationally sustainable classification, if "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights,"¹⁵⁹ will be held to violate the Equal Protection Clause.

The question at hand is whether the state refusal to recognize same-sex marriages involves an unjust and illegal discrimination. Arguably, it does because it involves discrimination on the basis of a classification that has already been recognized as meriting heightened scrutiny.

B. *Sex Discrimination*

The *Baehr* plurality held that the Hawaii marriage statute "on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex."¹⁶⁰ Although sex is a quasi-suspect classification on federal constitutional grounds, it is a suspect classification according to Hawaii's constitution, and thus a statute discriminating on the basis of sex will be subjected to strict scrutiny.¹⁶¹ The classification must be "justified by compelling state interests"¹⁶² and must be "narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights."¹⁶³

156. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

157. 458 U.S. 718 (1982).

158. *Id.* at 725-26.

159. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

160. *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

161. See Eric J. Toulon, *Call the Caterer: Hawaii to Host First Same-Sex Marriage*, 3 S. Cal. Rev. L. & Women's Stud. 109, 119 (1993).

162. *Baehr*, 852 P.2d at 67 (plurality opinion).

163. *Id.* (plurality opinion).

1. Facial Discrimination

The *Baehr* plurality reasoned that because a man may marry a woman but not a man, and because a woman may marry a man but not a woman, the Hawaii statute discriminated on the basis of sex.¹⁶⁴ In *Orr v. Orr*,¹⁶⁵ the Supreme Court struck down an alimony system that disadvantaged males, noting that "Mr. Orr bears a burden he would not bear were he female."¹⁶⁶ Thus, the Court found that Orr was being disadvantaged *because* of his sex, and held that the statutory scheme was unconstitutional.¹⁶⁷

In *Orr*, the Court made clear that not all males would be disadvantaged by the statute under examination. "As compared to a gender-neutral law placing alimony obligations on the spouse able to pay, the present Alabama statutes give an advantage only to the financially secure wife whose husband is in need."¹⁶⁸ Thus, the Court invalidated the statutory scheme, despite the fact that it did not adversely affect all males.

Arguably, the alimony system at issue in *Orr* was unconstitutional because it imposed a burden on *some* males but on *no* females. But the Hawaii marital statute imposed a burden on *both* sexes. Indeed, the dissent in *Baehr* argued that the statute did not involve an equal protection violation because all males and females were treated alike. "A male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female."¹⁶⁹

The *Baehr* plurality rejected the dissent's argument, correctly pointing out that the Supreme Court had rejected an analogous line of reasoning in *Loving*.¹⁷⁰ The *Loving* Court had to evaluate the State of Virginia's argument that "because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications,

164. See *id.* at 60 (plurality opinion).

165. 440 U.S. 268 (1979).

166. *Id.* at 273.

167. *Id.* at 282-83.

168. *Id.* at 282.

169. See *Baehr v. Lewin*, 852 P.2d 44, 71 (Haw.) (Heen, J., dissenting), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993). Similarly, the Missouri Supreme Court argued that:

The State concedes that the statute prohibits men from doing what women may do, namely, engage in sexual activity with men. However, the State argues that it likewise prohibits women from doing something which men can do: engage in sexual activity with women. We believe it applies equally to men and women because it prohibits both classes from engaging in sexual activity with members of their own sex. Thus, there is no denial of equal protection on that basis.

State v. Walsh 713 S.W.2d 508, 510 (Mo. 1986).

170. See *Baehr*, 852 P.2d at 67-68.

do not constitute an invidious discrimination based upon race."¹⁷¹ The Supreme Court rejected the "notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations."¹⁷² Just as the statute at issue in *Loving* discriminated on the basis of race, notwithstanding the fact that both whites and blacks would be disadvantaged, the statute at issue in *Baehr* discriminates on the basis of sex, notwithstanding the fact that both sexes are disadvantaged by the law.

Arguably, the statute at issue in *Baehr* discriminates on the basis of sexual orientation rather than on the basis of sex. Yet, on its face, the statute applies to all individuals, regardless of their orientation.¹⁷³ While it may fairly be assumed that most individuals wanting to marry a same-sex partner will be lesbian, gay, or bisexual, it should not be assumed that *only* people with a same-sex orientation will want to choose this option. For example, some individuals might wish to marry someone of the same sex for economic, political, or social objectives rather than sexual or emotional ones.¹⁷⁴ Indeed, bans on same-sex marriage have been criticized for their *overbreadth*—they are not narrowly tailored to discriminate *solely* against lesbians, bisexuals, and gays.¹⁷⁵

The state might try to tailor its statute more narrowly, for example, by seeking to make sure that same-sex couples who marry will *not*

171. *Loving v. Virginia*, 388 U.S. 1, 8 (1967); see also *Pace v. Alabama*, 106 U.S. 583, 585 (1883) ("Sect. 4189 applies the same punishment to both offenders, the white and the black. . . . The punishment of each offending person, whether white or black, is the same.").

172. *Loving*, 388 U.S. at 8.

173. *Baehr*, 852 P.2d at 71 (Heen, J., dissenting) ("[Haw. Rev. Stat.] § 572-1 treats everyone alike and applies equally to both sexes. The effect of the statute is to prohibit same sex marriages on the part of professed or non-professed heterosexuals, homosexuals, bisexuals, or asexuals, and does not effect an invidious discrimination.").

174. Just as one might wish to adopt another adult for economic reasons, one might wish to marry one for economic reasons, e.g., so that the person will receive inheritance or insurance benefits. See *supra* notes 94-95 and accompanying text. But see Marty K. Courson, *Baehr v. Lewin: Hawaii Takes a Tentative Step to Legalize Same-Sex Marriage*, 24 Golden Gate U. L. Rev. 41, 62 (1994) ("[A] same-sex couple is, for all practical purposes, synonymous with a homosexual couple.").

175. See Craig M. Bradley, *The Right Not to Endorse Gay Rights: A Reply to Sunstein*, 70 Ind. L.J. 29, 34 (1994) ("A ban on same-sex marriages is not perfectly tailored to further the governmental interest in not giving homosexual relationships legal recognition since it forbids people of the same sex from entering into a legally recognized 'marriage' regardless of their sexual proclivities (or lack of same).").

One commentator suggests that discrimination against gays, lesbians, and bisexuals is "not invidious" because such individuals have a "propensity to engage in morally controversial behavior." Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 Notre Dame L. Rev. 393, 437 (1994). Duncan seems not to appreciate that given the number of behaviors that are morally controversial (eating meat, using contraception, promoting bigotry, etc.), the standard offered would seem to justify much discrimination.

have sexual relations, but such an approach would, one hopes, have insurmountable privacy difficulties. If one reads *Bowers v. Harwick*¹⁷⁶ as permitting discrimination against gays, lesbians, and bisexuals,¹⁷⁷ however, then perhaps such a requirement would not seem so far-fetched.¹⁷⁸

2. Gender Discrimination

Some commentators suggest that same-sex marriage bans involve discrimination on the basis of gender because such a ban reinforces traditional sex roles.¹⁷⁹ In *Personnel Administrator of Massachusetts v. Feeney*,¹⁸⁰ the Supreme Court recognized that “[c]lassifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination.”¹⁸¹ Such classifications may not promote the view that the “female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”¹⁸² While it may once have been thought that the “natural and proper timidity and delicacy which belongs to the female sex evidently unfits

176. 478 U.S. 186 (1986).

177. See Bradley, *supra* note 175, at 35 (describing “discrimination against homosexuals” as “Supreme Court-endorsed”); Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 Mich. L. Rev. 2456, 2471 (1994) (“*Bowers v. Harwick* apparently closed the door on any ordinary strict scrutiny attack on equal protection grounds.”). But see *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1370-71 (N.D. Cal. 1987) (“*Harwick* simply did not address the issue of discrimination based on sexual orientation or sexual preference itself.”), *rev’d in part, vacated in part*, 895 F.2d 563 (9th Cir. 1990).

178. Cf. *Stuart v. State of New Hampshire Div. for Children & Youth Servs.*, 597 A.2d 1076, 1076 (N.H. 1991) (upholding requirement that foster care applicants “execute a declaration that neither they nor any other adult in their household is ‘a homosexual within the statutory definition’”).

179. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 249 (1994) (“[C]ompulsory heterosexuality keeps women in relationships in which men exert power over their lives.”); Law, *supra* note 83, at 231 (“[L]aws barring marriage of two people of the same sex discriminate on the basis of gender.”); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind. L.J. 1, 20 (1994) (“It is possible to think that the prohibition on same-sex marriages, as part of the social and legal insistence on ‘two kinds,’ is as deeply connected with male supremacy as the prohibition on racial intermarriage is connected with White Supremacy.”); Hohengarten, *supra* note 49, at 1518 (“[I]f gender-based access requirements for marriage serve any purpose, it is only the suspect one of maintaining gender-based sexual and social roles.”); see also Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511, 636-37 (1992) (“[R]ecognition of gay couples threatens elements of society that remain committed to clear distinctions between the appropriate roles of men and women and undermines institutions that support male domination.”).

180. 442 U.S. 256 (1979).

181. *Id.* at 273.

182. *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975).

it for many of the occupations of civil life,"¹⁸³ and that the "paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother,"¹⁸⁴ statutes that promote such views will no longer be countenanced even if they are "rationalized by an attitude of 'romantic paternalism.'"¹⁸⁵

The Supreme Court has not restricted its notion of what constitutes impermissible role promotion to those classifications promoting the view that women should stay home and rear the children. In *Mississippi University for Women v. Hogan*,¹⁸⁶ the Court struck down a classification that tended to "perpetuate the stereotyped view of nursing as an exclusively woman's job."¹⁸⁷ The Court insisted that state classifications be "free of fixed notions concerning the roles and abilities of males and females."¹⁸⁸ Classifications based on gender "carry the inherent risk of reinforcing stereotypes about the 'proper place' of women."¹⁸⁹ The Court is especially vigilant to prevent reinforcement of "archaic and stereotypic notions."¹⁹⁰ Discrimination "based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities."¹⁹¹

In *Craig v. Boren*,¹⁹² the Court held that because of the "weak congruence between gender and the characteristic or trait that gender purported to represent,"¹⁹³ the legislatures that had created sex-specific drinking ages had to make some changes—either "realign their substantive laws in a gender-neutral fashion"¹⁹⁴ or "adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact."¹⁹⁵ One of the questions at issue in this article is whether statutes prohibiting same-sex marriages involve a weak congruence between gender and the traits it is supposed to represent and thus need to be changed.

Many of the functions of marriage can be fulfilled as well by a same-sex couple as by an opposite-sex couple. A state barring same-sex marriages must explain why it has made a sex-based distinction. The state might claim that gender is being used as a proxy for the ability to procreate through the union of the two parties. Because the ability to

183. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

184. *Id.*

185. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

186. 458 U.S. 718 (1982).

187. *Id.* at 729.

188. *Id.* at 724-25.

189. *Orr v. Orr*, 440 U.S. 268, 283 (1979).

190. *Hogan*, 458 U.S. at 725.

191. *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984).

192. 429 U.S. 190 (1976).

193. *Id.* at 199.

194. *Id.*

195. *Id.*

procreate is not a requirement in opposite-sex marriages,¹⁹⁶ it seems more plausible that the state is using gender to promote its own view of the proper role of the sexes.¹⁹⁷ The *Boren* rationale suggests that a state must either adopt a gender-free classification in its marriage statutes or tailor a classification that more precisely captures gender differences. For example, a state may require that the would-be marital partners be able and willing to have a child through their union. It is doubtful, however, that such a marriage requirement would pass constitutional muster.¹⁹⁸

The same-sex marriage ban promotes stereotypical gender roles in various ways. It suggests that marital fulfillment (whether sexual, psychological, or emotional) is only appropriately sought by males from females and by females from males.¹⁹⁹ While there is nothing wrong in seeking such fulfillment from a member of the opposite sex, there is also nothing wrong in seeking it from a member of the same sex.

Hostility toward gays and lesbians (one manifestation of which is a same-sex marriage ban) has been linked to other stereotypical attitudes about sex roles.²⁰⁰ Presumably, it is precisely because lesbians, gays, and bisexuals are allegedly engaging in activities "inappropriate" for their sex that they are stigmatized and penalized by not being allowed to marry their partners.²⁰¹ Yet, it is not for the state to decide the proper roles of the sexes,²⁰² especially when no one is harmed by the adoption of the nontraditional roles.

196. See *infra* notes 261-306 and accompanying text.

197. See *infra* notes 199-201 and accompanying text.

198. See *infra* notes 230-348 and accompanying text.

199. William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 Va. L. Rev. 1419, 1510 (1993) ("The ideology is an essentialism of gender, in which women are naturally heterosexual and naturally desirous of marrying men, which naturally results in their bearing children."); Hohengarten, *supra* note 49, at 1528 ("Not sanctioning same-sex marriages . . . reproduces specific gender roles by enforcing a system in which gender is *always* relevant to the possibility of intimate relations, and by obsessively focusing on a single type of sexual conduct in which men and women have set, stereotyped positions.").

200. Law, *supra* note 83, at 187, 210 ("[C]ontemporary legal and cultural contempt for lesbian women and gay men serves primarily to preserve and reinforce the social meaning attached to gender. . . . Sexism and heterosexism are tightly linked."); Sunstein, *supra* note 179, at 21; see also Fajer, *supra* note 179, at 617 ("Much of the psychological literature examining homophobia has concluded that support for the traditional gender-role structure is a primary cause of homophobia.").

201. Koppelman, *supra* note 179, at 234 ("It should be clear from ordinary experience that the stigmatization of the homosexual has *something* to do with the homosexual's supposed deviance from traditional sex roles.").

202. *Id.* at 218 ("Since it began subjecting sex-based classifications to heightened scrutiny, the Court has *never* upheld a sex-based classification *resting on normative* stereotypes about the proper roles of the sexes.").

