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ARTICLES

CONSTITUTIONAL EQUAL PROTECTION, STRICT SCRUTINY, AND THE POLITICS OF MARRIAGE LAW

Anita K. Blair*

Many people today are amazed to hear anyone seriously contend that the Constitution guarantees men and women the right to marry persons of their same sex. But a member of Congress visiting here from the late 1860s would be astounded by more than that. When he and his colleagues passed the Civil Rights Amendments,¹ they intended to make the same constitutional rights then guaranteed to white citizens also apply to newly freed slaves.² Our visitor would be incredulous to learn that the Fourteenth Amendment adopted in 1868 remains a vital and contentious

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1. The Thirteenth Amendment prohibits slavery and involuntary servitude in the United States. *See* U.S. CONST. amend. XIII. The Fifteenth Amendment guarantees the right of citizens to vote regardless of "race, color, or previous condition of servitude." *Id.* amend. XV. The Fourteenth Amendment consists of five sections. Sections 2, 3 and 4 relate to post-Civil War issues concerning voting rights and apportionment, qualifications to hold federal offices, and validity of public debts. *Id.* amend XIV, §§ 2-4. Section 1 of the Fourteenth Amendment defines U.S. and state citizenship to include "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof . . ." It further provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. amend. XIV, § 1.

2. *See* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 36 (1990). "In a great burst of constitution-making prompted by the Civil War, the nation from 1865 to 1870 adopted three major constitutional amendments designed, primarily, to provide the recently freed slaves with the same civil and political rights as all free citizens." *Id.*

force in U.S. law 130 years later—long after every one of the freed slaves and former rebels intended to be dealt with by the Fourteenth Amendment had passed from this earth.

Politically speaking, the idea that the Equal Protection Clause of section 1 of the Fourteenth Amendment obliges states to license and recognize homosexual marriages remains shocking and amazing to voters. Polls show that nearly seventy percent of Americans believe states should not sanction marriage between persons of the same sex.³ Since 1996, when the federal Defense of Marriage Act (DOMA) was enacted,⁴ twenty-five states have passed laws banning same-sex marriage, and eleven more were considering such legislation in early 1998.⁵

The democratic process seems unlikely to yield results that will favor changing the traditional definition of marriage; however, the courts have given some preliminary success to proponents of same-sex marriage. An early victory in Hawaii⁶ established the formula—a mixture of law and politics that requires abstracting the issue out of the usual democratic process and subjecting it to strict judicial scrutiny under constitutional equal protection.

I. EQUAL PROTECTION AND “STRICT SCRUTINY”

The *Baehr v. Miike* case concerned the equal protection clause of Hawaii's Constitution, which provides: “No person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.”⁷ Similar language exists in the Fourteenth Amendment of the U.S. Constitution, and in many other state constitutions.⁸ Even so, and despite several previous challenges,⁹ no

3. See Lisa Keen, *Poll: Most Oppose Granting Licenses for Same-Sex Marriages*, WASH. BLADE, Apr. 12, 1996, at 19.

4. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (1996)).

5. See M. Jane Taylor, *An ever-shifting landscape*, WASH. BLADE, Feb. 13, 1998, at 1. State laws limiting marriage to one man and one woman enjoy substantial popular support. For example, when Washington State Governor Gary Locke vetoed such a bill at the end of the 1997 session, proponents reintroduced, passed and overrode a second veto “at lightning speed.” *Id.*

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

7. HAW. CONST. art. 1, § 5 (1978).

8. Thirty-five states approved the Federal Equal Rights Amendment before the time for ratification expired in 1982. Five later rescinded their approvals. See George F. Will, *Remember the ERA?*, WASH. POST, Mar. 20, 1997, at A27.

