"To Love and Honor All the Days of Your Life": A Constitutional Right to Same-Sex Marriage?

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COMMENTS

“TO LOVE AND HONOR ALL THE DAYS OF YOUR LIFE”: A CONSTITUTIONAL RIGHT TO SAME-SEX MARRIAGE?

Do you promise to be true . . . in good times and in bad, in sickness and in health, to love . . . and honor . . . all the days of your life?

. . .

. . . [T]o have and to hold, from this day forward, for better, for worse, for richer, for poorer, in sickness and in health, until death do you part?¹

* * * *

My Love is of a birth as rare
As 'tis, for object, strange and high;
It was begotten by Despair
Upon Impossibility

. . . .

And yet I quickly might arrive
Where my extended soul is fixed;
But Fate does iron wedges drive,
And always crowds itself betwixt.²

Men and women coming together in love and companionship is a tradition as old as time.³ The marital unit provides a release and a conduit for

¹. INTERNATIONAL COMMISSION ON ENGLISH IN THE LITURGY: THE RITES OF THE CATHOLIC CHURCH 725-28 (1990) [hereinafter RITES]. This Comment will address the legal arguments for and against a constitutional right to same-sex marriage. However, whenever possible this Comment shall refrain from discussing or critiquing the moral, ethical, religious, social, or psychological implications of same-sex marriage. When such a discussion occurs it is merely to further elucidate a pertinent issue regarding the legal concepts discussed.


³. See Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man and woman . . . is as old as the book of Genesis."), appeal dismissed, 409 U.S. 810 (1972); see also G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 1-2 (1988) (indicating that early hunter-gatherers practiced a form of consort-
a myriad of human needs and desires: the problems of loneliness and isolation, the need for sexual release, intimacy, partnership, and child rearing.\textsuperscript{4} In addition to emotional and psychological benefits, marriage provides substantial legal and economic advantages.\textsuperscript{5} Due to these benefits, marriage is seen by the courts and citizens in general as "the most important relation in life."\textsuperscript{6} So important is the institution of marriage that it is deemed a fundamental right deserving constitutional protection.\textsuperscript{7}

The status of marriage as the pillar of our social structure has led state legislatures and state and federal courts to provide numerous protections for the marital unit.\textsuperscript{8} The courts, however, define the right to marry


\textsuperscript{6} Maynard v. Hill, 125 U.S. 190, 205 (1888); Baehr, 852 P.2d at 56. The revered status of marriage is limited in these and other cases to traditional marriages and did not contemplate a same-sex marriage. See id. at 55-57.


\textsuperscript{8} In \textit{Zablocki}, the Supreme Court held that the right to marry is an integral part of the fundamental right to privacy and any statute that burdens this right triggers the application of strict scrutiny review of the statute. \textit{Id.} at 383-84. In addition to the federal constitutional protection extended to marriage, states provide the marital unit with numerous protections as well. See, e.g., Huntington v. Saunders, 120 U.S. 78, 79-82 (1887) (stating one spouse is not liable for the obligations of the other); Jersey Shore Medical Ctr.-Fitken Hosp. v. Estate of Baum, 417 A.2d 1003, 1005 (N.J. 1980) (holding that under the New Jersey Married Woman's Property Act, one spouse is not liable for the other's obligations); Madison, Wis., \textit{General Ordinances} § 28.03(2) (1992) (creating single family zoning and thereby providing a special living environment for married couples and their children); see also 1 Homer H. Clark, Jr., \textit{The Law of Domestic Relations in the
Constitutional Right to Same-Sex Marriage?

While heterosexuals are afforded the economic and legal benefits of a legally recognized marriage in addition to the emotional benefit of sharing their lives with the person they love the most, same-sex or gay couples are denied these most fundamental benefits.

Historically, the right to regulate marriage has been exercised by most civilizations. In our nation, regulation of marriage traditionally has been governed by state law. States possess the power to prescribe various formal and substantive requirements for marriage. However, because the United States Supreme Court holds the right to marry as fundamental, such regulations are subject to federal constitutional restraints.

The fundamental right to marry encompasses interracial marriages, as recognized in Loving v. Virginia. In Loving, the Supreme Court held


10. The phrase gay marriage or same-sex marriage, as used in this Comment, refers to both gay and lesbian marriages. See Webster's Encyclopedic Unabridged Dictionary of the English Language 587 (1989) (defining "gay" as a homosexual person, particularly a male) [hereinafter Webster's]; id. at 822 (defining "lesbian" as a homosexual relationship between women). Strictly speaking, homosexuality is the exhibition of "sexual desire . . . toward a person . . . of one's own sex." Id. at 680; see Ingram, supra note 4, at 34 n.6 (discussing the definition of homosexual).

11. State v. Jackson, 80 Mo. 175, 179 (1883) ("The right to regulate marriage . . . has been assumed and exercised by every civilized and Christian nation.").

12. See, e.g., Salisbury v. List, 501 F. Supp. 105, 107 (D. Nev. 1980) (stating the individual states have the power to regulate marriage); O'Neill v. Dent, 364 F. Supp. 565 (E.D.N.Y. 1973) (discussing the power of states to regulate the institution of marriage); Baehr v. Lewin, 852 P.2d 44, 58 (Haw. 1993) ("The power to regulate marriage is a sovereign function reserved exclusively to the respective states.").


15. See, e.g., Planned Parenthood v. Casey, 112 S. Ct. 2791, 2806 (1992) ("The Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."); Zablocki, 434 U.S. at 374 (indicating that the right to marry is fundamental and any regulation implicating marriage is subject to strict scrutiny analysis); Loving v. Virginia, 388 U.S. 1 (1967) (holding that state marriage statutes prohibiting interracial marriages are unconstitutional).

16. 388 U.S. 1 (1967). In Loving, a white man and a black woman, married in the District of Columbia, returned to the state of Virginia. Id. at 2. Upon returning, the
antimiscegenation\textsuperscript{17} laws violative of the Fourteenth Amendment's Due Process and Equal Protection Clauses.\textsuperscript{18} Prior state cases had upheld antimiscegenation statutes as avoiding the production of "evil, and evil only, without any corresponding good,"\textsuperscript{19} or as preventing unions "distasteful to our people."\textsuperscript{20} Although similar rationales are advanced to preclude the recognition of gay marriages,\textsuperscript{21} courts have been unwilling to extend the umbrella of constitutional protection to same-sex couples.\textsuperscript{22} As our legal system encompasses and protects a larger and larger segment of human relationships, same-sex marriages are conspicuously absent.\textsuperscript{23}

This Comment explores the constitutional dimensions of the right to same-sex marriage. Initially, this Comment examines the historical reluctance of state and federal courts and state legislatures to extend the guarantee of the fundamental right to marry to same-sex couples. After laying this foundation, this Comment discusses past and current judicial definitions of marriage and the notable control states have over marriage. Next, this Comment considers the constitutional implications of the right

couple was arrested and prosecuted under the state’s antimiscegenation statute. \textit{Id.} at 2-3. The couple plead guilty and were sentenced to a year in jail. \textit{Id.} at 3. The sentence was completely suspended if the couple did not return to the state for 25 years. \textit{Id.} The couple appealed to the United States Supreme Court, which overturned the convictions. \textit{Id.} at 12.

17. "Miscegenation" is defined as "marriage or cohabitation between a man and woman of different races, esp., in the U.S., between a Negro and a white person." See \textsc{Webster's}, supra note 10, at 915.


19. \textit{Scott} v. State, 39 Ga. 321, 324 (1869). The defendant challenged a Georgia statute that made any marriage between a black person and a white person a felony. \textit{Id.} The court upheld the conviction based on its finding that the traditional definition of marriage precluded couples of different races. \textit{Id.} at 323.

20. \textit{Lonas} v. State, 50 Tenn. 287, 300 (1871). The defendant was prosecuted for violating a Tennessee statute making interracial marriage a felony. \textit{Id.} The court upheld the conviction based on the traditional definition of marriage as a union between persons of the same race. \textit{Id.} at 299-311.

21. \textit{See} Ingram, supra note 4, at 44-55.


23. \textit{See}, e.g., \textit{Moore} v. City of E. Cleveland, 431 U.S. 494 (1977) (protecting the extended family as distinct from the nuclear family); \textit{Loving} v. Virginia, 388 U.S. 1, 12 (1967) (recognizing interracial marriages); \textit{Braschi} v. Stahl Assocs., 543 N.E.2d 49 (N.Y. 1989) (extending New York's eviction law to cover same-sex couples cohabitating and defining them as families for purposes of the statute); \textsc{Walter O. Weyrauch \\& Sanford N. Katz, American Family Law in Transition} 431 (1983) (indicating that our legal system increasingly is recognizing more nontraditional human relationships).
to same-sex marriage. This Comment goes on to address the question whether same-sex marriage is a fundamental right or suspect classification for due process and equal protection analysis. Additionally, this Comment considers an intermediate level of scrutiny for same-sex marriages under the heading of sex discrimination. Subsequently, this Comment explicates and critiques various reasons articulated by states for their prohibition on same-sex marriages. This Comment concludes that as the concept of marriage evolved to encompass interracial marriages as a constitutionally protected fundamental right, so should it continue to progress to recognize same-sex marriages.

I. STATE STEWARDSHIP OVER MARRIAGE

Domestic relations, including marriage, historically are within the province of state law, not federal statutory or constitutional law. State regulation of marriage, however, must conform to federal constitutional limitations. Accordingly, the state may substantially infringe upon the fundamental right to marry only for compelling reasons. The state may impose "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship." The motivating force be-

24. See Salisbury v. List, 501 F. Supp. 105, 107 (D. Nev. 1980) (indicating marriage regulation has historically been a function of state law); Baehr v. Lewin, 852 P.2d 44, 58-59 (Haw. 1993) (same); see also Bruce C. Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463, 470 (1983) (stating that domestic relations have been traditionally the exclusive domain of state law); Ingram, supra note 4, at 37 (addressing the issue of whether states can regulate marriage).

25. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 388-91 (1978); Loving, 388 U.S. at 7-12; Baehr, 852 P.2d at 59. Because the Supreme Court determined that marriage is a fundamental right deserving constitutional protection, any state regulation that unreasonably interferes with a person's right to enter into a marital relationship is subject to strict scrutiny. See Zablocki, 434 U.S. at 374-91; Ingram, supra note 4, at 37 (discussing the power of states to regulate marriage); Mary F. Gardner, Note, Braschi v. Stahl Associates Co.: Much Ado About Nothing?, 35 Vill. L. Rev. 361, 363 n.12 (1990) (indicating the Supreme Court has held the right to marry to be fundamental and the state may not unreasonably interfere with that right).


27. Zablocki, 434 U.S. at 386. In another context the Court stated "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse." Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984). Unfortunately, courts have been unwilling to extend those constraints to protect same-sex couples. See infra notes 54-86 and accompanying text.
hind any regulation that significantly interferes with the marital decision must be a “sufficiently important state interest.”

By virtue of its power to regulate marriage, the state has the authority to determine the elements of a valid marriage contract, to control the qualifications for marriage and the forms and procedures necessary to finalize the marriage, to establish the rights and duties that marriage creates, and to prescribe the requirements for marital dissolution. While at one time states had an “absolute right to prescribe the conditions upon which . . . marriage . . . shall be created,” this right is no longer absolute. Thus, the modern trend has been for states to move away from excessive regulation of marriage. Similarly, states historically have claimed the right to regulate marriage in order to protect general societal goals; however, this laudable goal


31. See, e.g., Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that states may not prohibit interracial marriages); Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993) (stating that the right of states' to regulate marriage is subject to federal constitutional limitations); Krause, supra note 5, at 230-45 (discussing the inevitable involvement of the federal government in states regulation of marriage); Ingram, supra note 4, at 37-39 (discussing state regulation of marriage).

32. While states fight to assert their rights to regulate the institution of marriage in order to prohibit same-sex marriages, the same states are decreasing legislative and judicial regulation of marriage and broadening the definition of those who have the capacity to marry. See Krause, supra note 5, at 39-41 (indicating that more states are reducing or eliminating numerous restrictions or prohibitions on marriage); Weyrauch & Katz, supra note 23, at 352 (indicating that age requirements for marriage are lower, mental competence to marry is assumed, and interracial marriage is permitted).

33. See, e.g., Maynard v. Hill, 125 U.S. 190, 205 (1888) (stating that “marriage . . . [has] more to do with the morals and civilization of a people than any other institution”); Reynolds v. United States, 98 U.S. 145, 165 (1878) (indicating that “[u]pon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations”), overruled by Thomas v. Review Bd., 450 U.S. 707 (1981); Perez v. Lippold, 198 P.2d 1, 31 (Cal. 1948) (Carter, J., concurring) (indicating that the prohibition of interracial marriages is not a valid regulation because “that . . . marriage cannot be considered vitally detrimental to the public health, welfare and morals”); Fearon v. Treanor, 5 N.E.2d 815, 816 (N.Y. 1936) (indicating that marriage “constitutes an institution involving the highest interests of society. It is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the state”). See generally Weitzman, supra note 29, at 1242-43.
appears to lack the compelling nature required to pass constitutional analysis. 34

II. THE TWO FACES OF THE FUNDAMENTAL RIGHT TO MARRIAGE

A. Marriage as a Fundamental Right

The United States Supreme 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." 35 The Supreme Court first characterized the right to marry as fundamental in *Skinner v. Oklahoma*. 36 In *Skinner*, the right to marry was linked to the right to procreate and rear children. 37 The right to procreate, and consequently the right to marry, were seen by the Court as fundamental pillars of society. 38

The right to marry was first characterized as "the most important relation in life" in *Maynard v. Hill*. 39 Subsequently, the Court recognized the right "to marry, establish a home and [raise] children" as a pivotal part of the liberty protected by the Due Process Clause. 40 In *Griswold v. Connecticut*, 41 the Court perceived the marriage relationship as an association

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34. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (indicating the need for a compelling state interest to legitimate any regulation infringing upon the right to marry); *Loving*, 388 U.S. at 11 (characterizing marriage as a fundamental right that requires a compelling state interest for any regulation to infringe upon).


