

**THE SAME-SEX MARRIAGE CONTROVERSY AND  
AMERICAN CONSTITUTIONALISM:  
LESSONS REGARDING FEDERALISM, THE SEPARATION  
OF POWERS, AND INDIVIDUAL RIGHTS**

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INTRODUCTION

The controversy over same-sex marriage has been percolating in the United States for two decades, and in a short time the U.S. Supreme Court, which recently considered the issue inconclusively, will have to confront it fully. The decision of the United States Court of Appeals for the Sixth Circuit on November 6, 2014, to uphold bans on same-sex marriage in four states and thus produce a split among the circuits, may mean that the Supreme Court will agree to hear a case involving same-sex marriage during the current October 2014 term.<sup>1</sup> Perhaps more than any other recent political and legal controversy in the United States this one involves what the noted constitutional scholar Philip Kurland identified as the “three elements” of the U.S. Constitution: the republican form of government, which includes federalism; separation of powers, in particular the division between the popularly responsible political branches and the popularly insulated judiciary; and the importance of individual rights, which is mainly how Americans understand their liberty, and hence what they expect their government to protect.<sup>2</sup>

In this Article, I examine the debate over same-sex marriage from two different, if overlapping, perspectives, which can be called the moral-political and the constitutional. The first refers to the question of which policy is best, and hence should be adopted by those bodies, legislatures normally, charged with making such decisions. The second refers to the limitations that the Constitution and the institution of judicial review impose on such legislative decisions. When the requirements of constitutionality approach the requirements of wisdom, by which I mean

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1. Lyle Denniston, *Analysis: Paths to Same-Sex Marriage Review (Updated)*, SCOTUSBLOG (Nov. 7, 2014, 4:10 PM), <http://www.scotusblog.com/2014/11/analysis-paths-to-same-sex-marriage-review>. I will take note of the recent lower federal court decisions briefly in the conclusion of this Article.

2. Philip Kurland, *The True Wisdom of the Bill of Rights*, 59 U. CHI. L. REV. 7, 7–8 (1992).

the best policy, we run the risk of losing any semblance of republican government in the United States.

Our Constitution guarantees every state a republican form of government.<sup>3</sup> While the Supreme Court has refused to provide a direct account of this clause, its legislative apportionment decisions indirectly address the question. For example, in *Reynolds v. Sims*, the Court stated: “As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.”<sup>4</sup> That the Court chose the term “representative” rather than “republican” to define the American form of government reflects the necessarily indirect character of our republican self-government. Even the Anti-Federalist critics of the Constitution conceded the need for representation; they simply claimed that the proposed federal government would have too much power and the people would have too little representation. But the importance of representation, which goes back to the American Revolution as well as the ratification of the Constitution, presupposes that the elected officials will actually have authority to make important governmental decisions. Judicial review, as it has developed, constitutes a serious challenge to representative government as we have known it if it leads courts to place the burden of proof on defenders of legislative choices.

Our constitutional separation of powers reflects a significant difference between legislative and judicial power. Members of Congress are subject to periodic popular elections; Article III judges are appointed for life. I acknowledge that interpreting an eighteenth century constitution, with critical amendments that were passed and ratified nearly 150 years ago, requires an appreciation of the need for interpretation. To paraphrase Chief Justice John Marshall, expounding a constitution is not the same as interpreting a prolix legal code.<sup>5</sup> In conformity with the distinction between

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3. U.S. CONST. art. IV, § 4.

4. *Reynolds v. Sims*, 377 U.S. 533, 562, 568 (1964) (establishing the constitutional equal protection requirement of equal population districts for both houses of state legislatures). An earlier case had already held that “one person one vote” was a requirement for the House of Representatives. *Wesberry v. Sanders*, 376 U.S. 1, 4 (1964). I note the irony that in *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 735 (1964), the Court pitted itself against a popular referendum that supported apportionment in one house by political subdivision on what was called the “federal analogy,” which insisted on equal population districts for both houses of a state legislature, even where, in the case of Colorado, the people expressed their desire for a senate with apportionment reflecting political subdivisions as well as population. *Id.*

5. See *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the

legislative and judicial power, Madison's separation of powers argument in Federalist 47 and 51 differs from Hamilton's separation of powers argument in Federalist 78. The former two essays concern the checks and balances resulting from an overlapping of the governmental powers of the two houses of Congress and the president.<sup>6</sup> The latter essay concerns the need for insulating federal judges from electoral responsibility, so that they will have the fortitude to uphold the Constitution against legislative abuses.<sup>7</sup>

The challenge for judges today is to understand when judicial review is an appropriate check on legislative action and when that authority should be exercised with restraint, lest it overwhelm the indirectly popular, and hence genuinely republican and consent-giving, parts of our constitutional polity. James Madison's remark in Federalist 10, to the effect that many legislative conflicts can be framed in terms of rights, illustrates the problem.<sup>8</sup>

While it is perfectly understandable that supporters of same-sex marriage do not care whether they achieve their objective in the courts or through legislative action, it should matter to U.S. citizens how significant laws and practices are changed. What is at stake is preserving an adequate space for republican government to flourish. The Supreme Court has recognized this in some of its decisions interpreting the religion clauses of the First Amendment. It has supported "play in the joints" as a way of reconciling the two clauses—Establishment and Free Exercise—without taking all discretion away from federal or state lawmakers.<sup>9</sup> The courts should not press legislatures to make the best choice in a conflict between governmental authority and individual rights. Some "play in the joints" is necessary to allow popularly elected legislatures to make important choices. There are several reasons to support such an approach.