9. See *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995); *DeSanto v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct.

other federal or state court had ever found a constitutionally protected right to marry a person of the same sex. Instead, courts and agencies presented with this question had uniformly determined that marriage was legitimately limited to couples consisting of one man and one woman.¹⁰

The Hawaii appeals court concluded that, based on its review of federal constitutional precedents, strict scrutiny applies to sex classifications. In *Baehr*, the trial court applied a strict scrutiny standard and ruled that Hawaii's law restricting marriage to heterosexual couples was an unconstitutional denial of equal protection, because it improperly classified persons based on their sex.¹¹ Under the strict scrutiny standard enunciated by the U.S. Supreme Court and adopted by the Hawaii Supreme Court, the state was obliged to show that its marriage law was "narrowly drawn" to serve a "compelling state interest []." ¹²

The court reasoned that the Hawaii equal protection clause resembles the Federal Equal Rights Amendment,¹³ and therefore should be interpreted under the same standard that would have applied if the Federal ERA had been adopted.¹⁴

At that time, the Hawaii court did not have the benefit of the Supreme Court's 1996 decision in *United States v. Virginia* (the *VMI* case).¹⁵ The author of that opinion, Justice Ruth Bader Ginsburg, later candidly admitted that "there is no practical difference between what has evolved and the ERA."¹⁶ The *VMI* decision applies a standard of review that has

App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

10. See David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 7-10 (1997).

11. See *Baehr*, 852 P.2d at 60.

12. *Id.* at 67.

13. The Federal ERA stated, "Equality of rights under the law shall not be denied or abridged . . . on account of sex." It was passed by Congress in 1971. Thirty-five (out of a required minimum of thirty-eight) states eventually approved it; however, five rescinded their approvals and five more were poised to do so when the time for ratification expired in 1982. See Will, *supra* note 8.

14. See *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (plurality would have judicially adopted the ERA, then pending before the states, and would have treated sex classifications the same as race classifications, i.e., as suspect).

15. 518 U.S. 515 (1996).

16. Anita K. Blair, *How We Got the ERA*, THE WOMEN'S QUARTERLY, Spring, 1997, at 6.

Among the most prominent advocates seeking adoption of the ERA by [judicial] means was the head of the ACLU's Women's Rights Project at that time: Columbia Law School Professor Ruth Bader Ginsburg. Until her appointment as a federal judge in 1980, Ginsburg herself briefed and even argued several of the major Supreme Court cases in the 1970s dealing with sex classifications under the

come to be called "skeptical scrutiny." As applied, however, there is no practical difference between "skeptical" and "strict" scrutiny. The U.S. Supreme Court has insisted, rather, that constitutional equal protection scrutiny, whether applied to race or sex or other classifications, must involve a rigorous examination of the actual purposes and effects of the laws or state actions under challenge.

Properly understood, strict scrutiny is not a measure of the quality or desirability of legislative determinations, but a tool for discovering if they are founded on irrational or improper assumptions.

Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.¹⁷

Contrary to lawyers' lore, even strict scrutiny is not "fatal in fact." As the U.S. Supreme Court has recently reiterated, applying "strict scrutiny" does not automatically invalidate every challenged classification, even those involving race.¹⁸ Strict scrutiny does not create an irrebuttable presumption of unconstitutionality; by its own terms, it allows some limited forms of legal discrimination.¹⁹ Classifications subject to strict scrutiny under the U.S. Constitution are those which, almost invariably, are completely irrelevant to any assessment of a person's capabilities or qualifications.²⁰ Thus, classifications based on factors like race or national origin are "strictly" scrutinized because it is highly likely that they are irrational and unrelated to any proper purpose.

Properly applied, strict scrutiny illuminates false prejudices and stereotypes, but does not ignore facts or obscure the truth. Regardless of the applicable level of scrutiny, constitutional equal protection never requires courts to disregard *actual* differences between persons. In the case of race, mere superficial differences in skin color are irrelevant to ability; in the case of sex, physical differences, if significant, *may* affect capacity.

Fourteenth Amendment.

Id. at 7.

17. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

18. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

19. For example, the use of affirmative action as a remedy for past racial discrimination is not prohibited, even by *Adarand*. *See id.*

20. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) ("These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations [as race, alienage, or national origin,] are deemed to reflect prejudice and antipathy . . .").

Unlike race or national origin, sex manifests itself in inherent physical differences that affect a person's actual capabilities. "Skeptical scrutiny," the current federal constitutional standard for examining sex classifications as articulated in the *VMI* case, forbids virtually all state laws or state actions that distinguish between persons based solely on sex, with only one exception: distinctions based on actual inherent physical differences between men and women.