C. Orientation Discrimination

The *Baehr* plurality made clear that it was not declaring orientation a suspect classification.²⁰³ While the class of bisexuals, gays, and lesbians should be recognized as a suspect or quasi-suspect class,²⁰⁴ it is unlikely that this will occur.²⁰⁵ Even if orientation was recognized as a suspect or quasi-suspect class, it is not clear that recognition of same-sex marriages would follow,²⁰⁶ although the parallel with *Loving* would be even stronger.²⁰⁷

Suppose that sexual orientation were declared a suspect or quasi-suspect category.²⁰⁸ If a court nonetheless upheld a state's refusal to recognize same-sex marriage because, for example, the court found the state's reasons for the refusal to be sufficiently compelling, then the state's refusal to accord benefits to same-sex nonmarital partners would also likely be upheld. Courts addressing the issue would simply deny that the distinction was based on orientation, because opposite-sex nonmarital partners would also be denied the benefits.²⁰⁹ Indeed, courts might well adopt an attitude *sub silentio* which a Maryland Appeals Court has been willing to make explicit, ranking three couples: "1) a homosexual couple (male or female); 2) an unmarried heterosexual couple; or 3) a married heterosexual couple,"²¹⁰ and described the list as involving a "roughly ascending hierarchy of favor."²¹¹ Were

203. See *Baehr v. Lewin*, 852 P.2d 44, 67 n.33 (Haw.) (plurality opinion), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

204. See *supra* notes 127-31 and accompanying text.

205. See *supra* notes 125-26 and accompanying text.

206. *Dean v. District of Columbia*, 653 A.2d 307, 335 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part) ("[C]lassification of homosexuals as a constitutionally protected class would not grant them the right to marry one another.").

207. *Loving* involved discrimination against a suspect class, and abridgement of a fundamental right. *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

208. See *Jantz v. Muci*, 759 F. Supp. 1543, 1550-51 (D. Kan. 1991) ("There is, the court believes, no way to analyze the present issue under the guidelines set down by the Supreme Court and reach any conclusion other than that discrimination based on sexual orientation is inherently suspect."), *rev'd*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993).

209. See *Ross v. Denver Dep't of Health and Hosps.*, 883 P.2d 516, 522 (Colo. Ct. App. 1994) ("Because the rule does not classify or differentiate on the basis of sexual orientation, we conclude that Ross has not established a claim of denial of equal protection or due process."); see also *Beaty v. Truck Ins. Exch.*, 8 Cal. Rptr. 2d 593, 598 (Ct. App. 1992) (holding that insurance benefits did not extend to the policy holder's same-sex partner); *Lilly v. City of Minneapolis*, No. MC 93-21375, 1994 WL 315620, at *10-11 (Minn. Dist. Ct. June 3, 1994) ("All persons, whatever their sexual orientation, who are not married, are not eligible for benefits for a partner."), *aff'd*, 527 N.W.2d 107 (Minn. Ct. App. 1995); *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121, 126 (Wis. Ct. App. 1992) (holding that the state could withhold benefits from an employee's unmarried companion).

210. *Schochet v. Maryland*, 541 A.2d 183, 185 (Md. Ct. Spec. App. 1988), *rev'd*, 580 A.2d 176 (Md. 1990).

211. *Id.*; see also David Link, Note, *The Tie that Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 Loy. L.A. L. Rev. 1055, 1083 (1990) ("To the Maryland court, the understood consequence of there being homosexual

courts to have such a view (notwithstanding orientation's having received suspect or quasi-suspect status), it seems likely that they would continue to find no constitutional violation in not affording benefits to same-sex nonmarital partners, even if the state had refused to offer those partners the opportunity to marry. It is thus not surprising that one commentator has called same-sex marriage the linchpin that will determine how a variety of other issues will be decided.²¹²

D. *Illegitimates*

The Supreme Court has recognized that individuals born out-of-wedlock constitute a quasi-suspect class.²¹³ In *Parham v. Hughes*,²¹⁴ the Court pointed out that "it is unjust and ineffective for society to express its condemnation of procreation outside the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it."²¹⁵ For example, "a State which grants an opportunity for legitimate children to obtain paternal support must also grant that opportunity to illegitimate children."²¹⁶

The Court is unwilling to allow states to adversely affect children for the alleged sins of their parents—the Court has "expressly consid-

persons is to rank them at a lower level than heterosexuals without any further analysis."). Some judges might not even realize that they had adopted such a prejudicial view. See *Crawford v. United States*, 212 U.S. 183, 196 (1909). As Justice Peckham noted,

Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.

Id.

212. *Buchanan*, *supra* note 18. *Buchanan* wrote:

If it is resolved against the power of government to limit marriage to opposite-sex unions, against the power of government to confine marriage to its traditional opposite-sex moorings, then the legal system, as a practical matter, will have lost its capacity to make distinctions between same-sex and opposite-sex conduct in any walk of life.

Id. at 544; see also Barbara J. Cox, *Same-Sex Marriage and Choice-Of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?* 1994 Wis. L. Rev. 1033, 1034-35 (arguing that the public recognition of same-sex marriage would "forever change the landscape of lesbian and gay rights in the United States"); Deborah M. Henson, *Will Same-Sex Marriages Be Recognized In Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 J. Fam. L. 551, 557 (1994) (suggesting that permitting same-sex marriages would do more to eliminate prejudice than any other legal reform).

213. See *Mathews v. Lucas*, 427 U.S. 495 (1976).

214. 441 U.S. 347 (1979).

215. *Id.* at 352; see also *Trimble v. Gordon*, 430 U.S. 762, 770 (1977) ("The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status.").

216. *Mills v. Habluetzel*, 456 U.S. 91, 97 (1982). The Court also held that the "support opportunity provided by the State to illegitimate children must be more than illusory." *Id.*

ered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships."²¹⁷ Yet, same-sex marriage bans may well impose hardships on the children of gays and lesbians.

The claim here is not that all children in gay or lesbian households are illegitimate, because some are born in the context of a marriage recognized by the state. Rather, the point is that the rationale that children should not be punished for the "sins" of their parents applies here as well. Whether the children were born during a previous marriage or were born through either surrogacy or artificial insemination,²¹⁸ they should not be denied the psychological, emotional, or financial benefits that might accrue if they were in a family recognized by the state.

Children living with their same-sex parents may not be able to receive benefits from both of their parents as easily as other children might,²¹⁹ because of the state refusal to allow the same-sex couple to marry. For example, should a same-sex couple separate, it might be difficult to force the nonbiological parent to help support the child, even if that parent was (nonbiologically) instrumental in bringing about the birth of that child. While an estoppel argument *might* be successful to force the nonbiologically related partner to contribute,²²⁰ this would not offer the kind of protection that would be most desirable. Or, the biological parent might refuse to allow the nonbiological parent to have any contact with the child, notwithstanding the detriment to the child.²²¹ Should the biological parent die, the nonbiological parent might lose custody to the detriment of both the parent and the child.²²² Justice Scalia apparently sees no constitutional issues raised by a state's preventing a child from having two parents of the same sex,²²³ despite the foreseeable difficulties both for the parents and the child.

217. *Trimble*, 430 U.S. at 769.

218. For a discussion of whether parents can be prevented from having children out of wedlock, see *infra* notes 251-59 and accompanying text.

219. *Cf. Gomez v. Perez*, 409 U.S. 535, 538 (1973) ("[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.").

220. See *Karin T. v. Michael T.*, 484 N.Y.S.2d 780, 784 (Fam. Ct. 1985).

221. See *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 218-19 (Ct. App. 1991) (denying lesbian former partner not biologically related to children all contact with the children despite having played an important role in raising them).

222. See generally Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 Geo. L.J. 459 (1990) (analyzing three cases where the death of the biological mother led to abridgement of the nonbiological parent's rights).

223. Writing the plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), Justice Scalia wrote, "California law, like nature itself, makes no provision for dual fatherhood." *Id.* at 118.

A district court in Pennsylvania had to decide whether an unmarried, opposite-sex couple and their children would be entitled to HUD housing.²²⁴ The court discussed all of the opposite-sex couples living with children who would be denied benefits if the statute were narrowly construed.²²⁵ The court wrote, "Whether it is moral or immoral, wise or unwise, for the parents to spurn marriage, I cannot allow the sins of the parents to be visited upon their children."²²⁶ It is unclear whether the court realized that an analogous argument might apply to lesbian and gay couples who also have children,²²⁷ i.e., that the alleged immorality of the parents' behavior is being used to disadvantage their children.²²⁸

There are several equal protection concerns implicated by a state refusal to recognize same-sex marriages. Such a refusal involves sex discrimination in that it facially discriminates on the basis of sex and also in that it involves the state's imposing its own notions of appropriate gender roles. Insofar as states are prohibited from adversely affecting children because of their parents' alleged misdeeds, there would seem to be an additional reason that such bans should be struck down.

Sex discrimination arguments notwithstanding, courts have tended not to accept that same-sex marriage bans implicate equal protection concerns.²²⁹ Courts rejecting the equal protection argument must still examine the substantive due process issues implicated by a refusal to recognize same-sex unions. Regrettably, just as flawed analyses have caused courts to take definitional preclusion arguments seriously and to reject equal protection arguments, flawed analyses have also caused courts to inappropriately delimit which individual interests are funda-

224. *Hann v. Housing Auth.*, 709 F. Supp. 605 (E.D. Pa. 1989).

225. *See id.* at 610.

226. *Id.*

227. *Cf. id.* at 607 ("The real concern prompting the floor amendment was the propriety of granting housing assistance to homosexual couples, a question not before me today.").

228. It of course is not claimed that the behavior of the parents *is* immoral. *See infra* notes 436-40 and accompanying text.

229. *See, e.g., Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Ca. 1980) ("[T]he Colorado state law which rejects a purported marriage between persons of the same sex does not violate the due process or equal protection clause of the federal constitution."), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); *Singer v. Hara*, 522 P.2d 1187, 1196 (Wash. 1974) ("[W]e agree with the state's contention that to define marriage to exclude homosexual or any other same-sex relationships is not to create an inherently suspect legislative classification requiring strict judicial scrutiny to determine a compelling state interest."). *But see Dean v. District of Columbia*, 653 A.2d 307, 343-44 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part) ("This difference arguably amounts to invidious discrimination because the state would be withholding from homosexual couples a status that heterosexual couples could elect to legitimize for themselves the very same conduct . . . that homosexual couples would be helpless to legitimize.").

mental and to exaggerate how heavily particular state interests should be weighed.

III. FUNDAMENTAL INTERESTS

The Supreme Court has recognized that the Constitution affords “protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”²³⁰ Insofar as same-sex marriage is not definitionally precluded, jurists must address whether the fundamental right to marriage includes the right to marry a same-sex partner, even if the refusal to recognize same-sex marriages does not offend the Equal Protection Clause. Thus, because statutory classifications will be examined with heightened or strict scrutiny if the classification violates *either* the Equal Protection *or* the Due Process Clause, courts must still address the constitutionality of the same-sex marriage ban. Courts addressing this question have suggested that the fundamental right to marry does not include same-sex marriage because the importance of the right to marry lies in its allowing individuals to raise their own biological children. This misinterpretation of the relevant case law involves a major reinterpretation of domestic relations jurisprudence.

When discussing the right to marry, it is important to establish (a) how important that right is, and (b) why that right is important. Once these are made clear, courts should not be tempted to accept the kinds of analyses which allegedly establish that no fundamental rights are implicated by statutes prohibiting same-sex marriage.

A. *The Fundamental Interest in Marriage*

In *Loving v. Virginia*,²³¹ the Court recognized that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”²³² The Court described marriage as “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”²³³ The fundamental nature of the right has long been recognized—over seventy years ago, the Court recognized in *Meyer v. Nebraska*²³⁴ that the Due Process Clause of the Fourteenth Amendment protects “the right of the individual . . . to marry, establish a home and bring up children.”²³⁵

230. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992) (plurality opinion).

231. 388 U.S. 1 (1967).

232. *Id.* at 12.

233. *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

234. 262 U.S. 390 (1923).

235. *Id.* at 399; *see also* *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”).

The Court has spoken glowingly about the institution of marriage. In *Griswold v. Connecticut*,²³⁶ marriage was described as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."²³⁷ Marriage "promotes a way of life,"²³⁸ involves "a harmony in living,"²³⁹ and a "bilateral loyalty."²⁴⁰ The Court described marriage as an "association for as noble a purpose as any involved in our prior decisions."²⁴¹ In *Boddie v. Connecticut*,²⁴² the Court recognized "the basic position of the marriage relationship in this society's hierarchy of values."²⁴³ In *Santosky v. Kramer*,²⁴⁴ the Court discussed "this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."²⁴⁵

The question then is not whether the right to marry is fundamental—it clearly is, but whether the fundamental right to marry includes the right to marry one's same-sex partner. That question cannot be answered without examining the purposes of marriage.

B. *Why the Right to Marry Is Fundamental*

While courts agree that the right to marry is fundamental, they disagree about *why* that right is fundamental. That disagreement is due, at least in part, to the failure of many lower courts to understand or appreciate the numerous, constitutionally significant functions that the institution of marriage serves. For example, while the *Baehr* plurality recognized that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships,"²⁴⁶ it erred in its analysis of why that is so. Its misunderstanding is due to its interpretation of *Zablocki v. Redhail*.²⁴⁷

The *Zablocki* Court recognized that the right to marry is of the same level of importance as the right to have and raise one's children.²⁴⁸ The Court suggested that it "would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is

236. 381 U.S. 479 (1965).

237. *Id.* at 486.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. 401 U.S. 371 (1971).

243. *Id.* at 374.

244. 455 U.S. 745 (1982).

245. *Id.* at 753.

246. *Baehr v. Lewin*, 852 P.2d 44, 56 (Haw.) (plurality opinion) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978)), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

247. 434 U.S. 374 (1978).

248. *Id.* at 386.

the foundation of the family in our society."²⁴⁹ The *Baehr* plurality looked at this passage and concluded, "Implicit in the *Zablocki* court's link between the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, abortion, and child rearing, on the other, is the assumption that the one is *simply the logical predicate* of the others."²⁵⁰ Yet, there are several reasons why this analysis is faulty, both from a logical and a legal perspective. Indeed, this analysis is so obviously flawed that it cannot credibly be attributed to the Supreme Court.

1. Procreation Outside of Marriage

The *Baehr* analysis notwithstanding, marriage is neither a logical nor a biological predicate of procreation. While groups disagree about how to solve or even characterize the problems posed by out-of-wedlock births,²⁵¹ it is not credible to claim that marriage is a logical predicate of reproduction, because the illegitimacy rate is high²⁵² and is projected to go higher.²⁵³

Perhaps it will be thought that the *Baehr* plurality was simply being hyperbolic. Marriage is not the *logical* but the *legal* predicate of having and raising children. Yet, that analysis must also be rejected. Marriage is neither a legal predicate of having a child²⁵⁴ nor of raising

249. *Id.*

250. *Baehr*, 852 P.2d at 56 (emphasis added).