For one thing, those who do not support same-sex marriage, whether from hostility to homosexuals or from an attachment to traditional views on

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means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.").

6. THE FEDERALIST NO. 47, at 307–15 (James Madison) (Robert Scigliano ed., 2001); THE FEDERALIST NO. 51, at 330–35 (James Madison) (Robert Scigliano ed., 2001).

7. THE FEDERALIST NO. 78, at 495–500 (Alexander Hamilton) (Robert Scigliano ed., 2001).

8. See THE FEDERALIST NO. 10, at 56 (James Madison) (Robert Scigliano ed., 2001) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?")

9. See *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 669 (1969) (clarifying that aside from government sponsored religion and governmental interference with religion, governments may handle religious expression issues as they chose); *Locke v. Davey*, 540 U.S. 712, 718–19 (2004).

marriage, are much more likely to accept a legislative decision against their preferences than a judicial one. Furthermore, if the courts were not so willing to be in the forefront of political and constitutional change, opponents would be less likely to turn to constitutional amendments as the means to attain their objectives. That too takes the issue out of the ordinary political process. Courts have developed doctrines for examining issues that involve either individual rights and/or classifications of individuals that have the effect of increasing the range of judicial power at the expense of political power. I refer to the now commonly accepted three levels of scrutiny, with the two “heightened” levels requiring an almost perfect fit between the end sought and the means chosen.

In order to illustrate the difference between the question, “What should be done?” and the question “Is it constitutional?” I will begin with the moral and political arguments for and against same-sex marriage.

#### I. THE SAME-SEX MARRIAGE CONTROVERSY: PRO AND CON

The same-sex marriage controversy illustrates the absence of a clear boundary between the legislative and judicial spheres of government. Same-sex couples go to court and assert their right to marry based on principles of equality and liberty. They seek what amounts to the right to have their loving relationship given the same dignity and respect that heterosexual couples receive.<sup>10</sup> The Supreme Court decision central to this argument is *Loving v. Virginia*, the 1967 case that invalidated state anti-miscegenation laws.<sup>11</sup> Stating the position in favor of same-sex marriage reveals how constitutionality and wisdom tend to commingle.

While events in the 1980s caused gay rights activists to focus on marriage,<sup>12</sup> much of the extensive literature on same-sex marriage arose in the aftermath of the 1993 Hawaii Supreme Court decision in *Baehr v. Lewin*,<sup>13</sup> which led to passage of the federal Defense of Marriage Act (DOMA) in 1996.<sup>14</sup> Some of the participants in this debate have revised

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10. Respondents’ brief before the Supreme Court in the Proposition 8 case, *Hollingsworth v. Perry*, started with the importance of marriage and then turned to equality. See Brief for Respondents at 1, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (“This case is about marriage . . . . This case is also about equality.”).

11. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

12. See GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY 95–96, 105 (2004) (identifying three factors: a growth in the visibility and acceptance of lesbians and gay men, the devastation of AIDS, and the increase in lesbian couples having and/or raising children together).

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

14. Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 3(a), 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012), 28 U.S.C. § 1738(c) (2012)).

their earlier positions, in light of the increased acceptance of same-sex marriage and the recent Supreme Court decisions. But as long as the people in the several states are divided on the question of same-sex marriage and as long as the Supreme Court has not interpreted the Constitution to require each state to recognize same-sex marriage, the controversy remains. While advocates for same-sex marriage, who prefer the term “marriage equality,” present arguments that address both constitutionality and wisdom, these arguments can and should be separated. That is because rights arguments made in a judicial setting increasingly put the law on the defensive from the start; this happens when doctrines are employed to require a stricter level of scrutiny than reasonableness, or “rational basis.” The difficulty with such a result is that it shifts the responsibility to make good laws from the legislatures to the courts, and this turns judicial review into government by the judiciary.<sup>15</sup>

Scriptural authority is important in so far as it accounts for a good deal of opposition to homosexuality, let alone to same-sex marriage. At the same time, since the U.S. polity does not recognize scripture as legally binding, such a source cannot resolve this controversy for Americans. The moral philosophic positions prominent in this controversy are the natural law positions of John Finnis, Robert George and others on the one hand, and the political liberalism position of John Rawls and his followers on the other.

Finnis and the “new natural lawyers,” as they are called, present an argument in support of the Biblical position, but it is based on human reason alone.<sup>16</sup> Rawls, in the name of finding common ground, presents an argument that denies the legitimacy of relying on any comprehensive moral teaching, religious or philosophic, to settle political or constitutional issues.<sup>17</sup> I find each of these positions unsatisfactory. Finnis advocates a severely moral approach to marriage without even linking it to the good of procreation and raising children.<sup>18</sup> This allows him to distinguish “the marital act” between a man and a woman where procreation is impossible from any sexual act between homosexuals.<sup>19</sup> Finnis also disapproves of any

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15. See MURRAY DRY, *THE SAME-SEX MARRIAGE CONTROVERSY AND AMERICAN CONSTITUTIONALISM: LESSONS REGARDING FEDERALISM, THE SEPARATION OF POWERS, AND INDIVIDUAL RIGHTS* (forthcoming 2015) (discussing the Supreme Court’s development of three levels of scrutiny).

16. See John Finnis, *Law, Morality, and “Sexual Orientation,”* in *SAME SEX: DEBATING THE ETHICS, SCIENCE AND CULTURE OF HOMOSEXUALITY* 31 (John Corvino ed., 1997) (describing homosexuality as unnatural because it does not produce results that are intrinsic of human worth, such as offspring or companionship).

