"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.4 In addition to emotional and psychological benefits, marriage provides substantial legal and economic advantages.5 Due to these benefits, marriage is seen by the courts and citizens in general as “the most important relation in life.”6 So important is the institution of marriage that it is deemed a fundamental right deserving constitutional protection.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.8 The courts, however, define the right to marry


5. See, e.g., 26 U.S.C. § 2001 (1988) (providing for tax adjustment for gift taxes paid by decedent spouse); id. § 2056 (qualifying spouses for estate tax deductions); id. § 6013 (permitting husband and wife to file joint tax returns); 42 U.S.C. §§ 401-433 (1988) (granting Social Security benefits to married couples); id. § 426 (providing Medicare benefits to spouses of insured individuals); see also HAW. REV. STAT. § 663-3 (1988) (stating that spouses are entitled to wrongful death claims); MASS. GEN. L. CH. 190, § 1 (1990) (permitting intestate succession for a surviving spouse); 23 PA. CONS. STAT. § 3701 (1991) (providing for alimony upon entry of divorce decree); Elden v. Sheldon, 758 P.2d 582, 582-83 (Cal. 1988) (stating that loss of consortium does not extend to cohabitating individuals); Coliseum Motor Co. v. Hestor, 3 P.2d 105, 106 (Cal. 1931) (holding spouse entitled to tort recovery for wrongful death); Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993) (listing various Hawaii statutory provisions granting legal and economic benefits to married individuals). See generally HARRY D. KRAUSE, FAMILY LAW: CASES AND MATERIALS 127-95 (1976) (discussing various legal benefits conferred to married couples); Barbara J. Cox, Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining, 2 Wis. WOMEN'S L.J. 1, 46-50 (1986) (discussing the availability of visitation rights through the marital unit); Ingram, supra note 4, at 35-37 (discussing various state and federal benefits conferred on the basis of marital status).

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.


8. In 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. 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., 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., THE LAW OF DOMESTIC RELATIONS IN THE
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rowly. 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.\(^9\)

Historically, the right to regulate marriage has been exercised by most civilizations.\(^10\) In our nation, regulation of marriage traditionally has been governed by state law.\(^11\) States possess the power to prescribe various formal and substantive requirements for marriage.\(^12\) However, because the United States Supreme Court holds the right to marry as fundamental,\(^13\) such regulations are subject to federal constitutional restraints.\(^15\)

The fundamental right to marry encompasses interracial marriages, as recognized in *Loving v. Virginia*.\(^16\) In *Loving*, the Supreme Court held

\[\text{UNITED STATES § 7.1, at 423-25 (2d ed. 1987) (citing numerous statutes that place support obligations on both spouses); supra note 5 and accompanying text (providing further examples of benefits provided to the marital unit).}\]

\[9. \text{See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942) (indicating a close definitional relationship between marriage and procreation); Scott v. State, 39 Ga. 321 (1869) (holding that interracial marriages do not fall under the traditional definition of marriage); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (holding that same-sex marriages are not permissible forms of marriage), appeal dismissed, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187, 1191 (Wash. Ct. App.) (indicating that same-sex couples do not fall under the definition of marriage), review denied, 84 Wash. 2d 1008 (1974).}\]

\[10. \text{The phrase gay marriage or same-sex marriage, as used in this Comment, refers to both gay and lesbian marriages. See WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 587 (1989) (defining "gay" as a homosexual person, particularly a male) [hereinafter WEBSTER'S]; id. at 822 (defining "lesbian" as a homosexual relationship between women). Strictly speaking, homosexuality is the exhibition of "sexual desire . . . toward a person . . . of one's own sex." Id. at 680; see Ingram, supra note 4, at 34 n.6 (discussing the definition of homosexual).}\]

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

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

\[13. \text{See, e.g., Friedrich v. Katz, 318 N.E.2d 606 (N.Y. 1974); Krause, supra note 5, at 1-80 (discussing various historical and contemporary state regulations of marriage).}\]


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

\[16. \text{388 U.S. 1 (1967). In *Loving*, a white man and a black woman, married in the District of Columbia, returned to the state of Virginia. Id. at 2. Upon returning, the}\]
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.

22. \textit{See Nan D. Hunter, Marriage, Law, and Gender: A Feminist Inquiry}, 1 \textsc{Law \\& Sexuality} 9 (1991) (arguing for an acceptance of same-sex marriages); \textit{James Trosino, American Wedding: Same-Sex Marriage and the Miscegenation Analogy}, 73 \textsc{B.U. L. Rev.} 93 (1993) (stating the thesis that the reasons articulated for the unconstitutionality of antimiscegenation statutes should apply with equal force to same-sex marriages); \textit{see also Thomas Stoddard \\& Bruce Fein, Gay Marriage: Should Homosexual Marriages be Recognized Legally?}, \textsc{A.B.A. J.}, Jan. 1990, at 42-43 (debating whether same-sex marriages should be legalized).