251. See, e.g., Thomas B. Edsall, *Disillusioned Rainbow Coalition Mulls Third-Party Bid*, Wash. Post, May 28, 1995 at A4 ("Jackson and prominent members of the black clergy voiced their anger over what they see as Republican efforts to turn concerns over out-of-wedlock births and families without fathers into minority issues."); Judith Havemann & Barbara Vobejda, *Block Grant Welfare Reform Advances: Senate Panel Says Transfer to States Will Save U.S. \$16.8 Billion*, Wash. Post, May 27, 1995 at A8 ("[A]bortion opponents say provisions in the House welfare reform measure to curb out-of-wedlock births inevitably would increase the number of abortions."); Tracy Thompson, *Unhitched but Hardly Independent Having No Husband Complicates Escape From Welfare*, Wash. Post, May 13, 1995 at A1, A10 ("The House-passed welfare bill would bar cash benefits to unwed mothers younger than 18 to try to discourage out-of-wedlock births."); Barbara Vobejda, *The Debates Over Welfare: Moynihan, Observing From the Wings*, Wash. Post, June 4, 1995 at A1 (discussing Senator Moynihan's efforts to "get welfare recipients into the work force and to discourage out-of-wedlock births").

252. See Robert D. Reischauer, *The Blockbuster Inside the Republicans' Budget: In the Rush to Fiscal Devolution, Has Anyone Figured Out How to Divvy Up the Cash*, Wash. Post, May 14, 1995 at C2 (stating that "out-of-wedlock births have soared").

253. See Mary McGrory, *No Legitimate Solution in Sight*, Wash. Post, Mar. 16, 1995 at A2 ("Social scientists project a 50 percent illegitimacy rate by the turn of the century.").

254. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis omitted) (citations omitted)). The idea that someone could be forced to abort because she was not married would offend people across the political spectrum. Policies that might induce (much less require) abortions have sparked protest. See, e.g., Kenneth J. Cooper, *Welfare*

one.²⁵⁵ Thus, marriage is *neither* a logical *nor* a legal predicate *either* of having *or* of raising a child. *Zablocki* cannot plausibly be understood to be as limited as the *Baehr* plurality implied—indeed, it has been suggested that *Zablocki* is much more significant than many lower courts are willing to admit.²⁵⁶

In most states, gay or lesbian individuals can adopt children or can have custody of their own biological children.²⁵⁷ Some commentators suggest that preventing gay and lesbian people from having custody of children would be unconstitutional,²⁵⁸ especially considering that empirical studies indicate that children raised by lesbian or gay parents are no more likely to have emotional or psychological disorders than are children raised by heterosexual parents.²⁵⁹

The constitutionality of laws limiting gay and lesbian parenting is not at issue here. What is at issue is an interpretation of Supreme Court precedents regarding who may marry whom. The *Baehr* plurality offered an interpretation of the relevant precedents that both ignores the case law and defies common sense. That the court's interpretation was in error becomes even more obvious when one

Overhaul Survives Abortion Dispute: Disincentive for Childbearing Spurs 15 From GOP to Defect on House Procedural Rule, Wash. Post, Mar. 23, 1995 at A12 (stating that some conservative lawmakers "were concerned that pregnant unmarried teenagers and older welfare mothers would have abortions rather than face proposed cuts in benefits").

255. See *Stanley v. Illinois*, 405 U.S. 645 (1972); see also *Michael H. v. Gerald D.*, 491 U.S. 110, 144 (1989) (Brennan, J., dissenting) ("[T]he very premise of *Stanley* and the cases following it is that marriage is not decisive in answering the question whether the Constitution protects the parental relationship under consideration.").

256. See Karst, *supra* note 87, at 671 ("Properly understood, *Zablocki* implies a thoroughgoing reassessment of the constitutionality of a wide range of state laws limiting the right to marry and restricting other nonmarital forms of intimate association.").

257. Jana B. Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443, 1528 ("Today most states consider a parent's sexual behavior relevant to determining custody only if the behavior directly affects the parent's relationship with the child.").

258. Beschle, *supra* note 65, at 89-90; cf. Strasser, *supra* note 23, at 1026 ("Homosexuals do not merely invoke their right to marry. They also invoke their rights to have and raise children."). But see *In re* Petition for Approval of Forms Pursuant to Rule 10-1.1(b) of the Rules Regulating the Florida Bar—Stepparent Adoption Forms, 613 So. 2d 900, 902 (Fla. 1992) ("A homosexual may not adopt in Florida."); Law, *supra* note 83, at 231 ("[G]ay couples are often denied the ability to nurture children as adoptive or foster parents.").

259. See Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 Law & Sexuality 133, 157 (1991) ("[N]o evidence exists that having a gay parent or role model is harmful to the child. Nor do the children of gay parents differ significantly from children raised in heterosexual households in their development of gender identity or sexual orientation." (footnote omitted)); Julieanne C. Scocca, Comment, *Society's Ban on Same-Sex Marriages: A Reevaluation of the So-Called "Fundamental Right" of Marriage*, 2 Seton Hall Const. L.J. 719, 766-67 (1992) ("Research . . . show[s] that a parent's homosexual orientation does not result in the child's developing an 'abnormal' gender identity. Likewise, research has revealed no statistical difference in the psychopathology of children raised in gay and lesbian homes and children raised in heterosexual homes." (footnotes omitted)).

considers other implications of the opinion. Not only is marriage neither a logical nor a legal predicate of parenthood, but the contrapositive is also true—actual or potential parenthood is neither a logical nor a legal predicate of marriage. Nonetheless, courts have upheld state refusals to issue marriage licenses to same-sex couples because of their alleged inability to have children.²⁶⁰

2. Marriage Without Procreation

Arguably, because the purpose of marriage is to provide a setting for children, individuals (such as gays and lesbians) who cannot have children need not be afforded the right to marry. This argument, however, is faulty because (1) there is no requirement that married couples be able or willing to have children,²⁶¹ and (2) even were there such a requirement, gay and lesbian couples nonetheless could not be precluded on that account.²⁶²

It is obvious that there is no procreational requirement for marriage, because opposite-sex couples who will not or cannot procreate may nonetheless marry. Courts only claim that “propagation of the race is basic to the concept of marriage and its legal attributes”²⁶³ and use that to prevent couples from marrying when same-sex partners wish to be joined together in matrimony. Yet, no unbiased court would hold that opposite-sex couples unable to procreate are permitted to marry but that same-sex couples are prohibited from marrying *precisely because of their alleged inability to procreate*. While there may be justifications for distinguishing between opposite-sex and same-sex couples, those justifications should be stated. Courts lose credibility when they impose requirements on one group but not on another when the two groups are similarly situated.²⁶⁴

The *Adams* court tried to explain why there were no equal protection issues implicated by a policy that distinguished among couples

260. See *infra* notes 261-89 and accompanying text.

261. Hohengarten, *supra* note 49, at 1523 (“The ability to procreate is not and never has been essential for entering into a marriage.”).

262. Christopher J. Keller, Comment, *Divining the Priest: A Case Comment on Baehr v. Lewin*, 12 Law & Ineq. J. 483, 499 (1994) (“[H]omosexual couples are falsely assumed incapable of producing children through methods such as sperm donation, egg donation, and surrogate mothers. Homosexual couples can propagate and help ‘sustain the race.’ ”); Trosino, *supra* note 23, at 108 (“[E]ven if marriage, as an institution, is primarily concerned with child rearing, evidence suggests that gay couples make suitable parents.” (footnote omitted)); cf. Claudia A. Lewis, Note, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 Yale L.J. 1783, 1790 (1988) (“Though the lack of connection at first blush appears ‘natural,’ for by their sexual union homosexuals cannot procreate, the Court failed to acknowledge that only state prohibitions—legal constructs—bar homosexuals from marrying and raising families.”).

263. *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980), *aff’d*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982).

264. Link, *supra* note 211, at 1078 (“We use lack of procreative ability against gay men and lesbians in a way we do not use it against heterosexuals.”).

unable to procreate, allowing the opposite-sex couples to marry but prohibiting the same-sex couples from doing so. The court reasoned that because "the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised,"²⁶⁵ the state is permitted "to allow legal marriage as between *all* couples of opposite sex,"²⁶⁶ even though some of those couples will be unable to have children. The court understood that there were other ways the state might seek to promote its compelling interest in procreation. For example, the state could "inquire of each couple, before issuing a marriage license, as to their plans for children."²⁶⁷ Further, the state might "give sterility tests to all applicants, refusing licenses to those found sterile or unwilling to raise a family."²⁶⁸ The court rejected this approach, believing that "[s]uch tests and inquiries would themselves raise serious constitutional questions."²⁶⁹

Yet, one must wonder why these policies would be constitutionally offensive if indeed the state has a compelling interest in making sure that only people willing and able to procreate are joined in matrimony. The state would be narrowly tailoring its procedures to promote its compelling interest.

The *Adams* court failed to notice that even more constitutional issues are raised by the state's allegedly having a compelling interest in procreation but only seeking to promote that interest at the expense of one particular group.²⁷⁰ Theorists mirror this tendency of selectively applying theories to the disadvantage of one particular group when they claim that the purpose of sexual relations is to produce offspring but then make an exception for sterile, heterosexual couples.²⁷¹ At the very least, these thinkers are open to the charge of intellectual inconsistency.²⁷²

Even if the sole purpose of marriage is to provide a setting for the production and raising of children, constitutional questions are raised by inquiring about couples' procreational abilities if the state does not

265. *Adams*, 486 F. Supp. at 1124.

266. *Id.* (emphasis added).

267. *Id.* at 1124.

268. *Id.* at 1124-25.

269. *Id.* at 1125 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

270. See *supra* notes 261-69 and accompanying text.

271. See John M. Finnis, *Law, Morality and "Sexual Orientation,"* 69 *Notre Dame L. Rev.* 1049, 1066 (1994); cf. David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *Hastings L.J.* 957, 976 (1979) ("[A]ccording to one influential model, sex is only proper for the purpose of procreation.").

272. Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 *Va. L. Rev.* 1515, 1529 (1994) (suggesting that the permissibility of unwillingly sterile couples' engaging in sexual relations "raises some deep questions about the consistency of [Finnis's] reasoning").

in fact have a compelling interest in preventing individuals from marrying who are incapable of producing children *through their union*.²⁷³ After all, such a couple might adopt a child or *one* of the individuals might have a child.²⁷⁴ In either of these scenarios, the court would need a different justification for upholding the state prohibition of that marriage.

The *Adams* court may have believed that asking individuals about their procreational plans would itself invade their privacy—if the court could know those plans without asking, then no privacy issues would be implicated. Yet, there is no basis in law for such a position. A man and a woman who voluntarily signed an affidavit stating that each had been sterilized could not be prevented from marrying on that ground and, presumably, not even the *Adams* court would have upheld a statute that prevented two such people from marrying.²⁷⁵

The point here is not that couples unable or unwilling to procreate should not be allowed to marry if gay and lesbian couples cannot—“the fact that a State is dealing with a distinct class and treats the members of that class equally does not end the judicial inquiry.”²⁷⁶ There is no reason that nonprocreating couples should be prevented from marrying and thus no reason that the whole class should have that burden placed upon it. But additional difficulties are raised when a group is selectively burdened. In *Eisenstadt v. Baird*,²⁷⁷ the Court points out that “nothing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”²⁷⁸

The *Singer* court reasoned that because “marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race,”²⁷⁹ and because “it is apparent that no same-sex couple offers the possibility of the birth of children by their union,”²⁸⁰ the state’s refusal to authorize same-sex

273. See *supra* notes 257-59 and accompanying text.

274. See Höhengarten, *supra* note 49, at 1520 (“An individual involved in a same-sex relationship may be a biological parent (perhaps, but not necessarily, as a result of a previous marriage to someone of the opposite sex), and the same-sex partner of this biological parent may serve as the functional second parent to a child raised within the context of their relationship.”).

275. See Strasser, *supra* note 23, at 1011-12 (suggesting that a law prohibiting those past childbearing or childbegetting age from marrying would be declared unconstitutional).

276. *Carrington v. Rash*, 380 U.S. 89, 93 (1965).

277. 405 U.S. 438 (1972).

278. *Id.* at 454 (quoting *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)); see also *Michael M. v. Superior Court*, 450 U.S. 464, 497 (1981) (Stevens, J., dissenting) (“It cannot be true that the validity of a total ban is an adequate justification for a selective prohibition; otherwise, the constitutional objection to discriminatory rules would be meaningless.”).

279. *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974).

280. *Id.*

marriage does not involve "invidious discrimination."²⁸¹ The court recognized that "married couples are not required to become parents and . . . some couples are incapable of becoming parents and . . . not all couples who produce children are married."²⁸² It claimed, however, that these were "exceptional situations."²⁸³

The *Singer* court's analysis was faulty on both empirical and conceptual grounds. First, there is reason to think that the *Singer* court's demographic analysis was inaccurate at the time²⁸⁴ and is even less accurate now.²⁸⁵ It was not and is not true that only the exceptional married couple does not have children. Even were such a demographic analysis accurate, however, the court's opinion would still have been unpersuasive. Presumably, "societal values associated with the propagation of the human race"²⁸⁶ also involve the nurturing and raising of children. Thus, same-sex couples who have children fall *within* the protected category rather than outside of it.²⁸⁷ When the *Adams* court argued that "the state has a compelling interest in . . . providing status and stability to the environment in which children are raised,"²⁸⁸ it conveniently overlooked that its argument *supported* rather than undermined allowing same-sex couples to marry, precisely because such couples may have children to raise.²⁸⁹ Both the *Adams* and *Singer* courts paradoxically asserted that the state's compelling

281. *Id.*

282. *Id.*

283. *Id.*

284. See Randolph E. Schmid, *Working Mom Is Now U.S. Norm*, Detroit Free Press, June 16, 1988, at 8B ("The number of childless couples with both husband and wife employed and the wife of childbearing age increased from 3 million to 4.3 million over the 11-year period [1976-1987]."). The 4.3 million couples only involve a subset of all of the married, childless couples, because some couples might not have been of childbearing age and others might not have had both individuals working outside of the home.

285. See Tom Walker, "Career Survival Kit" Offers Tips for Worried Workers, Atlanta Const., Oct. 3, 1991, at B3 ("The share of U.S. households represented by two-parent families with children shrank 13 percent from 1970 to 1990.").

286. *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974).

287. See Strasser, *supra* note 23, at 1026 ("Even were homosexuals unable to procreate at all, their adopting and raising children would help to promote the survival of the race, since they would be providing a stable and nurturing home for individuals who will eventually be contributing members of society.").

288. *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982).