Explaining why the U.S. Supreme Court continues to treat sex and race differently, Justice Ruth Bader Ginsburg, on behalf of a seven-justice majority, wrote:

Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. . . . See *Loving v. Virginia*, 388 U.S. 1 (1967). Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Ballard v. United States*, 329 U.S. 187, 193 (1946).²¹

Thus, skeptical scrutiny differs from strict scrutiny only in name. In purpose and effect, it yields identical results.

II. "STRICT SCRUTINY" MISAPPLIED IN THE *BAEHR V. MIKE* CASE

In applying strict scrutiny to Hawaii's law restricting marriage to heterosexual couples, the Hawaii trial court assumed away any possibility that the state ever could meet this burden. The trial court determined that, because some children can survive without one or both of their biological parents, the State may not take measures to assist and encourage biological parents to remain jointly present and responsible for the upbringing of their own children.²² This in itself is an unreasonable assumption. Equal protection does not forbid honest efforts to achieve a better world merely because perfection is unattainable.

A. "Compelling Interest"

The circuit court found that the State in fact had demonstrated that "[t]here is a public interest in the rights and well-being of children and families."²³ Although children and families can survive under all sorts of circumstances, some conditions have proven to be much more favorable than others for the nurture of children and families. Traditional mar-

21. 518 U.S. 515, 533 (1996).

22. See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, [hereinafter *Baehr*].

23. *Baehr*, 1996 WL 694235, at *17.

riage, which binds one woman and one man to each other and to their children, is not a perfect institution; it has many virtues, however, that make it naturally superior, as a rule, to other possible arrangements for promoting the welfare of children and families.

The virtues of marriage are that it aims to create an exclusive, permanent bond between persons whose sexual activity may result in conception and birth. Not every male-female couple produces children; but every child has two, and only two, biological parents, who always consist of one man and one woman. Not all couples are faithful or stay together, but marriage at least extracts the promise from both to be responsible to each other and to their children. Human children (unlike other animals' young) require years of care and attention before they are self-sufficient. While examples abound of people who have selflessly raised others' children, it remains generally true that of all possible candidates, the biological parents are the persons most likely to be willing to invest their time in the care of their own child. Traditional marriage is no insurance against fate, but for thousands of years it successfully served society by providing strong protection for the great majority of children, women and families.

The mere fact that children are sometimes raised in circumstances without both biological parents does not mitigate society's compelling interest in encouraging and protecting traditional heterosexual marriage.²⁴ To legalize same-sex marriage is, as Manhattan Institute Fellow and author David Frum recently wrote:

[to] endors[e] the conscious creation of families intended from the beginning to be fatherless or motherless or both. To believe in gay marriage, you have to be ready to accept that girls might be raised by two men—and that it won't matter. You have to be ready to accept that boys will be taken away from their fathers, and led to manhood by two women—and that it won't matter. You have to be ready to accept children being raised by foursomes: Two men, two women who mutually impregnate each other. (No, I'm not inventing this: Just such a family lives in Vancouver, British Columbia, and was admirably profiled by Canada's *Globe and Mail* last year.) You have to be ready to accept children being bought and sold like prize heifers as lesbians purchase semen from sperm banks and gay men rent wombs from surrogate mothers. Gay marriage is maybe not the last

24. Conspicuously missing from the *Baehr* court's findings was a serious discussion of children's rights and interest in knowing and living with their biological parents, as well as the potentially staggering degree of confusion and suffering that accompanies the departure from traditional marriage norms. See *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989) ("The facts of this case are, we must hope, extraordinary.").

step to the transformation of children into commodities. But it's close to the last.²⁵

The State's arguments in *Baehr* established that the vast majority of children and families rely specifically on the very kind of rights and security afforded by traditional marriage to protect their welfare. Assisting and encouraging couples who engage in procreative sex to commit themselves exclusively and permanently to each other and their children is a compelling interest of any society. Making the same advantages generally available to any and all pairs of persons nullifies the exclusive—and impairs the permanent—nature of heterosexual marriage.

B. "Narrowly Drawn"

The plaintiffs-appellees in the *Baehr* case frankly admitted they were seeking the full array of legal benefits associated with marriage.²⁶ In examining whether a law restricting marriage to male-female couples complies with constitutional equal protection requirements, the issue arises whether couples or groups of the same or mixed sexes should be entitled to other various ancillary legal benefits. The answer to that question depends on legislative determinations concerning those benefits.