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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-

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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

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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 17, 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.\textsuperscript{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.”\textsuperscript{35} The Supreme Court first characterized the right to marry as fundamental in \textit{Skinner v. Oklahoma}.\textsuperscript{36} In \textit{Skinner}, the right to marry was linked to the right to procreate and rear children.\textsuperscript{37} The right to procreate, and consequently the right to marry, were seen by the Court as fundamental pillars of society.\textsuperscript{38}

The right to marry was first characterized as “the most important relation in life” in \textit{Maynard v. Hill}.\textsuperscript{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.\textsuperscript{40} In \textit{Griswold v. Connecticut},\textsuperscript{41} the Court perceived the marriage relationship as an association

\textsuperscript{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); \textit{Loving}, 388 U.S. at 11 (characterizing marriage as a fundamental right that requires a compelling state interest for any regulation to infringe upon).

\textsuperscript{35} Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639-40 (1974); \textit{see also} U.S. CONST. amend. XIV, § 2.

\textsuperscript{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. \textit{Id.} The petitioner was convicted for crimes ranging from chicken stealing to armed robbery between 1926 and 1936. \textit{Id.} at 537. Consequently, the state Attorney General brought proceedings against the petitioner under the sterilization statute. \textit{Id.} Holding the statute unconstitutional, the Court determined that “[m]arriage and procreation are fundamental to the very existence and survival of the race.” \textit{Id.} at 541. The Court found that to deprive the petitioner of either of these rights would have “far reaching and devastating effects.” \textit{Id.}

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} 125 U.S. 190, 205 (1888). The \textit{Maynard} Court viewed marriage as “the foundation of the family and of society, without which there would be neither civilization nor progress.” \textit{Id.} at 211.


\textsuperscript{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. JOHN E. 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. amend. 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).
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The right to privacy was first recognized in Griswold, 381 U.S. at 479. See NOWAK & ROTUNDA, supra, § 14.27, at 760. Griswold involved a Connecticut statute prohibiting the use of contraceptives by married couples. Griswold, 381 U.S. at 480. In finding the statute unconstitutional, the Court laid the parameters for determining what constitutes a fundamental right—those rights that implicate the fundamental principles of ordered liberty and the collective traditions and conscience of our people. Id. at 493 (Goldberg, J., concurring). The majority, not utilizing these two elements, held that several of the Bill of Rights guarantees protect privacy interests and create a penumbra of privacy. Id. at 484 (majority opinion). Accordingly, the Court determined the very idea of police searching the “sacred precincts of marital bedrooms” for signs of contraceptive use are “repulsive to the notions of privacy surrounding the marriage relationship.” Id. at 485-86; see NOWAK & ROTUNDA, supra, § 14.26, at 757-816 (providing a general discussion of the right to privacy).


47. See Zablocki, 434 U.S. at 386; Baehr, 852 P.2d at 56 (indicating that the Zablocki holding was limited to heterosexual marriages because of the Supreme Court’s linking of marriage and procreation and child rearing); Denise Bricker, Note, Fatal Defense: An Analysis of Battered Woman’s Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners, 58 BROOK. L. REV. 1379, 1414 (1993) (stating that the Supreme Court continually links procreation and marriage); Mary N. Cameli, Note, Extending Family Benefits to Gay Men and Lesbian Women, 68 CHI.-KENT L. REV. 447, 448 (1992) (indicating that the Supreme Court continually views marriage through the procreation spectrum); Comment, Homosexuals’ Right To Marry: A Constitutional Test and a Legislative Solution, 128 U. PA. L. REV. 193, 200-02 (1979) [hereinafter Comment, Homosexuals’ Right].

Procreation and child-rearing are not the only reasons espoused by courts in recognizing the right to marry as fundamental. See infra notes 107-34 and accompanying text. However, procreation and child-rearing have been used by courts to regulate which associations the fundamental right to marry encompasses. See infra notes 48-53 and accompanying text. Procreation and child-rearing are therefore the linch-pin issue in same-sex marriage cases.


49. Id. at 541. In another case, the Court indicated a similar connection between marriage and procreation, stating that the liberty guaranteed by the Fourteenth Amendment denotes the freedom to marry, establish a home, and bring up children. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
not by itself create the fundamental right to marry. If the coupling of
marriage and procreation alone creates the fundamental right to marry,\textsuperscript{50} then marriage without child-rearing and procreation does not merit con-
stitutional protection as a fundamental right.\textsuperscript{51}

\textit{Zablocki, Skinner,} and their predecessors and progeny are the constitution
al lexicon through which all same-sex marriage cases are decided.\textsuperscript{52} State courts unequivocally follow the Supreme Court’s coupling of mar-
riage and procreation first articulated in \textit{Maynard} and later solidified in \textit{Zablocki}.\textsuperscript{53}

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

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

\begin{itemize}
\item \textsuperscript{50} 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. . . . [I]f 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.
\end{quote}

\textit{Id.} at 386.