36. 316 U.S. 535 (1942). The dispute before the Court arose out of an Oklahoma statute that permitted the state to sterilize habitual criminals without their consent. *Id.* The petitioner was convicted for crimes ranging from chicken stealing to armed robbery between 1926 and 1936. *Id.* at 537. Consequently, the state Attorney General brought proceedings against the petitioner under the sterilization statute. *Id.* Holding the statute unconstitutional, the Court determined that "marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541. The Court found that to deprive the petitioner of either of these rights would have "far reaching and devastating effects." *Id.*

37. *Id.*

38. *Id.*

39. 125 U.S. 190, 205 (1888). The *Maynard* Court viewed marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Id.* at 211.


41. 381 U.S. 479 (1965).
"intimate to the degree of being sacred." With each of these cases the Court laid a piece of the foundation ultimately leading to the recognition of the right to marry as fundamental.

The Supreme Court explicitly recognized marriage as a fundamental right in Zablocki v. Redhail. In Zablocki, the Court held that the fundamental right to privacy subsumed the right to marry, therefore requiring strict scrutiny review of any statute implicating the institution of marriage. The Court found the institution of marriage to be deeply rooted in our nation's tradition and collective conscience and "essential

42. Id. at 486.
44. Id. at 384. Zablocki involved a Wisconsin statute prohibiting any Wisconsin resident with minor children not in his custody and which he is under an obligation to support, from obtaining a marriage license until the resident demonstrated to a court that he was in compliance with his child support obligations. Id. at 375-76. Holding the statute violative of the United States Constitution, the Court stated that the right to marry was fundamental. Id. at 386. Because of this fundamental character, the Court utilized a strict scrutiny standard of review. Id. at 388-91. In applying strict scrutiny review, the Court saw the statute as underinclusive because it failed to account for other fathers who failed to meet their child support obligations due to other financial difficulties. Id.

Marriage also has been defined as a fundamental right by state courts. See, e.g., Perez v. Lippold, 198 P.2d 17, 18-19 (Cal. 1948) (describing "marriage [as] . . . a fundamental right of free men"); Zavala v. City of Denver, 759 P.2d 664, 673 (Colo. 1988) (indicating the right to marry is fundamental in the State of Colorado); Baehr v. Lewin, 852 P.2d 44, 55 (Haw. 1993) (stating that the Hawaii constitution "encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution").

45. Zablocki, 434 U.S. at 384; see also Baehr, 852 P.2d at 55 (supporting the Zablocki Court's reasoning and holding). The right of privacy arises out of the doctrine of substantive due process, which emanates from the precepts of the Fifth and Fourteenth Amendments to the United States Constitution. JOHNSON NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.4, at 369, 374-75 (4th ed. 1991). These Amendments provide that neither the federal government nor individual state governments shall deprive any individual of "life, liberty, or property, without due process of law." U.S. CONST. amends. V; id. amend. XIV, § 1. These Amendments authorize judicial examination of the adequacy of legal procedure, or procedural due process, under federal and state law. See Developments in the Law: The Constitution and the Family, 93 HARV. L. REV. 1156, 1166 (1980) [hereinafter Constitution and the Family]. In contrast to procedural due process, substantive due process focuses on governmental deprivations of certain specified fundamental rights or governmental actions toward certain suspect classifications regardless of the procedural mechanisms used. Id.; see also NOWAK & ROTUNDA, supra, § 11.4, at 374-75. Substantive due process utilizes a heightened standard of judicial review when certain fundamental rights are implicated. Id. § 11.4, at 370-71. The Supreme Court usually uses a rational basis test when scrutinizing the substance, as opposed to the procedure, of federal or state law. Id. at 374. Under the rational basis test, the government merely must establish that the legislation in question is rationally related to a legitimate governmental interest. Id. In contrast, the Court employs strict scrutiny when fundamental rights or suspect classifications are involved. Id. In this case, the legislation will be upheld only if it is narrowly tailored to protect a substantial or compelling state interest. Id. at 375; see Ingram, supra note 4, at 39-40 (discussing the elements of substantive due process analysis).
to the orderly pursuit of happiness by free men.’” 46 Zablocki represented the culmination of a long evolutionary process in the Supreme Court’s understanding of the right to marry.

B. The Coupling of the Fundamental Right to Marry With Procreation and Child-Rearing

In recognizing the right to marry as fundamental, the Supreme Court sometimes premises the essential nature of that right on the concepts of child-rearing and procreation. 47 In Skinner v. Oklahoma, 48 the Court determined that the dual rights of marriage and procreation are “fundamental to the very existence and survival of the race.” 49 This determination focused on the relationship between marriage and child-rearing; the union of two individuals in love, sharing their lives in compassion, does
not by itself create the fundamental right to marry. If the coupling of marriage and procreation alone creates the fundamental right to marry, then marriage without child-rearing and procreation does not merit constitutional protection as a fundamental right.\textsuperscript{50}

\textit{Zablocki, Skinner}, and their predecessors and progeny are the constitutional lexicon through which all same-sex marriage cases are decided.\textsuperscript{51} State courts unequivocally follow the Supreme Court's coupling of marriage and procreation first articulated in \textit{Maynard} and later solidified in \textit{Zablocki}.\textsuperscript{53}

\section{C. Judicial Intransigence Toward Expansion Of The Definition Of Marriage}

Since 1971, a number of litigants have attempted to challenge the constitutionality of laws prohibiting same-sex marriage.\textsuperscript{54} In rejecting each

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\item See \textit{Zablocki}, 434 U.S. at 384-86. The Court stated:
\begin{quote}
It is not surprising 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. . . . \textquotedblleft If appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the [s]tate . . . allows sexual relations legally to take place.\textit{Id.} at 386.
\end{quote}

\item See \textit{Baehr}, 852 P.2d at 55-56; \textit{see also} Craig A. Bowman \& Blake M. Cornish, Note, \textit{A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances}, 92 \textsc{Colum. L. Rev.} 1164, 1181 (1992) (indicating that the Supreme Court continually links procreation and marriage together); Comment, \textit{Homosexuals' Right}, supra note 47, at 200-02 (articulating the view that the \textit{Zablocki} holding is limited to heterosexual couples); Note, \textit{The Legality of Homosexual Marriage}, 82 \textsc{Yale L.J.} 573, 578-79 (1973) (indicating that the Supreme Court continually connects marriage and procreation) [hereinafter Note, \textit{Legality}].

\item This Comment coins and uses the phrase \textquotedblleft \textit{Zablocki} lexicon\textquotedblright to refer to the United States Supreme Court's persistent joining of marriage and procreation or child-rearing into a single definition. \textit{See Zablocki}, 434 U.S. at 383-87 (discussing procreation or child-rearing as an important element of marriage); \textit{Baehr}, 852 P.2d at 55-57 (discussing the propensity of the Supreme Court to define marriage in conjunction with procreation). In analyzing the fundamental right to marry this fact is essential. \textit{See Trosino, supra} note 22, at 111-16 (chronicling various same-sex marriage cases and courts' continual dependence on the Supreme Court's definition of marriage as the logical predicate of procreation).

\item See, \textit{e.g.}, \textit{Maynard v. Hill}, 125 U.S. 190, 211 (1888) (indicating the close relationship between marriage and child rearing); \textit{Baehr}, 852 P.2d at 55-56; Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973).

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of these claims, courts have relied consistently on the definition of a marriage as the union of a man and woman or on the integral relationship between marriage and procreation. For courts, the terms same-sex marriage or gay marriage are unprecedented oxymorons because of their unfounded belief that same-sex couples are incapable of procreation.

One of the initial cases contesting the ban on gay marriages was Baker v. Nelson. In that case, Richard Baker and James McConnell applied for a marriage license from the clerk at their local Minnesota courthouse. They were denied the license because they were of the same sex; subsequently they filed suit, contesting this denial. In rejecting their argument, the court relied on the traditional definition of marriage as the union between persons of the opposite sex. The court invoked traditional principles reminiscent of Zablocki by stating that the union of a man and a woman for procreation and child rearing are indispensable elements of the marriage institution.

The next case challenging the legality of the ban on same-sex marriages was Singer v. Hara. The plaintiffs, two males, challenged Washington State’s refusal to issue them a marriage license. The court upheld the refusal to issue the marriage license by relying upon the “Zablocki lexicon” to define marriage: the intimate relationship between the marriage and procreation or child rearing.

55. See supra note 51; see also Trosino, supra note 22, at 111-16. The author discusses courts’ reluctance to expand the definition of marriage beyond its traditional meaning of a union between a man and a woman. Id.

56. See WEYRAUCH, supra note 23, at 430 (discussing the penchant of courts to view the concept of same-sex marriage as absurd); infra notes 101-06 and accompanying text (discussing adoption, surrogate motherhood, and artificial insemination as viable means of conception for same-sex couples).

57. 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972).

58. Id. at 185.

59. Id. The Minnesota statute that governed marriage within the state when the suit was commenced contained neither an express provision denying same-sex couples the right to marry nor a provision limiting marriage to heterosexual couples. See id. at 185-88 (discussing MINN. STAT. ANN. §§ 517.01-.08 (West 1971)).

60. Id. at 186. The court added that “the present statute is replete with words of heterosexual import such as ‘husband and wife’ and ‘bride and groom.’ ” Id. (quoting MINN. STAT. ANN. § 517).


63. Id. at 1188.

64. Id. at 1192. The court stated: [A]ppellants are not being denied entry into the marriage relationship because of their sex; rather, they are being 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.
In both *Baker* and *Singer* the respective state statutes neither limited marriage to heterosexual couples nor prohibited gay marriages.\(^{65}\) In both cases however, the courts interpreted the applicable statute as implicitly limiting the right to marry to heterosexual couples.\(^{66}\) Both courts determined that the use of words such as husband and wife or person or individual, limited state sanctioned marriage to heterosexual couples.\(^{67}\) In

\(^{65}\) *Id.*. Implicit in the *Singer* court's continual reference to marriage as the union of a man and a woman is the notion that marriage has primarily a procreative function which same-sex couples are incapable of satisfying. *See id.* at 1189, 1191-92, 1195.

\(^{66}\) *Id.* at 1189. In *Singer* the applicable statute provided:

"Marriage is a civil contract which may be entered into by persons of the age of eighteen years, who are otherwise capable: Provided, That every marriage entered into in which either party shall not have attained the age of seventeen years shall be void except where this section has been waived by a superior court judge of the county in which the female resides on a showing of necessity." *Id.* at 1189 n.2 (quoting *WASH. REV. CODE* § 26.04.010 (1970)).

Similarly, the Minnesota statute at issue in *Baker* provided no explicit statutory limitation mandating either that only heterosexual marriages would receive state recognition or that same-sex marriages were banned. *See Baker*, 191 N.W.2d at 185-86 (citing *MINN. STAT. ANN.* §§ 517.01-.08). The Minnesota Code now defines marriage as the union of a man and a woman, but still fails to explicitly prohibit same-sex marriage. *MINN. STAT. ANN.* § 517.01 (1990); *see Comment, Homosexuals' Right, supra* note 47, at 194-96 (discussing various cases challenging prohibitions to same-sex marriage).

Most state marital statutes are either gender neutral or contain no specific provisions that either limit marriage to heterosexual couples or prohibit same-sex marriages. *See, e.g.*, *HAw. REV. STAT.* §§ 572-1, -6 (1993); *MINN. STAT. ANN.* §§ 517.01-08 (1990); 23 PA. CONS. STAT. ANN. §§ 1301-1304 (1991); *WASH. REV. CODE* § 26.04.010 (1986). *See Ingram, supra* note 4, at 44-45 (discussing how state courts and legislatures have dealt with same-sex marriages); Heidi A. Sorensen, Note, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEO. L.J. 2105, 2105-06 (1993) (discussing the District of Columbia's marriage statute and its lack of any prohibition against same-sex marriages or any requirement that the partners be members of the opposite sex).

