The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family

Alissa Friedman
The Necessity for State Recognition of Same-Sex Marriage:
Constitutional Requirements and Evolving Notions of Family

Alissa Friedman

INTRODUCTION

Many Americans consider the traditional family—the nuclear family—to be the indivisible, elemental unit of social organization. The nuclear family, they believe, is uniquely situated to transmit society’s most important values. One group of Americans writes:

It is time to reaffirm some “home truths” and to restate the obvious. Intact families are good. Families who choose to have children are making a desirable decision. Mothers and fathers who then decide to spend a good deal of time raising those children themselves rather than leaving it to others are demonstrably doing a good thing for those children. . . . Public policy and the culture in general must support and reaffirm these decisions—not undermine and be hostile to them. . . .

† Associate, Morrison & Foerster; J.D. 1987, University of California, Berkeley; A.B. 1982, Harvard and Radcliffe Colleges.

I wish to extend heartfelt thanks to Barbara Flagg for suggesting the topic; to Professor Herma Hill Kay of the University of California, Berkeley for her comments on the first version of this paper; to Sally Elkins of the Lesbian Rights Project for giving me a copy of her research materials; to my editor Lily Hamrick and her article team for their enthusiastic encouragement and valuable editorial and research assistance; and to Sharon Ellen Haug, of course.


“Strong families are the foundation of society. Through them we pass on our traditions, rituals, and values. From them we receive the love, encouragement, and education needed to meet human challenges. Family life provides opportunities and time for the spiritual growth that fosters generosity of spirit and responsible citizenship.”

See also R. RICHTER, ANTI-GAY LEGISLATION: AN ATTEMPT TO SANCTION INEQUALITY 1-4 (1982).

2 WORKING GROUP, supra note 1, at 3.
These same commentators, the Attorney General Meese-appointed Working Group on the Family, decry legal changes that legitimize alternative family arrangements and eliminate incentives to conform to the nuclear paradigm:

*The family has paid too much. It has lost too much of its authority to courts and rule writers. . . . Now we face the unfinished agenda: turning back to the households of this land the autonomy that was once theirs . . . where the family can generate and nurture what no government can ever produce—Americans who will responsibly exercise their freedom and, if necessary, defend it.*

Whatever the content of American fantasies surrounding the nuclear family, decreasing numbers of Americans actually live in them. Many married couples divorce, and an increasing number of people never marry in the first place. American family relationships now subsume a whole range of alternatives: group living, unmarried cohabitation, single parent families. Although these arrangements appear to be distinct from the traditional family, they do preserve and reproduce some of its most valuable qualities: commitment, shared values, and affection, to name a few.

Same-sex partners, upon whom this Article focuses, remain together in committed relationships, often till death do them part. They share their income, friends, a set of values, the holidays, a home. Many committed same-sex couples have and raise children. Furthermore, the growing accessibility of new reproductive technologies—donor insemination for women, surrogate mothers for men—allows a same-sex couple

---

3 *Working Group, supra* note 1, at 3 (emphasis in the original).
5 Id. at 881.
7 See infra notes 160-67 and accompanying text.
8 Donor insemination is the process whereby a woman is impregnated by mechanically injecting a donor's sperm into her vagina or uterus. A woman can choose to take advantage of insemination services available at a local sperm bank, or she can perform the insemination on her own using sperm from a known donor. For capsule discussions of the legal status of donor insemination, see O'Rourke, *Family Law in a Brave New World: Private Ordering of Parental Rights and Responsibilities for Donor Insemination*, 1 Berk. Women's L.J. 140, 144-47 (1985) and *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 Harv. L. Rev. 669, 670-71 (1985) (Note).
9 Surrogate mothers contract to become pregnant, usually by donor insemination, and to give up all rights to the child upon birth. The surrogate mother is paid for these services. Under the most "traditional" of circumstances—the use of surrogates by heterosexual married couples who cannot have children because of the wife's inability to carry a fetus—the contracts are usually held void or voidable. *In re Baby M, No. A-39*, slip op. at 59 (N.J. Sup. Ct. Feb. 3, 1988); Surrogate Parenting Assocs. v. Commonwealth ex. rel. Armstrong, 704 S.W.2d 209, 212-13 (Ky. 1986); *In re Adoption of Baby Girl L.J.*, 132 Misc. 2d 972, 505 N.Y.S.2d 813, 817 (Sup. Ct. 1986). Although it would be possible for two gay men to make surrogacy
to choose to procreate within the context of the relationship. Like traditional parents who are the pride of the New Right, same-sex parents "do these things naturally out of love, loyalty and a commitment to the future."\(^{10}\)

As these family relationships develop in complexity and stability, the legal system will be forced to acknowledge their existence, although such changes appear to be taking place very slowly.\(^{11}\) Nevertheless, as the Working Group on the Family itself emphasizes, "[p]ublic policy and the culture in general must support and reaffirm [decisions to have and raise children]—not undermine and be hostile to them."\(^{12}\) There remains the question of whether same-sex couples are entitled as of right to the protections and benefits enjoyed by heterosexual couples.\(^{13}\)

This Article argues that statutes denying two members of the same sex the right to marry each other interfere with fundamental rights to marriage, family, and procreation, and should therefore be subjected to strict judicial scrutiny. The Supreme Court has determined that the due process clause of the fourteenth amendment to the Constitution protects individuals against unwarranted governmental regulation of marriage, family relationships, and procreation.\(^{14}\) This protection is based on the notion that an individual's choices within these realms are essentially private.\(^{15}\) Laws that seek to limit such choices are valid only if they are narrowly tailored to the achievement of a compelling state interest: if

---

\(^{10}\) Working Group, supra note 1, at 3.

\(^{11}\) There has been no legislative change in this area. Nonetheless, the lesbian and gay community has been promoting the issue in symbolic demonstrations, including a mass marriage ceremony conducted during the October, 1987 March on Washington. See Wheeler, 2,000 Gay Couples Exchange Vows in Ceremony of Rights, Wash. Post, Oct. 11, 1987, Metro, at B1. Increasingly, members of the clergy are accepting and blessing the unions of same-sex couples. See Dart, Support Grows Among Clergy for "Weddings" of Gay Couples, L.A. Times, Dec. 7, 1987, part 1, at 3, col. 1; Tivnan, Homosexuals and the Churches, N.Y. Times, Oct. 11, 1987, sec. 6, at 86, col. 4; Unitarians Endorse Homosexual Marriages, N.Y. Times, June 27, 1984, sec. A, at 26, col. 4.

\(^{12}\) Working Group, supra note 1 at 3.

\(^{13}\) This Article uses the terms "same-sex couple" and "homosexual couple" interchangeably. This reflects the traditional assumption that sexual relations are an integral part of marriage. See, e.g., Op. Att'y Gen. of S.C., slip op. (Aug. 12, 1976) (reasoning that there would be a direct conflict between the state's buggery law and a construction of the marriage laws that would allow same-sex couples to marry). Clearly, a same-sex "marriage of convenience" between two members of the same sex who are not sexually involved but who choose to arrange themselves as a family would be possible, were same-sex marriage recognized. In many senses, such marriages could be even less traditional than marriages between lesbian and gay couples. This Article does not address the broader issue of how and whether the state should validate voluntary family relationships (such as group living) among people who are not sexually involved.


\(^{15}\) "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy." Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
they satisfy strict judicial scrutiny. After examining state interests in distinguishing between same-sex and opposite-sex marriages, the Article concludes that these laws cannot survive such scrutiny.

Preliminarily, however, the Article explores the context of the debate—the history of lesbian and gay couples' attempts to procure marriage licenses. Part of this history lies in these couples' use of equal protection and equal rights amendment arguments in support of their constitutional right to same-sex marriage.

I. HISTORY OF THE SAME-SEX MARRIAGE BATTLE

It is no accident that most of the cases dealing with the issue of same-sex marriage were brought and decided during the early 1970s: these courtroom battles are inextricably linked to the history of the gay rights movement. Before the birth of Gay Liberation at the Stonewall Inn on June 27, 1969, lesbian and gay activists, and the homophile movement, had been scarcely visible to the general population. The notion that anybody could have a "right" to a same-sex marriage was virtually non-existent. Yet, by 1970, several lesbian and gay couples had applied for marriage licenses, demanding the same legal rights accorded heterosexual couples.

The early same-sex marriage cases are better viewed as political efforts to raise the consciousness of the American public than as realistic efforts to effect social change through litigation. If the Supreme Court did not strike down state anti-miscegenation statutes as violative of the fourteenth amendment's guarantees of equal protection and due process until 1967, what hope could there have been that the Court would intervene so speedily on behalf of the gay community? So remote were the chances of success that in one case the plaintiffs did not even bother to reply to the state's brief in support of dismissal.

---

16 The language used to express the standard for review differs slightly from case to case. Compare Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . .") and Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977) ("[W]here a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.") with Zablocki v. Redhail, 434 U.S. 374, 388 (1978) ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.").


18 Id. at 217-19.


Nevertheless, gay and lesbian activists' success cannot be measured solely by the cases' outcomes. The courts' opinions were certainly discouraging, but the plaintiffs made headlines and increased the visibility of the gay and lesbian community. By publicizing the concept of a same-sex marriage, activists challenged the stereotype of abnormal promiscuity among gay people and gave notice of their intent to battle homophobic laws and social thinking.

* * * *

In 1970, Jack Baker was a student activist at the University of Minnesota. President of a gay liberation group, Baker maintained a high profile on campus. In 1971, Baker, a law student, became the first openly gay student body president at the University. As he gained acceptance for himself and his political ideas, Baker also sought acceptance and recognition of his relationship with Michael McConnell. Baker had met McConnell in 1967, and the two had fallen in love. Shortly thereafter, McConnell lined up a job in the University library system so that he could join Baker in Minneapolis. The pair purchased wedding rings, and on May 18, 1970, they went to the county district court clerk to procure a marriage license.

In *Baker v. Nelson*, Baker and McConnell challenged the clerk's failure to issue them a marriage license on both statutory and constitutional grounds. The Minnesota Supreme Court, after determining that the term “marriage,” as employed in the statute, definitionally required that the partners be of opposite sex, considered and rejected plaintiffs' equal protection and due process challenges.