\item \textsuperscript{51} See \textit{Baehr}, 852 P.2d at 55-56; see also Craig A. Bowman & Blake M. Cornish,
Note, \textit{A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordi-
nances}, 92 \textit{COLUM. L. REV.} 1164, 1181 (1992) (indicating that the Supreme Court continu-
inously 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 \textit{YALE L.J.} 573, 578-79 (1973)
(indicating that the Supreme Court continually connects marriage and procreation) \[here-
inafter Note, \textit{Legality}].

\item \textsuperscript{52} This Comment coins and uses the phrase “\textit{Zablocki lexicon}” to refer to the United
States Supreme Court’s persistent joining of marriage and procreation or child-rearing into
a single definition. See \textit{Zablocki}, 434 U.S. at 383-87 (discussing procreation or child-rear-
ing as an important element of marriage); \textit{Baehr}, 852 P.2d at 55-57 (discussing the propen-
sity of the Supreme Court to define marriage in conjunction with procreation). In
analyzing the fundamental right to marry this fact is essential. See Trosino, \textit{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 \textsuperscript{53} See, e.g., Maynard v. Hill, 125 U.S. 190, 211 (1888) (indicating the close relation-
ship between marriage and child rearing); \textit{Baehr}, 852 P.2d at 55-56; Jones v. Hallahan, 501
S.W.2d 588 (Ky. 1973).

\item \textsuperscript{54} See, e.g., Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980), \textit{aff’d}, 673 F.2d
1036 (9th Cir.), \textit{cert. denied}, 458 U.S. 1111 (1982); Dean v. District of Columbia, 18 Fam. L.
N.W.2d 185 (Minn. 1971), \textit{appeal dismissed}, 409 U.S. 810 (1972); \textit{In re Estate of Cooper},
149 Misc. 2d 282 (N.Y. Surrogate’s Ct. 1990), \textit{aff’d}, 592 N.Y.S.2d 797 (1993); De Santo v.
1008 (1974).
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.\textsuperscript{55} 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.\textsuperscript{56}

One of the initial cases contesting the ban on gay marriages was \textit{Baker v. Nelson}.\textsuperscript{57} In that case, Richard Baker and James McConnell applied for a marriage license from the clerk at their local Minnesota courthouse.\textsuperscript{58} They were denied the license because they were of the same sex; subsequently they filed suit, contesting this denial.\textsuperscript{59} In rejecting their argument, the court relied on the traditional definition of marriage as the union between persons of the opposite sex.\textsuperscript{60} The court invoked traditional principles reminiscent of \textit{Zablocki} by stating that the union of a man and a woman for procreation and child rearing are indispensable elements of the marriage institution.\textsuperscript{61}

The next case challenging the legality of the ban on same-sex marriages was \textit{Singer v. Hara}.\textsuperscript{62} The plaintiffs, two males, challenged Washington State’s refusal to issue them a marriage license.\textsuperscript{63} The court upheld the refusal to issue the marriage license by relying upon the \textquotedblleft \textit{Zablocki lexicon} \textquotedblright to define marriage: the intimate relationship between the marriage and procreation or child rearing.\textsuperscript{64}

\textsuperscript{55} \textit{See supra} note 51; \textit{see also} \textit{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. \textit{Id.}

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

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

\textsuperscript{58} \textit{Id.} at 185.

\textsuperscript{59} \textit{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. \textit{See id.} at 185-88 (discussing \textit{Minn. Stat. Ann.} §§ 517.01-.08 (West 1971)).

\textsuperscript{60} \textit{Id.} at 186. The court added that \textquoteleft the present statute is replete with words of heterosexual import such as 'husband and wife' and 'bride and groom.' \textquoteright \textit{Id.} (quoting \textit{Minn. Stat. Ann.} § 517).

\textsuperscript{61} \textit{Id.}; \textit{see Zablocki v. Redhail}, 434 U.S. 374 (1978).


\textsuperscript{63} \textit{Id.} at 1188.

\textsuperscript{64} \textit{Id.} at 1192. The court stated:

\textquoteleft\textquoteleft Appellants 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.\textquoteright\textquoteright
In both *Baker* and *Singer* the respective state statutes neither limited marriage to heterosexual couples nor prohibited gay marriages. In both cases however, the courts interpreted the applicable statute as implicitly limiting the right to marry to heterosexual couples. Both courts determined that the use of words such as husband and wife or person or individual, limited state sanctioned marriage to heterosexual couples. In *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.