Some states, however, explicitly prohibit same-sex marriages. *See, e.g.*, *CONN. GEN. STAT.* § 46a-81r (Supp. 1993) (indicating that certain statutory provisions are not to be construed to permit same-sex marriages); *LA. CIV. CODE ANN.* art. 89 (West 1990) ("Persons of the same sex may not contract marriage with each other."); *MASS. GEN. L. ch. 151B, §§ 1, 3, 4 (1992); N.H. REV. STAT. ANN. §§ 457:1, :2 (1992); *TEX. FAM. CODE ANN.* § 1.01 (West 1993) ("A license may not be issued for the marriage of persons of the same sex."); *VA. CODE ANN.* § 20-45.2 (Michie 1990) ("A marriage between persons of the same sex is prohibited."). *See Ingram, supra* note 4, at 38 (indicating most state statutes do not expressly prohibit same-sex marriages); Trosino, *supra* note 22, at 96 n.23 (stating that most state marriage statutes do not explicitly prohibit same-sex marriages).

\(^{66}\) *See Trosino, supra* note 22, at 111-16; *Comment, Homosexuals' Right, supra* note 47, at 194-96. The Minnesota Supreme Court, in *Baker*, viewed the situation through the *Zablocki* lexicon, stating that marriage is uniquely involved in the activities of procreation and child rearing. *Baker* v. *Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *see supra* note 52 (explaining the phrase *Zablocki* lexicon).

\(^{67}\) *See supra* notes 56-63. In defining these terms, courts look to their traditional understanding, found in *Webster's Dictionary*, *Black's Law Dictionary*, and the *Zablocki* lexicon. *See, e.g.*, *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); *Baehr v. Lewin*, 852 P.2d 44, 55-57 (Haw. 1993); *Jones v. Hallahan*, 501 S.W.2d
neither of these cases did the courts consider assigning a non-sex or gender specific role to these terms.\textsuperscript{68}

In 1984, a state court once again maintained a hard line, traditional definition of marriage.\textsuperscript{69} In \textit{De Santo v. Barnsley},\textsuperscript{70} Mr. De Santo filed a divorce decree against Mr. Barnsley, claiming the couple had a common-law same-sex marriage.\textsuperscript{71} Mr. Barnsley denied the existence of the common-law marriage.\textsuperscript{72} The court denied the divorce decree, relying on

\begin{itemize}
  \item 68. A nongender or sex-specific role is meant to reach beyond a superficial understanding of the terms involved (husband and wife) and define the terms, for legal purposes, more along the lines of roles and characteristics. These characteristics might well include the gender or sex of the individual involved, but the definition would also include other properties, such as the functions undertaken in the home or in society by each partner, the respective roles of the individuals in the relationship, and so forth. See generally Cox, supra note 5, at 4, 8-11 (applying various elements of the judicial definition of the word family to alternative families); Marc A. Fajer, \textit{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 (1992) (discussing the similarities between same-sex and heterosexual relationships); Gardner, supra note 25, at 370 n.45 (discussing various elements courts and commentators use to define the term family for legal purposes). Just as the judicial definition of family at times transcends the traditional or dictionary definition of that term, so too may courts go beyond the traditional or dictionary definition of terms such as husband, wife, spouse, or marriage. See \textit{Constitution and the Family}, supra note 45, at 1156; Gardner, supra note 25, at 371-81.
  \item 69. \textit{De Santo}, 476 A.2d at 953-54.
  \item 70. \textit{Id}.
  \item 71. \textit{Id}. at 952-54. Common-law marriages are not entered into under sanction of a state statutory provision or religious ceremony; instead, they are recognized by the state as existing due to the length and closeness of the relationship between the individuals involved. \textit{Id}. at 954. Because of this closeness, a de facto marriage arises in the eyes of the state. See, e.g., \textit{In re Estate of Manfredi}, 159 A.2d 697, 700-01 (Pa. 1960). \textit{Black's Law Dictionary} defines common law marriage as containing the following: "a positive mutual agreement, permanent and exclusive of all others, to enter into a marriage relationship, cohabitation sufficient to warrant a fulfillment of necessary relationship of man and wife, and an assumption of marital duties and obligations." \textit{Black's Law Dictionary} 277 (6th ed. 1990).
  \item 72. \textit{De Santo}, 476 A.2d at 952.
\end{itemize}
traditional definitions of marriage found in dictionaries and case law. As in previous cases, the court narrowly defined the union of marriage to heterosexual couples even though Pennsylvania’s marriage law did not define marriage, nor did the court have any case law that specifically stated that marriage was limited to two persons of the opposite sex.

Most recently, in *Baehr v. Lewin*, several same-sex couples were denied marriage licenses because the couples were of the same sex. The Hawaii Supreme Court, relying on the Zablocki lexicon, held that petitioners had no fundamental right to a gay marriage. The court relied on this traditional definition of marriage to construe the state marriage statute narrowly as implicitly prohibiting same-sex marriages. Similarly, other courts insist on assuming that marriage is the logical predicate of procreation, thereby limiting marriage to heterosexual couples.

Although a majority of state marital statutes fail to prohibit gay marriages explicitly or limit marriage to heterosexual couples, courts continue to recognize such a limitation implicitly. By identifying marriage with procreation, the equation "straight is to gay as marriage is to no marriage" concedes the entire domain of marriage to heterosexuality. While courts are willing to construe the meaning of numerous statutory

73. *Id.* at 953-54 & 954 n.1. The De Santo court quotes the definition of marriage from *Black's Law Dictionary* and *Webster's Dictionary* as well as from case law defining marriage as integrally intertwined with procreation. *Id.*

74. *Id.* at 954. The court took this traditional approach to the definition of marriage even though later in the opinion the court stated that “the law should take into account changes in social relationships.” *Id.* at 955.

75. 852 P.2d 44 (Haw. 1993). In *Baehr*, several homosexual and lesbian couples were denied marriage licenses from the state. *Id.* at 48-49. The *Baehr* court held that under Article I, section 5 of the Hawaii Constitution, the petitioners might have a claim for sex discrimination (citing *HAW. CONST.* art. I, § 5). *Id.* at 59. Nonetheless, the court held that same-sex couples do not have a fundamental right to marry. *Id.* at 57. The court determined, however, that gender is a suspect category under the Hawaii Constitution, thereby, invoking strict scrutiny analysis. *Id.* at 66-67. Moreover, the court stated that “[t]he equal protection clauses of the United States and Hawaii Constitutions are not mirror images of one another.” *Id.* at 59. The Hawaii Constitution specifically prohibits state-sanctioned discrimination against a person based on that person’s gender. *Id.* at 59-60. The court remanded the case for further determinations consistent with its holding. *Id.* at 68.

76. *Id.* at 44-52.

77. *Id.* at 55-57; see *supra* note 52 and accompanying text.

78. *Baehr*, 852 P.2d at 55-57. The court viewed the right at issue as the right to a gay marriage rather than the right to marriage. *Id.* However, the court challenged the state ban on gay marriage under an equal protection analysis. *Id.* at 57-68.

79. *Id.* at 48 nn.1-2, 55-57.

80. *Id.* at 56; *supra* note 54.

81. See *supra* note 65; see also *Ingram, supra* note 4, at 44-45.

82. See *supra* notes 56-80 and accompanying text.

83. KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP 210 (1991) (discussing various attributes of lesbian and gay families).
and constitutional terms broadly, this willingness has not been extended to defining marriage to include same-sex couples.\textsuperscript{84} State and federal courts persist in defining marriage as an outgrowth of procreation and child rearing, thereby limiting marriage to heterosexual couples.\textsuperscript{85} The spirit of the \textit{Loving} decision has battled judicial intransigence head on and lost in the arena of same-sex marriage.\textsuperscript{86}

III. \textbf{The Definition of Marriage: Procreation and Child Rearing as a \textquotedblright Two Way Street\textquotedblright}

A. \textit{Application of the Procreation and Child Rearing Definition of Marriage to Same-Sex Couples}

Although courts persist in defining marriage and procreation or child rearing as logical corollaries of one another,\textsuperscript{87} such a definition does not necessarily preclude gay marriages.\textsuperscript{88} Procreation or child rearing are not necessarily the defining characteristics of a traditional marriage; rather, such a limiting characteristic is grossly underinclusive.\textsuperscript{89}

The right to marry and the right to procreate or raise children were made logical predicates of one another by the Supreme Court's linkage of the two in \textit{Zablocki v. Redhail}.\textsuperscript{90} Most other courts have followed a

\textsuperscript{84} See supra note 47. The United States Constitution is interpreted as including a right to privacy, the right to an abortion, the right to procreation, and numerous other nontextual rights. See \textit{NOWAK & ROTUNDA}, supra note 45, §§ 14.26-.30, at 757-816.

\textsuperscript{85} While courts continue to premise the constitutional right to marry on an inseparable relationship between marriage and procreation or child rearing, such that the right to marry is constitutionally protected because of this relationship, this definition does not necessarily preclude including same-sex marriages within the scope of constitutional protection. See Ingram, supra note 4, at 35; see also infra notes 99-104, 108-20, 134-36.

\textsuperscript{86} See supra notes 17-23 and accompanying text; infra notes 162-87 and accompanying text.

\textsuperscript{87} See supra notes 47-79 (discussing how courts join the fundamental right to marry with child-rearing or procreation and the propensity of courts dealing with same-sex marriage cases to follow the same line of reasoning).

\textsuperscript{88} See generally Andrew H. Friedman, \textit{Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage}, 35 How. L.J. 173 (1992) (discussing the need to and feasibility of expanding the definition of marriage beyond that of the traditional family); see also Rebecca L. Melton, Note, \textit{Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of \textquotedblright Family\textquotedblright}, 29 J. Fam. L. 497 (1990-91) (discussing the need to recognize the large number of same-sex couples).

\textsuperscript{89} See, e.g., Ingram, supra note 4, at 46-47.

\textsuperscript{90} 434 U.S. 374, 386 (1978) (indicating that marriage has been placed on the same level as \textquotedblright procreation, childbirth, and child-rearing\textquotedblright); \textit{Baehr v. Lewin}, 852 P.2d 44, 56 (Haw. 1993) (same); see supra notes 39-53 and accompanying text. See generally \textit{NOWAK & ROTUNDA}, supra note 45, § 14.28, at 763-70 (discussing the holding in several right to marry cases).
similar line of reasoning. In many marriages however, the husband and wife have no children, do not plan on having children, or are incapable of having children. If the rationale for nonrecognition of same-sex marriages revolves around issues of procreation and child rearing then this categorization is grossly underinclusive and discriminatory.

Heterosexual couples who have passed their childbearing years, who are impotent, sterile or infertile, use contraceptives on a regular basis, or simply do not want children are permitted to marry and receive the concomitant benefits of marriage. Such heterosexual couples without children are similarly situated to same-sex couples, and because the right to marry is a fundamental right subject to strict scrutiny, prohibitions on same-sex marriages linked to procreation would appear to be invalid. If the true rationale for denying gay couples the right to marry is the intermeshing of marriage and procreation, then statutes preventing heterosexual couples, who cannot have or do not want children, from receiving the benefits of marriage are legitimate and logical. Notably, courts refuse to extend the marriage-procreation reasoning to deny certain heterosexuals a right to marry.

91. See supra notes 54-80 (discussing contemporary case law dealing with same-sex marriages and courts continually defining marriage along the lines of procreation).

92. See Weyrauch & Katz, supra note 23, at 352. The authors discuss the questionable relationship between marriage and procreation and assert that the long association of marriage and procreation is no longer valid in today's world. Id. Today, numerous children are born outside of wedlock, and marriage serves other functions such as emotional support and financial stability. See Clark, supra note 8, § 2.1, at 74.

93. See Marks v. Marks, 77 N.Y.S.2d 269 (N.Y. App. Div. 1948) (indicating that individuals may marry one another even though they are unable to have children); Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 344 (1949) (discussing the evolution and application of the Equal Protection Clause and indicating that an underinclusive law would violate the Clause by not treating "similarly those similarly situated").

94. See, e.g., Marks, 77 N.Y.S.2d at 269; Ingram, supra note 4, at 46-47.

95. See supra note 5.


97. See supra note 44.

98. See generally Ingram, supra note 4, at 47 (discussing the irrationality of permitting heterosexual couples incapable of having children to benefit from the institution of marriage while denying the same right to same-sex couples).

99. See Southern Pac. Co. v. Industrial Comm'n, 91 P.2d 700 (Ariz. 1939), overruled by Means v. Industrial Comm'n, 515 P.2d 29 (Ariz. 1973) (indicating that the inability to have children is not a statutory ground for an annulment); Linneman v. Linneman, 116 N.E.2d 182 (Ill. App. Ct. 1953) (same); see also Marks v. Marks, 77 N.Y.S.2d 269 (N.Y. App. Div. 1948) (stating that the inability to have children is not a bar to marriage); Ingram, supra note 4, at 47.
Therefore, the marriage-procreation link is discriminatorily applied with the purpose, or at least the effect, of discriminating against same-sex couples. This discrimination lacks justification because gay married couples can procreate and rear children as well. Same-sex couples have the viable options of artificial insemination, the use of a surrogate mother, or adoption. Numerous heterosexual couples use such procedures and so may same-sex couples. Same-sex couples utilizing such

100. Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993) (permitting a lesbian to adopt her partner's child); Holly Metz, Branching Out: Defining Today's Family is More than a Relative Matter, Student Law., Oct. 1993, at 23, 26 (discussing the perils an artificially inseminated lesbian couple experienced when attempting to have one of the partners adopt their child).