These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. . . . This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners

---


Visibility was a key element of the new Gay Liberation movement. According to historian John D'Emilio,

Gay liberationists . . . recast coming out as a profoundly political act that could offer enormous personal benefits to an individual. The open avowal of one's sexual identity, whether at work, at school, at home, or before television cameras, symbolized the shedding of the self-hatred that gay men and women internalized, and consequently it promised an immediate improvement in one's life. To come out of the "closet" quintessentially expressed the fusion of the personal and the political that the radicalism of the late 1960s exalted.

J. D'EMILIO, supra note 17, at 235.


24 291 Minn. 310, 191 N.W.2d 185, appeal dismissed, 409 U.S. 810 (1971).

25 *Id.* at 311-12, 191 N.W.2d at 185-86.

26 *Id.* at 311-12, 191 N.W.2d at 186-87.
contend.\textsuperscript{27} 

In \textit{Jones v. Hallahan},\textsuperscript{28} the Kentucky Court of Appeals incorrectly declared that no constitutional issues were involved in denying two Kentucky women a marriage license because the statute's implied definition of marriage required that the members be of opposite sex.\textsuperscript{29} The court reasoned that "[i]n substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage."\textsuperscript{30}

Essentially, the court asserted that the fundamental right to marriage could not protect a relationship that by definition was not a marriage. This reasoning begs a critical question: is a caring, supportive, committed, romantic relationship qualitatively different because entered into by two members of the same-sex rather than by a man and a woman? Would, then, the privacy-based right to marry protect only the right to marry a person of the opposite sex?\textsuperscript{31}

At root, the constitutional challenge to the denial of the right to same-sex marriage depends on a functional definition of the marriage relationship. The challenge necessarily fails if the state can define the component participants in a marriage, rather than merely defining the component qualities of a marriage relationship—intimacy, loyalty, companionship, support. The limits of the states' power in this respect were delineated in \textit{Loving v. Virginia}.\textsuperscript{32} Virginia had provided that "[a]ll marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process."\textsuperscript{33} All parties recognized, however, that the state was not wholly free to define the participants in a marriage: "[w]hile the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, the State does not contend . . . that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it . . . ."\textsuperscript{34} \textit{Loving} suggests that states are bound by a functional definition of marriage—that intimate relationships are protected by the right to marriage.

In \textit{Singer v. Hara},\textsuperscript{35} the last case in which a same-sex couple sought court-ordered issuance of a marriage license, the Washington Court of Appeals upheld the opposite-sex requirement against challenges under both the United States and Washington Constitutions.

\begin{footnotes}
\item 27 \textit{Id.} at 312, 191 N.W.2d at 186.
\item 28 501 S.W.2d 588 (Ky. Ct. App. 1973).
\item 29 \textit{Id.} at 590.
\item 30 \textit{Id.}
\item 31 Professor Karst conceptualizes the right more broadly—as the right to freedom of intimate association. \textit{See} Karst, \textit{Freedom of Intimate Association}, 89 \textit{Yale L.J.} 624 (1980).
\item 32 388 U.S. 1 (1967).
\item 33 \textit{Id.} at 4 n.3 (citing \textit{Va. Code Ann.} §§ 20-57 (1960 Repl. Vol.)).
\item 34 \textit{Id.} at 7 (citation omitted).
\end{footnotes}
ers had recently ratified a state equal rights amendment (ERA) substantially similar to the federal ERA then before the states for ratification.³⁶ Plaintiffs, two Washington men, argued that the ERA required the state to issue them a marriage license.³⁷ Ironically, the specter of this very interpretation of the statute had been raised by opponents of the ERA during the past election's ratification debate.³⁸ Although the court in *Singer* dismissed the plaintiff's federal constitutional claims with a brief quotation from *Baker*,³⁹ Judge Swanson devoted considerable space to an analysis of plaintiffs' challenge under the state ERA.⁴⁰

Plaintiffs' argument under the ERA is forceful because of its simplicity. If men and women are to be treated exactly the same,⁴¹ then women should be entitled to the same rights as men. This includes the right to marry a woman. In *Singer*, the Washington court rejected this argument by relying on *its supposition* of what the voters had intended.

We do not believe that approval of the ERA by the people of this state reflects any intention upon their part to offer couples involved in same-sex relationships the protection of our marriage laws. A consideration of the basic purpose of the ERA makes it apparent why that amendment does not support appellants' claim of discrimination. The primary purpose of the ERA is to overcome discriminatory legal treatment as between men and women "on account of sex." The popular slogan, "Equal pay for equal work," particularly expresses the rejection of the notion that merely because a person is a woman, rather than a man, she is to be treated differently than a man with qualifications equal to her own.⁴²

Despite states' successful limitation of their ERAs to more traditional concepts of equality between the sexes, the notion survives that the complete equality mandated by the plain language of the ERA would require individuals to be treated the same in both public and private spheres. In 1984, when Maine voters considered the ERA, opponents of the amendment raised the same objections—that the ERA would require the state to sanction homosexual marriage—that Washington ERA opponents had raised ten years earlier.⁴³ The issue was considered serious enough for the Governor of Maine to request an advisory opinion on the matter from the State Attorney General.⁴⁴ The Attorney General

---

³⁶ *Id.* at 250 n.4, 522 P.2d at 1190 n.4.
³⁷ *Id.* at 251, 522 P.2d at 1190.
³⁸ *Id.* at 251 n.5, 522 P.2d at 1190 n.5.
³⁹ *Id.* at 264, 522 P.2d at 1197.
⁴⁰ *Id.* at 250-60, 522 P.2d at 1190-95.
⁴¹ The federal ERA would have provided that: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." State ERAs use similar language.
⁴² 11 Wash. App. at 257-58, 522 P.2d at 1193-94.
⁴³ Clendinen, Of Crime, Equal Rights and a Mental Hospital, N.Y. Times, Nov. 5, 1984, at A16, col. 1 (local papers were sent UPI releases about this issue during the last week before the election).
adopted the reasoning of United States Senator Birch Bayh, sponsor of the federal ERA:

The equal rights amendment would not prohibit a State from saying that the institution of marriage would be prohibited to two men partners. It would not prohibit a State from saying the institution of marriage would be prohibited from two women partners. All it says is that if a State legislature makes a judgment that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a woman—or if a State says it is wrong for a woman to marry a woman, then it must say that it is wrong for a man to marry a man. 45

Senator Bayh's argument, that the ERA would require only that male couples be treated the same as female couples, ignores the fact that the ERA protects individuals, not couples. Therefore, it is the individual's right—to marry a man as a woman is allowed or to marry a woman as a man is allowed—that is at stake. The court in Singer, too, closed its mind to this fact.

Baker, Jones, and Singer were decided respectively in 1971, 1973, and 1974. Since that time, there have been no reported decisions involving a lesbian or gay couple seeking court-ordered issuance of a marriage license. Every so often, a litigant attempts to analogize a committed lesbian or gay relationship to a marriage for one of a variety of purposes: avoiding alimony payments to a former spouse involved in such a relationship, 46 renewing a lease held in the name of a deceased lover, 47 or asserting property rights in a former lover's assets. 48 In all of these cases, however, the courts have refused to recognize the analogy.

In Adams v. Howerton, 49 a male American citizen and a male alien obtained a marriage license from a Colorado county clerk and were then "married" by a Colorado minister. Plaintiffs then petitioned the INS for

45 Id. (citing 118 CONG. REC. 4389 (1972) (statement of Sen. Bayh)).
48 See De Santo v. Barnsley, 328 Pa. Super. 181, 476 A.2d 952 (1984). In De Santo, plaintiff based his claims for alimony and equitable distribution on his having contracted a common law marriage with defendant. Id. at 183, 476 A.2d at 952. The court held that same-sex couples could no more contract a common law marriage under Pennsylvania law than they could a statutory marriage.

If, under the guise of expanding the common law, we were to create a form of marriage forbidden by statute, we should abuse our judicial power: our decision would have no support in precedent, and its practical effect would be to amend the Marriage Law—something only the Legislature can do.

Id. at 189, 476 A.2d at 956. See also Small v. Harper, 638 S.W.2d 24 (Tex. Ct. App. 1982) (a "partnership for profit" contract between lesbian lovers could be valid). But cf., Succession of Bacot, 502 So. 2d 118 (La. Ct. App.) (considering and rejecting argument that surviving homosexual lover's inheritance should be limited under Louisiana law because a homosexual lover is a "concubine"), writ denied, 503 So. 2d 466 (La. 1987).
49 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982).
reclassification of the alien as an immediate relative of an American citizen. \(^{50}\) Presumably, this would have allowed the alien to obtain an immigrant visa and avoid deportation. The Ninth Circuit ruled that the marriage did not satisfy the immigration law's requirements \(^{51}\) and that Congress could constitutionally restrict preferential treatment of citizens' spouses to heterosexual spouses. \(^{52}\) Rather than dealing rigorously with the constitutional issues raised by plaintiffs, the court based its decision on the traditional deference accorded Congress' judgment in the field of immigration. \(^{53}\)

The lesbian and gay community's subsequent move away from the marriage debate may be explained by political factors. First, legal recognition of same-sex marriage was unlikely, since most judges lacked the social perspective necessary to consider the issues fairly and dispassionately. In order to be more productive, the community put its resources into areas where the courts were more sympathetic to lesbian and gay interests: fair employment, \(^{54}\) child custody, \(^{55}\) and the exercise of first amendment rights. \(^{56}\)

In addition, same-sex marriage was not uniformly accepted as part of the lesbian and gay political agenda. From the start, some members of the lesbian and gay community had opposed the efforts of lesbian and gay couples to get married. Marriage, these opponents maintained, was designed to subordinate the interests of one partner to the interests of the other. One disenchanted activist wrote:

Another Cause-with-a-capital-C that keeps coming up every so often is the Right of Homosexuals to Marry—to Marry each other, that is. For some reason, lesbians seem to be more prone to this one than the gay boys; but they aren't immune, by any means. They loudly demand, in violent manifestos in all colors of typewriter ribbon, the right to have a religious ceremony solemnizing their union, to adopt children, own property in common, etc., etc., etc. (None of them has ever gone so far as to include

\(^{50}\) Id. at 1038.