17. JOHN RAWLS, *POLITICAL LIBERALISM* 22 (expanded ed. 2005).

18. Finnis, *supra* note 16, at 38.

19. *Id.* at 34–35.

form of sexual activity between a husband and wife whose purpose is pleasure rather than procreation.<sup>20</sup>

John Rawls offered a view of “public reason” in his book *Political Liberalism* that has the effect of putting the burden of proof on supporters of same-sex marriage.<sup>21</sup> Arguments made from “public reason” may not be comprehensive doctrines regarding justice, be they based on religion or moral philosophy, since reasonable people disagree over which doctrine is correct. In other words, everyone must argue from premises that everyone accepts. Rawls describes the state’s legitimate interest in the family as an institution “needed to reproduce political society over time” by “rearing and educating children.”<sup>22</sup> From there Rawls asserts:

[T]he government would appear to have no interest in the particular form of family life, or of relations among the sexes, except insofar as that form or those relations in some way affect the orderly reproduction of society over time. Thus, appeals to monogamy as such, or against same-sex marriages . . . would reflect religious or comprehensive moral doctrines. Accordingly, that interest would appear improperly specified.<sup>23</sup>

According to Rawls, those positions could be defended “if monogamy were necessary for the equality of women, or [if] same-sex marriages [were] destructive to the raising and educating of children.”<sup>24</sup> Thus, under Rawls’ political liberalism, the traditional practice of marriage is presumptively invalid: proponents of monogamy, as well as marriage as the union of a

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20. *Id.* at 38 (“But one’s sex act with one’s spouse will not be truly marital—and will not authentically actualize, and allow one in a non-illusory way to experience, one’s marriage—if one engages in it while one *would be willing* in some circumstance(s) to engage in a sex act of a non-marital kind—e.g. adultery, fornication, intentionally sterilized intercourse, solitary masturbation or mutual masturbation (e.g. sodomy) and so forth.”). Finnis cites a passage in Plato’s *Gorgias* in support of his position that “[s]exual acts cannot in *reality* be self-giving unless they are acts by which a man and a woman actualize and experience sexually the real giving of themselves to each other—in biological, affective, and volitional union in mutual commitment, both open-ended and exclusive.” *Id.* at 35. But since Plato’s Socrates was arguing against the reduction of the good to the pleasant, especially with the pleasant understood as related to the body, Finnis’ interpretation goes a step further than Plato’s Socrates in morally disapproving of any activity that is chosen for the sake of pleasure. I do not think that either Plato or Aristotle’s treatment of the virtue of moderation is nearly as severe on pleasure as Finnis and his fellow “new natural lawyers” are. For similar “natural law” presentations, see Robert P. George & Gerald V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 304 (1995) and SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 27–28 (2012).

21. RAWLS, *supra* note 17, at 212–13.

22. *Id.* at 456–57.

23. *Id.* at 457.

24. *Id.*

man and a woman, must assume the burden of proof in justifying what are regarded at the outset as presumptive violations of political liberalism. Writing about “the question of gay and lesbian rights and duties” in relation to families, Rawls says: “If these rights and duties are consistent with orderly family life and the education of children, they are, *ceteris paribus*, fully admissible.”<sup>25</sup>

I will turn now to writers whose consideration of same-sex marriage involves questions of expediency as well as morality. Their different views about marriage reflect different opinions concerning the effect of extending marriage to same-sex couples. I will start with the opponents of such a change.

James Q. Wilson, in *The Marriage Problem: How Our Culture Has Weakened Families*, writes: “By a family I mean a lasting, socially enforced obligation between a man and a woman that authorizes sexual congress and the supervision of children. . . . A marriage is a ceremony that makes, or at least symbolizes, the legitimacy of the family.”<sup>26</sup> At the end of his chapter “Why Do Families Exist?” Wilson notes that the family “now rests almost entirely on affection and child care,” whereas it used to be a more comprehensive “political, economic, and educational unit.”<sup>27</sup> Nonetheless, it remains “a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve.”<sup>28</sup>

David Blankenhorn, founder of the Institute for American Values and author of *The Future of Marriage*, defines the institution of marriage as Wilson does:

In all or nearly all human societies, marriage is socially approved sexual intercourse between a woman and a man, conceived both as a personal relationship and as an institution, primarily such that any children resulting from the union are—

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25. *Id.* at 467 n.60. Rawls treats the abortion controversy in a similarly abrupt manner. *Id.* at 243 n.32. He later revises his apparent support for a woman’s right to abort in the first trimester, but he still gives the impression that any legitimate argument from public reason supports the right. *Id.* at 479. In another place, Rawls calls abortion a disputed question and, in such a case, each side should abide by the outcome of a vote even if it goes against the Catholic position rejecting abortion. *Id.* at 480. For Rawls, opponents of abortion “need not themselves exercise the right to abortion.” *Id.* It is strange that Rawls addresses a vote for abortion; the Supreme Court made the key vote on that issue. Rawls fails to say whether a vote against abortion with exceptions for, say, a mother’s health, incest, rape, etc., would pass muster with public reason.

26. JAMES Q. WILSON, *THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES* 24 (2002).

27. *Id.* at 40–41.