For example, in 1996 the U.S. Supreme Court reviewed Colorado's Amendment 2, which expressly forbade any state or local government action to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Justice Anthony Kennedy, for the majority, wrote:

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. (citations omitted.) We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. (citation omitted.)²⁷

Unlike the Colorado referendum, Hawaii's marriage law at issue in *Baehr* does not target any class of persons. It restricts marriage to man-

25. David Frum, *Dispatches & Dialogues*, SLATE (Mar. 17, 1997) <<http://www.slate.com/code/DDD/DDD.asp?file=GayMarriage&iMsg=3>>.

26. See *Baehr v. Lewin*, 852 P.2d 44, 50, 57-59 (Haw. 1993). The state-granted benefits generally include tax advantages, public assistance, community property rights, dower and inheritance rights, child custody and support, spousal privilege for confidential communications, etc. See *id.* at 59.

27. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

woman couples for the obvious reason that human reproduction occurs only heterosexually. To be sure, some biological parents never choose to marry, or else they divorce, depart, or die, sometimes leaving another to care for the children. But marriages, even today, survive much more often than they fail.²⁸

In defining marriage as a contract between one man and one woman, the legislature did not abridge any person's constitutional rights. There is no absolute right to marry,²⁹ and no unencumbered right to make independent decisions regarding procreation.³⁰ Attraction to one's own sex (homosexuality) is not a proscribed or suspect legal classification.³¹ Sex discrimination simply does not enter into Hawaii's marriage law: women and men are treated precisely the same, and for reasons having to do with "enduring" physical differences.³² Given the State's compelling interest in protecting the rights and well-being of children and families, its decision to establish a legal structure within which biological parents may commit themselves exclusively and permanently to each other and their children was narrowly tailored, rational, measured and appropriate.

III. EQUAL PROTECTION AND THE POLITICS OF MARRIAGE LAW

Even if Hawaii (or another state) were to legalize same-sex marriage, it would not follow automatically that public benefits now associated with marriage would be extended to same-sex couples. Decisions about setting tax rates and funding insurance programs, welfare programs, and the like must be made by the legislature on a sound fiscal basis. The legislature of any state that legalized same-sex marriage might well determine that it is not financially feasible to expand the definition of marriage while continuing to provide the same historical benefits to a larger pool of beneficiaries.

Significantly, the federal government already has determined, through the Defense of Marriage Act (DOMA),³³ that it will use the traditional definition of marriage in administering its laws.³⁴ This will limit federal

28. See U.S. BUREAU OF THE CENSUS, STAT. ABSTRACT OF THE U.S. tbl. 142-149 (1995).

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

30. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 872 (1992).

31. See *Evans*, 517 U.S. at 636 (Scalia, J., dissenting) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

32. See *supra* notes 12-21 and accompanying text.

33. Pub. L. No. 104-199, 1996 U.S.C.A.N. (110 Stat.) 2419 [hereinafter DOMA].

34. See 1 U.S.C.A. § 7 (West 1997) ("[T]he word 'Marriage' means only a legal union between one man and one woman.").

benefits for same-sex couples. DOMA also invokes the Full Faith and Credit provision of Article IV, Section 1, of the U.S. Constitution to permit states not to recognize the validity of same-sex marriages contracted in other states.³⁵

In *Frontiero v. Richardson*,³⁶ when four members of the U.S. Supreme Court moved to adopt the Equal Rights Amendment (which was then before the states for ratification), Justice Powell would not join their analysis, but wrote:

There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.³⁷

On a similarly controversial subject, abortion rights, Justice Scalia wrote in dissent in *Casey*: “[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, . . . the Court merely prolongs and intensifies the anguish.”³⁸

The Hawaii circuit court reached an unprecedented legal conclusion, which, if upheld, will have widespread and unpredictable effects. If the Hawaii Supreme Court upholds the ruling below, it will appear to foreclose an important public debate. On the other hand, as members of the U.S. Supreme Court have found, deference to the legislative and democratic process will improve public confidence in the judiciary and public acceptance of the final legal result.