\(^{51}\) "Congress intended that only partners in heterosexual marriages be considered spouses under section 201(b)." Id. at 1041.

\(^{52}\) Id. at 1041-43.

\(^{53}\) "[I]n this area of the law, Congress has almost plenary power and may enact statutes which, if applied to citizens, would be unconstitutional. Thus, it is not clear what treatment a seemingly irrational statute should receive." Id. at 1042. Having thus decided that the most plaintiff was entitled to expect from Congress was a rational basis supporting the legislation, the court sustained the statute. Congress rationally could have decided to deny homosexual spouses preferential immigration treatment "because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores." Id. at 1043.


\(^{55}\) See generally Sexual Orientation and the Law § 1.03 (R. Achtenberg ed. 1987).

\(^{56}\) See Gay Servs. v. Texas A & M Univ., 737 F.2d 1317 (5th Cir. 1984) (public college or university's refusal to recognize gay student organization unconstitutional under first amendment), cert. denied, 471 U.S. 1001 (1985); Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980) (male homosexual high school student had first amendment right to attend his senior dinner-dance with a male escort).
the right to prosecute one's erring partner for adultery, but I'm expecting to see that one included any day now.)

[M]ost modern women are trying to escape the legal and other restrictions of marriage, so that it's funny to see these "enlightened" lesbians trying to get into them . . . .

The inadequacy of traditional marriage for committed lesbians and gays continues to be a theme in gay literature. It is doubtful, however, that same-sex couples sought marriage licenses in order to adopt uncritically the heterosexual model of marriage. According to Michael McConnell, one of the plaintiffs in Baker v. Nelson,

We want to cause a re-examination and re-evaluation of the institution of marriage. We feel we can be the catalyst for that. Our getting married would be a political act with political implications. I sincerely believe that my love for Jack [Baker] is as valid and deep as any heterosexual love, and I think it should be recognized—I demand it be recognized!—by the state and society.

Regardless of proponents' intentions, ambivalence about the heterosexual model for relationships may have contributed to the removal of same-sex marriage from the gay and lesbian political agenda.

Finally, the late 1970s and early 1980s witnessed the climax of the battle over ratification of the federal ERA. The tactics of the Stop ERA crew—using the specter of legalized homosexual marriage to scare off would-be ERA supporters—put ERA activists in the position of denying that the ERA would radically change basic gender roles. Lesbian-feminists, at the core of both the pro-ERA coalition and the gay family rights movement, may have decided that it was not politically expedient to continue challenging state marriage laws. The ERA was too important, too imminent, too fragile; after ERA passed, a more radical agenda could be entertained. Of course, the federal ERA was never ratified by the required number of states.

The Court's fourteenth amendment jurisprudence, however, has evolved significantly since the early 1970s. The Supreme Court has enlarged the scope of the equal protection clause by holding that gender-based classifications must be subjected to heightened scrutiny; the

---

57 D. Teal, supra note 19, at 291 (quoting Dennison, All That's Gay Does Not Glitter or We Have a Lunatic Fringe Too, 4 GAY POWER 14).

58 See, e.g., D. Altman, The Homosexualization of America, The Americanization of the Homosexual 185-90 (1982) (arguing that the lack of availability of marriage to lesbians and gay men allows them to develop relationships that are less oppressive and more adaptable).

59 K. Tobin & R. Wicker, supra note 23, at 144.


Court has also applied a more demanding rational relationship test to certain marginally suspect classifications, such as mental retardation\textsuperscript{62} and classifications based on illegitimacy.\textsuperscript{63} Further, the right to privacy embodied in the due process clause now protects a woman's right to an abortion,\textsuperscript{64} a minor's right to obtain contraceptives,\textsuperscript{65} and an individual's right to marry.\textsuperscript{66} Finally, gay men and lesbians living in committed relationships and raising families have become more visible in the community at large.\textsuperscript{67} Both equal protection and due process arguments advanced in support of requiring states to issue marriage licenses to same-sex couples now have a solid doctrinal foundation.

II. EQUAL PROTECTION AND THE SAME-SEX FAMILY

A. Equal Protection, Gender

When \textit{Baker v. Nelson}\textsuperscript{68} was decided in 1971, sex-based classifications had not yet been subjected to heightened scrutiny.\textsuperscript{69} Even \textit{Reed v. Reed},\textsuperscript{70} which applied a more demanding version of the rational relationship test to a legislative classification based on sex, had not yet been decided.\textsuperscript{71} Any legislative classification that bore a rational relationship to a legitimate governmental interest would satisfy the equal protection clause, unless that classification were based on race, color, or national origin or unless it inhibited the exercise of a fundamental right.\textsuperscript{72} It is not surprising, then, that plaintiffs' equal protection claim failed to convince the court.

Plaintiffs in \textit{Baker} rested their equal protection argument on an analogy to \textit{Loving v. Virginia},\textsuperscript{73} in which the Court declared Virginia's anti-miscegenation statute to be unconstitutional.\textsuperscript{74} The Court in \textit{Loving} held that even though the right to marry a person of a different race was denied equally to Blacks and whites, the statute violated equal protec-

\begin{itemize}
  \item \textsuperscript{62} Cleburne v. Cleburne Living Center, 473 U.S. 432, 447-50 (1985) (detailed examination of legislative intent, ostensibly under rational basis test).
  \item \textsuperscript{63} Trimble v. Gordon, 430 U.S. 762 (1977).
  \item \textsuperscript{64} Roe v. Wade, 410 U.S. 113, 154 (1973).
  \item \textsuperscript{66} Zablocki v. Redhail, 434 U.S. 374, 384-85 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967).
  \item \textsuperscript{67} See, e.g., Wheeler, supra note 11 at B1.
  \item \textsuperscript{68} 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810 (1972).
  \item \textsuperscript{69} The Court first indicated that it might subject sex-based classifications to more demanding scrutiny in \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973). In \textit{Frontiero}, a plurality of the Court invalidated a federal regulation that required female, but not male, members of the uniformed services to prove the dependency of their spouse in order to receive increased quarters allowance, by subjecting the regulation to strict scrutiny.
  \item \textsuperscript{70} 404 U.S. 71 (1971).
  \item \textsuperscript{71} \textit{Baker} was decided on October 15, 1971; \textit{Reed} on November 22, 1971.
  \item \textsuperscript{72} McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (other classifications permissible unless "wholly irrelevant to the achievement of the State's objective").
  \item \textsuperscript{73} 388 U.S. 1 (1967).
  \item \textsuperscript{74} 388 U.S. at 2.
\end{itemize}
tion. Analytically, the right being denied Blacks under the statute was the right to marry whites, not, as Virginia would have it, the right to intermarry.

Similarly, one could argue, failure to issue marriage licenses to same-sex couples denied women the right to marry women—a right that only men would be allowed to exercise—and denied men the right to marry men—again, treating men and women differently. But when the plaintiffs in Baker tried to analogize their case to Loving, the Minnesota Supreme Court was still able to respond in good conscience that “there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.”

Baker represents the first and last time any court fully considered the argument that the opposite-sex requirement in state marriage statutes works an invidious discrimination on the basis of sex. Yet, during the intervening sixteen years, the United States Supreme Court has taken an entirely different approach to legislative classifications based on sex. Such classifications have been held to be unconstitutional unless substantially related to an important state interest. Moreover, the Court has emphasized that “[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.” Given these developments in the law, the analogy to Loving suggested by the plaintiffs in Baker seems more compelling than it did in 1971. The same sex-marriage restriction does classify on the basis of sex in the same way that the anti-miscegenation statutes classified on the basis of race. That the restrictions are symmetrically applied to male couples and to female couples does not protect them from judicial scrutiny.

Faced with an equal protection challenge to the opposite-sex marriage requirement, a court would be required to ask the questions that the Minnesota Supreme Court was able to avoid: does the restriction serve an important state objective, and is it substantially related to the

75 “[W]e reject the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations . . . .” 388 U.S. at 8.

76 The lack of symmetrical treatment of Blacks and whites was even more obviously reflected in the statute’s underlying rationale—maintaining “White Supremacy.” 388 U.S. at 11. Therefore, the statute stigmatized Blacks, but not whites. An identical argument cannot be made in the same-sex marriage context: the restrictions would not seem to have any more tendency to stigmatize women than men. However, there is a sense in which the restriction’s underlying rationale—that women and men fulfill different roles in marriage—reflects “archaic and stereotypic notions,” the perpetuation of which is not a legitimate statutory objective. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982). Women are stigmatized by the perpetuation of role-based stereotypes. See Karst, supra note 31, at 683-84 (discussing the analogy between the stigma imposed on Blacks by anti-miscegenation laws and the opposite-sex marriage requirement’s perpetuation of male dominance).

77 291 Minn. at 315, 191 N.W.2d at 187.


79 Hogan, 458 U.S. at 725.
achievement of that objective? The permissible state objectives that can be advanced in support of the restriction are examined more fully in Part V of this Article. At that point, the Article will argue that those objectives cannot support the refusal of states to issue marriage licenses to same-sex couples.

One disadvantage to using gender-based equal protection analysis may be that the courts would require some showing that men and women are similarly situated with respect to their ability to be spouses. It may not be at all clear to many judges that women and men are the same in this respect—that in terms of romance, companionship, and support, a male spouse fulfills the same role as a female spouse. Gender-based equal protection is theoretically dependent on the ability of the Court to make such a judgment. Whatever the empirical evidence on this point, the Court, on at least one occasion, has refused to use equal protection to strike down laws embodying stereotypes about the ways men and women behave within relationships.