65. *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, 485 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

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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. \textit{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, Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 \textit{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. \textit{See Constitution and the Family}, supra note 45, at 1156; Gardner, supra note 25, at 371-81.
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One commentator has indicated that “[t]he problems judges encounter in dealing with a theory of homosexual marriage are related to language.” \textit{Weyrauch & Katz}, supra note 23, at 430 (emphasis added). Prior case law has focused on a common-usage definition of marriage, relying on sources such as \textit{Webster's}. \textit{Id.} However, “\textit{Webster's} . . . is not necessarily concerned with the question whether a particular usage [of a term] is constitutionally objectionable, or even discriminatory.” \textit{Id.} For courts, viewing terms such as marriage, homosexuality, husband, or wife in a nontraditional setting is a conundrum of immense proportions.

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69. \textit{De Santo}, 476 A.2d at 953-54.
70. \textit{Id.}
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. \textit{See, e.g., 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).
72. \textit{De Santo}, 476 A.2d at 952.
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traditional definitions of marriage found in dictionaries and case law.\textsuperscript{73}
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.\textsuperscript{74}

Most recently, in \textit{Baehr v. Lewin},\textsuperscript{75} several same-sex couples were denied marriage licenses because the couples were of the same sex.\textsuperscript{76} The Hawaii Supreme Court, relying on the \textit{Zablocki} lexicon,\textsuperscript{77} held that petitioners had no fundamental right to a gay marriage.\textsuperscript{78} The court relied on this traditional definition of marriage to construe the state marriage statute narrowly as implicitly prohibiting same-sex marriages.\textsuperscript{79} Similarly, other courts insist on assuming that marriage is the logical predicate of procreation, thereby limiting marriage to heterosexual couples.\textsuperscript{80}

Although a majority of state marital statutes fail to prohibit gay marriages explicitly or limit marriage to heterosexual couples,\textsuperscript{81} courts continue to recognize such a limitation implicitly.\textsuperscript{82} 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.\textsuperscript{83}

While courts are willing to construe the meaning of numerous statutory

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

\textsuperscript{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.” \textit{Id.} at 955.

\textsuperscript{75} 852 P.2d 44 (Haw. 1993). In \textit{Baehr}, several homosexual and lesbian couples were denied marriage licenses from the state. \textit{Id.} at 48-49. \textit{The Baehr} court held that under Article I, section 5 of the Hawaii Constitution, the petitioners might have a claim for sex discrimination (citing \textit{HAW. CONST.} art. I, § 5). \textit{Id.} at 59. Nonetheless, the court held that same-sex couples do not have a fundamental right to marry. \textit{Id.} at 57. The court determined, however, that gender is a suspect category under the Hawaii Constitution, thereby, invoking strict scrutiny analysis. \textit{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.” \textit{Id.} at 59. The Hawaii Constitution specifically prohibits state-sanctioned discrimination against a person based on that person’s gender. \textit{Id.} at 59-60. The court remanded the case for further determinations consistent with its holding. \textit{Id.} at 68.

\textsuperscript{76} Id. at 44-52.

\textsuperscript{77} Id. at 55-57; see supra note 52 and accompanying text.

\textsuperscript{78} \textit{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. \textit{Id.} However, the court challenged the state ban on gay marriage under an equal protection analysis. \textit{Id.} at 57-68.

\textsuperscript{79} Id. at 48 nn.1-2, 55-57.

\textsuperscript{80} Id. at 56; supra note 54.

\textsuperscript{81} See supra note 65; see also \textit{Ingram}, supra note 4, at 44-45.

\textsuperscript{82} See supra notes 56-80 and accompanying text.

\textsuperscript{83} \textit{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. State and federal
courts persist in defining marriage as an outgrowth of procreation and
child rearing, thereby limiting marriage to heterosexual couples. The
spirit of the Loving decision has battled judicial intransigence head on
and lost in the arena of same-sex marriage.

III. THE DEFINITION OF MARRIAGE: PROCREATION AND CHILD
REARING AS A "TWO WAY STREET"

A. 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, such a definition does not
necessarily preclude gay marriages. Procreation or child rearing are not
necessarily the defining characteristics of a traditional marriage; rather,
such a limiting characteristic is grossly underinclusive.

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 Zablocki v. Redhail. Most other courts have followed a

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 Nowak & Rotunda, supra note 45, §§ 14.26-.30, at 757-816.

85. While courts continue to premise the constitutional right to marry on an insepara-
ble 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 pro-
tection. See Ingram, supra note 4, at 35; see also infra notes 99-104, 108-20, 134-36.

86. See supra notes 17-23 and accompanying text; infra notes 162-87 and accompany-
ing text.

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 mar-
riage cases to follow the same line of reasoning).

88. See generally Andrew H. Friedman, Same-Sex Marriage and the Right to Privacy:
Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage, 35
How. L.J. 173 (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, Legal
Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of
"Family", 29 J. Fam. L. 497 (1990-91) (discussing the need to recognize the large number
of same-sex couples).