102. See, e.g., J.M.G., 632 A.2d at 550; Keider, supra note 101, at 1. In J.M.G., New Jersey Superior Court Judge Philip J. Freedman stated that the child, who was being adopted by the female partner of her mother, "would provide[d] critical legal rights and protections for her safety as well as her physical and emotional well-being." J.M.G., 632 A.2d at 551. Moreover, the court noted, the adoption would provide additional economic security, the right to support and inheritance, health insurance as a dependant of J.M.G., and the continuity of the relationship. Id. at 551-52. Lastly, the court stated that "the rights of parents cannot be denied, limited, or abridged on the basis of sexual orientation." Id. at 553. These identical arguments have been asserted in favor of same-sex marriages; however, they have been continually rebuffed. Trends indicate that more courts are recognizing adoptions by same-sex couples:

[A recent] second-parent adoption... was reportedly the seventh such adoption granted to same-sex partners. Judges in San Francisco, Minneapolis, New York, Los Angeles, and other cities have since granted many requests by lesbian petitioners to adopt their partner's biological children. According to the Lesbian and Gay Rights Project of the American Civil Liberties Union, more than 100 cases have succeeded at the trial court level.

Metz, supra note 100, at 26; see also Tammy, 619 N.E.2d at 315 (permitting a lesbian partner to adopt the couple's daughter); Shaista-Parveen Ali, Comment, Homosexual Parenting: Child Custody and Adoption, 22 U.C. Davis L. Rev. 1009 (1989) (discussing barriers to homosexual adoption).

procedures would have the ability to procreate and raise children, thereby allowing them to fall within the *Zablocki* lexicon. Identifying marriage and procreation together can be a two way street permitting both gay and heterosexual couples to benefit from the institution of marriage. Beyond being able to procreate and raise children, discrimination against same-sex couples is unjustified because the most fundamental reason for protecting marriage constitutionally is the freedom of association values implicated in marriage. Marriage strengthens and facilitates the emotional, social, and psychological bonding between two individuals.

**B. A “Bilateral Loyalty”: Alternative Definitions of Marriage**

Defining marriage as a means to procreate and rear children is under-inclusive. In *Griswold v. Connecticut*, the United States Supreme Court defined marriage as a “way of life,” “a harmony in living,” “a bilateral loyalty,” and an association “intimate to the degree of being sa-

104. See Ingram, *supra* note 4, at 47 (indicating that procedures such as surrogate motherhood or artificial insemination should allow same-sex couples the chance to procreate); *supra* note 52; see also ALAN P. BELL & MARTIN S. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN (1978) (discussing the homosexual community and several attributes of homosexual life); BOZETT, *supra* note 101. Some commentators indicate that “gay relationships often involve the love and intimacy we associate with idealized heterosexual relationships” and that “warmth, love, friendship, and emotional commitment are extremely important to gay people.” Fajer, *supra* note 68, at 546, 550; see also CITY OF Los ANGELES TASK FORCE ON FAMILY DIVERSITY, FINAL REPORT: “STRENGTHENING FAMILIES: A MODEL FOR COMMUNITY ACTION” 79 (1988) (indicating that approximately half of all same-sex relationships are a lifetime commitment) [hereinafter STRENGTHENING FAMILIES]; Alissa Friedman, The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family, 3 BERKELEY WOMEN’S L.J. 134, 135 (1987) (stating that numerous same-sex couples remain in committed relationships for their whole lives).

105. See ROBERT L. BARRET & BRYON E. ROBINSON, GAY FATHERS 88 (1990) (“Children living in families with a homosexual parent present themselves with the same issues that one would observe in children living in more conventional families.”); Ali, *supra* note 102, at 1009-10 (discussing various methods used by lesbian couples to conceive children); Elizabeth Zuckerman, Comment, Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother, 19 U.C. DAVIS L. REV. 729 (1986) (discussing second-parent adoption as a means for lesbian couples to create a family unit).

106. See Gardner, *supra* note 25, at 370 n.45. See generally WEYRAUCH & KATZ, *supra* note 23, at 352 (“Procreation is no longer always a primary concern of marriage.”); Constitution and the Family, *supra* note 45, at 1156 (discussing state and Supreme Court case law dealing with the family and the constitution); Claudia A. Lewis, Note, From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage, 97 YALE L.J. 1783, 1802 (1988) (indicating a viable and necessary expansion of the definition of marriage).

107. 381 U.S. 479 (1965); see *supra* note 45 (discussing the facts and holding of the *Griswold* Court).
Same-sex couples clearly could meet such a definition of marriage, thereby, permitting them to share in the constitutional protection afforded traditional marriages. So protected, same-sex couples could benefit from not only the legal and economic benefits of marriage, but also from its emotive benefits.

Marriage should be defined as a relationship that is more than just an association primarily for procreative purposes. Instead, the Griswold characterization of marriage should be adopted. These characteristics are shared by both heterosexual and homosexual couples. So understood, the unions of homosexual and...
heterosexual couples truly are similar. Any judicial or legislative action that confers the benefits of marriage on one and not the other is arbitrary and capricious.

Marriage is further defined as "a partnership to which both partners bring their financial resources as well as their individual energies and efforts." Perceived in this light, marriage is essentially the joining of two individuals for economic reasons and for the creation of an emotional and psychological bond. Such a marital relationship is replete with benefits and values beyond mere procreation and child rearing. These alternative definitions undermine courts' continual focus on the prominence of the procreative element of marriage. While procreation is an important element of most marriages, it is most assuredly not the only, nor always the most important, element. Lastly, marriage may be defined as encompassing "deep attachments and commitments," and as a union to share "thoughts, experiences, and beliefs." Numerous homosexual couples are characterized by all or most of these charac-

114. See Comment, Homosexuals' Right, supra note 47, at 197-99. According to one study:

[H]omosexual and heterosexual bonds share a host of commonalities. In particular, the settled-in qualities of the homosexual couple tend to be precisely those which characterize the stable heterosexual relationship. The similarities evidenced in daily life are especially noticeable. The way the partners interact as they engage in conversation, the way casual affection is expressed and minor irritations are dealt with, as well as how visitors are treated and myriad other details of everyday life are all more or less indistinguishable. Viewed from this angle, there are clearly more differences between individuals and individual couples than there are between kinds of couples.


115. See supra notes 89-104 and accompanying text.


117. See Ingram, supra note 4, at 35 (discussing the reasons why people marry).


119. See, e.g., Knox, supra note 111, at 81-90 (discussing the differences and similarities between love and procreation); Ingram, supra note 4, at 35-36 (indicating other potential benefits found in the marital relationship besides procreation).

120. See Ingram, supra note 4, at 35-37, 40-42 (explicating numerous reasons behind the decision to marry). The author states, as "important as procreation may be to many marriage partners, there are many other important values and benefits which can be realized in the marital relationship." Id. at 35.

121. See supra notes 106-18 and accompanying text.

122. Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984). The Court espoused the following definition:

[Deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. [Relationships] . . . distinguished by such attributes as relative smallness, a high degree of selectivity
teristics.123 Like the Griswold definition, this definition contemplates the numerous elements found in any marital unit124 and allows same-sex couples to profit from the myriad benefits provided to married couples.125

Attempts to define marriage as the logical predicate126 of procreation are underinclusivend,127 given other commonly accepted definitions.128 Moreover, through the use of such vehicles as surrogate motherhood, adoption, or invitro-fertilization, same-sex couples may experience procreation and child rearing.129 Marriage need not be defined merely as a logical predicate130 of procreation. Instead, marriage encompasses numerous other characteristics.131 Even the dictionary defines marriage as not necessarily containing a procreative element.132 Under any modern definition of marriage, same-sex couples either fit that definition or they are capriciously and arbitrarily excluded from enjoying benefits that similarly situated heterosexual couples enjoy.133

in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.

Id. While the Court offers this definition as applicable to families, it appears to be equally applicable to the union of marriage. See generally Supreme Court, 1985 Term, supra note 113, at 219 n.51 (indicating the possible application of this definition to homosexual relationships). Family and marriage are logical extensions of one another and should therefore be defined and analyzed in conjunction. See infra notes 134-52.

123. See, e.g., Fajer, supra note 68, at 550; Comment, Homosexuals' Right, supra note 47, at 197-99.


125. Note, Legality, supra note 51, at 579-80 (discussing benefits conferred on married couples); see supra note 5 (listing various benefits provided married couples).


127. See supra notes 87-105 and accompanying text.

128. See supra notes 45 and 106-33.

129. See supra notes 100-05 and accompanying text.

130. See Baehr, 852 P.2d at 56.

131. See supra notes 112-25 and accompanying text.

132. See Webster's, supra note 10, at 879 (defining marriage as "any close or intimate association or union"). While this definition is not listed first, it is one of a number of viable understandings of the term marriage. This Comment supports the position that reliance on a traditional definition of marriage in a legal context fails to fully appreciate the constitutional issues implicated in same-sex marriage cases. See supra note 68. However, if a dictionary definition of marriage is to be used, this Webster's definition is not as constraining as those traditionally employed by courts.

133. See Lauren Anderson, Note, Property Rights of Same-Sex Couples: Toward A New Definition of Family, 26 J. Fam. L. 357, 358 (1988); Melton, supra note 88, at 500.
C. Birds of a Feather Should Flock Together: Marriage and Family a Definitional Dichotomy?

Just as marriage and procreation have been interpreted by courts as logical predicates of one another so should family and marriage be interpreted. Courts, state legislatures, and city councils have extended the traditional definition of family to include same-sex couples. If same-sex couples have the necessary characteristics to qualify as a family for certain situations, logic dictates that same-sex couples have the right to consummate that familial relationship with marriage.

In Braschi v. Stahl Associates, two gay men lived together for ten years in the same apartment. After one of the men died, the other was

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134. See, e.g., Braschi v. Stahl Assocs., 543 N.E.2d 49 (N.Y. 1989); Metz, supra note 100, at 23 (discussing the "branching out" of the modern American family); see also Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984) (discussing marriage as a relationship which "attend[s] the creation and sustenance of a family"); Maynard v. Hill, 125 U.S. 190, 211 (1888) (stating that marriage is "the foundation of the family"). See generally Knox, supra note 111 (discussing generally family and marriage in a single text because of their close connection); Sarah T. Knox, The Family and The Law 25 (1941) ("The normal conventional family starts with marriage."); Bryan Strong & Christine Devault, The Marriage and Family Experience 5 (5th ed. 1992) ("A family has traditionally been defined as a married couple."); supra notes 47-86 and accompanying text (discussing the propensity of courts to define marriage and procreation as part and parcel of one another).

135. See, e.g., Braschi, 543 N.E.2d at 55; Yorkshire Towers Co. v. Harpster, 510 N.Y.S.2d 976, 978 (N.Y. Civ. Ct. 1986) (indicating that a homosexual partner was a "de facto immediate family member of his partner"); rev'd, 538 N.Y.S.2d 703 (N.Y. App. Div. 1988); N.Y.C. Exec. Order No. 48 (Jan. 7, 1993) (stating that "significant changes in our society have resulted in . . . the development of an expanded concept of the family unit"); Gardner, supra note 25, at 361-86. Additionally, numerous state legislatures and city councils have created domestic partnership ordinances which permit heterosexual and homosexual couples to avail themselves of various legal benefits. See Bowman & Cornish, supra note 51, at 1164 (discussing the domestic partnership ordinances of various cities). Domestic partnership ordinances illustrate the evolving nature of the family and attempts by various governmental institutions to accommodate the expanding family. Id. at 1164-66; see also National Gay and Lesbian Task Force Policy Institute, Domestic Partnership Organizing Manual 7-10 (1992) (indicating the definition of family is changing) [hereinafter Organizing Manual]; Anderson, supra note 133, at 367 (stating that "the judicial system is in flux regarding its notions of what constitutes a 'family' "); Robert L. Eblin, Note, Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others), 51 Ohio St. L. J. 1067, 1072 (1990) (listing and discussing numerous domestic partnership ordinances in several cities); Melton, supra note 88, at 497 (discussing the changing definition of family and new statutory and courtroom definitions to deal with this reality).

136. See generally Metz, supra note 100, at 23-29 (discussing the current legal status of nontraditional families); Eblin, supra note 135, at 1067-72 (discussing discrimination against same-sex couples and the need to provide these couples with various marital benefits through domestic partnership ordinances).


138. Id. at 49-50.
Constitutional Right To Same-Sex Marriage?

to be evicted from their apartment.\(^\text{139}\) The court held that the survivor was protected from eviction under New York’s rent-control laws\(^\text{140}\) because the attributes of the couple’s relationship qualified them as a family.\(^\text{141}\) There is a logical inconsistency in recognizing a same-sex couple as constituting a family in certain circumstances while failing to recognize their relationship as a marriage because the reasons for calling a same-sex couple a family apply equally when the question is whether this is a marriage.\(^\text{142}\)

Some courts and legislatures are willing to acknowledge the realities of modern family life, but most refuse to extend the same openness to non-traditional marriages.\(^\text{143}\) The court in Braschi argued that the definition of family should be based on emotional and financial interdependence and commitment.\(^\text{144}\) The intransigence of courts in the area of marriage is incongruous with the expanding definition of family, as illustrated by the Braschi opinion.\(^\text{145}\) If a family is characterized by such considerations

\(^{139}\) Id.

\(^{140}\) Id.