The alternative route to strict scrutiny—due process privacy rights—requires less of the Court. It is easier to decide that the choice of

---

80 See supra notes 171-211 and accompanying text.
81 See Michael M. v. Superior Ct., 450 U.S. 464 (1981). In Michael M., the Court was asked to evaluate the constitutionality of the California statutory rape law, which imposed criminal liability on males for "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." CAL. PENAL CODE § 261.5 (Deering 1987). Petitioner argued that the statute unlawfully discriminated on the basis of gender. The California Supreme Court agreed that § 261.5 discriminated on the basis of sex because "only females may be victims and only males may violate the section." 25 Cal. 3d 608, 611, 601 P.2d 572, 574 (1980). However, the California court concluded that the statute was justified by the state's compelling interest in preventing teenage pregnancy. Id.

On review by the Supreme Court, the key issue was whether the California statute was actually designed to discourage teenage pregnancy. Petitioner argued that the statute simply codified traditional assumptions about male and female sex roles and then punished the traditional aggressor. 450 U.S. at 475. Justice Rehnquist, writing for a plurality, rejected petitioner's argument and affirmed the California court's holding that males and females are not similarly situated with respect to pregnancy. "Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct." 450 U.S. at 473.

Four dissenters, by contrast, agreed with petitioner that the statute was not tailored to serve the state's interest in discouraging teenage pregnancy. Justice Brennan traced the history of § 261.5 and discovered that "the law was initially enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual intercourse." 450 U.S. at 494. Both Justice Brennan, joined by Justices White and Marshall, and Justice Stevens, dissenting separately, argued that a gender-neutral statute punishing both males and females would serve the state's interest in discouraging teenage pregnancy without making assumptions about which party is the sexual aggressor. 450 U.S. at 496-97.

Why, then, did five Justices nonetheless resist requiring the statutory rape law to be gender-neutral when such a requirement is routinely imposed on other types of legislation? Why so disingenuous? The obvious answer is that five Justices believed that stereotypes regarding male and female sexuality, unlike stereotypes regarding women's capacities in the workplace, for example, reflect genuine differences between the sexes. An equal protection challenge to the opposite-sex requirement incorporated in the marriage laws confronts the same kinds of stereotypes embodied in the statute upheld in Michael M.: stereotypes about the role of physiology in matters of sexuality and intimacy.
SAME-SEX MARRIAGE

a life partner must be left to the individual than it is to decree that women are absolutely the same as men in romantic relationships. Therefore, gender-based equal protection may not be the ideal doctrine for challenging the marriage laws.

B. Equal Protection, Sexual Orientation

The plaintiffs in *Baker v. Nelson* also suggested that the Minnesota Supreme Court's interpretation of the marriage statute denied them equal protection on the basis of sexual orientation: "Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited." The court summarily rejected this argument by pointing out that "abstract symmetry" was not required by the fourteenth amendment. In an explanatory footnote, the court quoted Supreme Court language to the effect that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."\(^8^5\)

The Minnesota Court's observation that legislative classification according to sexual orientation is not suspect under the equal protection clause remains, with two exceptions,\(^8^6\) an accurate, if unfortunate, statement of the law. The Supreme Court has yet to consider the imposition of a heightened standard of review upon such classifications and turned down the opportunity to do so in *Rowland v. Mad River Local School District*.\(^8^7\) Justice Brennan's eloquent dissent from the denial of certiorari establishes that at least he and Justice Marshall believe that "discrimination against homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under both prongs of our settled equal protection analysis."\(^8^8\)

Recent Supreme Court equal protection cases do evidence a trend away from creating new "suspect classes."\(^8^9\) This trend can be seen in

\(^8^2\) The term "sexual orientation" refers to an individual's homosexual, heterosexual, or bisexual disposition. "Sexual orientation" communicates the concept better than another commonly used term, "sexual preference," because the word "orientation" correctly implies that a significant component of one's sexuality is not freely chosen. See infra note 192.

\(^8^3\) 291 Minn. 310, 313, 191 N.W.2d 185, 187, appeal dismissed, 409 U.S. 810 (1971).

\(^8^4\) Id. at 314, 191 N.W.2d at 187.

\(^8^5\) Id. at 314 n.4, 191 N.W.2d at 187 n.4 (quoting Tigner v. Texas, 310 U.S. 141, 147 (1939)).

\(^8^6\) In two recent cases, the Ninth Circuit and the District Court for the Northern District of California have subjected laws discriminating on the basis of sexual orientation to strict scrutiny. See Watkins v. U.S. Army, 837 F.2d 1428 (9th Cir. 1988) and High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987).

\(^8^7\) 470 U.S. 1009 (1985), denying cert. to 730 F.2d 444 (6th Cir. 1984).


\(^8^9\) The notion of a "suspect class" was developed as a tool for determining which legislative classifications must be subjected to heightened or strict scrutiny under an equal protection
Cleburne v. Cleburne Living Center.\textsuperscript{90} In Cleburne, none of the Justices believed that the best doctrinal resolution of the matter was to find that the mentally retarded constituted a “suspect class.” All, however, examined the city’s interests in denying a special use permit for a group home for the mentally retarded with less deference than could be justified under the traditional, highly deferential rational basis test.\textsuperscript{91} The availa-
bility of this "second order" rational basis scrutiny,92 combined with the Court's refusal to find that the mentally retarded constituted a suspect class, signals that the Court is unlikely to determine that any new class is suspect. In particular, faced with an equal protection challenge to a state law that requires marriage partners to be of different sexes, the Court is unlikely to find that homosexuals constitute a suspect class.

It is equally unlikely that the Court would strike down the marriage laws' opposite-sex requirement under a rational basis test or even a "second order" rational basis test. The government could argue that because it is more likely that opposite-sex couples will have children, it is more important to provide such couples with the option to marry. Under any rational basis standard, the government need not narrowly tailor the statutory scheme to fit the asserted governmental interest, and it need not use the "least restrictive means" of accomplishing its goals. Consequently, the generalization that opposite-sex couples are more likely to have children could support the marriage law restriction, provided that the restriction does not, in reality, reflect irrational prejudice.93 Of course, if heightened or strict scrutiny is triggered, the government cannot offer underinclusive and overinclusive justifications94 for its statutes.95

III. THE EQUAL RIGHTS AMENDMENT AND THE SAME SEX FAMILY

The federal equal rights amendment, had it been ratified, would have supported a very serious challenge to the opposite sex marriage restriction. The plain statement that "equality of rights under the law shall not be denied or abridged . . . on account of sex" can be applied directly to the marriage laws. There is a forceful, simple, and credible argument that these words make a person's gender utterly irrelevant.

92 "[P]erhaps the method employed must hereafter be called 'second order' rational basis review rather than 'heightened scrutiny.'" 473 U.S. at 458 (Marshall, J., concurring in part and dissenting in part).
93 See Cleburne, 473 U.S. at 450 (equal protection denied because the permit requirement appeared "to rest on an irrational prejudice against the mentally retarded").
94 A legislative classification is underinclusive with respect to its underlying justification if it solves only part of the problem. A classification is overinclusive if it solves the problem by subjecting a broader class to its strictures than the justification requires.
95 The heightened scrutiny requirement of a substantial relation between legislative classification and state objective prohibits the government from making generalizations, even generalizations supported by empirical evidence. See, e.g., Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 151-52 (1980) (empirical support for a statutory generalization does not change the fact that a state cannot discriminate on the basis of gender for mere purposes of administrative convenience); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975) (requiring gender-neutral distribution of survivors' benefits even though "the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support").

Certain justifications offered in support of the opposite-sex marriage requirement have enough empirical support to survive rational basis scrutiny, but nonetheless could not withstand a "substantial relationship" inquiry. See infra notes 179-86 and accompanying text (discussion of state's interest in protecting children).
under the law. Litigants have advanced this argument in challenging the marriage laws under state ERAs.

In *Singer v. Hara*, plaintiffs argued that the language of Washington's state ERA made sex an absolutely impermissible basis for legal classification. Under this interpretation of the ERA, even classifications that could survive strict scrutiny, classifications necessary to promote a compelling state interest, could not survive. Certainly, then, a law that would allow a man to marry a woman but not another man would be unconstitutional. In particular, plaintiffs urged that the sex-based discrimination attributed to the Washington marriage law was analogous to the racial discrimination ruled unconstitutional in *Loving v. Virginia* in 1967.

Chief Judge Swanson rejected plaintiffs' argument, holding that the definition of marriage, rather than a legislative classification, required that it consist of one man and one woman. There is no analogous sexual classification involved in the instant case because 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.

Plaintiffs had argued, however, that the definition of marriage in Virginia before *Loving* included the requirement that the partners be of the same race and that the Constitution, therefore, could require states to change that definition. Swanson responded that "[t]he *Loving* ... court did not change the basic definition of marriage as the legal union of one man and one woman." Essentially, Swanson argues that discrimination is immune from constitutional attack if it stems from the incorporation of a discriminatory "basic definition" into an otherwise valid law.

---

97 Washington had recently enacted an ERA that read, "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." *Id.* at 250, 522 P.2d at 1190 (quoting WASH. CONST. art. 31, § 1).
98 *Id.* at 250-51, 522 P.2d at 11-0. Ironically, the same argument was advanced by Phyllis Schlafley in the course of her Stop ERA campaign. See J. MANSBRIDGE, WHY WE LOST THE ERA 137 (1986) (reprinting the text of an ad run by Phyllis Schlafley's Maine STOP ERA group). In Washington, state ERA opponents' "Statement Against" the ERA warned: "Homosexual and lesbian marriage would be legalized, with further complication regarding adopting children into such a 'family.' People will live as they choose, but the beauty and sanctity of marriage must be preserved from such needless desecration." *Singer v. Hara*, 11 Wash. App. at 251 n.5, 522 P.2d at 1190 n.5.
100 11 Wash. App. at 253-56, 522 P.2d at 1191. The analogy to *Loving* is strongest when an ERA is in effect, since only in that context would sex-based classifications be as suspect as race-based classifications.
101 *Id.* at 253-55, 522 P.2d at 1191-92.
102 *Id.* at 254-55, 522 P.2d at 1192.
103 *Id.* at 255 n.8, 522 P.2d at 1192 n.8 (emphasis added).
SAME-SEX MARRIAGE

The supposed distinction between "law" and "definition" does not make good analytical sense. A definition, however basic, constitutes an integral part of the law that incorporates it. Furthermore, the federal Constitution provides explicitly that "[t]his Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." State constitutions likewise bind the states, "basic definitions" to the contrary notwithstanding. The fact that a definition is derived from the common law, rather than from an associated statutory provision, does not immunize it from Constitutional scrutiny.