IV. EQUAL PROTECTION AND GENDER POLITICS

This is not the first time an interest group has turned to the courts to achieve results denied by the democratic process. Consider the strategy employed by feminists to achieve, at last, the enactment of the Federal Equal Rights Amendment, without actually adding it to any printed copy of the Constitution.

35. See 28 U.S.C.A § 1738C (West Supp. 1997).

36. 411 U.S. 677 (1973).

37. *Id.* at 692.

38. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 1001 (1992) (Scalia, J., dissenting).

The Federal ERA was first proposed in 1923 by suffragettes fresh from their victory in obtaining adoption of the Nineteenth Amendment, which had given women the right to vote.³⁹ According to Betty Friedan, author and co-founder of the National Organization for Women (NOW), the ERA “had been bottled up in Congress for nearly fifty years.” She, and other NOW founders who considered Title VII of the 1964 Civil Rights Act insufficient, wanted to call greater attention to the enforcement of women’s rights and so resurrected the dormant ERA in 1971.⁴⁰

That same year, the Supreme Court decided *Reed v. Reed*.⁴¹ This was presented as an equal protection challenge to an Idaho probate law provision that whenever two equally entitled candidates applied for appointment as administrator of an estate, the man was preferred.⁴² Under the equal protection analysis at that time, the applicable test was whether treating applicants differently bore a “rational relationship” to a state interest embodied in the statute.⁴³ The State argued that the automatic preference for men served to expedite estate proceedings, avoid the cost of hearings and minimize intra-family disputes.⁴⁴ The Court rejected the State’s reasons and unanimously declared the law unconstitutional.⁴⁵

Several aspects of *Reed* are noteworthy: first, the Court did not have to decide this case; the Idaho legislature amended its probate code and eliminated the provision in question some time before the decision was rendered, thus the Court could have declared the case moot.⁴⁶ Second, the alternatives to giving male candidates a preference (such as holding a hearing in each case or selecting administrators by lot) would be expensive, time-consuming, divisive, unfair or arbitrary – all factors a state legislature should be entitled to consider. Finally, the law was enacted by a legislature elected by women as well as men. Women, normally constituting more than half the adult population, are capable of electing legislators who will represent their interests. Instead, the Supreme Court decided to substitute its judgment about what is “rational” for the judgment of the people (including the women) of Idaho.

Two years later in *Frontiero v. Richardson*,⁴⁷ a divided court took up

39. See U.S. CONST. amend. XIX.

40. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 387 (1984).

41. 404 U.S. 71 (1971).

42. See *id.* at 73-74.

43. See *id.* at 76.

44. See *id.*

45. See *id.* at 76-77.

46. See *id.* at 74 n.4.

47. 411 U.S. 677 (1973).

another equal protection case involving a Defense Department policy requiring husbands of military women, in order to qualify for dependent benefits, to show that they actually depended on their wives for more than half their support. Again, despite many reasons in support of this policy and against other alternatives, eight justices voted to invalidate it. Four of them, anticipating passage of the ERA, said they would judge sex classifications by the same standard as race classifications; the other four would not go so far but agreed the reasons for the policy did not constitute a rational basis for it.⁴⁸

In the 1976 case of *Craig v. Boren*,⁴⁹ at issue was the constitutionality of an Oklahoma law prohibiting the sale of beer to males under twenty-one and females under eighteen years old. The state argued that this law had a rational basis because teenage boys are far more likely to drink, drive and be involved in auto accidents than are teenage girls. This time the Court abandoned the pretext that it was applying a rational basis test. For sex (by this time called “gender”)⁵⁰ classifications, the Court devised a new standard, which came to be known as “intermediate scrutiny.”

Intermediate scrutiny was less strict than the strict scrutiny standard applied to racial classifications, but more strict than the rational basis standard applied to everything else. To survive intermediate scrutiny, a gender classification must be substantially related to the achievement of an important governmental objective. Justice Rehnquist, in dissent, identified the emerging conflict between self-government by the people and ever-escalating levels of judicial scrutiny:

How is this Court to divine what objectives are important? . . . I would have thought that, if this Court were to leave anything to decision by the popularly elected branches of the Government, . . . it would be the decision as to what governmental objectives to be achieved by law are “important,” and which are not.⁵¹

By the time the ERA was declared dead in 1982, the intermediate scrutiny standard for gender classifications was well established in constitutional equal protection law. As ERA opponents had predicted, many cases overturning popularly enacted laws actually came out adverse to

48. The four ERA supporters were Justices Brennan, Douglas, Marshall and White. The other four were Chief Justice Burger and Justices Blackmun, Powell and Stewart. Justice Rehnquist dissented. *See id.* at 678, 682, 691.