289. Eskridge, *supra* note 88, at 364 ("[M]any bisexuals, gay men, and lesbians have children."); Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 How. L.J. 173, 207 (1992) ("The 'procreation' argument ignores the fact that homosexual couples are having and raising children . . ."); Arthur S. Leonard, *Lesbian and Gay Families and the Law: A Progress Report*, 21 Fordham Urb. L.J. 927, 941 (1994) ("[E]xcluding same-sex couples from marriage is not necessary to achieve the state's interest, and may be counterproductive in light of the many same-sex couples who are raising children and for whom obtaining the benefits of marriage will assist their children in the same way that those benefits assist the children of opposite-sex couples . . ."); Bowman & Cornish, *supra* note 35, at 1181-82 ("Many children live in house-

interest in providing a stable environment for the raising of children justified denying marital status to individuals who did have children to raise and granting marital status to individuals who did not. Opinions like these undermine the belief that the courts are approaching the same-sex marriage issue fairly and in good faith.

The state's compelling interest in providing a stable home for the raising of children is a reason to allow rather than prohibit same-sex marriage. To use it as a reason to prohibit such unions is to turn the rationale on its head. Indeed, even if one arbitrarily limited the state's interest to the *production* of children, the argument still could not be used in good faith to prohibit same-sex marriages. The state's refusal to allow same-sex couples to marry might deter gay and lesbian individuals from *procreating*, precisely because they are barred from marrying.²⁹⁰ Neither the state nor the courts can in good faith use the state's compelling interest in the production or raising of children as a reason to prohibit lesbian and gay couples from marrying when such couples both have and raise children.

The use of the argument that the state's compelling interest in producing and raising children justifies prohibiting certain marriages has a sad and embarrassing history. It has been used to establish the invalidity of interracial marriages, either because such unions allegedly will produce offspring who may not be able to reproduce with their chosen mates²⁹¹ or because, in any case, the offspring of interracial marriages are allegedly inferior.²⁹² This history alone should give

holds headed by other than a married couple, and measures to enhance the stability of such households would protect and promote children's welfare.").

290. See *Developments, supra* note 81, at 1610 ("The prohibition on same-sex marriage may in fact discourage procreation; some same-sex couples may elect not to have children precisely because their relationship is not sanctioned by the state.").

291. See *State v. Jackson*, 80 Mo. 175, 179 (1883) ("It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments."); see also Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 Va. L. Rev. 1224, 1239 (1966) ("Senator James R. Doolittle . . . claimed that mulattoes could not propagate their species indefinitely, and concluded: 'It is the fiat of the Almighty which is stamped upon this very idea of forcing an amalgamation of the races against nature and against the laws of God.'"); Trosino, *supra* note 23, at 101-02 ("A common belief held by white Southerners was 'that mulattoes cannot reproduce amongst themselves after the third generation and that they are troublesome by nature while unmixed blacks just naturally 'know their place.'").

292. See *Naim v. Naim*, 87 S.E.2d 749, 756 (Va.) ("We find . . . no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship."), *vacated on procedural grounds*, 350 U.S. 891 (1955); Trosino, *supra* note 23, at 101 ("Another justification for anti-miscegenation laws was based on the popular belief that children of interracial marriage were mentally and physically inferior to pure race children.").

courts reason to pause before asserting such a rationale, especially because a related rationale was rejected in *Loving*.²⁹³

In *Skinner v. Oklahoma*,²⁹⁴ the Court held that “[m]arriage and procreation are fundamental to the very existence and survival of the race.”²⁹⁵ Yet, there is no reason to think that the very existence and survival of the human race should or will rest on the shoulders only of those whose *biological* parents raise them.

When the Court has discussed the fundamental right to raise one’s children, the Court has not limited that right only to those parents who were raising their own biological children.²⁹⁶ Thus, even had the Supreme Court “deemed marriage a fundamental right substantially because of its relationship to procreation,”²⁹⁷ marriage would still be fundamental for gays and lesbians who are also raising children needing a stable and loving environment.²⁹⁸ It is thus difficult to understand how judges who “recognize that gay and lesbian couples can and do have children through adoption, surrogacy, and artificial insemination”²⁹⁹ can nonetheless believe that such families do not warrant constitutional protection.

In *Moore v. City of East Cleveland*,³⁰⁰ the Supreme Court struck down housing restrictions that were based on an overly narrow definition of family.³⁰¹ Were courts correct that the Supreme Court’s domestic relations jurisprudence is based on the model of two parents who raise their own biological children, *Moore* would have been decided differently. When the *Moore* Court noted that it “is through the family that we inculcate and pass down many of our most cherished values, moral and cultural,”³⁰² the Court could not have been limiting

293. See *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (“[T]he State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.”).

294. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

295. *Id.* at 541.

296. See *Pierce v. Society of the Sisters*, 268 U.S. 510, 535-36 (1925) (holding that parents and guardians have a fundamental right to direct the upbringing of their children and the children for whom they are responsible); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the guarantee of liberty in the 14th Amendment is “not merely freedom from bodily restraint, but also the right of the individual to . . . marry, establish a home and bring up children”).

297. *Dean v. District of Columbia*, 653 A.2d 307, 333 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part).

298. See *id.* at 345 (Ferren, J., concurring in part and dissenting in part) (noting that between eight and ten million children are raised in gay and lesbian households).

299. *Id.* at 333; see also Nussbaum, *supra* note 272, at 1650 (“Many same-sex couples . . . have and raise children, whether their own from previous relationships, adopted, or engendered by artificial insemination within the same-sex relationship.”).

300. 431 U.S. 494 (1977).

301. See Gerald Gunther, *Constitutional Law* 555 (12th ed. 1991) (“*Moore* invalidated a zoning ordinance limiting occupancy of a dwelling to members of a single ‘family,’ narrowly defined . . .”).

302. *Moore*, 431 U.S. at 503-04.

its discussion of the family to two parents who were raising children biologically related to both of them.³⁰³ Rather, the Supreme Court has recognized what the lower courts discussed here apparently have not, namely, that many of our most cherished values are passed down in settings that do not involve two parents raising children biologically related to each of them.

The *Moore* Court cautioned that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."³⁰⁴ Apparently, various lower courts have not taken that warning to heart.

The *Moore* Court made clear that courts must not close their "eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause."³⁰⁵ As the *Roberts* Court emphasized, families "have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs."³⁰⁶ All kinds of families may play that role, not just those in which the children are biologically related to both adults.

Perhaps the difficulty is not that gay and lesbian parents will be unable to communicate values to their children, but that they will communicate the "wrong" values.³⁰⁷ Yet, there is no reason to believe that the "wrong" values would be transmitted—commitment, loyalty, tolerance, and respect for self and others are values that should be transmitted.³⁰⁸ Further, there is no one set of values exhausting the "permissible" values that may be imparted.³⁰⁹ Finally, were the relevant standard for raising children whether the "wrong" values would be imparted, many parents teaching their children intolerance of, for example, other races, nationalities, or religions, would seem vulnerable to losing their children.³¹⁰

303. See Gunther, *supra* note 301, at 555 & n.7 (pointing out that the statute at issue would not have been violated were the grandmother living with two grandsons who were brothers rather than first cousins).

304. *Moore*, 431 U.S. at 499.

305. *Id.* at 501.

306. *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984).

307. *But see Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972) ("A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.").

308. See Heeb, *supra* note 103, at 354-55.

309. Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 Harv. L. Rev. 1348, 1371 (1994) ("People are not meant to be socialized to uniform, externally imposed values. People are to be able to form families and other intimate communities within which children might be differently socialized and from which adults would bring different values to the democratic process.").

310. Cf. *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) ("We are not an assimilative, homogeneous society, but a facilitative, pluralistic one,

The *Zablocki* Court recognized the right to marry as fundamental because it is the "foundation of the family in our society."³¹¹ Families, however, need not and often do not involve children. Marriage and family serve a variety of important functions in addition to the production and raising of children.

Were one to read the court opinions that suggest that same-sex relationships are not afforded constitutional protection, one would infer that the sole reason that marriage is important is that it facilitates the begetting and raising of the couple's own biological children. This analysis, which makes marriage only instrumentally important for the production and rearing of children, misrepresents the nature of the interest in marriage. The right to marry is itself "of fundamental importance,"³¹² just as the right to procreate is itself fundamental, whether the procreator is married or single.³¹³ Further, the Supreme Court has never said that only heterosexuals have a fundamental interest in marriage; on the contrary, "the right to marry is of fundamental importance for all individuals."³¹⁴

3. Intimate Association

In *Board of Directors of Rotary International v. Rotary Club of Duarte*,³¹⁵ the Court recognized that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights."³¹⁶ The Court discussed a number of intimate associations that are protected: marriage, begetting and bearing children, child rearing and education, and cohabitation with relatives.³¹⁷ The Court explicitly rejected the argument that only those relationships that implicate *all* of these intimate associations would be protected.³¹⁸

In *Turner v. Safley*,³¹⁹ the Supreme Court had to decide whether prisoners have a right to marry while they are in prison. The Court recognized that the "right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration."³²⁰ Thus, a re-

in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncracies.").

311. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

312. *Id.* at 383.

313. *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

314. *Zablocki*, 434 U.S. at 384.

315. 481 U.S. 537 (1987).

316. *Id.* at 545.

317. *Id.*

318. *Id.* ("Of course, we have not held that constitutional protection is restricted to relationships among family members.").

319. 482 U.S. 78 (1987).

320. *Id.* at 95.

striction that might not pass constitutional muster outside of the prison context might be permissible within that context. Nonetheless, "legitimate corrections goals"³²¹ notwithstanding, the Court recognized that the prisoner's right to marry was constitutionally protected.³²²

Turner is important because of the interests that the Court recognized as having constitutional significance. The Court upheld the prisoner's right to marry because (1) marriages "are expressions of emotional support and public commitment";³²³ (2) marriage may involve "an exercise of religious faith as well as an expression of personal dedication";³²⁴ (3) *most* marriages will be "formed in the expectation that they ultimately will be fully consummated";³²⁵ and (4) marriage is often a "precondition to the receipt of government benefits."³²⁶

The Court did *not* say that the fundamental interest in marriage was dependent upon the couple's having or raising children. Indeed, the Court did not say that marriage was dependent upon consummation, because *most* rather than *all* marriages would be formed in the expectation of their being consummated.³²⁷ Instead, the Court mentioned interests possessed by all individuals, including gays, lesbians, and bisexuals.³²⁸ If the interests articulated by the Court justify allowing opposite-sex couples to marry, legitimate penological concerns notwithstanding, it is hard to understand why those same individual interests are suddenly insufficiently weighty to allow same-sex couples to marry, even when no penological concerns are implicated.

Ironically, it was brought to the attention of the *Dean* court that *Turner* involved factors that applied to both same-sex and opposite-sex couples.³²⁹ Nonetheless, the *Dean* court rejected the approach of-

321. *Id.* at 96.

322. *Id.*

323. *Id.* at 95.

324. *Id.* at 96.

325. *Id.*

326. *Id.*

327. *But see* Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 *Law & Sexuality* 63, 87 (1991). Dunlap writes:

The buried premise of most discussions of marriage, that marriage must involve sex, should be unearthed and, insofar as government is concerned, rejected. If it is not the business of government to regulate private adult consenting sexual activity in general, why should government be free to prescribe it, implicitly or otherwise, as a requisite of marriage?

Id.

328. Stephen Macedo, *Morality and the Constitution: Toward a Synthesis for "Earthbound" Interpreters*, 61 *U. Cin. L. Rev.* 29, 46 (1992) ("[H]omosexual relationships embody many of the same goods as heterosexual relationships: friendship, care, affection, intimate society. All of these goods and more are promoted through homosexual as well as heterosexual relationships.").

329. *See Dean v. District of Columbia*, 653 A.2d 307, 336 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part) ("Appellants proffer that, given the nature

ferred by the Supreme Court and instead seemed to accept the *Baehr* analysis linking marriage to procreation,³³⁰ and then failed to recognize that the state's procreation concerns *support* allowing same-sex couples to marry.

In *Roberts v. United States Jaycees*,³³¹ the Court recognized that "individuals draw much of their emotional enrichment from close ties with others."³³² These relationships must be protected "from unwarranted state interference,"³³³ at least in part, because they safeguard "the ability . . . to define one's identity"³³⁴ independently. The ability to develop one's own identity is "central to any concept of liberty."³³⁵ The *Roberts* Court recognized that intimate associations "foster diversity and act as critical buffers between the individual and the power of the State."³³⁶ Such relationships safeguard "the individual freedom that is central to our constitutional scheme."³³⁷ Insofar as intimate associations serve as a buffer between individuals and the state so that individuals can independently define themselves, gay and lesbian intimate associations are especially deserving of protection,³³⁸ because

of homosexuality, *Turner's* attributes of marriage—emotional support, religious or spiritual significance, physical consummation, and government and other benefits—are as relevant and important to same-sex couples as to heterosexual couples.”).

330. See *id.* at 332 (Ferren, J., concurring in part and dissenting in part) (“An historical survey of Supreme Court cases concerning the fundamental right to marry, however, demonstrates that the Court has called this right ‘fundamental’ because of its link to procreation.” (citing *Baehr v. Lewin*, 852 P.2d 44, 55 (Haw.) (plurality opinion), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993)).

331. 468 U.S. 609 (1984).

332. *Id.* at 619.

333. *Id.*

334. *Id.*

335. *Id.*; see also *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”).

336. *Roberts*, 468 U.S. at 619. Dissenting from the Court’s holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986), Justice Blackmun argued that:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many ‘right’ ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.

Id. at 205 (Blackmun, J., dissenting).

337. *Roberts*, 468 U.S. at 618.

338. See *Shahar v. Bowers*, 836 F. Supp. 859, 863 (N.D. Ga. 1993) (“[T]he court finds as a matter of law that plaintiff’s relationship with her female partner constitutes a constitutionally-protected intimate association.”); see also *Developments, supra* note 81, at 1606 (“Choice in intimate relationships is no less critical for homosexuals than for heterosexuals.”).

unconventional associations are the most likely to be subject to discrimination.³³⁹

Several commentators have suggested that the right to same-sex marriage should be recognized as falling within the right to intimate association.³⁴⁰ Insofar as marriage is protected because it involves an intimate lifelong commitment that may be central to the life of any individual, both opposite-sex and same-sex unions must be protected.³⁴¹

Same-sex couples seeking the right to marry are not merely seeking the right to live together, but to live together as a unit recognized by society. It is simply false that the fundamental interest in intimate association is satisfied as long as the individuals may live in the same household.³⁴² Just as a state refusal to recognize interracial or interreligious marriages would not be upheld on grounds that the state was willing to allow such couples to live together, the state cannot escape its responsibility to recognize same-sex marriages by allowing intrasexual couples to live together.