In any case, the court in Singer rejected plaintiffs' interpretation of the state ERA as absolutely prohibiting the state from employing sex-based classifications.

A generally recognized "corollary" or exception to even an "absolute" interpretation of the ERA is the proposition that laws which differentiate between the sexes are permissible so long as they are based upon the unique physical characteristics of a particular sex, rather than upon a person's membership in a particular sex per se.

Other state courts will undoubtedly follow the Washington Court's ERA interpretation, stopping short of holding that gender-based classifications are absolutely impermissible. Other state and federal Constitutional provisions that are worded in absolute terms—the right to free exercise of religion, freedom of speech—have been interpreted to require a balancing of the state's interests against the individuals' rights.

The Washington appellate court balanced plaintiffs' rights against the state's interests and held that refusal to issue marriage licenses to same-sex couples was constitutional because it was based on "unique physical characteristics."

In the instant case, it is apparent that the state's refusal to grant a license allowing the appellants to marry one another is not based upon appellants' status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their

---

104 U.S. CONST. art. VI.
106 11 Wash. App. at 259, 522 P.2d at 1194.
107 See, e.g., Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983) (government's interest in preventing racial discrimination justified denying tax-exempt status to religious university despite university officials' "genuine belief that the Bible forbids interracial dating and marriage"); Branzburg v. Hayes, 408 U.S. 665 (1972) (first amendment claim asserted by newsman to maintain confidential relationship with his sources outweighed by obligation to give information to grand jury); Konigsberg v. State Bar, 366 U.S. 36, 50 n.11 (1961) ("the First Amendment immunity for speech, press and assembly has to be reconciled with valid but conflicting governmental interests").
union. Thus the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination "on account of sex."\footnote{118}

Although this "impossibility of reproduction" is often cited as the critical factor justifying differential treatment of heterosexual and homosexual couples,\footnote{109} the underlying empirical and technological basis for that justification has been eroding steadily. Lesbian and gay couples are raising children, even bearing children, within the context of their relationships: as families.\footnote{110} If "marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race,"\footnote{111} then any couple engaged in propagating the human race should be eligible for the benefits associated with the issuance of a marriage license. The next part of this Article argues that because the values served by the institution of marriage—"family values"—are reflected most straightforwardly in substantive due process privacy doctrine, states' failure to recognize same-sex marriages is most appropriately challenged under that doctrine.

\section*{IV. \textsc{Substantive Due Process and the Same-Sex Family}}

The due process guarantee of the fourteenth amendment protects individuals from unwarranted state interference with rights that are "fundamental" or "implicit in the concept of ordered liberty."\footnote{112} The Supreme Court Justices have not reached consensus about which rights are "fundamental" in this sense,\footnote{113} but clearly encompassed are the rights to family, marriage, and procreation.\footnote{114}

The due process challenge to same-sex marriage prohibitions has clear advantages over equal protection and ERA arguments. Because the rights to family, marriage, and procreation correspond directly to the interests of a same-sex couple in becoming legally married, a due process challenge to the state's refusal to issue a marriage license is uniquely concrete. Instead of centering on the abstract question of whether the

\begin{enumerate}
\item[108] 11 Wash. App. at 259-60, 522 P.2d at 1195.
\item[109]  Id. at 259, 522 P.2d at 1195; Adams v. Howerton, 673 F.2d 1036, 1043 (9th Cir. 1982), cert. denied, 458 U.S. 1111 (1982).
\item[110]  See infra notes 160-67 and accompanying text.
\item[111]  Singer, 11 Wash. App. at 259, 522 P.2d at 1195.
\item[113]  See Bowers v. Hardwick, 106 S. Ct. 2841, 2848-59 (1986) (Blackmun, J., dissenting). Justices Blackmun, Brennan, and Marshall would hold that individuals have a fundamental interest in "controlling the nature of their intimate associations with others," \textit{id.} at 2852 (Blackmun, J. dissenting), whereas other members of the Court define the right to privacy more narrowly: "any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." 106 S. Ct. at 2844.
\item[114]  \textit{Id.} at 2843-44 (discussing the reach of the privacy cases and holding that respondent had not demonstrated a sufficient connection between "family, marriage, or procreation" and "homosexual activity" to support his due process challenge to Georgia's anti-sodomy statute).
refusal to issue marriage licenses to same-sex couples actually treats men and women differently, the due process challenge would involve the concrete details of same-sex couples' lifestyles. Are their needs and contributions qualitatively different from those of their opposite-sex counterparts? Another advantage to a due process argument is that successful invocation of a fundamental right would require the state to show that its actions are narrowly drawn to express compelling state interests.115 Under an equal protection argument, or even an ERA argument, judicial review of the state's action could be less exacting.116

Courts have had difficulty articulating an organizing principle for the cases that establish family rights under substantive due process. The cases uniformly have been held to involve a right to privacy, because they shield particularly intimate choices and behaviors from state regulation.117 In Griswold v. Connecticut,118 where this line of substantive due process cases was revitalized,119 the Court invalidated a state law criminalizing the use of contraceptives by a married couple.120 The cases following Griswold have extended the right of privacy to require that the


116 See infra notes 68-111 and accompanying text.

117 See, e.g., Griswold v. Connecticut, 381 U.S. 479, 485 (1965) ("We have had many controversies over these penumbral rights of 'privacy and repose.' These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.") (citations omitted); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Roe v. Wade, 410 U.S. 113, 154 (1973) ("the right of personal privacy includes the abortion decision"); Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977) ("This right of personal privacy includes 'the interest in independence in making certain kinds of important decisions.'") (citation omitted).

118 381 U.S. 479 (1965).

119 This line of cases can be traced back to at least the early 1920s. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925). However, after deciding two cases in the early 1940s, Skinner v. Oklahoma, 316 U.S. 535 (1942), and Prince v. Massachusetts, 321 U.S. 158 (1944), the Court appeared to have abandoned the line for more than twenty years. An explanation of the Court's abandonment and subsequent revitalization can be gleaned from Justice Douglas' opinion in Griswold: [W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that Lochner v. New York, 198 U.S. 45, should be our guide. But we decline that invitation.... We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

381 U.S. at 479-480.

The sense that the fundamental right to marriage, family, and procreation might bear some relation to the fundamental contract rights vindicated in Lochner would surely discourage the Court from pursuing that doctrinal line. To distinguish the Griswold decision from the earlier economic substantive due process decisions, the Court injected the concept of privacy into the doctrine. "[S]pecific guarantees in the Bill of Rights have penumbras.... Various guarantees create zones of privacy.... The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." 381 U.S. at 485.

120 381 U.S. at 485.
state allow contraceptive use by unmarried people,\textsuperscript{121} to invalidate state anti-miscegenation laws,\textsuperscript{122} and to limit state intervention in abortion.\textsuperscript{123}

The expansion of this privacy right came to an abrupt halt in \textit{Bowers v. Hardwick},\textsuperscript{124} in which plaintiffs argued that the fundamental right to privacy required invalidation of Georgia's anti-sodomy statute.\textsuperscript{125} The Court of Appeals for the Eleventh Circuit had agreed with Michael Hardwick that the right to privacy cases dealt with areas of life involving sexuality and intimacy and reflected the more general principle that private sexual activity between consenting adults is protected by the right to privacy.\textsuperscript{126} The right to procure and use contraceptives, for example, could imply a right to engage in sexual activity not directed toward procreation. This, in turn, implies a right to engage in private consensual sex with another adult.

The Supreme Court, however, disagreed with the plaintiff and held that the right to privacy protects individuals' choices in matters of family, marriage, and procreation rather than in matters of sexuality.\textsuperscript{127} Georgia's anti-sodomy statute did not implicate the right to privacy because "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . ."\textsuperscript{128} This and other \textit{Bowers} language\textsuperscript{129} seems to erect a hurdle to a due process challenge to a state's denial of the right to homosexual marriage. The Court clearly is not sensitive to the fact that anti-sodomy laws reflect irrational fears and prejudices directed against gay people. All the same, \textit{Bowers} deals only with laws regulating sexual practices\textsuperscript{130} and reinforces the generalization that family and marriage rights are absolutely protected under due process. As will be argued below, a very strong connection exists between family, marriage, and procreation on the one hand, and a state's refusal to issue marriage licenses to same-sex couples on the other.

\textsuperscript{122} Loving v. Virginia, 388 U.S. 1 (1967). The Court also held that the state's power to regulate marriage is limited by the fourteenth amendment. \textit{Id.} at 7.
\textsuperscript{123} Roe v. Wade, 410 U.S. 113 (1973).
\textsuperscript{124} 106 S. Ct. 2841 (1986).
\textsuperscript{125} \textit{See id.} at 2850.
\textsuperscript{126} \textit{Id.} at 2843.
\textsuperscript{127} \textit{Id.} at 2844.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards." \textit{Id.} at 2847 (Burger, C.J., concurring).
\textsuperscript{130} In two recent cases, the Ninth Circuit and the District Court for the Northern District of California held that homosexuals are protected from discrimination based on sexual orientation, if not from laws based on sexual conduct. \textit{See Watkins v. U.S. Army}, 837 F.2d 1428 (9th Cir. 1988) and \textit{High Tech Gays v. Defense Indus. Sec. Clearance Office}, 668 F. Supp. 1361 (N.D. Cal. 1987).
A. Right to Marry

One subset of the cases defining the right to privacy are those decided on the basis of a fundamental right to marry. The right to bond with another individual in marriage has attained constitutional stature, a stature that originated in Justice Douglas' well-worn passage from *Griswold v. Connecticut*.  

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is 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.