89. See, e.g., Ingram, supra note 4, at 46-47.

90. 434 U.S. 374, 386 (1978) (indicating that marriage has been placed on the same
level as "procreation, childbirth, and child-rearing"); Baehr v. Lewin, 852 P.2d 44, 56
(Haw. 1993) (same); see supra notes 39-53 and accompanying text. See generally Nowak &
Rotunda, supra note 45, § 14.28, at 763-70 (discussing the holding in several right to
marry cases).
similar line of reasoning. If 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 in-
seminated lesbian couple experienced when attempting to have one of the partners adopt
their child).

101. See, e.g., Surrogate Parent Agreements Held Valid Under California Law, 61
U.S.L.W. 1177, — (U.S. June 1, 1993) (discussing California's acceptance of surrogate-
1993); Ingram, supra note 4, at 47; George Keider, Lesbian Wins Approval to Adopt Part-
(Va. 1981) (holding that a gay parent may have visitation rights with his child); FREDERICK
W. BOZETT, GAY AND LESBIAN PARENTS (1987) (discussing adoptive and foster gay par-
tents, gay fathers, and gay stepparent families); William A. Henry III, Gay Parents: Under
Fire and On the Rise, Time, Sept. 20, 1993, at 66 (discussing the perils of a lesbian couple in
attempting to see one partner's son and similar obstacles encountered by other same-sex
couples).

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, "w[ould] 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 eco-

demic 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 orienta-
tion." Id. at 553. These identical arguments have been asserted in favor of same-sex mar-
riages; 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 peti-
tioners 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 part-
er to adopt the couple's daughter); Shaista-Parveen Ali, Comment, Homosexual Parent-
ing: Child Custody and Adoption, 22 U.C. Davis L. Rev. 1009 (1989) (discussing barriers
to homosexual adoption).

103. See BOZETT, supra note 101, at 168-71 (discussing lesbian couples' use of artificial
insemination); HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES 329
(William Paul et al., eds., 1982) (discussing various conception methods open to same-sex
couples); WILLIAM H. MASTERS, ET AL., HUMAN SEXUALITY 146-53 (3d ed. 1988) (listing
and discussing various options for conception); DEBORAH G. WOLF, THE LESBIAN COM-
MUNITY 136-66 (1979) (discussing issues affecting lesbian mothers, including methods of
conception); Stuart A. Sutton, Comment, The Lesbian Family: Rights in Conflict Under
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 underinclusive. 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

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108. Griswold, 381 U.S. at 486. In Griswold, the Court defined marriage as:

>a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes;

>a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. (emphasis added).

One scholar has indicated a change in the role of marriage:

>"[T]here is the change in the functions of marriage itself which has been going on for a long time, from the days when it was an economic producing unit... with responsibilities for child rearing... to the present, when its chief functions seem to be furnishing opportunities for affection, companionship and sexual satisfaction.... [T]he fact is that the most significant function of marriage today seems to be that it furnishes emotional satisfactions to be found in no other relationships."

Clark, supra note 8, § 2.1, at 74 (footnote omitted).

109. See supra note 5 (listing several legal benefits granted married couples).

110. See Griswold, 381 U.S. at 479-86 (providing an historical overview of the Supreme Court's treatment of marriage and concluding with a definition of marriage that includes elements beyond mere procreation and child-rearing); Robert J. Drinan, The Loving Decision and the Freedom to Marry, 29 Ohio St. L.J. 358 (1968) (discussing the Loving decision and marriage as encompassing more than just procreation); Rhonda R. Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 Hastings L.J. 799 (1979) (discussing several characteristics of homosexual persons and legal treatment of homosexuals in the United States).


112. Griswold, 381 U.S. at 486.

113. See Lesbian and Gay Marriage: Private Commitments, Public Ceremonies (Suzanne Sherman ed., 1992) (containing articles by various authors discussing the early relationship and later marriage of several same-sex couples); John Money & Anke A. Ehrhardt, Man & Woman, Boy & Girl 163-64, 234-35 (1972) (stating that homosexual relationships have a tendency to reproduce the patterns of heterosexual relationships); Fajer, supra note 68, at 544, 546, 550; Trosino, supra note 22, at 109 (discussing similar attributes of heterosexual and homosexual relationships); Comment, Homosexuals' Right, supra note 47, at 197-99 (explicating numerous similarities between heterosexual and same-sex couples); The Supreme Court, 1985 Term: Leading Cases: I. Constitutional Law, 100 Harv. L. Rev. 100, 218 n.51 (1986) ("Intimate homosexual relationships share the essential characteristics of an intimate heterosexual relationship . . . .") [hereinafter Supreme Court, 1985 Term].
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
Like the *Griswold* definition, this definition contemplates the numerous elements found in any marital unit and allows same-sex couples to profit from the myriad benefits provided to married couples.