\(^{141}\) Metz, supra note 100, at 24; see also Braschi, 543 N.E.2d at 53-55 (discussing the court’s view that the same-sex couple shared several attributes with traditional families); Gardner, supra note 25, at 378-81 (discussing the Braschi holding and its implications for an expanding definition of marriage).

\(^{142}\) While several states have domestic partnership ordinances that provide numerous benefits to same-sex couples, this Comment maintains that marriage provides additional benefits beyond the reach of such ordinances. See supra notes 4, 106-33; see also Eblin, supra note 135, at 1076-79 (discussing domestic partnership ordinances in New York and various other states and municipalities). Marriage provides couples with a means to express their love and compassion in a socially acceptable way, a base for emotional support, and a ritual right of passage in their evolving relationship. These emotive benefits transcend the various legal benefits provided to married couples, or to same-sex couples through domestic partnership ordinances. Therefore, this Comment maintains that domestic partnership ordinances are an insufficient middle ground. Contra Comment, Homosexuals’ Right, supra note 47, at 213-16 (discussing the benefits of “quasi-marital” status for same-sex couples).

\(^{143}\) See, e.g., Braschi, 543 N.E.2d at 54 (granting a homosexual eviction rights under New York eviction law to the apartment he shared with his deceased partner); Gardner, supra note 25, at 361-86 (same); Metz, supra note 100, at 23-29 (same); Bowman & Cornish, supra note 51, at 1164 (discussing state case law and city ordinances dealing with same-sex couples); Melton, supra note 88, at 500-508 (same).

\(^{144}\) The Braschi court determined that “sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.” Braschi, 543 N.E.2d at 53; see also Metz, supra note 100, at 25 (discussing the Braschi holding and its implications for same-sex couples).

\(^{145}\) See Melton, supra note 88, at 501-03 (discussing New York’s extension of the definition of family to include same-sex couples for purposes of the city’s eviction and rent-control codes). Numerous courts have expanded the definition of family to meet the realities of modern life. See, e.g., Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (expanding the definition of family beyond the nuclear family); Zimmerman v. Burton, 434 N.Y.S.2d 127, 128-29 (N.Y. Civ. Ct. 1980) (holding that New York’s eviction laws protect
as emotional support, financial intermingling, and commitment, so also should marriage, an obvious extension of the familial concept, receive the same characterization.\textsuperscript{146}

Just as some courts recognize the ever-expanding definition of family, so also have many city councils.\textsuperscript{147} Through the vehicle of domestic partnership ordinances, cities across the country are beginning to protect the interests of nontraditional families.\textsuperscript{148} In New York City, former Mayor Edward Koch issued an executive order that defined a domestic partner-

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\textsuperscript{146} See generally Gardner, supra note 25, at 368-81 (discussing the expanding parameters of the legal definition of family). See also Developments in the Law—The Constitution and the Family, 93 Harv. L. Rev. 1156, 1280-84 (1980) (discussing recent developments in the area of family law and how the Constitution affects these developments).

\textsuperscript{147} Numerous city councils have passed domestic partnership ordinances which permit individuals living together to receive certain legal benefits. See, e.g., Laguna Beach, Cal., Ordinance No. 1230, Ch. 1.12.010-080 (1992); San Francisco, Cal., Admin. Code §§ 62.1-8 (1990); San Francisco, Cal., Police Code §§ 4001-4010 (1989); Takoma Park, Md., City Code 1993-27 § 8B-175(b) (1993) (granting medical benefits to domestic partners of city employees); Takoma Park, Md. Resolution No. 1993-77 (1993) (establishing a domestic partnership registry for The City of Takoma Park); Madison, Wis., Gen. Ordinances § 28.03(2) (1993) (granting protection to alternative families in the areas of housing and zoning); Bereavement Leave in NYC Extended to Cover Death of Domestic Partner, 27 Gov't Empl. Rel. Rep. (BNA) 1114 (Aug. 14, 1989); Kathy Bodovitz, S.F. Refines Family Leave Policy, S.F. Chron., Oct. 16, 1990, at A6 (discussing the broadening of the definition of unpaid family leave by the San Francisco Civil Service Commission to include domestic partners); Thomas G. Keane, S.F. Domestic Partners Measure Winning, S.F. Chron., Nov. 7, 1990, at A8 (discussing how the city of San Francisco voted on Proposition K, a domestic partnership ordinance); Frank Messina, Couples in the Eyes of the Law: Laguna Beach Ordinance Granting Rights to Gay and Lesbian Partners Takes Effect, L.A. Times, May 22, 1992, at B1 (Orange County ed.). See Bowman & Cornish, supra note 51, at 1188 (discussing various city ordinances dealing with domestic partners); Eblin, supra note 135, at 1072 (discussing several city domestic partnership ordinances); Walter Isaacson, Should Gays Have Marriage Rights, Time, Nov. 20, 1989, at 101. This Comment will not discuss in depth the issue of domestic partnership ordinances. The brief discussion herein is simply meant to reinforce the need to expand the definition of marriage in accordance with the expansion of marriage's "cousin," the family.

\textsuperscript{148} See Bowman & Cornish, supra note 51, at 1189-98 (discussing current domestic partnership ordinances and proposals); Eblin, supra note 135, at 1072-77 (discussing the domestic partnership ordinances in Berkeley, California, Seattle, Washington, and several other cities); see also Organizing Manual, supra note 135, at 23-53 (listing and discussing numerous localities which have adopted domestic partnership ordinances); supra note 142 (setting forth this Comment's opinion that domestic partnership laws are an inadequate middle ground for same-sex couples).
ship as “two people . . . who have a close and committed personal relationship involving shared responsibilities.” This executive order granted bereavement leave to both heterosexual and homosexual couples when one of the partners dies. The City of Laguna Beach, California also has a domestic partnership ordinance granting city employees in same-sex relationships, as well as heterosexual couples, medical and dental benefits as well as visitation rights in jails or health-care facilities. As more and more cities recognize the changing face of the American family, courts nonetheless continue to cling to a one-dimensional understanding of marriage. Marriage and family are logical predicates of one another just as marriage and procreation, thus the extension of the definition of family to same-sex couples should be occasioned by the same extension of the legal definition of marriage.

IV. CONSTITUTIONAL CHALLENGE: EQUAL PROTECTION AND DUE PROCESS ANALYSIS

Under current due process and equal protection analysis, a heightened level of judicial scrutiny is employed when a suspect classification

151. See Bowman & Cornish, supra note 51, at 1189-90 (discussing the domestic partnership ordinance in Laguna Beach, California); Carla Rivera, Partners of Gays to Receive City Medical Benefits, L.A. TIMES, Aug. 9, 1990, at B1 (Orange County ed.).
152. See Melton, supra note 88, at 503-06 (discussing municipalities and the changing face of the American family); supra notes 147-51 and accompanying text.
153. See U.S. Const. amend XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”). Due process and equal protection analyses utilize a two-tiered approach. See supra note 45. Where a fundamental right or a suspect classification is involved, courts require the state regulation be “narrowly tailored to promote a compelling . . . [state] interest.” NOWAK & ROTUNDA, supra note 45, § 11.4, at 371. In most other situations the court will determine if the regulation is rationally related to a legitimate state interest. Id. § 11.4, at 369-80. In analyzing marriage regulations, it appears that both an equal protection and a due process evaluation produce identical results. See id. § 11.4, at 369-70 (“Regardless of whether a court is employing substantive due process or equal protection analysis, it should use the same standards of review.”); Ingram, supra note 4, at 40 (same); Kenneth L. Karst, The Freedom of Intimate Association, 89 YALE L.J. 624, 667-68 (1980) (indicating that equal protection and due process are complementary doctrines and that the level of review is what is most important). The crucial question is what level of scrutiny will be used; therefore, this Comment analyzes the equal protection and due process arguments together. See Ingram, supra note 4, at 40; Jane Rutherford, The Myth of Due Process, 72 B.U. L. REV. 1, 72 (1992) (indicating that “substantive due process often is intertwined with equal protection”).
154. Currently the Supreme Court has recognized race, alienage, and national origin as suspect classifications. See Graham v. Richardson, 403 U.S. 365, 372 (1971) (indicating
or fundamental right is implicated by some governmental action.\footnote{155} When either of these categories is present the court utilizes a "strict scrutiny" standard of review.\footnote{156} Strict scrutiny requires the state to choose means that are narrowly tailored to achieve a compelling state interest.\footnote{157} Because marriage is a fundamental right,\footnote{158} any regulation substantially interfering with the right to marry invokes strict scrutiny.\footnote{159} However, this is not always the case. Courts continually avoid application of the strict scrutiny standard by defining the right of marriage to include only heterosexual couples.\footnote{160}

\textbf{A. That "Loving Spirit: "Marriage" as a Fundamental Right}

Traditional equal protection analysis requires "that all persons similarly situated should be treated alike."\footnote{161} In \textit{Loving v. Virginia},\footnote{162} the United States Supreme Court determined that two individuals in love are similarly situated as any other two individuals in love, regardless of race.\footnote{163} However, this rationale has not been extended to recognize that two individuals in love are similarly situated to any other two individuals in love, regardless of sexual orientation.\footnote{164}

\textit{Loving v. Virginia}, 388 U.S. 1, 11 (1967) (indicating that race is a suspect classification deserving strict scrutiny review); \textit{Oyama v. California}, 332 U.S. 633, 640 (1944) (indicating alienage as a suspect classification); \textit{Korematsu v. U.S.}, 323 U.S. 214, 216 (1944) (indicating national origin as a suspect classification); \textit{see also Gerald Gunther, Constitutional Law} 621-31, 670-78 (11th ed. 1985); \textit{Nowak & Rotunda, supra note 45}, § 14.2, at 570-73; \textit{id. §§ 14.5-7, at} 605-10; \textit{id. § 14.8(d), at} 621-31.\footnote{155}

\textit{Loving v. Virginia}, 388 U.S. 1 (1967).\footnote{163}

\textit{id. at} 12; \textit{see also Trosino, supra note 22, at} 106-08; David Margolick, \textit{A Mixed Marriage's 25th Anniversary of Legality}, \textit{N.Y. Times}, June 12, 1992, at B20 (discussing the historical circumstances leading up to and following the \textit{Loving} case).\footnote{163}

\textit{supra} notes 35-46.
In *Loving*, a white man and a black woman, both of whom were residents of Virginia, were married in the District of Columbia. After returning to Virginia the couple was prosecuted under Virginia's antimiscegenation statute. They plead guilty and were sentenced by the trial court; the state's highest court upheld the constitutionality of the statute. The United States Supreme Court held the Virginia statute unconstitutional and declared that "the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State."

The *Loving* Court overcame social as well as legal arguments that interracial marriage was unnatural, detrimental to society, or simply wrong. Implicit in all same-sex marriage cases, as was the case in interracial marriage cases, is the notion that gay couples are different from heterosexual couples and therefore would damage the institution of marriage. *Loving* eviscerated these social stereotypes in the realm of interracial marriages. But courts refuse to extend its holding to recognize that gay and heterosexual couples are functionally equivalent. The ra-

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166. Id. at 2-3.
167. Id.
168. Id. at 3-4.
169. Id. at 12.
170. Id. at 1-13; see also Trosino, *supra* note 22, at 97-107 (providing an historical overview of antimiscegenation statutes).
171. See, e.g., Green *v.* State, 58 Ala. 190 (1877) (sustaining an Alabama statute that made interracial marriages a crime because such unions would cause discord, shame, and disruption to families); Scott *v.* Georgia, 39 Ga. 321 (1869) (upholding a Georgia statute prohibiting interracial marriages based on the Court's perception that such marriages were unnatural and produced "deplorable results"); State *v.* Jackson, 80 Mo. 175 (1883) (indicating that a Missouri statute prohibiting interracial marriages is not unconstitutional because such marriages may injure the moral, physical, and emotional well being of the community); Trosino, *supra* note 22, at 102-08 (discussing various cases upholding anti-miscegenation statutes).
172. See Scott, 39 Ga. at 323 (indicating interracial marriages would be harmful to society); Trosino, *supra* note 22, at 108-11. See generally A. Leon Higginbotham, Jr. & Barbara K. Kopystoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 Geo. L.J. 1967 (1989) (indicating the stereotypes and presumptions underlying the ban on interracial marriages). One author indicates that interracial marriages were prohibited because "[t]he social costs of racial mixing and miscegenation were perceived as so high that few seriously considered permitting the practices." Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 Duke L.J. 624, 657. The same arguments have been espoused in opposition of permitting same-sex marriages. See *supra* notes 54-86.
tionales for holding antimiscegenation laws unconstitutional should apply with equal force to a state's denial of recognition for same-sex marriages. 174 Unfortunately, courts fail to so extend the Loving doctrine. 175 Courts must recognize that the "constitution[ ...] may mandate, like it or not, that customs change with an evolving social order." 176 This view of the Constitution accepts a more activist role for the Court in reviewing governmental actions. Some scholars perceive a need for greater judicial restraint and would reject an activist role for the Court. 177

In Perez v. Lippold, 178 which predated the Loving decision, a court determined that the true question is not whether interracial marriages are a fundamental right, but whether marriage is a fundamental right. 179 The court perceived the essence of marriage as the right to unite with the person of one’s choosing, and found that any restriction based on race necessarily impairs that right. 180 Just as the Perez and Loving courts viewed their question as the fundamental right to marry, and not the fundamental right to interracial marriage, so too should courts take the same stand with respect to gay marriages. 181 The true question is not whether there is a fundamental right to gay marriage or interracial marriage.

relationship are virtually identical to those of a comparable heterosexual relationship.