The many entitlements and legal protections given to married couples attest to the institution's value to our society. Married couples are eligible for different tax treatment, for Social Security benefits based on a spouse's contribution, and for survivor's benefits upon the death of a veteran spouse. Furthermore, a married couple enjoys the benefits of intestate succession, favorable immigration laws, and an elaborate network of property and support rights upon divorce. Both state and federal governments allocate a great many rights on the basis of marital status and have created powerful incentives for an individual to marry. Furthermore, private entities, like insurance companies, often provide special benefits and lower rates for married couples and legally recognized families. Restrictions on the right to marry, therefore, affect both associational rights and a variety of societal entitlements.

In *Loving v. Virginia*, the Court considered a fourteenth amendment challenge to Virginia's laws prohibiting interracial marriage. After finding that the law violated the equal protection clause, the Court determined that an independent ground for invalidating the law existed:

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

---

131 381 U.S. 479, 486 (1965).
132 Id.
139 388 U.S. 1 (1967).
To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. . . . Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.  

Hence, the right to marry requires more than that all citizens be given the opportunity to marry, which would not be abridged by the anti-miscegenation statute invalidated by Loving. In addition, the right to marry protects an individual's choice of a marriage partner. This is precisely the right asserted by same-sex couples: like the Lovings, they seek the freedom to choose the partner with whom they are to enter into the intimate ("to the degree of being sacred") relationship of marriage.  

State interference with the right to marry need not include discrimination on the basis of race, sex, alienage, or national origin to be constitutionally suspect. In Zablocki v. Redhail, the Court invalidated a Wisconsin statute that had attempted to further a child welfare goal by restricting access to marriage licenses. The statute provided that "[n]o Wisconsin resident having minor issue not in his custody and which he is under obligation to support . . . may marry in this state or elsewhere . . .," without a court order. The court order, in turn, would issue only after the resident submitted proof of compliance with the support obligation and demonstrated that the children were not likely to become public charges. For parents whose children received funds under government assistance programs and who were too poor to ever be able to demonstrate that the children were not likely to become public charges, the statute completely eliminated the possibility of getting married while maintaining residency within the state.

The Court's invalidation of the Wisconsin statute rested firmly on the state's interference with plaintiff's right to marry. The Court reiterated the fundamental character of that right:  

[T]he decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our
A state regulation that interferes with the exercise of this fundamental right, held the Court, is to be subjected to rigorous scrutiny unless it does "not significantly interfere with decisions to enter into the marital relationship."\textsuperscript{148}

According to the foregoing cases, a state statute which places a "direct legal obstacle in the path of persons desiring to get married,"\textsuperscript{149} is unconstitutional unless it is "supported by sufficiently important state interests and is closely tailored to effectuate only those interests."\textsuperscript{150} Yet current state statutes and courts' interpretations of those statutes do exactly that: they place a direct legal obstacle in the path of same-sex couples who seek the legal protection offered by a marriage license. The elements considered fundamental to the existence of a marriage—"a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred"\textsuperscript{151}—exist in same-sex relationships despite the current lack of legal and societal support for these relationships. Surveys have shown that lesbian and gay relationships are similar to heterosexual relationships in terms of level of commitment, sharing resources, and loyalty.\textsuperscript{152} Psychologist C. A. Tripp reports that 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, or dinner is served, 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.\textsuperscript{153}

According to empirical evidence gathered by respected researchers, therefore, the interests of same-sex couples in marriage are identical to those of heterosexual couples. Therefore, the fundamental right to marry requires that state regulations confining the institution of marriage to heterosexual couples be subjected to strict scrutiny.

\begin{itemize}
\item \textsuperscript{147} Id. at 386.
\item \textsuperscript{148} Id.
\item \textsuperscript{149} See id. at 387 n.12 (explaining the difference between the Wisconsin statute and the section of the Social Security Act upheld in Califano v. Jobst, 434 U.S. 47 (1977)).
\item \textsuperscript{150} Id. at 388.
\item \textsuperscript{151} Griswold, 381 U.S. at 486.
\item \textsuperscript{152} See generally M. Mendola, supra note 6, at 120-25.
\item \textsuperscript{153} C. Tripp, The Homosexual Matrix 159 (2d ed. 1987).
\end{itemize}
The relationship between this branch and the right to marry is symbiotic, and the interrelationship between the two has been used to justify the denial of marriage licenses to same-sex couples: "marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." According to this line of reasoning, the right to marry exists only because the state of marriage is conducive to procreation and childrearing. The court in Singer v. Hara thus concluded that denial of marriage licenses to same-sex couples is justified because same-sex sexual activity does not result in conception. "[I]t is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination on account of sex."

This conflicts with the Court's language in privacy cases such as Griswold. Were it true that marriage is protected only for the sake of promoting reproduction, marriage licenses could be denied to all couples not involved in childrearing or procreation, including heterosexual couples who are unable or unwilling to have children. Furthermore, if the fundamental right to privacy is construed to protect relationships that serve society's interest in procreation and childrearing, many lesbian and gay couples will qualify for marriage licenses. A significant percentage of lesbian and gay couples raise children. In Mary Mendola's survey of lesbians and gay men involved in a "gay marriage relationship," 25% of the women and 17% of the men reported that either they or their partner had children. Of the women, 58% reported that the children

---

154 Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (liberty protected by the due process clause includes the right to "establish a home and bring up children," rendering invalid a law prohibiting the teaching of foreign languages to grade-schoolers). See also Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (law requiring children to attend public school "interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (law forbidding the use of contraceptives is "repulsive to the notions of privacy surrounding the marriage relationship"); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") (emphasis in original); Roe v. Wade, 410 U.S. 113, 152-53 (1973) (a woman's decision to terminate her pregnancy is encompassed by a constitutional "guarantee of personal privacy [which] has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education") (citations omitted); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) ("This right of personal privacy includes 'the interest in independence in making certain kinds of important decisions.'") (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).


157 Id. at 260, 522 P.2d at 1195.

158 For example, the values emphasized by Justice Douglas in Griswold v. Connecticut, 381 U.S. 479, 486 (1965) include intimacy, harmony, and bilateral loyalty, but not procreation.

159 Recognition of marriage between a transsexual and a member of the transsexual's former gender further belies this assumption. See infra note 177 and accompanying text.

160 M. MENDOLA, supra note 6, at 254.
lived "with [respondent] and [respondent's] partner most of the time," and another 39% reported that though the children did not live with the couple they did visit in the couple's home. Only 3% of the men reported that the children lived with them, but 53% reported that the children visited them at home.

Increasingly, same-sex couples, especially lesbian couples, are deciding to raise children together. New reproductive technologies are making this kind of family planning possible. In jurisdictions in which donor insemination is legal, a lesbian couple who would like to have children can do so: the women can take advantage of a sperm bank's services, or they can informally request a friend or relative to provide the necessary semen. The director of one sperm bank in Oakland, California reports that approximately 40% of its clients are lesbians—most came to the center as couples with plans to raise their children as part of a lesbian family. Documentation on the number of lesbian couples choosing informal donor insemination is unavailable, but it stands to reason that many couples choose this less expensive method.

Lesbian couples' determination to create their own families demonstrates that there is no connection between sexual identity and a desire to have children. Lesbian couples raise children without many of the advantages married parents take for granted: societal approval, legal recognition, and ease of conception. Yet lesbian parents have the same responsibilities: they must clothe, feed, and shelter their children, educate them, prepare them to face society and teach them moral values. Family law and marriage laws serve the interests of heterosexual couples in accomplishing these tasks competently. Yet state law denies lesbian

---

161 Id. at 255.
162 Id.
164 The "new" reproductive technologies do not really require any new technological innovations: insemination without coitus has always been possible. In the 1940s, the artificial insemination of "spinsters" caused considerable controversy. W. Finegold, Artificial Insemination 101 (2d ed. 1976).
165 Twenty-seven states have enacted legislation regulating donor insemination; of those, three impose criminal penalties for performing the procedure without physician supervision. O'Rourke, supra note 8, at 145.
166 The advantages and disadvantages of the available donor insemination procedures are detailed in O'Rourke, supra note 8, at 142-44.
167 Shapiro & Schultz, supra note 163, at 278.
168 The fact that some people think that "practicing homosexuality" is immoral does not lead lesbians and gay men to reject morality as a force in their lives. Nor does it discourage them from trying to instill values and morals in their children. One lesbian mother complains: [M]y boys lived with their father awhile, and their father is simply not a disciplinarian. He doesn't care whether they listen or not. And he never taught them that they should respect other people. Louise and I have been fighting this battle with the boys for over two years. They have to mind what we tell them to do whether or not they like it. I don't know how far we're getting raising them right, but it's a problem we share.
169 M. Mendola, supra note 6, at 88.
and gay couples and their children protection of identical family interests.

Ultimately, denying same-sex families this protection will put the state in an awkward position. As commentators Shapiro and Schultz remark: "Whether or not a jurisdiction [legally recognizes same-sex families], their courts must inevitably deal with the offspring of these unions and must determine rights for support, visitation, inheritance and all the other traditional rights stemming from a heterosexual marriage." If states licensed same-sex marriage, the courts could use precedents from marriage and family law to determine the legal rights of members of same-sex families. States soon will be forced to reevaluate the wisdom of denying children of same-sex couples the protections built up over centuries in the context of heterosexual marriage.

The Constitution protects procreation and childrearing from unwarranted state interference and requires that states administer all laws respecting this intimate and private sphere nondiscriminatory. Therefore, if marriage laws are designed to protect procreative and family interests, they must serve those interests consistently and cannot interfere with their exercise. By denying marriage licenses to same-sex couples, states interfere with the procreative and family interests of these couples. Thus, any law that denies marriage rights to same-sex couples is unconstitutional unless it can be narrowly tailored to promote a compelling state interest.

V. STATE INTERESTS SUPPORTING DENIAL OF MARRIAGE LICENSES TO SAME-SEX COUPLES

Courts have found the state's interest in encouraging procreation is sufficient to justify the denial of marriage licenses to same-sex couples. Therefore, they have not found it necessary to search for other potentially compelling justifications for this denial. However, the procreative interest is only one of many advanced by commentators to support the constitutionality of restrictive state marriage laws. Having established that marriage laws must be subjected to strict scrutiny, this Article next examines the adequacy of these various potential justifications. It con-

169 Shapiro & Schultz, supra note 163, at 280.
170 See supra note 115.
cludes that none of the interests suggested by either courts or commentators is sufficient to justify states’ opposite-sex marriage requirement.