Attempts to define marriage as the logical predicate of procreation are underinclusive, given other commonly accepted definitions. Moreover, through the use of such vehicles as surrogate motherhood, adoption, or invitro-fertilization, same-sex couples may experience procreation and child rearing. Marriage need not be defined merely as a logical predicate of procreation. Instead, marriage encompasses numerous other characteristics. Even the dictionary defines marriage as not necessarily containing a procreative element. 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.

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.


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

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

127. See 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.

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.\textsuperscript{134} Courts, state legislatures, and city councils have extended the traditional definition of family to include same-sex couples.\textsuperscript{135} 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.\textsuperscript{136}

In Braschi v. Stahl Associates,\textsuperscript{137} two gay men lived together for ten years in the same apartment.\textsuperscript{138} After one of the men died, the other was

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{137} 543 N.E.2d 49 (N.Y. 1989).

\textsuperscript{138} Id. at 49-50.
to be evicted from their apartment.\textsuperscript{139} The court held that the survivor was protected from eviction under New York's rent-control laws\textsuperscript{140} because the attributes of the couple's relationship qualified them as a family.\textsuperscript{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.\textsuperscript{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.\textsuperscript{143} The court in \textit{Braschi} argued that the definition of family should be based on emotional and financial interdependence and commitment.\textsuperscript{144} The intransigence of courts in the area of marriage is incongruous with the expanding definition of family, as illustrated by the \textit{Braschi} opinion.\textsuperscript{145} If a family is characterized by such considerations...

\textsuperscript{139} Id.

\textsuperscript{140} Id.

\textsuperscript{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).

\textsuperscript{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. \textit{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. \textit{Contra} Comment, \textit{Homosexuals' Right}, supra note 47, at 213-16 (discussing the benefits of "quasi-marital" status for same-sex couples).

\textsuperscript{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, \textit{supra} note 25, at 361-86 (same); Metz, \textit{supra} note 100, at 23-29 (same); Bowman & Cornish, \textit{supra} note 51, at 1164 (discussing state case law and city ordinances dealing with same-sex couples); Melton, \textit{supra} note 88, at 500-508 (same).

\textsuperscript{144} The \textit{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, \textit{supra} note 100, at 25 (discussing the Braschi holding and its implications for same-sex couples).

\textsuperscript{145} See Melton, \textit{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. \textit{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.\footnote{146}

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

\footnote{146. Some courts have granted same-sex couples the right to adopt. See supra notes 101-02 and accompanying text. It is paradoxical that same-sex couples may be considered families in certain situations and allowed to adopt children in others while still remaining unable to marry. See Kimberly P. Carr, Comment, Allison D. v. Virginia M.: Neglecting the Best Interests of the Child in a Nontraditional Family, 58 BROOK. L. REV. 1021 (1992).}

\footnote{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.}

\footnote{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.”149 This executive order granted bereavement leave to both heterosexual and homosexual couples when one of the partners dies.150 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.151 As more and more cities recognize the changing face of the American family,152 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 process153 and equal protection analysis, a heightened level of judicial scrutiny is employed when a suspect classification154

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.155 When either of these categories is present the court utilizes a “strict scrutiny” standard of review.156 Strict scrutiny requires the state to choose means that are narrowly tailored to achieve a compelling state interest.157 Because marriage is a fundamental right,158 any regulation substantially interfering with the right to marry invokes strict scrutiny.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.160

A. That “Loving Spirit:” “Marriage” as a Fundamental Right

Traditional equal protection analysis requires “that all persons similarly situated should be treated alike.”161 In Loving v. Virginia,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.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.164

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

155. See Nowak & Rotunda, supra note 45, § 11.4, at 371 (indicating strict scrutiny is implicated when a fundamental right is impinged); Comment, Homosexuals’ Right, supra note 47, at 199-201 (discussing the various levels of judicial scrutiny).


158. See supra notes 35-46.


160. See, e.g., Hafen, supra note 24, at 463 (discussing the constitutional right to marry); Gardner, supra note 25, at 363 n.12 (indicating that the Supreme Court holds heterosexual marriage as a fundamental right); supra notes 54-86 (discussing the judicial reluctance to use strict scrutiny when dealing with same-sex marriages).


162. 388 U.S. 1 (1967).

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

164. See supra notes 54-86.
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.

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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. Kopytoff, *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. Unfortunately, courts fail to so extend the Loving doctrine. Courts must recognize that the “constitution[ ] ... may mandate, like it or not, that customs change with an evolving social order.” 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.

In Perez v. Lippold, 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. 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. 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. The true question is not whether there is a fundamental right to gay marriage or interracial marriage.
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}

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 hist-

\textsuperscript{182} See Trosino, supra note 22, at 116; Walter Wadlington, The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective, 52 VA. L. REV. 1189 (1966) (discussing the general historical setting of the Loving case and the implications of the Supreme Court's decision).


\textsuperscript{185} See supra notes 54-86.