28. *Id.* at 41.

and are understood by the society to be—emotionally, morally, practically, and legally affiliated with both of the parents.<sup>29</sup>

Advocates of same-sex marriage, while agreeing with Wilson and Blankenhorn on the desirability of marriage as an institution, play down the importance of raising children and give greater weight to the social recognition of a committed, loving relationship and the function of lifetime caregiving.<sup>30</sup> Jonathan Rauch puts it this way in his book *Gay Marriage*:

If marriage has any meaning at all, it is that when you collapse from a stroke, there will be another person whose “job” is to drop everything and come to your aid. . . . To be married is to know there is someone out there for whom you are always first in line.<sup>31</sup>

Political Scientist Susan Shell responded to Rauch’s statement by noting it would sound odd “to any married couple with young children, partners whose first responsibility is not obviously spousal.”<sup>32</sup> She goes on to place parental responsibility above caregiving.<sup>33</sup> Let’s assume we agree with Shell on this point. Granting, moreover, that the two different roles can come into conflict, does that make it impossible for marriage to satisfy both responsibilities? Law professor Amy Wax, who presents a sympathetic case for traditional marriage, nonetheless suggests that as people live longer and the caregiving function becomes more significant, reasonable people might reconsider same-sex marriage.<sup>34</sup> Robin West argues that “no-fault” divorces, the availability of birth control, and legal neutrality regarding gender roles all combine to make the traditional definition of marriage

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29. DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 91 (2007) [hereinafter BLANKENHORN, *THE FUTURE OF MARRIAGE*].

30. See, e.g., JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 22 (2004); ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 179–80 (1st ed. 1995); ROBIN WEST, *MARRIAGE, SEXUALITY AND GENDER* 102–03 (2007); Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 *GEO. L.J.* 261, 295–97 (1995) (arguing that conservatives should support healthy relationships generally rather than challenge homosexual sex generally).

31. RAUCH, *supra* note 30, at 22.

32. Susan Shell, *The Liberal Case Against Gay Marriage*, *NAT’L AFF.*, Summer 2004, at 3, 11, available at [http://www.nationalaffairs.com/public\\_interest/detail/the-liberal-case-against-gay-marriage](http://www.nationalaffairs.com/public_interest/detail/the-liberal-case-against-gay-marriage).

33. *Id.* at 12.

34. Amy Wax, *The Meaning of Marriage: The Conservative’s Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 *SAN DIEGO L. REV.* 1059, 1101–03 (2005).



anachronistic.<sup>35</sup> Such an argument is not likely to persuade anyone with concerns about marriage, but the question remains: What is the likely risk of extending marriage to same-sex couples? It is not obvious that the couples that use artificial modes of reproduction to have children would not care for them.

Some gay rights activists do not support same-sex marriage because they oppose the institution of marriage as incompatible with true liberation.<sup>36</sup> That some radicals express a disingenuous support for same-sex marriage does not mean that marriage would suffer as a result of the change. In addition, most advocates of same-sex marriage are, indeed, supporters of marriage. They think, with E.J. Graff, that marriage is good for gays as long as it “is justified not by reproduction but by love”; then, “that venerable institution [marriage] will ever after stand for sexual choice, for cutting the link between sex and diapers.”<sup>37</sup> Likewise, Evan Wolfson, among the first advocates of same-sex marriage, contends that the radical rejecters of marriage among the gay community are in the minority.

What many gay people do not want is an all-or-nothing model imposed on their lesbian or gay identity; they want both to be gay *and* married, to be gay *and* part of the larger society. For these lesbians and gay men, being gay is not just about being different, it is also about being equal.<sup>38</sup>

To pursue the question concerning the consequences of same-sex marriage I want to consider part of Andrew Sullivan’s argument for, and David Blankenhorn’s argument against, same-sex marriage. Sullivan’s book *Virtually Normal* contains an account of four different approaches to homosexuality: prohibitionist, liberationist, conservative, and liberal.<sup>39</sup> He then presents his preferred position; he calls it “formal public equality,” and

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35. WEST, *supra* note 30, at 6. West notes that the Massachusetts Supreme Court redefined marriage when it held that the state’s constitution prohibited the traditional limitation of marriage to the union of a man and a woman. *Id.*

36. SULLIVAN, *supra* note 30, at 56–57. Sullivan devotes a chapter to the position he calls “liberationist.” *Id.* at 56. He also includes the writings of Paula Ettelbrick and Frank Browning in his same-sex reader to illustrate this position. Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, in SAME SEX MARRIAGE: PRO AND CON, A READER 118, 118–20 (Andrew Sullivan ed., 1st ed. 1997); Frank Browning, *Why Marry?*, in SAME SEX MARRIAGE: PRO AND CON, A READER 132, 132–33 (Andrew Sullivan ed., 1st ed. 1997).

37. See E.J. Graff, *Relying the Knot*, in SAME SEX MARRIAGE: PRO AND CON, A READER 134, 135–36 (Andrew Sullivan ed., 1st ed. 1997).

38. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 587 (1995).

39. SULLIVAN, *supra* note 30, at 19–20.

in light of his discussion it could be called “traditional liberalism.”<sup>40</sup> He describes liberalism as having undergone a development from the Enlightenment position, which recognizes that securing rights is not the same as guaranteeing that everyone acts rightly towards others, to an attempt, first with respect to race and then with respect to gender and sexual orientation, to eradicate prejudice.<sup>41</sup> While he expresses sympathy with the intention, Sullivan criticizes this governmental invasion into the private sphere by means of laws aimed at preventing discrimination by individuals—that is, non-governmental actors—in the areas of housing or employment.<sup>42</sup>

Sullivan argues for what he calls formal equality with respect to how homosexuals are treated; his examples are military service and marriage.<sup>43</sup> To make his case for same-sex marriage, Sullivan, like Rauch, emphasizes the importance of the “public recognition of a private commitment,” which as a “public contract [establishing] an emotional, financial, and psychological bond between two people,” is thus the same for homosexuals as for heterosexuals.<sup>44</sup> He dismisses the importance of procreation on the grounds that no marriage contract depends on a couple bearing children.<sup>45</sup> Sullivan essentially makes a liberal argument, one that Rawls’ political liberalism accepts but the traditionalists oppose.