Steve Susoeff, Comment, Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard, 32 UCLA L. REV. 852, 891 (1985) (indicating that homosexual and heterosexual relationships share numerous similarities).

174. See Trosino, supra note 22, at 108-16 (indicating that the reasons espoused to preclude same-sex marriages are identical to those put forth to support antimiscegenation laws).


176. Baehr v. Lewin, 852 P.2d 44, 63 (1993). One source indicates that the validity of same-sex marriages discussed in legal texts "testifies to the rapid and drastic social changes which have occurred." Clark, supra note 8, § 2.8, at 142.


178. 198 P.2d 17 (Cal. 1948).

179. Id.

180. Id. at 21. The court stated: "Since the essence of the right to marry is [the] freedom to join in marriage with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry." Id.

181. See Trosino, supra note 22, at 114-16 (discussing the propensity of courts in antimiscegenation cases to view the issue as the right to interracial marriage instead of the right to marry). Contra Comment, Homosexuals' Right, supra note 47, at 200 (discussing the fundamental right to same-sex marriage rather than the fundamental right to marry).
Rather, the true inquiry revolves around the limits of the fundamental right to marriage.\textsuperscript{182} Courts continually use the traditional definition of marriage as a union between persons of the opposite sex\textsuperscript{183} for mainly procreative or child rearing purposes\textsuperscript{184} to legitimize their denial to same-sex couples of the right to marry.\textsuperscript{185} However, the same definitional argument was used to uphold antimiscegenation laws.\textsuperscript{186} Just as courts defined marriage as traditionally excluding interracial couples, so they define marriage as excluding same-sex couples.\textsuperscript{187}

\textbf{B. Homosexuality: A Suspect Classification?}

Currently race,\textsuperscript{188} alienage,\textsuperscript{189} and national origin\textsuperscript{190} are considered suspect classifications. The criteria used to identify these suspect classes are inapplicable to homosexuals.\textsuperscript{191} These criteria include (1) a long his-
tory of discrimination as a class; (2) possession of a characteristic that bears no relation to ability to perform or contribute to society; (3) being marked by a badge of opprobrium; (4) relegation to a position of political powerlessness; and (5) possession of an immutable characteristic that is either inherent or uncontrollable. Because of these criteria there appears to be little hope of finding the light of suspect classification for homosexuals at the end of the judicial tunnel.

Unquestionably, homosexuals have experienced a long history of discrimination and are more than capable of contributing to soci-


This Comment does not maintain that homosexuality should not be perceived as a suspect classification; rather, it merely states that suspect classification should not be pursued as a means to achieve legal recognition of same-sex marriages because of judicial reluctance to extend suspect classification to cover homosexuals. The numerous other arguments for legal recognition of same-sex marriages espoused in this Comment are more likely to be met with success.


193. See Comment, Homosexuals' Right, supra note 47, at 202-06.

194. See Richard Plant, The Pink Triangle (1986) (discussing the treatment of homosexuals in Germany under Hitler's rule); Ellen M. Barrett, Legal Homophobia and the Christian Church, 30 HASTINGS L.J. 1019 (1979) (indicating a history of discrimination against gays from early christian times); Note, An Argument for the Application of Equal
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Plato, Michelangelo, Francis Bacon, Julius Caesar, Emily Dickinson, and Leonardo da Vinci are a sparse list of gay individuals whose sexual preference bore no relation to their ability to contribute to world knowledge and culture. Similarly, there can be little doubt that being gay is to be marked with a badge of opprobrium. The classes which are

Protection Heightened Scrutiny to Classifications Based on Homosexuality, 57 S. CAL. L. REV. 797, 824-25 (1984) (discussing the historical discrimination faced by homosexuals). One author states that "[i]n the United States, homosexuals have been persecuted and even imprisoned." GILBERT D. NASS & GERALD W. MCDONALD, MARRIAGE AND THE FAMILY 497-98 (2d ed. 1982). Homosexuals face discrimination in the United States, as well as in numerous other countries across the globe:

[H]omosexuality . . . in various societies [is] enough to warrant segregation, imprisonment, even capital punishment. In Cuba homosexuals are often thrown in jail and in China, they are sometimes subjected to shock treatment . . . . Basil Davidson, in his book The African Genius, observes that African tribes such as the Nyakyusa . . . regard homosexuality as a sin and a sickness "occasioned by witchcraft."


While England has decriminalized homosexual conduct it still prohibits teaching or publishing material which promotes homosexuality. Local Government Act 1986 (c 10) § 2A (prohibiting the promotion of homosexuality by teaching or publication); Baker v. Wade, 553 F. Supp. 1121, 1130 (N.D. Tex. 1982) (indicating England has decriminalized homosexual conduct for years), appeal dismissed, 743 F.2d 236 (5th Cir. 1984), cert. denied, 478 U.S. 1022 (1986). Homosexuals have also experienced discrimination in the area of employment. See, e.g., Singer v. United States Civil Serv. Comm'n, 530 F.2d 247 (9th Cir. 1976), vacated, 429 U.S. 1034 (1977); Note, Government Employment and the Homosexual, 45 ST. JOHN'S L. REV. 303 (1970).

195. Comment, Homosexuals' Right, supra note 47, at 203. One author indicates that "studies . . . have found an overall similarity between heterosexual's and homosexual's psychic adjustment and job performance." Id.; see also Norton v. Macy, 417 F.2d 1161, 1165-68 (D.C. Cir. 1969) (indicating that plaintiff's dismissal was not proper because his homosexuality did not affect his job effectiveness); PLATO, ON HOMOSEXUALITY: LYSIS, PHAEDRUS, AND SYMPOSIUM (Benjamin Jowett trans., 1991) (discussing the prevalence of sexual intimacy between adult males and adolescent males in both Greek society and Plato's dialogues The Symposium, The Lysis, and The Phaedrus); Gay Clout: The New Power Brokers, NEWSWEEK, May 3, 1993, at 45 (listing numerous powerful and prominent homosexuals, such as Barney Frank, Joan Nestle, Martina Navratilova, and Patricia Ireland); supra notes 100-02 (discussing the abilities of same-sex couples to raise children).

196. See THOMAS COWAN, GAY MEN AND WOMEN WHO ENRICHED THE WORLD (1988) (listing 40 individuals who have contributed to world culture and knowledge); Sylvia A. LAW, HOMOSEXUALITY AND THE SOCIAL MEANING OF GENDER, 1988 WIS. L. REV. 187, 205 n.89 (quoting Freud as mentioning the homosexuality of da Vinci, Plato, and Michelangelo); Out of History, Gannett News Service, Apr. 25, 1993, available in LEXIS, Nexis Library, GNS File (listing numerous gay individuals who have impacted the world in the last 3000 years).

197. See Comment, Homosexuals' Right, supra note 47, at 204-05; see also KNOX, supra note 111, at 78 (stating that homosexual persons are not instantly recognizable).
perceived as suspect, such as race,\textsuperscript{198} alienage,\textsuperscript{199} and national origin,\textsuperscript{200} all have visibly identifiable characteristics.\textsuperscript{201} Homosexuality appears to lack this overtly identifiable element.\textsuperscript{202} Psychologists recognize that gay persons are not instantly recognizable.\textsuperscript{203} While Justice Stevens has indicated that a personal characteristic "not as apparent to the observer as sex or race" is not "any less odious,"\textsuperscript{204} actual court holdings indicate that readily identifiable characteristics are paramount.\textsuperscript{205}

The political power of homosexuals is continually growing in strength.\textsuperscript{206} Gays are demanding and acquiring greater rights nationally and locally.\textsuperscript{207} Some universities and graduate schools now offer preferential treatment programs for homosexuals.\textsuperscript{208} While the political power of gays continues to grow, there are still numerous gays who hide their

\textsuperscript{198} Loving v. Virginia, 388 U.S. 1, 8 (1967).
\textsuperscript{199} Oyama v. California, 332 U.S. 633, 640 (1948).
\textsuperscript{200} Korematsu v. United States, 323 U.S. 214, 216 (1944).
\textsuperscript{201} See Comment, Homosexuals' Right, supra note 47, at 204.
\textsuperscript{202} See Fajer, supra note 68, at 511 (discussing the numerous similarities between heterosexual and homosexual couples and their lifestyles).
\textsuperscript{203} See Knox, supra note 111, at 78.
\textsuperscript{204} Mathews v. Lucas, 427 U.S. 495, 523 (1976) (Stevens, J., dissenting).
\textsuperscript{205} See Craig v. Boren, 429 U.S. 190 (1976) (using middle scrutiny for gender discrimination cases); supra note 192.
\textsuperscript{206} See Barry D. Adam, The Rise of a Gay and Lesbian Movement (1987) (providing an historical overview of the rise of homosexual political power); Peter Fisher, The Gay Mystique 210-12 (2d ed. 1975) (discussing the increasing political strength of homosexuals); Mark Curriden, Sodomy Laws Challenged: Gay Activists Find Successes In Some State Courts, Legislatures, A.B.A. J., July 1993, at 38 ("Texas is the latest battleground for gay activists who are fighting to repeal sodomy laws."); Homosexual Politics: After AIDS, The Economist, Apr. 24, 1993, at 26 (indicating that gays are now one of the most powerful forces in politics) [hereinafter Homosexual Politics].
\textsuperscript{207} See, e.g., Steve Friedman, Colorado's Amendment 2 Blocked: Court Says Referendum Barring Gay-Rights Laws Denies Equal Protection, A.B.A. J., Oct. 1993, at 48-49 ("By prohibiting legislative protections for gay men and women, Colorado voters effectively denied them equal participation in the political process . . ."); Howard Fineman, Marching to the Mainstream, Newsweek, May 3, 1993, at 42 (discussing the increase in gay power because of increased money and insider clout within the gay world); Homosexual Politics, supra note 206, at 26 ("Homosexuals are more visible, their money more plentiful, their issues more discussed than ever before."); Debbie Howlett, Unruly or Unseen, A Split on Fight for Change: Two Camps Struggling Over Tactics, USA Today, June 25, 1993, at 12A (discussing various homosexual power groups fight for gay rights); Joseph P. Shapiro et al., Straight Talk About Gays, U.S. News & World Rep., July 5, 1993, at 42 (discussing the increased presence of homosexuals in American society). See generally Adam, supra note 206, at 1 (discussing the historical evolution of the gay movement).
\textsuperscript{208} See D'Souza, supra note 194, at 5 ("In 1989, the Columbia Law Review announced a recruitment program offering preferential treatment for homosexuals and lesbians. The journal added five extra seats to its editorial board to promote 'diversity,' including special consideration for 'sexual orientation.'").
sexual preference out of fear. This fear may diminish their numbers, but this does not affect their political power base. As gays become more politically powerful, already reluctant courts will have further reasons to deny suspect classification to gays.

Lastly, the immutability question is a difficult hurdle to overcome. While much research indicates a biological origin of homosexuality, numerous individuals challenge such a finding. Due to the muddled nature of this area of science and politics, it is unlikely that courts will venture into this political hot bed. A court already reluctant to expand the definition of marriage to include same-sex marriages will not touch the question of the origins of homosexuality.

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209. See, e.g., Clark, supra note 8, § 2.8, at 142 (stating that "many homosexuals naturally choose to conceal, or not to reveal, their identities"); Knox, supra note 111, at 78 (citing a 1984 poll indicating 55% of the 1000 women aged 18 to 65 surveyed felt that homosexuality was not an acceptable alternative life-style); David H. Pollack, Comment, Forced Out of the Closet: Sexual Orientation and The Legal Dilemma of "Outing", 46 U. Miami L. Rev. 711 (1992) (discussing the various implications of leaving the closet for homosexuals); Comment, Homosexuals' Right, supra note 47, at 204-05 (indicating there are individuals who have antagonistic feelings toward homosexuals); Shapiro, supra note 207, at 46 (stating that "[with 1,898 hate crimes against gays and lesbians reported in just five major cities last year, many homosexuals fear that coming out can result in injury or even death"); James D. Wilson, Gays Under Fire, Newsweek, Sept. 14, 1992, at 35, 37 (indicating that a poll found 58% of those surveyed disagreed with same-sex marriages).

210. See supra notes 206-08.

211. See Nowak & Rotunda, supra note 45, § 14.3, at 573-74; Tussman, supra note 93, at 366 (discussing the Supreme Court's espoused need for self-restraint).


213. See supra notes 35-133 and accompanying text.

214. See supra notes 54-86. The Supreme Court continually indicates a proclivity toward judicial restraint. A majority of the Court recently stated: "The best that can be said
Although gays have experienced a long history of discrimination and have the abilities to contribute to society, courts are reluctant to characterize gays as politically impotent or as possessing an immutable characteristic. Any hope of granting same-sex couples the fundamental right to marry will not lie with designating homosexuality as a suspect classification. Courts are reluctant to enter into the political whirlwind that surrounds homosexuality. Homosexuality is not poised on the brink of acceptance as a suspect classification.