\textsuperscript{186} See Loving v. Virginia, 388 U.S. 1, 9-12 (1967); Mark J. Kappelhoff, Bowers v. Hardwick: Is There a Right to Privacy?, 37 AM. U. L. REV. 487, 505 n.143 (1988) (stating that the Loving Court dismissed the traditional definition of marriage as not including mixed marriages); Trosino, supra note 22, at 102-08; Edward G. Spitko, Note, A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication, 1990 DUKE L.J. 1337, 1357-59 (indicating that pre-Loving courts relied on the traditional definition of marriage as a union precluding mixed marriages, and Loving's disagreement with that traditional definition).

\textsuperscript{187} See Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459, 556-57 (1990) (favoring the Loving Court's shedding of traditional stereotypes about mixed marriages); Trosino, supra note 22, at 112-13; supra notes 54-86 and accompanying text.


\textsuperscript{190} Korematsu v. United States, 323 U.S. 214, 216 (1944).

\textsuperscript{191} See infra notes 194-220 and accompanying text. In 1986 the Supreme Court held that there is no fundamental right of homosexuals to engage in sodomy. Bowers v. Hardwick, 478 U.S. 186, 194 (1986). The Court did not address whether homosexuals are entitled to protection as a suspect class. The Court's reluctance to extend constitutional protection to homosexual sodomy does not preclude the recognition of same-sex marriages. Such relationships are not necessarily intertwined with the act of sodomy, but are based on legal rights, love, sharing, companionship, and numerous other emotive qualities.
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
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, Nexus 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

\begin{itemize}
\item \textsuperscript{198} Loving v. Virginia, 388 U.S. 1, 8 (1967).
\item \textsuperscript{199} Oyama v. California, 332 U.S. 633, 640 (1948).
\item \textsuperscript{200} Korematsu v. United States, 323 U.S. 214, 216 (1944).
\item \textsuperscript{201} See Comment, Homosexuals' Right, supra note 47, at 204.
\item \textsuperscript{202} See Fajer, supra note 68, at 511 (discussing the numerous similarities between heterosexual and homosexual couples and their lifestyles).
\item \textsuperscript{203} See Knox, supra note 111, at 78.
\item \textsuperscript{204} Mathews v. Lucas, 427 U.S. 495, 523 (1976) (Stevens, J., dissenting).
\item \textsuperscript{205} See Craig v. Boren, 429 U.S. 190 (1976) (using middle scrutiny for gender discrimination cases); supra note 192.
\item \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].
\item \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).
\item \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.' ").
\end{itemize}
sexual preference out of fear.\textsuperscript{209} This fear may diminish their numbers, but this does not affect their political power base.\textsuperscript{210} As gays become more politically powerful, already reluctant courts will have further reasons to deny suspect classification to gays.\textsuperscript{211}

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.\textsuperscript{212} Due to the muddled nature of this area of science and politics, it is unlikely that courts will venture into this political hot bed.\textsuperscript{213} 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.\textsuperscript{214}

\begin{footnotesize}
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\item 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 lifestyle); David H. Pollack, Comment, \textit{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, \textit{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 “[w]ith 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, \textit{Gays Under Fire}, \textit{Newsweek}, Sept. 14, 1992, at 35, 37 (indicating that a poll found 58\% of those surveyed disagreed with same-sex marriages).
\item 210. See supra notes 206-08.
\item 211. See \textit{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).
\item 213. See supra notes 35-133 and accompanying text.
\item 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\(^{215}\) and have the abilities to contribute to society,\(^{216}\) courts are reluctant to characterize gays as politically impotent\(^{217}\) or as possessing an immutable characteristic.\(^{218}\) 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.\(^{219}\) Homosexuality is not poised on the brink of acceptance as a suspect classification.\(^{220}\)

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.\(^{221}\) This middle level of scrutiny requires

\(^{215}\) See supra note 194 (citing several sources discussing discriminatory treatment of homosexuals in numerous countries around the world). See generally DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY (1988) (discussing the historical evolution of homosexuality in society and tracing its development).

\(^{216}\) See supra notes 195-96.

\(^{217}\) See supra notes 206-11 and accompanying text. See generally D’SOUZA, supra note 194, at 3 (“The coveted perks of . . . affirmative action policies have sometimes been extended to other groups claiming deprivation and discrimination, such as . . . homosexuals[,] and lesbians.”).

\(^{218}\) See supra notes 212-14.

\(^{219}\) See supra notes 54-86 and accompanying text; see also Melton, supra note 88, at 497 (discussing the changing nature of the American family and the need for the courts to deal with this reality).

\(^{220}\) See Comment, Homosexuals’ Right, supra note 47, at 200-06 (arguing that homosexuality is not a suspect classification).

\(^{221}\) Frontiero v. Richardson, 411 U.S. 677 (1973) (applying an intermediate level of review to gender discrimination cases); Comment, Homosexuals’ Right, supra note 47, at 207 (discussing the Supreme Court’s use of an intermediate level of review in gender discrimination cases).
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

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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. Marcossen, 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. Marcossen, 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

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).