49. 429 U.S. 190 (1976).

50. *See* DALE O’LEARY, *THE GENDER AGENDA, REDEFINING EQUALITY* 89-94 (1997) (discussing the evolution of the term “gender” as a substitute for “sex” in legal and political discourse).

51. *Craig*, 429 U.S. at 221 (Rehnquist, J., dissenting).

women's interests. An example is *Mississippi University for Women v. Hogan*,⁵² in which the Court ordered Mississippi's only all-female state nursing school to admit men, even though men had access to other state-supported nursing schools that were already co-ed.⁵³ The people of Mississippi had erred in perpetuating the "stereotype" of nursing as a women's profession.

Finally, in 1996 with the *VMI*⁵⁴ case, the Court declared that, in matters involving gender, it would require "an exceedingly persuasive justification" for any state law or action to distinguish between men and women.⁵⁵ No justification may rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females,"⁵⁶ and any justification is deemed overbroad if any individual might prove to be an exception to it.⁵⁷ This test, by any name, is strict scrutiny. Thus, the *VMI* case, as Justice Ginsburg admitted, represents the judicial enactment of the ERA, after the democratic process twice rejected it.⁵⁸

V. CONCLUSION

The great majority of Americans support traditional marriage and oppose efforts to legalize same-sex unions. Both the U.S. Congress and state legislatures have enacted legislation reflecting this strong public opinion.

Nevertheless, some courts have ignored the practical rationales behind laws restricting marriage to heterosexual couples. These decisions seem to be based on the belief that constitutional equal protection forbids legal inequality – that is, it forbids legal distinctions between persons, and legal generalizations that may be less than absolute.

The dual-track strategy (legislation and court action) now being pursued by proponents of same-sex marriage has also been used in the past successfully to overrule the political process. The legalization of same-sex marriage, however accomplished, would pose a serious threat to our society for many reasons.

52. 458 U.S. 718 (1982).

53. *See id.* at 731.

54. *United States v. Virginia*, 518 U.S. 515 (1996).

55. *Id.* at 531.

56. *Id.* at 533.

57. There was no individual plaintiff in the *VMI* case. The Court's decision was based in part on *VMI*'s admission that theoretically some woman might be able to perform the physical requirements imposed on male cadets. *See id.* at 523, 540-41.

58. *See supra* notes 16-21 and accompanying text. The original time for adoption of the ERA was ten years, expiring in 1981, but Congress agreed to extend the deadline until June 1982.

If, as seems possible, that result were accomplished through judicial rather than legislative action, it would threaten the very foundation of our constitutional government. Notions of “equality” such as would support such a counter-democratic finding are based on the belief that our basic law compels us to govern, if at all, only at the level of the lowest common denominator. In a fundamental way, such radical equality would devastate the quality of life in a democracy.

Toqueville foresaw the “species of oppression” that would result from the loss (or abandonment) of citizens’ right of self-government:

I seek to trace the novel features under which despotism may appear in the world. The first thing that strikes the observation is an innumerable multitude of men, all equal and alike, incessantly endeavoring to procure the petty and paltry pleasures with which they glut their lives. Each of them, living apart, is as a stranger to the fate of all the rest; his children and his private friends constitute to him the whole of mankind

Above this race of men stands an immense and tutelary power, which takes upon itself alone to secure their gratifications and to watch over their fate For their happiness such a government willingly labors, but it chooses to be the sole agent and the only arbiter of that happiness; it provides for their necessities . . . facilitates their pleasures, manages their principal concerns, directs their industry, regulates the descent of property, and subdivides their inheritances: what remains, but to spare them all the care of thinking and all the trouble of living?

Thus it every day renders the exercise of the free agency of man less useful and less frequent; it circumscribes the will within a narrower range and gradually robs a man of all the uses of himself. The principle of equality has prepared men for these things; it has predisposed men to endure them and often to look on them as benefits.⁵⁹

59. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 318-19 (1945).