In his Epilogue, Sullivan describes procreation in a manner that could have been written by Finnis, Wilson, or Blankenhorn: “The timeless, necessary, procreative unity of a man and a woman is inherently denied homosexuals; and the way in which fatherhood transforms heterosexual men, and motherhood transforms heterosexual women, and [the] parenthood transforms their relationship, is far less common among homosexuals than among heterosexuals.”<sup>46</sup>

Sullivan goes on to offer some generalizations about homosexual culture, acknowledging that it might be “understood as ‘homophobic’”:

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40. *Id.* at 171.

41. *Id.* at 137–47.

42. *Id.* at 156–68.

43. *Id.* at 172–79.

44. *Id.* at 179.

45. *Id.* at 179–80.

46. *Id.* at 196. For a similar, if less poetic, statement of the same point, see RAUCH, *supra* note 30, at 100 (“If I could have designed myself in the womb, I would have chosen to be heterosexual, because I feel I am missing out on something special and irreplaceable by not being able to conceive and raise a child with the partner I love.”). For a related point about the complementarity of male and female, see Dennis O’Brien, *A More Perfect Union*, CHRISTIAN CENTURY, Jan. 27, 2004, at 27, 30 (“I would say that it comes down to the ancient belief that men and women are different.”).

The experience of growing up profoundly different in emotional and psychological makeup inevitably alters a person's self-perception, tends to make him or her more wary and distant, more attuned to appearance and its foibles, more self-conscious and perhaps more reflective. The presence of homosexuals in the arts, in literature, in architecture, in design, in fashion could be understood, as some have, as a simple response to oppression.<sup>47</sup>

Then Sullivan turns to what homosexual culture can learn from heterosexual culture. "The values of commitment, of monogamy, of marriage, of stability are all posited as models for homosexual existence. And, indeed, of course, they are."<sup>48</sup> But Sullivan believes "homosexual relationships, even in their current, somewhat eclectic form, may contain features that could nourish the broader society as well."<sup>49</sup> He explains:

The mutual nurturing and sexual expressiveness of many lesbian relationships, the solidity and space of many adult gay male relationships . . . the openness of the contract makes it more likely to survive than many heterosexual bonds. Some of this is unavailable to the male-female union: there is more likely to be greater understanding of the need for extramarital outlets between two men than between a man and a woman; and again, the lack of children gives gay couples greater freedom.<sup>50</sup>

Sullivan suggests that infidelity will be a greater threat to heterosexual than homosexual couples, male and female, and only partly because heterosexual couples are likely to have children.<sup>51</sup> Sullivan then elaborates and explains his book's title:

I believe strongly that marriage should be made available to everyone, in a politics of strict public neutrality. But within this model, there is plenty of scope for cultural difference. There is something baleful about the attempt of some gay conservatives to educate homosexuals and lesbians into an uncritical acceptance of a stifling model of heterosexual normality. The truth is, homosexuals are not entirely normal; and to flatten their varied

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47. SULLIVAN, *supra* note 30, at 197–98.

48. *Id.* at 202.

49. *Id.*

50. *Id.*

51. *Id.* at 202–03.

and complicated lives into a single, moralistic model is to miss what is essential and exhilarating about their otherness.<sup>52</sup>

Two thoughtful conservative critics jumped on Sullivan's last two passages.<sup>53</sup> Elizabeth Kristol, after quoting these passages and acknowledging the benefits of marriage for homosexuals, suggested that the price would be too high: young people who are uncertain of their sexuality, the "waverers," would be "confronted with two equally legitimate images of adult [life]."<sup>54</sup> Even assuming, Kristol says, that one's "sexual orientation is firmly established by the age of five or six (a debatable point), this would hardly mean that sexual orientation is immune from social influence."<sup>55</sup> Kristol also fears that as "society broadens the definition of 'marriage'—and some would argue that the definition has already been stretched to the breaking point—the less seriously it will be taken by everyone."<sup>56</sup>

James Q. Wilson's review of *Virtually Normal* took issue with Sullivan's claim that marriage would have a domesticating effect on homosexuals.<sup>57</sup> His major objection, however, focused on childrearing.<sup>58</sup> "The role of raising children is entrusted in principle to married heterosexual couples because after much experimentation . . . we have found nothing else that works as well."<sup>59</sup> Wilson writes that little is known about how children raised by gay couples will fare.<sup>60</sup> Wilson is particularly critical of the use of artificial means to produce children.<sup>61</sup> Wilson's conclusion indicates a clear preference for a legislative, not a judicial, solution to the problem, and he seems open to civil unions.<sup>62</sup>

While conservatives such as Kristol and Wilson worry about the effect of the homosexual lifestyle on heterosexual marriage, David Blankenhorn, in his book *The Future of Marriage*, expresses a concern about what he

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52. *Id.* at 203–04.

53. See Elizabeth Kristol, *The Marrying Kind*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 132, 134 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (analyzing Sullivan's arguments for gay marriage); James Q. Wilson, *Against Homosexual Marriage*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 137 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) [hereinafter Wilson, *Against Homosexual Marriage*].

54. Kristol, *supra* note 53, at 135.

55. *Id.* at 135.

56. *Id.* at 136.

57. Wilson, *Against Homosexual Marriage*, *supra* note 53, at 137, 141.

58. *Id.* at 143.