A. Encouraging Procreation

1. Argument

Procreation is essential to the survival of the human race; therefore the state has an interest in encouraging procreation. Because the heterosexual family is still the primary setting for procreation and childrearing, the state is justified in encouraging individuals to participate in a traditional heterosexual childbearing family. Even though some same-sex couples do raise children, legally recognizing such unions would remove an incentive to enter into a relationship that is far more likely to result in procreation. A homosexual union pairs individuals who are capable of natural procreation in a relationship incapable of natural procreation.

2. Adequacy

The state has no compelling interest in encouraging procreation for the sake of the survival of the human race. Empirically, the real danger to human survival is from overpopulation, not underpopulation. The Supreme Court’s modern privacy decisions, which grant individuals the rights to contraception and abortion, demonstrate that a purported state interest in increasing human population cannot sustain a state law. Furthermore, it does not seem likely that state marriage laws are actually designed to protect such interests. No state has ever proscribed the marriage of a sterile man to a fertile woman or vice-versa. In addition, New Jersey’s opposite-sex marriage requirement has been held to allow a post-operative transsexual (born male, now female) legally to marry a man, even though such a couple could never conceive a child.

If underpopulation were a genuine state concern, compelling enough

176 In none of these cases did the state argue that a state interest in encouraging procreation could justify the challenged statute. Were the argument even marginally credible, the states would have raised it in defending the anti-abortion and anti-contraception statutes.
177 M.T. v. J.T., 140 N.J. Super. 77, 355 A.2d 204 (App. Div. 1976). The court reasoned that: If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually [although not reproductively] as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person’s identification at least for purposes of marriage to the sex finally indicated. Id. at 89, 355 A.2d at 210-11. Yet, the court accepted as a fundamental premise “that a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female.” Id. at 83, 355 A.2d at 207. If the state’s goal really was to encourage procreation, a postoperative transsexual would not be allowed to marry at all.
to justify the denial of same-sex marriage licenses, it seems likely that the state would have a plethora of like-motivated laws governing heterosexual unions. In addition, we might expect state recognition of lesbian marriages between menopausal women.

The state cannot advance hypothetical or pretextual justifications for laws that are subject to strict judicial scrutiny. In addition, legislation motivated by archaic and overbroad stereotypes is invalid regardless of whether there exists some conceivable interest that could support its enactment. Here, the interest in encouraging procreation seems both pretextual and, more fundamentally, uncompelling. Strict judicial scrutiny demands more.

**B. Protecting Children**

1. **Argument**

Marriage laws are designed to protect children and couples who choose to bear and raise children. Most children are raised by heterosexuals, and these children benefit from the legal advantages their parents receive. Additionally, children need protection from the harms caused by being raised by a lesbian or gay couple: the increased chance of growing up to be homosexual, the risk of being sexually abused, the reality of prejudice. Adults can choose for themselves to live in these lesbian and gay families, but it's unfair for them to choose that life for their children.

2. **Adequacy**

Marriage laws that allow only opposite-sex couples to obtain the benefits of marriage are not narrowly tailored to protect children. There are many children who are not raised by heterosexual couples, and there are many heterosexual couples who never raise children and who nonetheless receive the benefits of the marriage laws. The same-sex marriage prohibition is consequently both underinclusive and overinclusive with respect to the state's interest in protecting children. Such a law cannot survive rigorous constitutional scrutiny.

At the same time, laws against same-sex marriage cannot be justified

---

178 In practice, the courts guard against states' use of pretextual justifications by requiring a close fit between the state's interest and the statutory scheme. In the context of gender-based classifications, "[t]he purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725-26 (1982).

179 See supra notes 4-5 and accompanying text.

180 See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (statute requiring female, but not male, service members to prove their spouses' dependence in order to obtain increased quarters allowance, thus allowing men with independent wives to collect the increased allowance, found unconstitutional).
as protecting children from their gay parents. Empirically, it is not true that children of lesbian and gay couples are any more likely to be sexually molested than children of heterosexual couples. In fact, gay men are less likely than heterosexual men to sexually abuse children.\(^{181}\) Furthermore, the notion that lesbian and gay parents "indoctrinate" their children and cause them to "become gay" inartfully masks the value judgment that homosexuality is morally wrong. Hence, this justification can support a legislative classification only if the dominant culture's interest in enforcing its own moral norms is compelling.\(^{182}\) In any event, those moral norms are not necessarily enforceable by such a classification. Empirical studies show that homosexuality occurs with equal frequency among children of either heterosexual or homosexual parents.\(^{183}\) There appears to be little, if anything, that parents can do to affect the sexual orientation of their children.\(^{184}\)

Protecting children from the societal prejudice associated with being raised by a same-sex couple is a more realistic concern. Many of the children of same-sex couples will encounter societal prejudice. They will encounter prejudice, however, whether or not their parents legally marry. Legally recognizing the validity of same-sex unions will not add to that prejudice and could very well work to dissipate it. Such recognition would tend to legitimize the offspring of such unions. Further, many other children encounter prejudice as they grow up—children of mixed-race couples, black children, immigrant children—yet the law does not deny the parents of such children the right to marry.\(^{185}\) This right is protected by the notion central to the fourteenth amendment that law cannot be based on prejudice, whether the prejudice of legislators or the prejudice of society. Cases awarding lesbians and gay men custody of their children from prior heterosexual marriages\(^{186}\) implicitly recognize that it is more important for a parent to love and want a child than to conform with the dominant culture's definition of the ideal parent. If the state truly wants to protect children, it should recognize same-sex mar-

---


\(^{182}\) See infra notes 200-07 and accompanying text.


\(^{184}\) This is not to say that socialization has no effect on a person’s expression of his or her sexuality. For example, parents can affect their gay children by making it difficult for them to accept their own sexuality. However, there is a component of sexuality that appears to be impervious to parental influence.

\(^{185}\) Cf. Palmore v. Sidoti, 466 U.S. 429, 434 (1984) ("The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.").

riages. Such recognition would do more good than harm because this would tend to legitimize the offspring of such unions. The denial of same-sex marriage licenses, therefore, does not serve the state’s interest in protecting children.

C. Discouraging Illegal Homosexual Activity

1. Argument

Allowing same-sex couples to marry would increase the incidence of illegal homosexual activity in two ways. First, a state’s recognition of same-sex couples would decrease the moral force of its laws criminalizing sodomy and other homosexual sex acts. Second, recognition of same-sex marriage would encourage individuals to enter into relationships that are conducive to such illegal activity. The state’s interests in discouraging homosexual sex acts justified Georgia’s criminal sodomy statute in *Bowers v. Hardwick*. Consequently, this interest should be sufficient to justify the state’s denial of marriage licenses to same-sex couples.

2. Adequacy

The Georgia statute upheld in *Bowers* burdened only sexual interests and therefore needed to survive only rational basis scrutiny. In the case of same-sex marriage, state law burdens the individual’s fundamental rights to marriage and family. State interests held sufficient in *Bowers* to uphold Georgia’s sodomy statute do not necessarily justify marriage laws that are subject to strict scrutiny.

The severability of marriage rights from sexual rights is demonstrated by the fact that Georgia’s anti-sodomy statute broadly proscribes certain types of sexual acts, whether committed by members of the same-sex, by members of the opposite sex, or even by a legally married couple. State approval of marriage in general, therefore, does not imply approval of every consensual sexual act committed by a married couple. *Bowers* suggests only that while the right to privacy protects marriage, procreation, and family, it does not necessarily protect sexual activity that takes place within the marriage. There is no necessary contradiction between recognizing the family rights of same-sex couples and criminalizing sexual acts such a couple is capable of performing.

Furthermore, this state interest has no meaning in the twenty-three states that have repealed their anti-sodomy statutes. The opposite-sex

---

187 106 S. Ct. 2841, 2846 (1986) (the rational basis supporting the law is the “belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable”).
188 *Id.* at 2846.
189 *Id.* at 2842 n.1.
190 *Id.* at 2844, 2846.
191 See *Homosexuals’ Right to Marry*, supra note 172, at 211.
marriage requirement imposed in these states cannot serve to discourage illegal homosexual activity, since there is no illegal (private, consensual, adult) homosexual activity to discourage. In these states, especially, state laws restricting marriage to opposite-sex couples cannot serve the states' interests in discouraging "illegal" sexual activity.

D. Reducing Incidence of Homosexuality

1. Argument

Denying legal recognition to same-sex unions serves a state's interest in reducing the incidence of homosexuality. The unavailability of marriage as an option for same-sex couples encourages individuals to choose to be heterosexual. Eliminating that incentive will swell the homosexual ranks and increase the number of bisexuals who choose to settle down permanently with a member of the same-sex.

2. Adequacy

Experts generally agree that a person's sexual orientation is determined by age five or six. At that age, a child is only peripherally aware of the existence of law and takes no account of the legal incentives and disincentives imposed by the state. Accordingly, a change in the marriage laws is unlikely to have any effect on the incidence of homosexuality.

The experience of countries that have liberalized their laws regarding homosexuality bears this out. In Sweden, for example, a study conducted over ten years following the legalization of homosexual acts found there to be no noticeable increase in homosexual activity during that period. It seems that state laws may affect the quality of life for homosexual women and men, but not the incidence of homosexuality.

There are no empirical studies, however, focusing specifically on bisexuals' behavior in response to varying legal regimes. Common sense would indicate that legal incentives would have some effect on individuals who are indifferent to the gender of their partners. Yet, one would also expect the exercise of that choice to register an increase in the incidence of homosexuality in studies like the one conducted in Sweden. It may be that legal incentives and disincentives play a negligible role in individuals' romantic and social choices and that social pressures have far more impact on those choices.

If it is assumed that legal restrictions do affect bisexuals' choice of


marriage partners, then the "narrowly tailored" requirement is probably satisfied. The conceivable "less restrictive means" of prohibiting same-sex marriage only for those proven to be responsive to legal incentives would be impossible to enforce and highly intrusive.\textsuperscript{194} In general, the only alternatives to categorical marriage laws seem to involve unacceptable governmental intrusions into the individual's private life.