In *Planned Parenthood v. Casey*,³⁴³ the Court discussed matters that involved "the most intimate and personal choices a person may make

339. Karst, *supra* note 87, at 664 ("[I]n the area of intimate association . . . the unconventional are the most likely victims of legislative discrimination."); *see also* Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) ("In a community such as ours, 'liberty' must include the freedom not to conform."); *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (discussing "discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens").

340. Epstein, *supra* note 177, at 2460 ("[T]he current prohibitions against same-sex marriages are themselves a mistake—regardless of what one thinks of the wisdom or morality of these marriages—and should be rejected as inimical to the basic principle of freedom of association on which a liberal society should rest."); *see also* David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. Rev. 800, 853 (1986) (arguing that a basic principle of equal rights is that they "must be fairly extended to the most despised minorities"); Catherine E. Blackburn, Comment, *Human Rights in an International Context: Recognizing the Right of Intimate Association*, 43 Ohio St. L.J. 143, 163 (1982) ("It remains for the Supreme Court of the United States . . . to recognize expressly the right of all citizens of the United States to be free to associate in intimate relationships without unwarranted governmental intrusion.").

341. Catherine M. Cullem, Note, *Fundamental Interests and the Question of Same-Sex Marriage*, 15 Tulsa L.J. 141, 142 (1979) ("[I]t is the intimate, lifelong commitment between two people which gives the marital relationship its special and protected status."); *Developments, supra* note 81, at 1608 ("To the extent that marriage is a vehicle for stability because of the commitment it embodies, gay men and lesbians in stable, committed relationships should be no less entitled to marry than their heterosexual counterparts.").

342. Some commentators do not seem to appreciate this point. *See* Beschle, *supra* note 65, at 89 ("[C]onsider a legislative decision to formally recognize only heterosexual unions as 'marriages.' This act does not unduly burden the liberty of homosexuals to live as couples, so it would be subject only to the rational basis test.").

343. 112 S. Ct. 2791 (1992).

in a lifetime."³⁴⁴ The Court explained that "choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."³⁴⁵ It is hard to imagine those choices that qualify as central to personal dignity and autonomy if one's choice of an intimate life partner does not.

The freedom of intimate association is not absolute. The Government can regulate such relationships to promote very important interests.³⁴⁶ Those interests must be real, however—they cannot suddenly be compelling so that discrimination against gays and lesbians can be justified, and just as suddenly be noncompelling when nongay and nonlesbian individuals seek benefits seemingly precluded by these same, formerly compelling, state interests.

The *Loving* Court described marriage as "one of the vital personal rights essential to the orderly pursuit of happiness."³⁴⁷ Over one hundred years ago, the Supreme Court recognized that "the very idea that one man may be compelled to hold . . . any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."³⁴⁸ Courts that permit legislatures to prohibit individuals from marrying their same-sex partners are acting as accomplices in perpetuating this intolerable situation.

C. *What the Right to Marry Includes*

Even were courts to recognize all of the interests that the institution of marriage serves, it would not follow that no restrictions on marriage would be permissible. The *Zablocki* Court recognized that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."³⁴⁹ The Court also recognized, however, that "[w]hen 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."³⁵⁰ This implies that a statutory classification significantly interfering with the right to marry must serve compelling state interests.³⁵¹

344. *Id.* at 2807 (plurality opinion).

345. *Id.* (plurality opinion).

346. Karst, *supra* note 87, at 627 ("The freedom of intimate association, like other constitutional freedoms, is presumptive rather than absolute . . . [and] may give way to overriding governmental interests.").

347. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

348. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

349. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

350. *Id.* at 388.

351. *See id.* at 396 (Powell, J., concurring in the judgment).

Arguably, the Court's close scrutinization of any state marital restriction would result in its being invalidated.³⁵² Yet, if that is true, then the state restrictions on bigamy and incest, for example, must not be serving important state interests and arguably should be invalidated.³⁵³

Justice Douglas suggested that the state prohibition of bigamy will eventually be ruled constitutionally infirm.³⁵⁴ At least thus far, however, his prediction has not come true. Courts have subjected the classification to strict scrutiny and have nonetheless upheld it.³⁵⁵

Incest regulations might also seem vulnerable if subjected to strict scrutiny.³⁵⁶ Yet, there may be sufficiently compelling reasons to justify such prohibitions, e.g., genetic concerns³⁵⁷ or the protection of the young.³⁵⁸ Insofar as those interests are not implicated or are not deemed sufficiently important,³⁵⁹ and insofar as there are no other important interests served by the prohibition,³⁶⁰ then perhaps such regu-

352. See *id.* at 399 (Powell, J., concurring in the judgment) ("A 'compelling state purpose' inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce.").

353. Milton C. Regan, Jr., *Reason, Tradition, and Family Law: A Comment on Social Constructionism*, 79 Va. L. Rev. 1515, 1525 (1993) ("One can easily argue, then, that incest statutes are a crude form of regulation that sweeps both too broadly and too narrowly . . .").

354. *Wisconsin v. Yoder*, 406 U.S. 205, 247 (1972) (Douglas, J., dissenting) (suggesting that the *Yoder* decision would eventuate an overruling of *Reynolds v. United States*, 98 U.S. 145 (1878), which upheld the state prohibition of polygamy); see also *Beschle*, *supra* note 65, at 82 (suggesting "that the polygamy cases were wrongly decided").

355. *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir.) ("[T]he State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship."), *cert. denied*, 474 U.S. 849 (1985); see also *Barlow v. Blackburn*, 798 P.2d 1360, 1366-67 (Ariz. Ct. App. 1990) (holding that the state has a compelling interest in maintaining monogamous marriage qualification for its peace officers).

356. See *State v. Jackson*, 80 Mo. 175, 177 (1883) (suggesting that recognizing a federal constitutional right to marry would undermine incest laws).

357. *Dean v. District of Columbia*, 653 A.2d 307, 313 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part) (discussing genetic concerns raised by incest); see also *In re Estate of Loughmiller*, 629 P.2d 156, 158 (Kan. 1981) (discussing reasons for preventing incestuous marriages).

358. *Bowman & Cornish*, *supra* note 35, at 1182 ("[T]he potential for exploitation in a marriage between an adult and a child would be very high.").

359. It is not clear, for example, that the state's genetic interest, even if legitimate, is of sufficient weight to warrant a marriage prohibition. Cf. *Bucca v. State*, 128 A.2d 506, 510 (N.J. Super. Ct. Ch. Div. 1957) (suggesting that incestuous relationship between uncle and niece "may be treated not as biologically harmful but only as sociologically improper").

360. See *Karst*, *supra* note 87, at 672 ("[I]ncest laws forbidding parent-child marriage are arguably sustainable even when the child is mature, on the theory that parental authority established during one's childhood may have a lasting impact, dominating what would otherwise be the child's freedom of choice."); *Bowman & Cornish*, *supra* note 35, at 1182-83 ("The prohibition on incest . . . may find support in a concern for promoting social integration by encouraging marriage across family lines and by a concern for preserving nonsexual intimacy within the family."); *Keller*,

lations should not be upheld.³⁶¹ Indeed, where genetic concerns are not at issue and where the individuals are of age, there has been a tendency to relax incest prohibitions.³⁶² For example, a man was allowed to marry his adopted daughter,³⁶³ and a brother was allowed to marry his sister by adoption.³⁶⁴

Regulations preventing minors from marrying have been upheld as promoting important state interests,³⁶⁵ although they have not been subjected to strict scrutiny.³⁶⁶ Such regulations are less vulnerable to attack both because they concern minors who are less capable of making a mature, informed decision and because the regulation would defer rather than prohibit marriage.³⁶⁷

The Supreme Court has held that reasonable regulations that merely defer marriage may pass constitutional muster. For example, when upholding residency requirements for divorce,³⁶⁸ the Court made clear that such requirements were permissible because they did not involve a "total deprivation"³⁶⁹ of the right to marry but "only [a] delay."³⁷⁰ It should be noted that the prohibition of same-sex marriage involves a total denial of the right to marry rather than a mere delay.³⁷¹

supra note 262, at 506 ("It is the potential for domination and exploitation in incestuous relationships which undermines consent to the extent that the value of the liberty interest is grossly outweighed by its potential for harm.").

361. Cf. Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 Wis. L. Rev. 275, 315. Fineman writes:

It is hard to distinguish under a privacy analysis a choice to engage in bigamy, polygamy or a homosexual marriage from a choice to cohabit. If there are constitutionally protected associational values in intimate relationships, they permeate all forms of such relationships, not only those which resemble the traditional, heterosexual, monogamous marriage.

Id.

362. Singer, *supra* note 257, at 1466 ("Several recent cases have held that statutory prohibitions against incestuous marriage do not apply to relationships created by adoption.").

363. *Bagnardi v. Hartnett*, 366 N.Y.S.2d 89 (Sup. Ct. 1975).

364. *Israel v. Allen*, 577 P.2d 762 (Colo. 1978) (en banc).

365. *Moe v. Dinkins*, 669 F.2d 67, 68 (2d Cir.), *cert. denied*, 459 U.S. 827 (1982).

366. See *id.* ("[T]he right of minors to marry has not been viewed as a fundamental right deserving strict scrutiny.").

367. See Karst, *supra* note 87, at 672 ("Age restrictions, for example, can be seen as promoting the principle of associational choice, when the age of autonomy is set low enough. The choice to marry requires not only intellectual capacity but the maturity to appreciate something of the nature of the commitment one is making."); Bowman & Cornish, *supra* note 35, at 1182 ("Children cannot be expected to be capable of making informed decisions about marriage . . .").

368. *Sosna v. Iowa*, 419 U.S. 393 (1975).

369. *Id.* at 410.

370. *Id.*

371. Friedman, *supra* note 289, at 199 ("Legal prohibitions against same-sex marriages . . . wholly proscribe the ability of individuals to enter marriage with a partner of their choice.").

The point here is not that the state has (or does not have) an important interest in prohibiting bigamous or incestuous marriages, but merely that statutory classifications that significantly infringe on the fundamental right to marry must promote important or compelling interests if they are to be upheld. If the state is going to prohibit same-sex marriage, it must articulate the important state interests that would thereby be served.

D. *Anti-miscegenation Laws*

There are numerous reasons why the best analogue to the current state refusal to recognize intrasexual marriages is the former state refusal to recognize interracial marriages.³⁷² Many of the same reasons justifying the Court's striking down anti-miscegenation statutes justify striking down laws prohibiting same-sex marriages.³⁷³

In the context of racial intermarriage, the Supreme Court of California in *Perez v. Lippold*³⁷⁴ pointed out that because "the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry."³⁷⁵ The court recognized the great burden that individuals are forced to bear when laws prevent those individuals from marrying the person of their choice: "A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains."³⁷⁶ As one of the concurring judges in *Perez* pointed out, the question was not whether many would choose to marry someone of another race; rather, it was whether those "who do so desire have the right to make that choice."³⁷⁷

It is of course correct that interracial and intrasexual marriages are different. Thus, the Court's holding Virginia's anti-miscegenation statute unconstitutional in *Loving v. Virginia*³⁷⁸ did not thereby invali-

372. See generally Strasser, *supra* note 23 (discussing the parallels between prohibitions on interracial marriages and prohibitions on same-sex marriages).

373. See Ron-Christopher Stamps, Comment, *Domestic Partnership Legislation: Recognizing Non-Traditional Families*, 19 S.U. L. Rev. 441, 446 (1992) (likening current obstacles preventing same-sex marriages to past obstacles preventing interracial marriages).

374. 198 P.2d 17 (Cal. 1948).

375. *Id.* at 19.

376. *Id.* at 25; see also Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189, 1219 (1966) ("A miscegenation law may put an individual to a cruel choice between marrying the person whom he loves and leaving his home, or denying his affections and remaining in the state.").

377. *Perez*, 198 P.2d at 31 (Carter, J., concurring).

378. 388 U.S. 1 (1967).

date all intrasexual marriage prohibitions.³⁷⁹ The rationale behind *Loving*, however, implies that same-sex marriage bans will not pass constitutional muster.

The *Baker* court suggested that "there is a clear distinction between a marital restriction based *merely* upon race and one based upon the fundamental difference in sex."³⁸⁰ Yet, such a view misrepresents just how fundamental the difference in race was thought to be. At the time the Virginia anti-miscegenation law was invalidated, many did not think it obvious that the right to marry included the right to marry someone of a different race.³⁸¹ Interracial marriages were not envisioned as traditional marriages deserving the kinds of protections intraracial marriages deserved.³⁸² Indeed, interracial marriages were described as violating God's Law.³⁸³

E. A New Fundamental Right?

When the *Baehr* plurality addressed whether there was a due process right to same-sex marriage, the court sought to determine whether such a union should be recognized as a new fundamental right.³⁸⁴ Not surprisingly, it concluded that a right to same-sex marriage is not "so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions."³⁸⁵ It also concluded that the right to same-sex

379. See *Baehr v. Lewin*, 852 P.2d 44, 70 (Haw.) (Heen, J., dissenting) ("[T]he plaintiff in *Loving* was not claiming a right to a same sex marriage."), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

380. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (emphasis added), *appeal dismissed*, 409 U.S. 810 (1972).

381. See, e.g., *Avins*, *supra* note 291, at 1255. *Avins* writes:

I therefore am led to conclude that the fourteenth amendment does not forbid state laws preventing interracial marriage or extra-marital sexual relations. The matter remains subject to the state police power. Whatever the fate, therefore, of these laws in the present United States Supreme Court, the abiding Constitution of the United States, which I believe will ultimately prevail, makes these anti-miscegenation laws completely valid.

Id.

382. Some commentators seem not to appreciate this. See *Beschle*, *supra* note 65, at 64 ("A 'right to marry' has been recognized, but that right has thus far been limited to the right to be free of obstacles to entering a traditional marriage.").

383. See *Naim v. Naim*, 87 S.E.2d 749, 752 (Va.) (discussing with approval a case holding that "the natural law which forbids their intermarriage and the social amalgamation which leads to a corruption of races is as clearly divine as that which imparted to them different natures"), *vacated on procedural grounds*, 350 U.S. 891 (1955); see also *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (discussing the trial court's view that God did not intend such marriages).