59. *Id.*

60. *Id.* Today some researchers claim there is adequate evidence that gay parents are just as able as heterosexual parents. Others claim that the data are not sufficient and that it will take several generations to know the result. For further discussion of this issue, see DRY, *supra* note 15.

61. Wilson, *Against Homosexual Marriage*, *supra* note 53, at 143.

62. *Id.* at 144.

calls the deinstitutionalization of marriage.<sup>63</sup> This means treating marriage as a private contract between two adults, subject to conditions like any other contract.<sup>64</sup> On this view, the state should get out of the marriage business and leave it to the churches and synagogues. Individuals should be free to form contractual partnerships, and there is no reason why they need to be limited to two persons, let alone two persons of the opposite sex. Blankenhorn, whose definition of marriage focuses on procreation and childrearing, argues that same-sex marriage will transform the institution by breaking down the three forms of marriage in the name of freedom of choice:

The first is the form of opposites: marriage is a man and a woman. The second is the form of two: marriage is for two people. The third is the form of sex: marriage is connected to sexuality and procreation. . . . Knocking out any one of them weakens the overall institution—that’s the whole point!—and makes it easier to knock out the other two.<sup>65</sup>

Blankenhorn’s concern is with families and the well-being of children, not with homosexuality.<sup>66</sup> He elaborates on his concern about children in his chapter “Goods in Conflict.”<sup>67</sup> These “goods” are the equal dignity of homosexuals and “the child’s need to be emotionally, morally, practically, and legally affiliated with the woman and the man whose sexual union brought the child into the world.”<sup>68</sup>

How are the rights in conflict affected by a change in the definition of marriage (from a union of a man and a woman to a union of two people)? Blankenhorn discusses three consequences:

Because same-sex pair-bonding cannot produce children from the union of one spouse’s eggs with the other spouse’s sperm, parenting by same-sex couples in every instance relies decisively on at least one of three additional factors. The first is any of a growing number of assisted reproductive technologies. The second is the involvement of third-party participants such as sperm donors, egg donors, or surrogates. And the third is the

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63. BLANKENHORN, *THE FUTURE OF MARRIAGE*, *supra* note 29, at 8.

64. *Id.* at 49.

65. *Id.* at 133.

66. *Id.* at 201.

67. *Id.* at 171–212.

68. *Id.* at 175.

granting of parental status to at least one member of the couple who is biologically unrelated to the child.

Embracing these trends as normative clearly necessitates a redefinition of parenthood itself and therefore a thorough reformulation of the right to found a family.<sup>69</sup>

Thus, Blankenhorn claims that same-sex marriage threatens the institution of marriage in two ways: the necessary redefinition lends support to those who would reduce marriage to a mere private contract, and necessarily repudiates the principle that the model family involves the biological parents raising their child or children.

How strong is Blankenhorn's argument? When we consider what (apart from same-sex marriage) has weakened this model of marriage, such as no-fault divorce, adoption, birth control, and technically assisted means of reproduction, and that these legal and technological developments appear to be well established, we wonder how much more damage, from Blankenhorn's perspective, same-sex marriage is likely to do. Even if we accept Blankenhorn's contention that adoption and remarriage are remedies for a loss or failure, the result is nonetheless that some non-biological parents will raise children. And as for same-sex couples: in many states they are permitted to raise children and for the sake of the children, the non-biological partner can become a guardian to the child. Would it not be better for such children and for their parents to receive the same legal benefits as married couples? That points at least to "civil union" or "domestic partnership" status. But what about the added benefit of the legitimacy of marriage? Would Blankenhorn not have to say that extending marriage to same-sex couples to legitimize their children runs the risk of encouraging same-sex couples to use artificial means of having children, children who, in many cases, will never know their father? (This assumes more lesbians than male homosexuals would choose to have children.) The effect of same-sex marriage on the number of children raised by parents who cannot satisfy the biological lineage requirement is likely to be small. That leaves the question of whether extending marriage to same-sex couples will put additional pressure on what remains of the marriage forms: the union of two people who love one another and who wish to live together and take care of one another. So far, based on the reported marriages in those states that allow same-sex marriage, the form of two remains.

Finally, nature seems to be on the side of marriage as Blankenhorn describes it, even if state and federal law in the United States has loosened

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69. *Id.* at 184.

the obligations. First, the number of homosexuals is relatively small and constant over time, regardless of the laws. Second, as common sense tells us, and as both Sullivan and Rauch have attested, the natural desire in most human beings to marry and have children wherever possible is not likely to be undermined by extending marriage to individuals who are not able to procreate.

Given Blankenhorn's genuine interest in the well-being of children as well as his straightforward acknowledgement of the dignity of homosexuals, his decision to no longer oppose same-sex marriage should not be surprising.<sup>70</sup>

I conclude from this examination that the case for same-sex marriage is stronger than the case against, largely because it obtains clear benefits for some people without any clear harm to others. However, because the grounds for opposition to same-sex marriage are reasonable and decent, and because we cannot know for sure what the change in marriage will mean for married couples and their children, the decision should be left to the legislatures in the several states or to the people in those states which have popular referenda. I turn now to examine the judicial consideration of the issue.