For this reason, apart from the empirical question of whether legal incentives ever have a significant effect on individuals' sexuality, the crucial legal issue is whether a state interest in reducing the incidence of same-sex coupling—or preventing an increase—is "compelling." Relatively few governmental interests qualify as "important" enough to withstand heightened scrutiny.\textsuperscript{195} Strict scrutiny, if applied here to protect rights to family and marriage, would be yet more demanding—"fatal" in practice.\textsuperscript{196} In the context of marriage, family, and procreative rights, only the preservation of human life has been held sufficiently compelling to support government regulation.\textsuperscript{197}

Homosexuality poses no such threat to human life. The threats associated with the spread of Acquired Immune Deficiency Syndrome (AIDS) would be reduced by a liberalization of the marriage laws, since the availability of legally recognized marriage would encourage and legitimize monogamy among gay men. Furthermore, the AIDS virus does not choose its victims according to sexual orientation: it passes from one person to another by the exchange of bodily fluids, regardless of whether the exchange is between two men, two women, or a man and a woman.\textsuperscript{198} The level of AIDS infection has reached such proportions in all sexual communities that "safe sex" practices are recommended for everyone.\textsuperscript{199} Realistically, the spread of the AIDS virus argues against denying legitimacy to same-sex unions and thus cannot constitute the compelling state interest required to justify that continuing denial.

An increased incidence of homosexuality, thus, would trouble only those who believe homosexuality fundamentally immoral. The state's interest in promoting majoritarian moral norms is examined next.

\textsuperscript{194} Imagine a regime under which 18-year-olds would be required to fill out a sexuality and legality questionnaire, leading to governmental classification; or a petition procedure for same-sex couples, including declarations that restrictive marriage laws would have no effect on their behavior.

\textsuperscript{195} Redressing the effects of past discrimination, Kahn v. Shevin, 416 U.S. 351 (1974), and preventing teenage pregnancy, Michael M. v. Superior Court, 450 U.S. 464 (1981), are two "substantial" state interests from the gender-based equal protection context.


\textsuperscript{197} See Roe v. Wade, 410 U.S. 113, 155, 163-64 (1973) (strictly scrutinizing but upholding state bans on post-viability abortion).

\textsuperscript{198} See generally NATIONAL ACADEMY OF SCIENCES, INSTITUTE OF MEDICINE, MOBILIZING AGAINST AIDS: THE UNFINISHED STORY OF A VIRUS (1986).

\textsuperscript{199} \textit{Id.}
E. Promoting the Dominant Culture's Moral Norms

1. Argument

Although law and morality are not coextensive, they are inextricably linked. Majority moral norms affect the legislation a state enacts, and, conversely, the laws enacted by the state reinforce and shape majority moral attitudes. Buchanan, in his article *Same-Sex Marriage: The Linchpin Issue* explains:

To a degree hard to calibrate, every retreat from the legal prohibition of conduct enhances, in the eyes of society, the moral appeal of the conduct that is now permitted legally to occur. All other things being equal, it is harder to condemn what the law permits than what the law prohibits. If the majority is to maintain its vision of moral excellence, it must codify that morality, to the extent possible, in the laws of the state. Legitimizing same-sex marriage would undercut the majority's moral vision; therefore, the issue is no longer simply one of privacy. Buchanan argues, "The majority may reasonably believe that a fundamental change in the legal definition of an institution 'older than the Bill of Rights' has a significant capacity to threaten the standards of morality that the majority wishes to preserve in relation to that institution."

2. Adequacy

In one respect, Buchanan is correct: laws promulgated by the majority serve the interest of the majority in fashioning a world that reflects its values. Furthermore, when a law does not implicate an individual's constitutional rights, the interest of the majority in promoting its own values ordinarily justifies enforcement of that law. Yet without a reliable algorithm for distinguishing between those moral norms enforceable through law and those enforceable only by pressure from other social mechanisms, the coercive power of the majority would be objectionable. The Constitution figures heavily in any such algorithm.

When there exists a conflict between effectuating the will of the majority and respecting the constitutional rights of individuals, that conflict must always be resolved by reference to the Constitution and to constitutional doctrine. Moral norms that interfere with the exercise of constitutional rights are to be given the force of law only if they prevent objective and concrete harm. Constitutional rights cannot be abridged by majoritarian moral beliefs.

200 This argument is taken from Buchanan, *supra* note 172, at 557-62, where it is explored in greater detail.
201 Buchanan, *supra* note 172, at 559.
202 Id. at 560.
203 Professor Tribe enunciates a similar principle in the context of the First Amendment: "Harms existing only in the eye or mind of the voluntary beholder cannot justify restricting otherwise protected behavior." L. Tribe, *supra* note 105, at 981.
Supreme Court cases upholding statutes subject to heightened or strict scrutiny confirm that the state's interest must be concrete.\textsuperscript{204} For example, in \textit{Michael M. v. Superior Court}, California presented the Court with extensive statistical evidence regarding the problem of teenage pregnancy.\textsuperscript{205} California's concrete interest in preventing the harms associated with teenage pregnancy, which included loss of human life, justified the continuing enforcement of its statutory rape law.\textsuperscript{206} In \textit{Roe v. Wade}, similarly, the state could constitutionally prohibit the performance of abortions only when viable human life was at stake.\textsuperscript{207} Thus, the majority's moral interest in condemning homosexuality should be grounded in the desire to prevent some concrete harm. If such harm cannot be shown convincingly, then laws prohibiting same-sex marriage cannot be justified on "moral" grounds.

\section*{F. Supporting the Traditional Family}

1. \textbf{Argument}\textsuperscript{208}

Traditional opposite-sex marriage promotes certain individual and community values: allegiance to family life, conventional marriage and childbearing. Because opposite-sex marriage is held in high esteem in our society, the values promoted by opposite-sex marriage are also held in high esteem. Preserving these values is a legitimate concern of the majority.

The majority, therefore, may reasonably believe that legal recognition of same-sex marriage would destroy the exclusiveness of the present position held by opposite-sex marriage in the eyes of society and, by so doing, would impair the ability of opposite-sex marriage to advance the individual and community values that it has traditionally promoted.\textsuperscript{209} Although the exact consequences of this debasement are impossible to predict, "[g]overnment should not be required to yield its position in advance for the main purpose of creating the empirical data that may only tend to show why government should not have yielded in the first

\begin{footnotes}
\item[204] See, e.g., \textit{Roe v. Wade}, 410 U.S. 113, 154 (1973) (state interests sufficiently compelling to justify some regulation of the right to an abortion included interests in "safeguarding health, in maintaining medical standards, and in protecting potential life"); \textit{Kahn v. Shevin}, 416 U.S. 351, 355 (1974) (state's interests in "cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden" justified granting widows a special property tax exemption); \textit{Schlesinger v. Ballard}, 419 U.S. 498, 508 (1975) (military's sex-based classification as to length of officers' tenure before mandatory discharge for want of promotion was justified by the fact that women's exclusion from participation in combat limited opportunities for promotion).
\item[206] \textit{Id}. at 470-71 n.4.
\item[207] 410 U.S. at 163-64.
\item[208] This argument is taken from Buchanan, \textit{supra} note 172, at 565-70, where it is explored in greater detail.
\item[209] Buchanan, \textit{supra} note 172, at 567.
\end{footnotes}
2. Adequacy

These concerns are probably at the heart of the courts’ objections to the issuance of marriage licenses to same-sex couples. The dominant culture tends to view lesbians and gay men as exclusively sexual beings, probably because sexuality is the definitive difference between homosexuals and heterosexuals. A same-sex couple’s demand for a marriage license appears to be an attempt to redefine marriage as a sexual institution. The notion of a lesbian or gay family is novel and foreign to the majority.

However, if courts analyze the underlying components of “traditional family values,” they will find them no less served by same-sex families than by opposite-sex families. Same-sex marriage would serve such traditional marriage values as fostering commitment, loyalty, and intimacy, as well as serving traditional values associated with childrearing and procreation. Ultimately, there is no necessary connection between promoting the values served by opposite-sex marriage and restricting marriage licenses to opposite-sex couples.

CONCLUSION

Once it is recognized that lesbian and gay family interests are essentially identical to heterosexual family interests, the states’ denial of marriage licenses to same-sex couples becomes recognizably invidious and irrational. Several individual rights doctrines would seem to require invalidation of these state marriage laws: equal protection on the basis of sex, equal protection on the basis of sexual orientation, equal rights under state equal rights amendments, and substantive due process. Of these doctrines, substantive due process is best suited to resolve this issue because the values it protects—the values of marriage, procreation, and family—are precisely the values at stake in same-sex marriage cases. Furthermore, once invoked, due process requires that states advance compelling interests in support of the challenged laws.

No court has yet found state opposite-sex marriage requirements unconstitutional. Because the Supreme Court dismissed plaintiffs’ appeal in Baker v. Nelson for want of a substantial federal question, it has never given the matter plenary consideration. When the issue next reaches the Court, the substantiality of the matter will be manifest. First, it is becoming increasingly clear that the content of the constitutional

---

210 Id. at 570.
211 See supra notes 151-52 and 158-68 and accompanying text.
212 409 U.S. 810, dismissing appeal from 291 Minn. 310, 191 N.W.2d 185 (1971).
The right to privacy protects an individual's rights to marriage, children, and family.\textsuperscript{213} Despite the sometimes fragmented jurisprudence of substantive due process, a retreat along these lines would constitute an abrupt departure from precedent. Second, lesbians and gay men are actively pursuing these rights—honoring their own committed relationships, raising children, and building families—despite the current lack of legal protection and support.\textsuperscript{214} It is no longer tenable to assert that lesbians and gay men do not engage in the essential functions of marriage. Consequently, if the Court is to be true to its own jurisprudence in this matter, it will hold that states cannot constitutionally deny marriage licenses to same-sex couples.

\textsuperscript{214} R. Achtenberg, \textit{supra} note 181, at 1.