C. Look at the Part Not the Whole!: Sex Discrimination and Middle-Level Scrutiny

The Supreme Court articulates a middle-tier standard of scrutiny for discrimination based on gender. This middle level of scrutiny requires
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state statutes concerning gender to have an important governmental interest that utilizes means substantially related to permissible ends. This middle-level scrutiny is applied to classifications based on sex.

Since Singer v. Hara, no court has held a statute limiting marriage to heterosexual couples as a classification based on sex. The Hawaii Supreme Court, however, recently took this first crucial step in Baehr v. Lewin. In Singer, the State of Washington found no gender-discrimination when "all same-sex marriages are deemed illegal by the state . . . [since] there is no [gender discrimination] so long as marriage licenses are denied equally to both male and female pairs." This argument is specious and was explicitly repudiated by the Loving Court. In Loving the state argued that both blacks and whites were equally denied the right to interracial marriage. However, the Court stated that the true inquiry is whether the statute constitutes an arbitrary and invidious discrimination. Any denial to same-sex couples of the right to marry should trigger the question of whether the discrimination is arbitrary or invidious.

In Baehr v. Lewin, however the Hawaii Supreme Court held that its state marriage statute denied a same-sex couple access to the status of

222. See Nowak & Rotunda, supra note 45, § 14.23, at 743-51 (discussing gender classifications and intermediate review); Comment, Homosexuals' Right, supra note 47, at 207 (same).


224. 522 P.2d 1187 (Wash. Ct. App.), review denied, 84 Wash. 2d 1008 (1974); see supra notes 62-74 (discussing the Singer case and other pertinent prior case law).

225. See supra notes 54-86 and accompanying text.

226. See supra notes 75-80 and accompanying text.

227. Singer, 522 P.2d at 1191.

228. Loving v. Virginia, 388 U.S. 1 (1967); see Trosino, supra note 22, at 107-08, 113 (discussing the reasoning of the Loving Court and its application to same-sex marriages); see also Loving, 388 U.S. at 11; Donald R. Livingston & Samuel A. Marcosson, The Court at the Crossroads: Runyon, Section 1981 and the Meaning of Precedent, 37 EMORY L.J. 949, 962 (1988) ("The same rationale was used to defend miscegenation laws: no one was being discriminated against, since neither whites nor blacks could marry a person outside their race."); Samuel A. Marcosson, Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII, 81 GEO. L.J. 1, 4-5 (1992) ("The Supreme Court found antimiscegenation laws to be race discrimination because they 'proscribe generally accepted conduct [only] if engaged in by members of different races.' " (quoting Loving, 388 U.S. at 11)).

229. Loving, 388 U.S. at 10-12; Trosino, supra note 22, at 106-08.

marriage on the basis of the applicant's sex. The *Baehr* court implicitly repudiated the state's argument in *Singer* that equal protection analysis is not triggered in same-sex marriage cases because no sex discrimination has occurred. The *Baehr* decision makes clear that the *Singer* court misconstrued the true question. The question is not whether both males and females are prohibited from same-sex marriages. Instead, the true inquiry concerns the prohibition of entry into the marital bond based on a person's gender. To illustrate, take the example of a same-sex couple composed of two females. If one of the partners in that relationship were a male, she would be permitted to marry the other partner. However, because of her sex she is precluded from doing so; therefore, the union of marriage is withheld from her due to her gender. The *Singer* court isolated the "relationship" and determined that males and females were both precluded from marrying partners of the same sex. However, the

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231. *Baehr* v. *Lewin*, 852 P.2d 44, 60 (Haw. 1993); see also Henry J. Reske, *Gay Marriage Ban Unconstitutional?: Hawaii Supreme Court Thinks So, Unless State Can Show Compelling Interest*, A.B.A. J., July 1993, at 28 ("The decision is significant because it is the first to hold that bias against homosexuals is sex discrimination.").

232. *Baehr*, 852 P.2d at 60; *Singer* v. *Hara*, 522 P.2d 1187 (Wash. Ct. App.), review denied, 87 Wash. 2d 1008 (1974). Although the *Baehr* court never explicitly makes this assertion, the espoused result may be inferred due to the court's explicit recognition that the state's marriage statute, under which the court determined there was no protection for or recognition of same-sex marriages, regulated access to marriage, on the basis of sex. *Baehr*, 852 P.2d at 60.

233. *Baehr*, 852 P.2d at 64-68. The underlying principle of equal protection analysis is that persons similarly situated should be treated the same. Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975) (striking down a statute that failed to provide a female worker the same protection which a similarly situated male worker would have received); United States Dep't of Agric. v. Murry, 413 U.S. 508, 517 (1973) (Marshall, J., concurring) (stating that "individuals similarly situated must receive the same treatment" (emphasis added)); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Lewis, *supra* note 106, at 1785 (discussing equal protection analysis).

234. See generally *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983) (cataloging and analyzing Supreme Court cases dealing with sex discrimination). The true question in gender discrimination cases is whether individuals are being classified on the basis of their gender and not simply whether men and women are treated alike. *See Baehr*, 852 P.2d at 60 (stating that it is the state's regulation of access to the status of married persons, on the basis of the applicant's gender, that triggers an equal protection analysis). While this distinction might appear nonexistent, when applied in the area of same-sex marriages it can make all the difference. *See id.; see also Singer*, 522 P.2d at 1187 (utilizing the above distinction to prohibit same-sex marriages). This distinction is represented implicitly by the dichotomous views of the *Singer* and *Baehr* courts on the question of same-sex marriages. This same distinction is used to argue that sodomy laws are discriminatory against gay persons because "[t]he physical acts themselves . . . are the same whether between a man and a woman or two persons of the same-sex." *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1527 n.57 (1989).

court should have isolated the individual partners in that relationship and determined if one of those partners were a member of the opposite sex would that partner have been permitted to marry the other individual. The analysis used in Singer was rebuffed explicitly in Loving. In the case of same-sex marriages, the words male and female merely need to be substituted for white and black, thereby looking at the part and not the whole. Any denial of recognition of same-sex marriages should implicate an intermediate level of scrutiny under the Equal Protection Clause. After determining the proper level of scrutiny to be applied, the second aspect of equal protection analysis must be examined: identification of an important governmental interest in the prohibition of same-sex marriages that is substantially related to those interests.

1. Why?: State Interests Behind Prohibition of Same-Sex Marriages

There are four primary reasons espoused by states for preclusion of same-sex marriages: to foster procreation, foster morality, encourage family stability, and support bans on homosexual acts. None of these reasons are sufficient to meet the middle-level of scrutiny applied to sex discrimination cases.

236. See generally Murry, 413 U.S. at 517 (stating that individuals similarly situated must receive the same treatment); Loving v. Virginia, 388 U.S. 1, 10 (1967) (rejecting an argument similar to the Singer court's rationale in the context of interracial marriages); Baehr, 852 P.2d at 44-68 (discussing the court's rationale for its holding).

237. The Court stated: "We have rejected the proposition . . . that the requirement of equal protection of the laws is satisfied . . . so long as white and Negro participants in the offense [are] similarly [treated]." Loving, 388 U.S. at 10; Trosino, supra note 22, at 113 (drawing a link between the rationale rejected by the Loving court and similar arguments espoused in same-sex marriage cases). In Pace v. Alabama, 106 U.S. 583 (1882), overruled by McLaughlin v. Florida, 379 U.S. 184 (1964), this rejected equal application doctrine was first applied. See Trosino, supra note 22, at 106-07.

238. See Baehr, 852 P.2d at 44-68. One may infer the same rationale found in Loving from the Baehr court's reasoning.

239. See supra notes 221-36 and accompanying text.


241. See, e.g., CLARK, supra note 8, § 2.8, at 145-47 (listing various reasons for prohibiting same-sex marriages); Ingram, supra note 4, at 46 (espousing several state reasons for precluding same-sex marriages); Weitzman, supra note 29, at 1243 (discussing numerous state interests in regulating marriage); Comment, Homosexuals' Right, supra note 47, at 210-11 (same); Note, Legality, supra note 51, at 580-82 (same).

242. The following discussion applies to both middle-tier scrutiny and strict scrutiny. If the state's reasons for prohibiting same-sex marriages is inadequate under the lower middle-tier scrutiny, they will not pass the higher strict scrutiny standard. See supra notes 87-151, 161-87 and accompanying text (indicating heterosexual couples have the protection of the fundamental right to marry).
a. Fostering Procreation

While procreation is vital to the human race, increasing numbers of individuals are raising children out of wedlock and numerous married couples are not having children. Under the umbrella of the right of privacy, individuals have the fundamental right to procreate, to use contraceptives (or not to procreate), to raise one’s children, and to have an abortion. Such rights indicate that one has the freedom to procreate and raise one’s resulting children; however, these rights also indicate that one may choose not to procreate. The established rights to use contraceptives, not to procreate, or to have an abortion indicate that while procreation is an important state interest, individuals have a great deal of control over their bodies. Permitting such rights while prohibiting same-sex marriages in the name of procreation penalizes a choice (not to procreate) protected by the Constitution.

If marriage is meant to encourage procreation, and same-sex couples are precluded from this union because of their supposed inability to procreate, then heterosexual couples who are sterile, infertile, or impotent should not be permitted to marry. Prohibiting same-sex marriages

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243. See, e.g., INFORMATION PLEASE ALMANAC 812 (43d ed. 1990) (indicating that births to unmarried women have increased more than six-fold between 1950 and 1986) [hereinafter ALMANAC]; ALBERT D. KLASSEN ET AL., SEX AND MORALITY IN THE U.S. 113-14 (1989) (discussing an increased acceptance of premarital sex among the general public); The Bargain Breaks, THE ECONOMIST, Dec. 26, 1992, at 37 (indicating that one in four births is to a single mother) [hereinafter Bargain Breaks]; John Leo, A Pox on Dan and Murphy, U.S. NEWS & WORLD REP., June 1, 1992, at 19 (quoting a recent report indicating an increasing rate of out-of-wedlock childbearing); Barbara D. Whitehead, Dan Quayle Was Right, THE ATLANTIC, Apr. 1993, at 50 (indicating that the out-of-wedlock birth rate “went from five percent in 1960 to twenty-seven percent in 1990 . . . [and] one out of every four women who had a child in 1990 was not married”).

244. Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding the right to privacy encompasses the right to choose to procreate).

245. Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the right to privacy includes the choice to use contraceptives).

246. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (indicating that the right to privacy includes the right to choose how to raise one’s children).

247. Roe v. Wade, 410 U.S. 113 (1973) (indicating that the right to privacy includes the ability to choose to have an abortion).

248. See supra notes 243-47 and accompanying text.

249. See supra notes 56-80 and accompanying text.

250. However, this has not been the view of the courts that have examined the issue. See T. v. M., 242 A.2d 670 (N.J. Super. Ct. Ch. Div. 1968) (indicating that one may not receive an annulment due to sterility); Marks v. Marks, 77 N.Y.S.2d 269 (N.Y. App. Div. 1948) (indicating that the inability to have children does not preclude one from the institution of marriage); see also Ingram, supra note 4, at 47 (indicating an inconsistency in permitting heterosexual couples incapable of procreation to marry while precluding same-sex couples from marrying because of their inability to procreate); Rivera, supra note 110, at 879-80 (indicating that homosexuality on the part of one’s spouse is not grounds for di-
while permitting the forgoing heterosexual couples to marry is contrary to the state's espoused interest in fostering procreation. Furthermore, the drastic increase in out-of-wedlock births indicates that the human race continues to propagate outside the institution of marriage. Therefore, discrimination against same-sex marriages as a measure to promote procreation, is arbitrary and irrational. Such discrimination is not substantially related to achieving the state's goal of fostering procreation.

b. Fostering Morality

The state's interest in promoting morality through marriage is directed primarily toward sexual intercourse. Many state laws attempt to regulate various types of sexual acts either inside or outside of the marital bond: acts such as fornication, adultery, bigamy, and statutory rape. While these laws are geared toward legitimate state interests, the interests are not substantially furthered by prohibiting same-sex marriages. The rate of out of wedlock births continues to increase; thereby, indicating that prohibiting same-sex marriages does not further the state's interest in morality. Nor is there any evidence that discriminating against same-sex marriages decreases the incidence of homosexual activity. Pro-

vorce); Tussman & tenBroek, supra note 93, at 344 (indicating that those in a similar position should be similarly treated).

251. See supra notes 243-48 and accompanying text.

252. See supra note 243.

253. See Ingram, supra note 4, at 47-48 (discussing the state's interest in fostering morality by prohibiting same-sex marriages).