235. Singer, 522 P.2d at 1191.
Constitutional Right To Same-Sex Marriage?

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. 236
The analysis used in Singer was rebuffed explicitly in Loving. 237 In the
case of same-sex marriages, the words male and female merely need to be
substituted for white and black, 238 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. 239
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. 240

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. 241 None of these
reasons are sufficient to meet the middle-level of scrutiny applied to sex
discrimination cases. 242

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.

240. See, e.g., Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S.
677 (1973); NOWAK & ROTUNDA, supra note 45, §§ 14.20-.24, at 733-51 (discussing
Supreme Court treatment of gender classifications).

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 mid-
tle-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.\textsuperscript{243} Under the umbrella of the right of privacy, individuals have the fundamental right to procreate,\textsuperscript{244} to use contraceptives (or not to procreate),\textsuperscript{245} to raise one's children,\textsuperscript{246} and to have an abortion.\textsuperscript{247} 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.\textsuperscript{248} 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,\textsuperscript{249} then heterosexual couples who are sterile, infertile, or impotent should not be permitted to marry.\textsuperscript{250} Prohibiting same-sex marriages

\textsuperscript{243} See, e.g., \textit{Information Please Almanac} 812 (43d ed. 1990) (indicating that births to unmarried women have increased more than six-fold between 1950 and 1986) [hereinafter \textit{Almanac}]; \textsc{Albert D. Klassen et al.}, \textit{Sex and Morality in the U.S.} 113-14 (1989) (discussing an increased acceptance of premarital sex among the general public); \textit{The Bargain Breaks}, \textit{The Economist}, Dec. 26, 1992, at 37 (indicating that one in four births is to a single mother) [hereinafter \textit{Bargain Breaks}]; \textsc{John Leo, A Pox on Dan and Murphy}, \textit{U.S. News \& World Rep.}, June 1, 1992, at 19 (quoting a recent report indicating an increasing rate of out-of-wedlock childbearing); \textsc{Barbara D. Whitehead, Dan Quayle Was Right}, \textit{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").

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

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

\textsuperscript{246} \textsc{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).

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

\textsuperscript{248} See \textit{supra} notes 243-47 and accompanying text.

\textsuperscript{249} See \textit{supra} notes 56-80 and accompanying text.

\textsuperscript{250} However, this has not been the view of the courts that have examined the issue. See \textsc{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); \textsc{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 \textsc{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); \textsc{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-

\[251. \text{See supra notes 243-48 and accompanying text.}\]
\[252. \text{See supra note 243.}\]
\[253. \text{See Ingram, supra note 4, at 47-48 (discussing the state's interest in fostering morality by prohibiting same-sex marriages).}\]
\[254. \text{See, e.g., ALA. CODE} \S 13A-13-2 (1982) (addressing the act of fornication and making the act of adultery a misdemeanor); ALASKA STAT. \S 25.24.050 (1991) (indicating that adultery is grounds for a divorce); CAL. PENAL CODE \S 285 (West 1988) (making the act of incest a crime); COLO. REV. STAT. \S 18-6-501 (1986) (making the act of adultery a crime); CONN. GEN. STAT. \S 53a-190 (Supp. 1993) (making the act of bigamy a crime); D.C. CODE ANN. \S 22-1002 (1989) (defining the act of fornication and making it a crime); GA. CODE ANN. \S 16-6-18 (Michie 1992) (indicating that the act of fornication is a misdemeanor); IDAHO CODE \S 18-1103 (1987) (indicating that bigamy is a crime in the state of Idaho); MASS. GEN. L. ch. 272, \S 18 (1990) ("Whoever commits fornication shall be punished by imprisonment for not more than three months or by a fine of not more than thirty dollars."); VA. CODE ANN. \S 18.2-344 (Michie 1988) ("Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4 misdemeanor."); Beasley v. State, 96 So. 2d 693 (Ala. Ct. App. 1957) (indicating conviction for the crime of adultery is grounds for disqualification as a juror); Jackson v. Williams, 123 S.W. 751 (Ark. 1909) (holding the act of fornication as criminal behavior).}\]
\[255. \text{See supra note 243.}\]
\[256. \text{See, e.g., KNISSEL, supra note 243, at 113-14 (indicating an increase in the acceptance of premarital sex); Bargain Breaks, supra note 243, at 37 (stating that the United States has one of the highest incidence of out-of-wedlock births in the industrial world).} \]
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. “In 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. The continued decrease in family stability despite the prohibition against same-sex marriages, and indications that numerous gay relationships share values identical to those of ideal heterosexual couples, suggest that there is no correlation between prohibiting same-sex marriages and family instability.

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

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

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

\footnote{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).}

\footnote{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).}

\footnote{275. Nass, supra note 194, at 497.}

\footnote{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, 535 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”).}

\footnote{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


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.”

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