384. See *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw.) (plurality opinion) ("[W]e are being asked to recognize a new fundamental right."), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

385. *Id.*; see also *Dean v. District of Columbia*, 653 A.2d 307, 333 (D.C. 1995) (Ferrer, J., concurring in part and dissenting in part) (arguing that same-sex marriage is not deeply rooted in this nation's history); *Dean v. District of Columbia*, Civ. A. No.

marriage is not "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed."³⁸⁶ The court failed to appreciate that same-sex marriages are not rooted in the consciences of the people, at least in part, precisely because lesbians, bisexuals, and gays have historically been subjected to discrimination.³⁸⁷

The *Baehr* plurality's analysis was faulty in that it used the wrong level of specificity when describing the right to marry. That error led the plurality to believe that a new fundamental right was at issue rather than a right already recognized. Further, when deciding whether the "new" right should be recognized, the plurality used a standard that would not have been met by many of the interests *already included within the right to privacy*. For example, had the Supreme Court used the analogue of the *Baehr* analysis in *Loving*, Virginia's anti-miscegenation statute would have been upheld.³⁸⁸

In *Bowers v. Hardwick*,³⁸⁹ the Supreme Court wrote, "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."³⁹⁰ Certainly, the Court needs some standard by which to decide what the Due Process Clause protects. Just as certainly, however, the Court must not arbitrarily change its standards when judging what is protected.

One such standard has been proposed by Justice Scalia: A practice "is not constitutionally protected . . . [if] (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed."³⁹¹ Such a jurisprudence, however, would mean that contraception, abortion, and

90-13892, 1992 WL 685364, at *1-2 (D.C. Super. Ct. June 2, 1992) (same), *aff'd*, 653 A.2d 307 (D.C. 1995).

386. *Baehr*, 852 P.2d at 57 (plurality opinion); see also Michael K. Steenson, *Fundamental Rights in the "Gray" Area: The Right of Privacy Under the Minnesota Constitution*, 20 Wm. Mitchell L. Rev. 383, 422 (1994) ("The court's decision in *Baehr* identifies the problems involved in asserting that the right to privacy encompasses a right to same-sex marriage, even under a specific constitutional provision that governs privacy. History and tradition typically present formidable hurdles for such arguments." (footnote omitted)).

387. See *Jantz v. Muci*, 759 F. Supp. 1543, 1546 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993) ("[H]omosexuality is not considered a deeply-rooted part of our traditions *precisely because* homosexuals have historically been subjected to invidious discrimination." (citation omitted)); see also *Dean*, 653 A.2d at 345 (Ferren, J., concurring in part and dissenting in part) ("[T]he discrimination faced by homosexuals is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes . . .").

388. See Hohengarten, *supra* note 49, at 1509; Trosino, *supra* note 23, at 114.

389. 478 U.S. 186 (1986).

390. *Id.* at 194.

391. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2874 (1992) (Scalia, J., concurring in part and dissenting in part).

miscegenation would all be proscribable. Further, such a view entails overturning a variety of precedents.

In *Roe v. Wade*,³⁹² Justice Stewart pointed out, "The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life."³⁹³ Further, the *Roe* Court was well aware that abortion had been criminalized by many states for about a century.³⁹⁴ According to Justice Scalia's analysis, abortion does not fall within the right to privacy.³⁹⁵

The right to use contraception or, more generally, the right to procreate is not mentioned anywhere in the Constitution.³⁹⁶ Further, contraception has a history of being criminalized by the states. For example, at the time that *Griswold v. Connecticut*³⁹⁷ was decided, Connecticut had criminalized the use of contraception for over eighty years.³⁹⁸ When *Eisenstadt v. Baird*³⁹⁹ was decided, Massachusetts had criminalized the distribution of contraceptives for over ninety years.⁴⁰⁰ Applying Justice Scalia's test, the distribution or use of contraception should not have been included within the right to privacy.

The right to marry someone of a different race is mentioned nowhere in the Constitution and, even more generally, the right to marry is not explicitly protected in the Constitution.⁴⁰¹ States had criminalized racial intermarriage for a very long time.⁴⁰² Were the Court to have accepted Justice Scalia's jurisprudence, *Loving* would have had a

392. 410 U.S. 113 (1973).

393. *Id.* at 168 (Stewart, J., concurring).

394. *Id.* at 116 ("The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century.").

395. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2876 (1992) (Scalia, J., concurring in part and dissenting in part); see also *id.* at 2859 (Rehnquist, C.J., concurring in part and dissenting in part) ("Nor do the historical traditions of the American people support the view that the right to terminate one's pregnancy is 'fundamental.'").

396. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 100 (1973) (Marshall, J., dissenting) ("I would like to know where the Constitution guarantees the right to procreate . . .").

397. 381 U.S. 479 (1965).

398. See *Poe v. Ullman*, 367 U.S. 497, 501 (1961) ("The Connecticut law prohibiting the use of contraceptives has been on the State's books since 1879.").

399. 405 U.S. 438 (1972).

400. See *id.* at 447 ("Section 21 stems from Mass. Stat. 1879, c. 159, § 1, which prohibited, without exception, distribution of articles intended to be used as contraceptives.").

401. See Richards, *supra* note 340, at 834.

402. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805 (1992) (plurality opinion) (noting that "[m]arriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century"); Avins, *supra* note 291, at 1224 ("These laws represent one of the oldest categories of legislation in this country, antedating by a considerable period of time in some instances the American Revolution. Such laws were widespread on the books of the states during the Reconstruction period and for a long time thereafter, and they still exist in many states today." (footnotes omitted)); Hohengarten, *supra* note 49, at 1506 (noting that "mixed-race marriages, particularly between blacks and whites, had long been legally forbidden").

different result. Indeed, much that is protected within the right to privacy would not be protected.

Justice Scalia's jurisprudence has been described as "tempting,"⁴⁰³ but "inconsistent with our law."⁴⁰⁴ The question then becomes what jurisprudence should be used. If "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects,"⁴⁰⁵ another standard must be offered to determine what is included within the right to privacy.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴⁰⁶ the plurality described the "Constitution's written terms"⁴⁰⁷ as embodying "ideas and aspirations"⁴⁰⁸ in need of interpretation and elucidation. That interpretation can be successfully performed only if the Court is willing to "accept [its] responsibility not to retreat from interpreting the full meaning of the [Constitution] in light of all of [the Court's] precedents."⁴⁰⁹ As the *Casey* plurality recognized, the interpretation process cannot simply be mechanistic, because the "adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."⁴¹⁰

This reasoned judgment will involve the Court's making decisions about the appropriate level of abstraction when judging the constitutionality of state classifications. For example, the right to procreation involves a more abstract level of generality than the right to use contraceptives. As a general matter, it should not be surprising that the greater the specificity with which one describes a right at issue, the less likely it is that the right will have historically received protection. Thus, while "the rights to marital privacy and to marry and raise a family"⁴¹¹ have historically been protected, the right to use contraception has not.⁴¹²

Justice Scalia's jurisprudence has been criticized both because it selectively relies on tradition⁴¹³ and because it examines issues with an

403. *Casey*, 112 S. Ct. at 2805 (plurality opinion).

404. *Id.* (plurality opinion).

405. *Id.* (plurality opinion).

406. 112 S. Ct. 2791 (1992).

407. *Id.* at 2833 (plurality opinion).

408. *Id.* (plurality opinion).

409. *Id.* (plurality opinion).

410. *Id.* at 2806 (plurality opinion).

411. *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring).

412. *Michael H. v. Gerald D.*, 491 U.S. 110, 139 (1989) (Brennan, J., dissenting) (suggesting that if the degree of specificity used in *Michael H.* had been used in *Eisenstadt* and *Griswold*, the results would have been much different).

413. *Id.* at 138 (Brennan, J., dissenting) ("It is ironic that an approach so utterly dependent on tradition is so indifferent to our precedents.").

inappropriate level of specificity.⁴¹⁴ Both of these weaknesses underlie the due process approaches contained in both *Baehr* and *Dean*.⁴¹⁵ The level of specificity chosen by these courts, if applied in other contexts, would have meant that privacy would not include rights to contraception, abortion, or interracial marriage. The *Bowers* Court's warning that there should be "great resistance to . . . redefining the category of rights deemed to be fundamental"⁴¹⁶ should also be taken to heart to prevent the Court's recategorizing as mere liberties those rights previously considered fundamental.

F. Sodomy

Some commentators suggest that the Court's upholding states' rights to criminalize sodomy has important implications for same-sex marriage.⁴¹⁷ That may be correct, although not for the reasons usually thought.

In *Bowers*, Chief Justice Burger pointed out that "proscriptions against sodomy have very 'ancient roots.'"⁴¹⁸ Regrettably, he neglected to mention that proscriptions having ancient roots may not have corresponded to what was proscribed by the state of Georgia. For example, at common law, oral sex was not included within the crime of sodomy.⁴¹⁹

A general difficulty with the *Bowers* analysis is that while the Court only addressed whether the "Federal Constitution confers a funda-

414. See *id.* at 132 (O'Connor, J., concurring in part) (characterizing Scalia's approach as "inconsistent with our past decisions in this area" because "[o]n occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available").

415. See, e.g., Otis R. Damslet, Note, *Same-Sex Marriage*, 10 N.Y.L. Sch. J. Hum. Rts. 555, 582 (1993) (criticizing the *Baehr* court for mischaracterizing the right in question).

416. *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986).

417. Friedman, *supra* note 289, at 214 ("The decision in *Bowers v. Hardwick* upholding state statutes prohibiting homosexual sodomy deals a serious, if not fatal, blow to any arguments that state prohibitions against same-sex marriages are unconstitutional."); Mary F. Gardner, Note, *Braschi v. Stahl Assocs. Co.: Much Ado about Nothing?*, 35 Vill. L. Rev. 361, 363 (1990) ("[I]n many states, the recognition of a right to same-sex marriage would conflict with state laws that criminalize consensual sodomy.")

418. *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring).

419. *Rex v. Samuel Jacobs*, 168 Eng. Rep. 830 (1817); *Baker v. Wade*, 553 F. Supp. 1121, 1125 (N.D. Tex. 1982) ("[F]or a period of 83 years, oral sodomy was not illegal in Texas—whether committed by man and wife, by unmarried male and female, or by homosexuals."), *rev'd*, 769 F.2d 289, (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986); *Commonwealth v. Wasson*, 842 S.W.2d 487, 491 (Ky. 1993) ("Unlike the present statute our common law tradition punished neither oral copulation nor any form of deviate sexual activity between women." (emphasis omitted)); Norman Vieira, *Hardwick and the Right of Privacy*, 55 U. Chi. L. Rev. 1181, 1184 (1988) ("In *Rex v Samuel Jacobs*, . . . the court specifically held that the criminal prohibition against sodomy did not apply to oral sex.").

mental right . . . to engage in sodomy,"⁴²⁰ the Georgia statute proscribed sodomy whether committed intrasexually or intersexually.⁴²¹ Commentators who suggest that *Bowers* precludes same-sex marriage seem to forget the Court's limited focus.⁴²² States can criminalize sodomy between unmarried heterosexuals without thereby implying that sodomy between married heterosexuals is also precluded.⁴²³ Likewise, states can criminalize sodomy between unmarried homosexuals without implying that sodomy between married homosexuals is so precluded.⁴²⁴

Indeed, the case for the Federal Constitution's protecting same-sex marriage may be stronger than for its protecting extramarital sodomy.⁴²⁵ Certainly, the Court could not in good faith echo its *Bowers* decision by claiming that there is "[n]o connection between family, marriage, or procreation on the one hand"⁴²⁶ and same-sex unions on the other. Insofar as sexual activity is protected because it instrumentally promotes the fundamental interest in marriage and family, same-sex marriage may have to be recognized as a fundamental right before sodomy can be included within the right to privacy.⁴²⁷

420. *Bowers*, 478 U.S. at 190.

421. See *id.* at 200 (Blackmun, J., dissenting); see also *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1371 (N.D. Cal. 1987) ("It is important to note that, at present, it has not been established that anyone, heterosexual or homosexual, has a fundamental right to engage in sodomy. The United States Supreme Court has never held that heterosexuals have a fundamental right to engage in sodomy."), *rev'd in part, vacated in part*, 895 F.2d 563 (9th Cir. 1990); *State v. Santos*, 413 A.2d 58 (R.I. 1980) (holding that unmarried persons committing sodomy are unprotected); *State v. Poe*, 252 S.E.2d 843 (N.C. Ct. App. 1979) (holding that sodomy outside of marriage is not protected), *review denied, appeal dismissed*, 259 S.E.2d 304 (N.C. 1979), *appeal dismissed sub nom. Poe v. North Carolina*, 445 U.S. 947 (1980).

422. See *supra* note 417.

423. *Poe*, 252 S.E.2d at 845 ("[T]he state, consistent with the Fourteenth Amendment, can classify unmarried persons so as to prohibit fellatio between males and females without forbidding the same acts between married couples."); *State v. Santos*, 413 A.2d 58, 68 (R.I. 1980) ("[W]e hold that the right of privacy is inapplicable to the private unnatural copulation between *unmarried* adults." (emphasis added)).

424. See *Dean v. District of Columbia*, 653 A.2d 307, 343 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part); see also *Cullem, supra* note 341, at 159-60 ("It is not that sodomy is any less a crime or unnatural simply because it is undertaken by married couples. Rather, it is the shield of privacy surrounding the marital relationship which these courts have held thwarts the state's attempt to regulate sexual intimacies between the spouses.")

425. See *Strasser, supra* note 23, at 1033-34 ("If the Court is going to remain within its tradition of recognizing the fundamental rights to marry and to have a family and of only recognizing sexual rights as something instrumentally connected to those rights, the Court will have to recognize homosexual marriages before it can recognize a right to homosexual sodomy.")

426. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

427. The point here of course is not that *Bowers* was rightly decided but merely that the *Bowers* rationale would more readily support same-sex marriage than a right to commit extramarital sodomy. *But see Regan, supra* note 353, at 1527 (suggesting that fewer state interests may be implicated by recognizing a private right to commit sodomy than by recognizing a right to same-sex marriage).

G. *Societal Interests*

A number of state interests have been offered to justify a state's refusal to recognize same-sex marriages. For example, some suggest that homosexuality should not be encouraged or condoned by the state so that individuals will not be induced to develop same-sex romantic relationships.⁴²⁸ Even if one brackets the issue that the state should not recommend certain (adult, consenting) romantic partners over others, there is an empirical claim to examine. Because decriminalization of sodomy has not led to a decrease in the marriage rate,⁴²⁹ there is no reason to believe that allowing same-sex couples to marry would induce many people to choose same-sex rather than opposite-sex marriage.⁴³⁰ It is quite unlikely that individuals with a same-sex orientation would pose a significant threat to the stability or number of opposite-sex marriages; rather, individuals with an opposite-sex orientation would more likely pose such a threat.⁴³¹

Certainly, legalization of same-sex marriages might induce gays and lesbians not to enter into opposite-sex marriages. This inducement,

428. See Richard A. Posner, *Sex and Reason* 299 (1992); see also Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *Stan. L. Rev.* 503, 518 (1994) (discussing commentators who hold this view); Arthur A. Murphy, *Homosexuality and the Law: Tolerance and Containment II*, 97 *Dick. L. Rev.* 693, 694 (1993) (offering a "containment" strategy so as not to encourage homosexuality).