254. See, e.g., ALA. CODE § 13A-13-2 (1982) (addressing the act of fornication and making the act of adultery a misdemeanor); ALASKA STAT. § 25.24.050 (1991) (indicating that adultery is grounds for a divorce); CAL. PENAL CODE § 285 (West 1988) (making the act of incest a crime); COLO. REV. STAT. § 18-6-501 (1986) (making the act of adultery a crime); CONN. GEN. STAT. § 53a-190 (Supp. 1993) (making the act of bigamy a crime); D.C. CODE ANN. § 22-1002 (1989) (defining the act of fornication and making it a crime); GA. CODE ANN. § 16-6-18 (Michie 1992) (indicating that the act of fornication is a misdemeanor); IDAHO CODE § 18-1103 (1987) (indicating that bigamy is a crime in the state of Idaho); MASS. GEN. L. ch. 272, § 18 (1990) (“Whoever commits fornication shall be punished by imprisonment for not more than three months or by a fine of not more than thirty dollars.”); VA. CODE ANN. § 18.2-344 (Michie 1988) (“Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4 misdemeanor.”); Beasley v. State, 96 So. 2d 693 (Ala. Ct. App. 1957) (indicating conviction for the crime of adultery is grounds for disqualification as a juror); Jackson v. Williams, 123 S.W. 751 (Ark. 1909) (holding the act of fornication as criminal behavior).

255. See supra note 243.

256. See, e.g., Klassen, supra note 243, at 113-14 (indicating an increase in the acceptance of premarital sex); Bargain Breaks, supra note 243, at 37 (stating that the United States has one of the highest incidence of out-of-wedlock births in the industrial world).
hibition of same-sex marriages thus is not substantially related to protecting the moral fabric of our society.

c. Encouraging Family Stability

Although the state has an important interest in maintaining family stability, forbidding same-sex marriages is not substantially related to furthering this goal. As time passes, incidence of divorce increases, youth violence increases, and domestic violence increases. From all indications, family stability is decreasing by leaps and bounds while same-sex couples continue to be precluded from marrying. Additionally, there is every indication that same-sex couples share the same values and concerns as the heterosexual community. Some courts have even al-

257. See, e.g., Estin v. Estin, 334 U.S. 541, 546 (1948) (holding that a New York separation decree granting alimony to one spouse survived a subsequent Nevada divorce decree).
258. See Bozett, supra note 101, at 89-175 (containing numerous articles by various authors discussing gay parents and related issues); Knox, supra note 111, at 78 (discussing the continuum on which homosexuality and heterosexuality exist and that no person is entirely homosexual or heterosexual in attitudes or behavior); Rivera, supra note 110, at 799 (indicating only six percent of the population has a family structure of a husband supporting a wife and a child); Comment, Homosexuals' Right, supra note 47, at 212-13.
259. See Almanac, supra note 243, at 807 (indicating that in 1988 out of over two million marriages over one million ended in divorce); Bryan Strong & Christine De Vault, The Marriage and Family Experience 490 (1986) (“If the current trend continues, 49 percent of all persons between the ages twenty-nine and thirty-five years will divorce by age seventy-five.”); Leo, supra note 243, at 19 (“American children are far more likely to grow up with only one parent than they were just a generation ago.”); Whitehead, supra note 243, at 50 (“In 1974 divorce passed death as the leading cause of family breakup.”).
260. See Whitehead, supra note 243, at 77.
261. See generally Carolyne R. Hathaway, Comment, Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints, 75 Geo. L.J. 667 (1986) (discussing various cases of domestic assault). “It has been estimated that between 30 to 50 percent of all marriages will at some point involve the use of physical violence and that annually as many as two million children may be physically abused by their parents.” Elissa P. Benedek, Baseball, Apple Pie, and Violence: Is It American?, in Family Violence: Emerging Issues of a National Crisis 1, 6 (Leah J. Dickstein & Carol Nadelson eds. 1989). When domestic violence cases are brought to court, the violence continues in the courtroom. “[I]n a survey of 385 women in Colorado who were granted protective orders, 17 percent were either verbally or physically assaulted in the courthouse by their former partners.” Henry J. Reske, Domestic Retaliations: Escalating Violence In The Family Courts, A.B.A. J., July 1993, at 49. Family court proceedings are increasingly becoming places where “assaults, shootings and deaths resulting from the emotionally charged atmosphere of marital breakups and child custody disputes,” occur. Id. at 48.
262. See supra notes 243-61 and accompanying text.
263. Fajer, supra note 68, at 511. Homosexual relationships are filled with love and compassion similar to that of ideal heterosexual relationships. Id.; see also Jerry J. Bigner & R. Brooke Jacobsen, Parenting Behaviors of Homosexual and Heterosexual Fathers, in Homosexuality and the Family 173 (Frederick W. Bozett ed., 1989); Jerry J. Bigner & R. Brooke Jacobsen, The Value of Children to Gay and Heterosexual Fathers, in Homosex-
owed same-sex couples to adopt and raise children.\footnote{264} The continued decrease in family stability despite the prohibition against same-sex marriages,\footnote{265} and indications that numerous gay relationships share values identical to those of ideal heterosexual couples,\footnote{266} suggest that there is no correlation between prohibiting same-sex marriages and family instability.\footnote{267}

d. Supporting Prohibitions on Gay Acts

While numerous states have laws prohibiting homosexual acts,\footnote{268} there is no indication that prohibiting same-sex marriages decreases the occurrence of homosexual acts.\footnote{269} As a matter of fact, the prohibition of same-sex marriages may foster greater promiscuity.\footnote{270} Additionally, some countries that have repealed their laws prohibiting homosexual conduct have not noticed an appreciable increase in homosexual conduct.\footnote{271} There is little connection between a state's policy of prohibiting gay acts and banning gay marriages. Additionally, a prohibition on same-sex marriages to curtail gay acts is overinclusive because it sweeps within its pa-

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\footnote{264}{See supra notes 101-02.}
\footnote{265}{See supra notes 243-61 and accompanying text.}
\footnote{266}{See Knox, supra note 111, at 78 (indicating homosexuals and heterosexuals express and experience love in the same manner); NASS, supra note 194, at 498-99 (indicating homosexuals and heterosexuals share numerous similarities); Fajer, supra note 68, at 512 (same).}
\footnote{267}{See supra notes 253-64 and accompanying text. Several commentators have even argued "that the values which underlie heterosexual relationships are furthered by stable homosexual relationships." Yao Apsu-Gbotsu et al., Survey On The Constitutional Right to Privacy In The Context of Homosexual Activity, 40 U. MIAMI L. REV. 521, 636 (1986).}
\footnote{268}{See Rivera, supra note 110, at 949-51.}
\footnote{269}{See Gay Relationships, supra note 263 (containing numerous articles discussing gay relationships, men who advertise for sex, and the use of personal ads in the gay world); Gilbert M. Cantor, The Need for Homosexual Law Reform, in The Same Sex, supra note 212, at 83, 90 (stating that 95% of homosexuals “have violated, at some time in their lives, one or more statutes relating to sexual behavior.”); Comment, Homosexuals’ Right, supra note 47, at 211 (“There is ... no reason to believe that withholding marital status [to same-sex couples] will lessen the incidence of homosexuality.”).}
\footnote{270}{See generally Carol A.B. Warren, Identity and Community in the Gay World (1974) (discussing sexual practices and behaviors in the gay world). See Knox, supra note 111, at 79 (quoting a survey showing only seven percent of respondents replied “never” to a question asking how often they go home with a person they have just met, while 50% said they did so frequently).}
\footnote{271}{See Baker v. Wade, 553 F. Supp. 1121, 1130 (N.D. Tex. 1982) (stating several european countries that have repealed their laws prohibiting homosexual acts saw little increase in such activity), appeal dismissed, 743 F.2d 236 (5th Cir. 1984), cert. denied, 478 U.S. 1022 (1986).}
rameters same-sex couples who might not wish to have sex or are incapable of doing so.272

Moreover, many scholars argue that the underlying assumptions of laws banning gay acts are out-dated and wrong.273 Ancient Greek society, the foundation of world culture and knowledge, perceived homosexuality as an acceptable practice.274 The Siwans of Africa expect all men to engage in some form of homosexual activity; "those who do not were considered peculiar."275 Additionally, numerous present day European countries either permit consensual private homosexual acts or have liberal laws directed at such acts.276 Denmark has gone so far as to legalize same-sex marriages.277

272. See Ingram, supra note 4, at 49 (indicating some same-sex couples who wish to marry may not want a sexual relationship).

273. See Acanfora v. Board of Educ., 359 F. Supp. 843, 847-48 (D. Md. 1973) (admitting testimony of an expert witness who determined that sexuality is decided by the age of five or six), aff'd, 491 F.2d 498 (4th Cir.), cert. denied, 419 U.S. 836 (1974); CLARK, supra note 8, § 2.8, at 143 ("The population seems to be distributed along a continuum at one end of which is the exclusively heterosexual person and at the other end the exclusively homosexual person, with many falling somewhere in between."); KNOX, supra note 111, at 78 ("Rarely is anyone entirely homosexual or heterosexual in both attitudes and behavior. Rather, our sexual orientation can be placed on a continuum. . . ."); Anne B. Goldstein, History, Homosexuality, and Political Values: Searching for The Hidden Determinants of Bowers v. Hardwick, 97 Yale L.J. 1073, 1086-87 (1988) (stating that the Bowers majority failed to adequately perceive the acceptance of homosexuality throughout history); Comment, Homosexuals' Right, supra note 47, at 211 (discussing homosexuality as a natural means of sexual expression).

274. See, e.g., NASS, supra note 194, at 498 (picturing the Greek female poet Sappho with a female lover and indicating in Greek society homosexuality was regarded as life-enriching); PLATO, THE SYMPOSIUM AND THE PHAEDRUS: PLATO'S EROTIC DIALOGUES (William S. Cobb trans., 1993).

275. NASS, supra note 194, at 497.

276. Countries such as France, Italy, Belgium, and Spain permit private homosexual acts; countries such as Germany, Holland, Denmark, and Scandinavia have extremely liberal laws regarding such acts. MICHAEL RUSE, HOMOSEXUALITY: A PHILOSOPHICAL INQUIRY 237-38 (1988) (stating several European countries have relaxed or eliminated their prohibitions on homosexual activity); see also Baker v. Wade, 553 F. Supp. 1121, 1130 (N.D. Tex. 1982) (indicating countries such as England, France, Holland, and Finland have decriminalized homosexual conduct for years), appeal dismissed, 743 F.2d 236 (5th Cir. 1984), cert. denied, 478 U.S. 1022 (1986); see also John Boswell, Sexual and Ethnic Categories in Premodern Europe, in HOMOSEXUALITY/HETEROSEXUALITY, supra note 212, at 15 (discussing historically the treatment of sexual issues in premodern Europe); Matthew Fawcett, Taking the Middle Path: Recent Swedish Legislation Grants Minimal Property Rights to Unmarried Cohabitants, 24 Fam. L.Q. 179, 185 (1990) (stating that the law granting unmarried cohabitants property rights was extended to include homosexual couples); Laurence R. Helfer, Note, Finding a Consensus on Equality: The Homosexual Age of Consent and The European Convention on Human Rights, 65 N.Y.U. L. Rev. 1044, 1079 (1988) (indicating that in 1969, Germany "legalized homosexual relations between consenting adult males by amending Article 175 of its criminal code").

277. See Friedman, supra note 88, at 220 n.237 (stating that Denmark now permits same-sex marriages); Polikoff, supra note 187, at 555 n.528 (indicating that Denmark per-
2. Four Strikes and You're Out: Lack of an Important State Interest

The above discussion indicates that no important state interest is sufficiently advanced by a prohibition of same-sex marriages. Accordingly, any state regulation denying same-sex couples the right to marry should be held invalid as either infringing on the fundamental right to marry or as being an impermissible classification based on sex. Neither the state’s interest in promoting morality, fostering procreation, stabilizing the family, nor curtailing gay acts is sufficiently important to justify a total ban on same-sex marriages. When balanced against the rights of same-sex couples to enjoy the numerous benefits and privileges of marriage and the myriad counter-arguments, the espoused interests of the state fail to pass muster.

V. Conclusion

Courts traditionally define procreation as a logical predicate of marriage. Through this definition courts have legitimized the denial to same-sex couples of the fundamental right to marriage. However, same-sex couples satisfy both courts’ definition of marriage and alternative definitions of marriage. Moreover, with the continual expansion of the definition of family, a logical predicate of marriage, courts have created an illogical situation where same-sex couples are considered families in certain situations but are never permitted to benefit from the union of marriage.

Marriage is a fundamental right that is denied to same-sex couples on account of their common gender. While other groups within our society are protected from such discrimination, same-sex couples continue to suffer the indignity of such discrimination. Courts must recognize that the Constitution is a mutable document which has and should mature with changing times. Fear of change and progression is unfounded because they are quite similar to continuity. Change and continuity are merely discrete points on the continuum of time; society’s evolution is simply a progression along this continuum. The moment has arrived for courts to recognize homosexual activities); Sheilla Rule, Rights for Gay Couples in Denmark, N.Y. Times, Oct. 2, 1989, at A8.

278. See supra notes 243-77 and accompanying text.
279. See supra notes 35-46.
280. See supra notes 243-77.
281. See supra notes 243-77 and accompanying text.
282. See Butcher v. Superior Ct., 139 Cal. App. 3d 58, 64 (1983) ("When it is determined that the common law or judge-made law is unjust or out of step with the times, we should have no reluctance to change it. The law is not, nor should it be, static. It must keep pace with changes in our society . . . .") (citation omitted).
recognize what the Constitution already knows: "customs change with an evolving social order."\textsuperscript{283}

Kevin Aloysius Zambrowicz

\textsuperscript{283} Baehr v. Lewin, 852 P.2d 44, 63 (Haw. 1993).