429. *Baker v. Wade*, 553 F. Supp. 1121, 1130 (N.D. Tex. 1982) ("In some countries (e.g., England, France, Holland, Finland), homosexual conduct has been decriminalized for years, and there is no greater incidence of homosexuality in those countries than in the United States. Moreover, there have been no adverse side effects in the 21 states that have now decriminalized consensual sodomy between adults in private."), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986); Posner, *supra* note 428, at 297 ("No one as far as I know has suggested, let alone presented evidence, that the removal of legal disabilities to homosexuality in countries such as Sweden and the Netherlands, and the growth of social tolerance to which that removal must in large part have been due, caused the number of homosexuals to increase."); Richards, *supra* note 271, at 993 ("The many countries which have legalized homosexual relations show no decline in the incidence of heterosexual marriage.").

430. See *Evans v. Romer*, 882 P.2d 1335, 1347 (Colo. 1994) (en banc) ("[W]e reject defendants' suggestion that laws prohibiting discrimination against gay men, lesbians, and bisexuals will undermine marriages and heterosexual families because married heterosexuals will 'choose' to 'become homosexual' if discrimination against homosexuals is prohibited. This assertion flies in the face of the empirical evidence presented at trial on marriage and divorce rates."), *cert. granted*, 115 S. Ct. 1092 (1995); *People v. Onofre*, 415 N.E.2d 936, 941 (N.Y. 1980) ("Certainly there is no . . . empirical data submitted which demonstrates that marriage is nothing more than a refuge for persons deprived by legislative fiat of the option of consensual sodomy outside the marital bond."), *cert. denied*, 451 U.S. 987 (1981); Blackburn, *supra* note 340, at 149 (taking issue with the claim that "homosexuality might become an accepted lifestyle if the legal proscriptions against it were removed").

431. See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 442 (S.D. Ohio 1994) ("[T]estimony from both the Plaintiffs' and Defendants' witnesses established that heterosexual males are far more responsible than gays in this society for the break down of the family unit."), *rev'd*, 54 F.3d 261 (6th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3122 (U.S. Aug. 10, 1995) (No. 95-239).

however, would presumably benefit all concerned, because it is unlikely that marriages between gay and straight individuals would be happy or stable.⁴³²

Closely related to the fear that recognition of same-sex marriage might induce people to choose same-sex rather than opposite-sex relationships is the claim that the state should not condone or endorse the "homosexual lifestyle."⁴³³ Most Americans do not approve of gay marriage.⁴³⁴ Yet, the state should not endorse certain but not other marital unions between consenting, autonomous adults. For example, the state should not endorse intraracial or intrareligious marriages but not interreligious or interracial marriages. Further, the state's recognition of intrasexual or interracial marriages does not entail an endorsement of those marriages.⁴³⁵

When commentators claim that the state should not be endorsing same-sex relationships, they may implicitly be claiming that the state should not promote "immorality." Yet, same-sex relationships are not immoral,⁴³⁶ just as interracial relationships are not immoral, majority view notwithstanding.⁴³⁷ Neither type of relationship harms anyone.

Although the state has often claimed that punishing same-sex behavior somehow promotes the public welfare, the basis for that position has not been articulated.⁴³⁸ There is no reason to believe that the failure to punish same-sex relationships will somehow lead to a greater incidence of murder or theft.⁴³⁹ Indeed, alleged moral rules

432. Fajer, *supra* note 179, at 594-95; Strasser, *supra* note 23, at 996-97.

433. Murphy, *supra* note 428, at 697-99; *see also* Dean v. District of Columbia, Civ. A. No. 90-13892, 1992 WL 685364, at *4 (D.C. Super. Ct. June 2, 1992) ("[L]egislative authorization of homosexual, same-sex marriages would constitute tacit state approval or endorsement of the sexual conduct."), *aff'd*, 653 A.2d 307 (D.C. 1995).

434. Trosino, *supra* note 23, at 93 ("The majority of Americans, however, disapprove of gay marriage."); Scott K. Kozuma, *Baehr v. Lewin and Same-Sex Marriage: The Continued Struggle for Social, Political and Human Legitimacy*, 30 *Willamette L. Rev.* 891, 911 (1994) ("Currently, most Americans oppose the legal sanctioning of same-sex marriages.").

435. *See* Evans v. Romer, 882 P.2d 1335, 1347 (Colo. 1994) (en banc), *cert. granted*, 115 S. Ct. 1092 (1995); Epstein, *supra* note 177, at 2470.

436. *See* Strasser, *supra* note 127, at 966-67 ("[A]ccording to a variety of theories, homosexual behavior is morally permissible.").

437. *See* Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980). The *Bonadio* court held:

Many issues that are considered to be matters of morals are subject to debate, and no sufficient state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority. Indeed, what is considered to be 'moral' changes with the times and is dependent upon societal background.

Id.

438. *See* Baker v. Wade, 553 F. Supp. 1121, 1132 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986); *People v. Onofre*, 415 N.E.2d 936, 940-41 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1991).

439. *See* Bowers v. Hardwick, 478 U.S. 186, 212 (1986) (Blackmun, J., dissenting). Apparently, Representative Dornan wants to blame all of society's evils on bisexuals, lesbians, and gays. *See* 140 Cong. Rec. H2026 (daily ed. Mar. 24, 1994) (statement of

designed to penalize unpopular groups who themselves do no harm must be recognized for what they are—biases masquerading as moral or legal rules.⁴⁴⁰

Even if same-sex behavior and relationships were immoral, this would not imply that the promotion of morality is of sufficient importance to deny something so fundamental as the right to marry. The Supreme Court rejected the argument that morality would justify prohibiting the use of contraception by unmarrieds⁴⁴¹ or access to abortion.⁴⁴² Just as the courts and the state cannot claim in good faith that procreation through the union of the parties is a compelling state interest when people of the same sex want to marry, but a noncompelling (or nonexistent) state interest when people of the opposite sex wish to marry, so, too, neither the courts nor the state can in good faith use morality to define or delimit the fundamental rights of one group but not of other groups.

Even those courts and commentators using morality as a justification for penalizing gays and lesbians admit that the interest in promoting morality is not substantial.⁴⁴³ Further, as the *Casey* plurality recognized, men and women of good conscience can disagree about profound moral questions.⁴⁴⁴ The Court's "obligation is to define the

Rep. Dornan) (suggesting that "our culture is literally melting down . . . the whole world points at us and refers to our child pornography, our drive-by shootings, our gangs and carjackings, . . . people are pulled out of cars by teenagers and beaten sometimes to death" and that "one of the root causes [is] trying to sell sodomy as a healthy lifestyle").

440. Koppelman, *supra* note 179, at 283-84 ("The issue is not 'whether or not to legislate morality,' but rather what kind of morality may be legislated. Certain moralities are tied to impermissible objectives; the Constitution forbids laws the purpose of which is to promote these moralities."); see also *Bowers*, 478 U.S. at 211-12 (Blackmun, J., dissenting) ("A state can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus.").

441. See *Eisenstadt v. Baird*, 405 U.S. 438, 450 (1972).

442. Cf. *Roe v. Wade*, 410 U.S. 113, 148 (1973) (noting that criminal abortion laws were "product[s] of a Victorian social concern").

443. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 580 (1991) (Scalia, J., concurring in the judgment) (suggesting that moral concerns are not "particularly 'important' or 'substantial,' or amount[] to anything more than a rational basis for regulation." (emphasis omitted)); David S. Caudill, *Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-Law Marriage*, 49 Tenn. L. Rev. 537, 557 (1982) ("[L]aws that advance a particular view of morality bear a weaker relationship to the public welfare than do laws to ensure the public's security and safety." (footnote omitted)); J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 Cornell L. Rev. 563, 617 (1977) ("Least persuasive of the state's justifications for restricting lifestyle freedoms is the general promotion of morality.").

444. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992) (plurality opinion) ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage."); see also *Bowers v. Hardwick*, 478 U.S. at 212 (Blackmun, J., dissenting) ("Reasonable people may differ about whether particular sexual acts are moral or immoral.").

liberty of all, not to mandate [its] own moral code."⁴⁴⁵ Indeed, part of the public morality of our society is to allow individuals to develop their private morality according to their own lights, as long as they do not harm others in the process.⁴⁴⁶ Thus, "a mere feeling of distaste or even revulsion at what someone else is or does, simply because it offends majority values without causing concrete harm"⁴⁴⁷ would not justify that state's "withholding the marriage statute from same-sex couples."⁴⁴⁸ The Supreme Court has recognized that "mere public intolerance or animosity cannot be the basis for abridgment of . . . constitutional freedoms"⁴⁴⁹ and it seems clear that public animosity is one of the major reasons that gays and lesbians are penalized by society.⁴⁵⁰ Public animosity against bisexual, lesbian, and gay people does not implicate a legitimate interest of the state, much less the kind of compelling interest that is required for such a burden on a fundamental right to be justified.⁴⁵¹ Indeed, there is a strong state interest in *eradicating* this kind of animosity and prejudice against gay, bisexual, and lesbian people.⁴⁵²

There are other state interests in promoting marriage, such as record keeping⁴⁵³ and stability for children and adults,⁴⁵⁴ that *support*

445. *Casey*, 112 S. Ct. at 2806 (plurality opinion). In another context, the Court has discussed the influence of personal moral beliefs on controversial issues:

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

Roe v. Wade, 410 U.S. at 116.

446. Blackburn, *supra* note 340, at 149 ("The right of each individual to be free in his or her private life is no less a manifestation of the moral order of society than is the protection of public decency.").

447. *Dean v. District of Columbia*, 653 A.2d 307, 355 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part).

448. *Id.*

449. *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971).

450. Ted Hansen, Note, *Domestic Relations*, 22 Drake L. Rev. 206, 211 (1972) ("Probably the strongest reasons for prohibiting 'same-sex' marriage are laws against homosexuality and society's disapproval of homosexual relationships.").

451. *Perez v. Lippold*, 198 P.2d 17, 32 (Cal. 1948) (Carter, J., concurring) ("[I]t is not conceded that a state may legislate to the detriment of a class—a minority who are unable to protect themselves, when such legislation has no valid purpose behind it. Nor may the police power be used as a guise to cloak prejudice and intolerance. Prejudice and intolerance are the cancers of civilization.").

452. *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. 1987) (en banc).

453. See Caudill, *supra* note 443, at 558.

454. See Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 486 (1983); Bowman & Cornish, *supra* note 35, at 1180-81.

recognition of same-sex marriages.⁴⁵⁵ Health concerns, e.g., prevention of AIDS,⁴⁵⁶ support the recognition of same-sex marriage as a way of supporting long-term, monogamous relationships.⁴⁵⁷

Perhaps it will be thought that not enough individuals would be interested in marrying to justify recognizing same-sex unions. Yet, there is reason to doubt that the number would be insignificant.⁴⁵⁸ Even if the number was likely to be small, however, it would not justify a state refusal to recognize same-sex marriages. The right at issue is "a personal one."⁴⁵⁹ It is "as an individual"⁴⁶⁰ that a person seeking to marry his or her same-sex partner would be "entitled to the equal protection of the laws."⁴⁶¹ The very "essence of the constitutional right is that it is a personal one."⁴⁶² The Court has made quite clear that it "is the individual who is entitled to the equal protection of the laws."⁴⁶³ Thus, because a *personal*, fundamental right is at issue, the number of those wishing to avail themselves of this right is beside the point.⁴⁶⁴

H. Domestic Relationships

Some of the interests served by marriage would also be served by recognizing domestic partnerships. For example, economic benefits might be assured through a different mechanism than marriage.⁴⁶⁵ Indeed, the state may have a strong interest in setting up a domestic partnership system, even bracketing same-sex marriage issues.

455. See Zimmer, *supra* note 82, at 694-95.

456. State v. Walsh, 713 S.W.2d 508, 512 (Mo. 1986) (en banc).

457. Michael L. Clozen & Carol R. Heise, *HIV-AIDS and the Non-Traditional Family: The Argument for State and Federal Judicial Recognition of Danish Same-Sex Marriages*, 16 Nova L. Rev. 809, 810 (1992) ("[T]here are sound public policy reasons not only to allow same-sex marriages, but also to encourage them. After all, we are now faced with the deadly and incurable HIV-AIDS disease."); Link, *supra* note 211, at 1143-44 ("[G]iven the realities of AIDS, public policy would seem to demand that gay men, particularly, be encouraged to form stable relationships. A policy which does not allow them to do so would not seem to meet any standard of rationality at all.").

458. Sue Nussbaum Averill, Comment, *Desperately Seeking Status: Same-Sex Couples Battle for Employment-Linked Benefits*, 27 Akron L. Rev. 253, 278 (1993) ("In 1988, U.S. census officials estimated that there were 1.6 million unmarried same-sex couples living in the United States."); see also Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. Rev. L. & Soc. Change 567, 583 (1994) (discussing two studies indicating that a large percentage of gays and lesbians would marry if they were able to marry someone of the same sex).

459. Missouri *ex rel* Gaines v. Canada, 305 U.S. 337, 351 (1938).

460. *Id.*

461. *Id.*

462. McCabe v. Atchison, Topeka, & Santa Fe Ry., 235 U.S. 151, 161 (1914).

463. *Id.* at 161-62.

464. Apparently Judge Posner does not realize that numbers should not be used in this way. See Posner, *supra* note 428, at 293-95.

465. David G. Richardson, *Family Rights for Unmarried Couples*, 2 Kan. J.L. & Pub. Pol'y, Spring 1993, at 117, 122.

A significant number of individuals in the United States do not live in households that fit the traditional definition of family.⁴⁶⁶ This poses certain difficulties for the state. If two individuals have cohabited for a number of years and that relationship ends, decisions must be made about how to divide the couple's property.⁴⁶⁷ If the state does nothing, then the shrewd individual who has put all of the property in his own name will be rewarded.⁴⁶⁸

In *Marvin v. Marvin*,⁴⁶⁹ the Supreme Court of California held that agreements between nonmarried cohabiting individuals relating to "their earnings, property, or expenses"⁴⁷⁰ may be upheld as long as they do not "rest upon a consideration of meretricious sexual services."⁴⁷¹ The court rejected the notion that nonmarital relationships were equivalent to practices involving prostitution.⁴⁷² The court took judicial cognizance of the fact that society's mores had changed, concluding that "the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case."⁴⁷³

Domestic partnership laws that extend certain rights to unmarried couples are themselves controversial. Critics believe that individuals should not be given the rights and benefits of marriage without the

466. Stamps, *supra* note 373, at 441-42 ("A 1988 survey revealed that only twenty-seven percent (27%), or 24.6 million, of this country's 91.1 million households fit the traditional definition of family.")

467. *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (discussing the difficulties "attendant upon establishing property and financial rights between unmarried couples under available theories of law other than contract").

468. *Hewitt v. Hewitt*, 380 N.E.2d 454, 459 (Ill. App. Ct. 1978) ("The rule often operates to the great advantage of the cunning and the shrewd, who wind up with possession of the property, or title to it in their names, at the end of a so-called meretricious relationship." (quoting *West v. Knowles*, 311 P.2d 689, 692-93 (1957) (Finley, J., concurring)), *rev'd*, 394 N.E.2d 1204 (Ill. 1979).

469. 557 P.2d 106 (Cal. 1976).

470. *Id.* at 113.

471. *Id.*; *see also* *IDK, Inc. v. County of Clark*, 836 F.2d 1185 (9th Cir. 1988) (holding that the regulation of escort services does not implicate the fundamental right of association).

472. *Marvin*, 557 P.2d at 122.

473. *Id.*; *see also* *Atkisson v. Kern County Hous. Auth.*, 130 Cal. Rptr. 375, 380 (Ct. App. 1976) (rejecting a policy that "automatically presumes immorality, irresponsibility and the demoralization of tenant relations from the fact of unmarried cohabitation"); *Zimmerman v. Burton*, 434 N.Y.S.2d 127, 128 (Civ. Ct. 1980) ("The law must keep abreast of changing moral standards. Accordingly, recent case precedent reflects a recognition of the rights of unmarried partners."); *Hudson View Properties v. Weiss*, 431 N.Y.S.2d 632, 637 (Civ. Ct. 1980) ("A prohibition against discrimination based on marital status is consistent with both evolving notions of morality and the realities of contemporary urban society, where couples openly live in heterosexual and homosexual units without sanction of state or clergy."), *rev'd*, 442 N.Y.S.2d 367 (Sup. Ct. 1981), *rev'd*, 448 N.Y.S.2d 649 (App. Div. 1982), *rev'd*, 450 N.E.2d 234 (N.Y. 1983).

corresponding responsibilities,⁴⁷⁴ presumably believing that the legal recognition of domestic partnerships would induce people not to marry. Yet, domestic partnerships are not the equivalent of marriage⁴⁷⁵ and do not give individuals all of the rights they would have if they were married. Further, there is evidence that unmarried cohabitation does not pose a threat to marriage.⁴⁷⁶ Finally, there is an additional worry. If the state refuses to extend benefits to cohabiting couples, then an individual may be induced *not* to marry so that he will not have to support the other individual should the relationship end prematurely.⁴⁷⁷ The state has an interest in making sure that individuals are protected if their relationships suddenly end, if only so that the state will not have to support those individuals.

As far as same-sex unions are concerned, it simply is not fair to deny individuals the possible benefits of domestic partnerships because, allegedly, they could have married when in fact same-sex partners cannot marry.⁴⁷⁸ Indeed, there is some question whether the state can in good faith condition benefits on marriage when same-sex couples cannot marry and when same-sex relationships serve the same functions as the traditional family.⁴⁷⁹

Notwithstanding the appearance of bad faith, courts that uphold a denial of benefits to same-sex partners sometimes invoke the societal

474. Richardson, *supra* note 465, at 118 ("Opponents of extending family rights to unmarried heterosexual couples argue that a couple should not be given the legal rights and benefits attached to marriage without also accepting the correlative marital legal responsibilities.")

475. Link, *supra* note 211, at 1148 ("Domestic partnership is not a proposal for spousal equivalency. . . . Because domestic partnership is not a marriage, it does not automatically entitle the partners to established statutory benefits.") For example, domestic partnership laws in other countries may not allow the gay or lesbian couple to adopt. *See* Stamps, *supra* note 373, at 456 (discussing the Danish Domestic Partnership Act, which does not allow gay or lesbian couples to adopt); *see also* Wolfson, *supra* note 458, at 606 (stating that "domestic partnership is indeed second-class").

476. Caudill, *supra* note 443, at 547 ("Many sociologists do not consider unmarried cohabitation, as an alternative or a preliminary to marriage, a threat to the institution of marriage." (footnote omitted)).

477. *See* Hewitt v. Hewitt, 380 N.E.2d 454, 460 (Ill. App. Ct. 1978) (suggesting that a rule denying cohabitants benefits "can only encourage a partner with obvious income-producing ability to avoid marriage and to retain all earnings which he may acquire."), *rev'd*, 394 N.E.2d 1204 (Ill. 1979).

478. *Beaty v. Truck Ins. Exch.*, 8 Cal. Rptr. 2d 593, 596 (Ct. App. 1992) ("To the extent plaintiffs were treated differently than a 'married couple,' it is because they are not married and not because they are homosexuals."); *Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410, 416 (Ct. App. 1985) (noting that "[h]omosexuals are simply a part of the larger class of unmarried persons"); *Lilly v. City of Minneapolis*, No. MC 93-21375, 1994 WL 315620, at *11 (Minn. Dist. Ct. June 3, 1994) ("All persons, whatever their sexual orientation, who are not married, are not eligible for benefits for a partner."); *aff'd*, 527 N.W.2d 107 (Minn. Ct. App. 1995); *Phillips v. Wisconsin Personnel Comm'n* 482 N.W.2d 121, 129 (Wis. Ct. App. 1992) (holding that appellant "is thus in the same position as all unmarried heterosexual males and females").

479. *See* Karst, *supra* note 87, at 684.

policy of favoring marriage,⁴⁸⁰ as if these individuals had tried to secure legal benefits while avoiding the accompanying legal detriments. For example, a Wisconsin court noted that “[t]he law imposes no mutual duty of general support, and no responsibility for provision of medical care, on unmarried couples of any gender, as it does on married persons.”⁴⁸¹ Such a rationale is unpersuasive given that same-sex individuals cannot marry, and given that those who incur the legal obligations contractually are still denied the relevant benefits.⁴⁸²

A separate issue involves the difficulties courts may have in determining whether individuals are domestic partners or mere friends. Yet, systems can be set up relatively easily⁴⁸³ to ensure that courts will not have to closely examine the intimate details of individuals’ lives to see whether they indeed constitute a family,⁴⁸⁴ discriminating against those couples unwilling to have their privacy invaded in that way.⁴⁸⁵ The unseemliness of invading couples’ privacy can thus be avoided.⁴⁸⁶ Further, courts will not have to worry about whether they are using an artificially high standard to determine who qualifies as domestic partners.⁴⁸⁷ With an appropriate administrative system, the benefits of domestic partnerships could be attained without the accompanying costs.

Of course, not all unmarried couples wish to be classified as domestic partners.⁴⁸⁸ Some wish neither to have the responsibilities nor the benefits of marriage, and it seems sensible to allow individuals to have this option.⁴⁸⁹ Presumably, one of the reasons that some courts insist

480. *Beatty*, 8 Cal. Rptr. 2d at 596 (discussing “the state’s legitimate interest in promoting marriage, . . . [which] is furthered by conferring statutory rights upon married persons which are not afforded unmarried partners”); see also *Hinman*, 213 Cal. Rptr. at 417 (“The state’s public policy favoring marriage is promoted by conferring statutory rights upon married persons which are not afforded unmarried partners.”).

481. *Phillips*, 482 N.W.2d at 126.

482. See *Beatty*, 8 Cal. Rptr. 2d at 594-95 (upholding denial of an insurance policy reserved for married couples to a homosexual couple with joint contractual legal obligations); *Hinman*, 213 Cal. Rptr. at 412 (upholding denial of employee dental care benefits to homosexual couple with joint contractual legal obligations).

483. See generally *Bowman & Cornish*, *supra* note 35 (describing the characteristics of domestic partner relationships).

484. See *Hinman*, 213 Cal. Rptr. at 418.

485. *Id.*

486. Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 Harv. L. Rev. 1640, 1653 (1991) [*hereinafter* Note, *Family Resemblance*]; see also James D. Esseks, *Recent Development, Redefining the Family*, 25 Harv. C.R.-C.L. L. Rev. 183, 195 (1990) (stating that examining couples’ personal lives is intrusive).

487. See Note, *Family Resemblance*, *supra* note 486, at 1654; see also Esseks, *supra* note 486, at 195 (“Family life for many traditional families is not the rosy picture of long-term, exclusive devotion and emotional commitment on which the court relies as its standard.”).

488. See *Fineman*, *supra* note 361, at 325.

489. *Id.* (“Many couples knowingly choose cohabitation over marriage to avoid the formal economic consequence of marriage.”).

upon explicit agreements⁴⁹⁰ between unmarried cohabitants is precisely because they realize that some cohabitants do not want their relationships to be marriage-like. This factor must be weighed against considerations that militate against requiring such agreements, e.g., that as a matter of fact these agreements tend not to be made,⁴⁹¹ and that the state may be forced to provide for one of the partners should the relationship break up. The point here is not that states should (or should not) require explicit oral or written agreements between cohabitants before they will have some marital benefits, but that this issue should not be allowed to be used as a smokescreen to deny same-sex couples who are willing to make the appropriate explicit agreements the benefits that opposite-sex couples may enjoy.

Just as some commentators worry that granting unmarried cohabitants some of the rights and responsibilities of married individuals may make it very difficult for others who wish to live together but not to be accorded those rights and responsibilities, other commentators worry that if the state recognizes the right of same-sex individuals to marry, some same-sex individuals wishing to cohabit but not to have the rights and responsibilities of marriage may find it increasingly difficult to do so⁴⁹² or may come to be treated as second class citizens.⁴⁹³ Yet, the argument that opposite-sex couples should not be allowed to marry so that individuals who do not want to marry will not be saddled with unwanted rights and responsibilities would be treated with disdain. Presumably, were same-sex couples allowed to marry, some would avail themselves of that option and some would not. Of those that chose not to marry, some would want the rights and responsibilities that opposite-sex cohabitants have acquired,⁴⁹⁴ while others would not want such rights and responsibilities. All of these different types of individuals can be accommodated. The central issue is whether same-sex couples are afforded the same options as opposite-sex couples.⁴⁹⁵

490. See, e.g., *Morone v. Morone*, 413 N.E.2d 1154, 1158 (N.Y. 1980) (“[W]e decline to recognize an action based upon an implied contract for personal services between unmarried persons living together.”).

491. Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. Rev. 1125, 1164 (1981) (“[U]nmarried cohabiting couples simply do not make formal cohabitation contracts.”); cf. *Alexander v. Alexander*, 445 So. 2d 836, 842 (Miss. 1984) (Lee, J., dissenting) (finding that no express agreement had existed, precisely because the individuals had considered themselves man and wife and thus had not needed to make the agreement explicit).

492. Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 Law & Sexuality 31, 50-51 (1991).

493. See Steven K. Homer, Note, *Against Marriage*, 29 Harv. C.R.-C.L. L. Rev. 505, 528 (1994); Dunlap, *supra* note 327, at 78.

494. See, e.g., *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Ct. App. 1988) (upholding express agreement between same-sex cohabitants).

495. Zimmer, *supra* note 82, at 694-95 (“The real issue is equal choice. Same-sex couples need options equivalent to those available to their heterosexual counterparts.”).

CONCLUSION

When courts have upheld state refusals to recognize same-sex marriages, they have employed a variety of specious rationales to do so. They have used definitional preclusion arguments that would never be accepted in other contexts, refused to acknowledge the obvious equal protection issues, and inappropriately delimited the fundamental right to marry. Further, courts have exaggerated the importance of certain state interests while ignoring others and then refused to acknowledge that the recognized interests would be promoted rather than undermined by same-sex marriages.

Both domestic partnerships for same-sex couples⁴⁹⁶ and same-sex marriages⁴⁹⁷ have been permitted in other societies, and thus the recognition of such unions is not as novel as might be believed. Further, the fact that states have not recognized these unions thus far is no reason for courts to allow this practice to continue. Intrasexual marriage prohibitions, like interracial marriage prohibitions, are invidious and must be struck down as violating the Fourteenth Amendment of the United States Constitution.

One of the most underappreciated facets of the same-sex marriage controversy is the extent to which domestic relations jurisprudence must change in order to justify the prohibition. Many of the arguments now offered to justify the same-sex marriage ban, such as the definitional preclusion argument, could also be used to justify prohibitions of interracial or interreligious marriage. The Equal Protection Clause has to be given such a cramped interpretation to justify this prohibition that, if so viewed in other contexts, it would offer no protection to a variety of types of individuals currently given protection. So too, the understanding of substantive due process that is required to justify this application would seem to put many "fundamental" rights at risk. The state's interests in "morality" or procreation could

496. Nussbaum, *supra* note 272, at 1524; Richardson, *supra* note 465, at 121; Stamps, *supra* note 373, at 456.

497. As one commentator has noted:

Same-sex marriages continued and were well-known in the Roman Empire until the mid-fourth century. While the precise definition of marriage has varied from one community to another and from one era to the next, there is a tradition of Christian same-sex marriage ceremonies celebrating unions that were considered marriages in the same sense in which opposite-sex couples married. The tradition of same-sex marriage transcends thousands of years of human history.

Damslet, *supra* note 415, at 560 (footnotes omitted); see Keller, *supra* note 262, at 513 ("[T]hrough the late middle ages homosexuality was well tolerated and encouraged, and gay marriages were sanctioned by the Catholic Church."); Link, *supra* note 211, at 1085-86 ("[I]t now appears that the original Christian ceremony for uniting couples united same-sex couples."); Scott Turner, Comment, *Braschi v. Stahl Assocs. Co.: In Praise of Family*, 25 *New Eng. L. Rev.* 1295, 1322 (1991) ("[G]ay marriages were an established part of Western Christendom after the fifth century."); see generally Eskridge, *supra* note 199 (discussing same-sex unions in various cultures throughout history).

be used to justify a variety of surprising policies if they can be so used here.

That the courts seem willing to invoke allegedly compelling interests to penalize one group but to ignore those interests when other, relevantly similar groups are involved is itself cause for concern. The rule of law and the integrity of the courts themselves are thereby brought into question. If courts continue to uphold intrasexual marriage bans and continue to offer the kinds of analyses thus far offered to justify such policies, the implications for domestic relations jurisprudence specifically, and our legal system generally, are frightening to contemplate.