## II. THE SUPREME COURT DECISIONS WHICH PROVIDE SUPPORT FOR SAME-SEX MARRIAGE

Advocates of same-sex marriage, wary of taking their case to the U.S. Supreme Court, initially pursued the strategy of litigating in state courts and exclusively on state constitutional grounds.<sup>71</sup> They assumed that the federal

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70. In a public statement published in the *New York Times* in June 2012, Blankenhorn concluded that his opposition to same-sex marriage had not helped "to lead heterosexual America to a broader and more positive recommitment to marriage as an institution." David Blankenhorn, Op-Ed., *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), [http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?\\_r=0](http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?_r=0) [hereinafter Blankenhorn, *View on Gay Marriage*]. Noting that "much of the opposition to gay marriage seems to stem, at least in part, from an underlying anti-gay animus," Blankenhorn decided "to help build new coalitions bringing together gays who want to strengthen marriage with straight people who want to do the same." *Id.*

71. See *infra* Part III. As the late Vermont District Court Judge Frank Mahady said to me after lecturing at Middlebury College, the Supremacy Clause "is a single-edged sword." Conversation with Judge Frank Mahady, United States District Court for the District of Vermont, in Middlebury, Vt. (Spring 1985). He was of course referring to the fact that if there are "adequate and independent state ground[s]" for a constitutional decision rendered by the state's highest court, the U.S. Supreme Court will not take jurisdiction in the case. See *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."). Hence, state courts are free to interpret their constitutions to protect rights more extensively than what the Supreme Court has held that the federal Constitution protects.

courts would not look favorably on their constitutional argument. This was based on tradition and on the Supreme Court's summary dismissal, for lack of a substantial federal question, of the challenge to Minnesota's traditional marriage law in 1972.<sup>72</sup> However, Court decisions concerning race and sex under the Equal Protection Clause and "privacy" under the Due Process Clause have provided the foundation for a formidable argument that the Constitution requires states to allow same-sex marriage. After the Court established "strict scrutiny" for race classifications,<sup>73</sup> it introduced a third, or middle level of scrutiny for gender classifications.<sup>74</sup> While each level of scrutiny ostensibly has a distinctive "end" and "means" requirement, the critical factor concerns the "means," or the fit between the end or purpose of a given law and the means chosen.<sup>75</sup> Moreover, as the Court has developed its tests for race and gender classifications, the difference between "strict" and "heightened" scrutiny has become difficult to discern. Consider the significance of the difference between "narrow tailoring," which the Court requires for laws based on race, and "an exceedingly persuasive justification," which it requires for laws based on gender.<sup>76</sup> As a practical matter, when a court employs either "strict" or "heightened" scrutiny, the law is likely to be struck down.<sup>77</sup>

It is worth considering what would have happened if the Court had continued to apply rational basis review to gender classification cases, while striking down laws that were based on outdated generalizations about women. That is precisely what the Court did in *Reed v. Reed*<sup>78</sup> and

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72. *Baker v. Nelson*, 409 U.S. 810 (1972).

73. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

74. *Craig v. Boren*, 429 U.S. 190, 197–99, 204 (1976) (holding gender-based classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives").

75. *See, e.g., id.* at 204 (holding statute failed constitutional scrutiny because "the relationship between gender and traffic safety" was "far too tenuous" and thus the gender-based classification was not "substantially related to achievement of the statutory objective").

76. *Compare Grutter v. Bollinger*, 539 U.S. 306, 326–27, 333 (2003) (holding that race-based laws must be "narrowly tailored"), with *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (holding that an exceedingly persuasive justification is required to uphold a statute that classifies individuals based on their gender). Justice Ginsburg used the phrase "exceedingly persuasive justification" in her opinion in *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Miss. Univ. for Women*, 458 U.S. at 524), the most recent gender classification case. The difference between these two levels of scrutiny was narrowed when the *Grutter* Court used "narrowly tailored," *Grutter*, 539 U.S. at 326–27, rather than "precisely tailored," which was Justice Powell's language in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978). *See also Grutter*, 539 U.S. at 323 (discussing Justice Powell's *Bakke* opinion).

77. *See Grutter*, 539 U.S. at 326 (depicting Justice O'Connor's retort to Professor Gerald Gunther that "[s]trict scrutiny is not necessarily 'strict in theory, but fatal in fact'" (quoting *Adarand*, 515 U.S. at 237)).

78. *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).



*Frontiero v. Richardson*,<sup>79</sup> despite Justice Brennan's attempt in *Frontiero* to get the Court to hold that sex, like race, should be subject to strict scrutiny.<sup>80</sup> Three years after *Frontiero*, Justice Brennan reinterpreted *Reed* and *Frontiero* in *Craig v. Boren* and established a new middle level of scrutiny for gender-based classifications: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>81</sup>

Two justices have expressed doubts about the wisdom of this three-tiered approach to judicial review. In his concurring opinion in *Craig v. Boren*, Justice Stevens wrote:

There is only one Equal Protection Clause. . . . I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.<sup>82</sup>

Justice Thurgood Marshall expressed a similar criticism in two other equal protection cases.<sup>83</sup>

The Court did restrain itself from expanding the categories of cases subject to more than "rational basis" scrutiny in the 1985 case of *City of Cleburne v. Cleburne, Living Center*<sup>84</sup>. The *Cleburne* Court unanimously struck down a local zoning ordinance that required permits (that were

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79. See *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973) (plurality opinion) (applying strict scrutiny and striking down statutes); *id.* at 691 (Stewart, J., concurring) (agreeing that the statutes "work an invidious discrimination" and violate the Constitution); *id.* at 691–92 (Powell, J., concurring) (striking down statutes under rational basis review).

80. See *id.* at 682, 688 (plurality opinion) ("[C]lassifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."); *id.* at 691–92 (Powell, J., concurring) ("I cannot join the opinion of Mr. Justice Brennan, which would hold that all classifications based upon sex . . . are 'inherently suspect and must therefore be subjected to close judicial scrutiny.' It is unnecessary for the Court in this case to characterize sex as a suspect classification . . . ." (quoting *id.* at 682 (majority opinion))).

81. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

82. *Id.* at 211–12 (Stevens, J., concurring). Justice Stevens explained that "[w]hatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard." *Id.* at 212.

83. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) ("I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis."); *Dandridge v. Williams*, 397 U.S. 471, 519–20 (1970) (Marshall, J., dissenting) (noting that the case did not easily fit any particular test).

84. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985).

denied) for a group home for the mentally retarded but not for apartment houses, multiple dwellings, boarding houses, fraternities, sororities, nursing homes, etc.<sup>85</sup> However, it declined five to four to add mental retardation to the list of “quasi-suspect” classifications.<sup>86</sup>

For the Court, Justice White wrote that the normal presumption of constitutionality “[w]hen social or economic legislation is at issue . . . gives way . . . when a statute classifies by race, alienage, or national origin,” since “[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.”<sup>87</sup> Justice White then mentions gender and illegitimacy: “[gender] generally provides no sensible ground for differential treatment,” and “illegitimacy is beyond the individual’s control” and is not related to one’s ability to “contribute to society.”<sup>88</sup> Mental retardation is not a good candidate for special status because members in the class tend to “have a reduced ability to cope with and function in the everyday world.”<sup>89</sup> In addition, there is a range of disabilities, making a single strict standard inappropriate in all cases. Moreover, Justice White maintained that lawmakers have been responsive to the needs of the mentally retarded “in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.”<sup>90</sup> In his concurrence, Justice Stevens reiterates his objection to the levels of scrutiny approach, which is now threefold.<sup>91</sup> While Justice Stevens used the language of “rational basis,” he treated the requirement more seriously than the Court did in earlier cases.<sup>92</sup>

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85. *Id.* at 450.

86. *Id.* at 442–43.

87. *Id.* at 440.

88. *Id.* at 440–41 (quoting *Mathews v. Lucas*, 427 U.S. 495, 505 (1976)).

89. *Id.* at 442.

90. *Id.* at 443. Courts that have considered same-sex marriage claims have parsed the *Cleburne* opinion to determine whether classification by sexual orientation should be subject to heightened scrutiny. *See, e.g.*, *High Tech Gays v. Def. Indus. Sec. Clearance*, 668 F. Supp. 1361, 1369 (N.D. Cal. 1987) (“The rationale of the Supreme Court in *Cleburne* mandates that classifications based on sexual orientation be scrutinized under a heightened standard of review analogous to the standard of review afforded classifications based on gender.”). This becomes important if a court does not conclude that the “fundamental right to marry” includes same-sex couples. For an in-depth discussion of this issue, see DRY, *supra* note 15.

91. *Cleburne*, 473 U.S. at 451 (Stevens, J., concurring).

92. *Id.* at 453. (“In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a ‘tradition of disfavor’ by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a ‘rational basis.’”). Justice Marshall’s partial concurrence and partial

*Romer v. Evans*, the first of two important “gay rights” cases, involves Colorado’s Amendment 2, the state constitutional referendum that rescinded all state and local laws protecting homosexuals and bisexuals against discrimination.<sup>93</sup> The amendment passed by a popular referendum vote 53% to 47%.<sup>94</sup> The Court, in an opinion by Justice Kennedy, struck down the Amendment on equal protection grounds without, however, holding that sexual orientation was a suspect or quasi-suspect classification.<sup>95</sup> The Court noted that Colorado’s approach to discrimination was to enumerate those classes of individuals that required special protection in specific laws.<sup>96</sup>

Amendment 2 deleted only one protected category. Such an action invited discrimination in housing and places of privately owned public accommodation, as well as private employment.<sup>97</sup> Since the effect of the Amendment was far more extensive than anything needed to guarantee any legitimate concerns, such as personal or religious objections to homosexuality, the majority concluded that “the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”<sup>98</sup> In conclusion: “A State cannot so deem a class of persons a stranger to its laws.”<sup>99</sup>

This resembles Justice Stevens’ approach. The application to same-sex marriage is twofold: first, the Court is taking a critical look at government action which harms homosexuals; second, it seems to resist the rigidity of holding sexual orientation a suspect or quasi-suspect class.<sup>100</sup>

Justice Stevens’ suggested approach to equal protection cases is generally consistent with an argument Professor Gerald Gunther made, based on his study of fifteen Supreme Court equal protection decisions in 1971–1972. Gunther found that “with only one exception, these cases found

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dissent supported adding mental retardation to the quasi-suspect category. *Id.* at 456 (Marshall, J., concurring in part, dissenting in part). He suggests that the Court is using “heightened scrutiny” to invalidate the law without saying so. *Id.* at 458.

93. *Romer v. Evans*, 517 U.S. 620, 623 (1996).

94. Stephen Gascoyne, *Anti-Gay-Rights Law Leads to Colorado Boycott Calls*, CHRISTIAN SCI. MONITOR (Dec. 3, 1992), <http://www.csmonitor.com/1992/1203/03031.html>.

95. *Romer*, 517 U.S. at 635.

96. These classes included: “age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates—and, in recent times, sexual orientation.” *Id.* at 629 (citing Aspen Mun. Code § 13-98(a)(1) (1977)).

97. *Id.* at 624.

98. *Id.* at 632.

99. *Id.* at 635.

100. *See id.* at 631–35. Strict scrutiny applies to “suspect” classifications or where “fundamental rights” are involved. Gerald Gunther, *The Supreme Court 1971 Term Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

bite in the [E]qual [P]rotection [C]lause after explicitly voicing the traditionally toothless minimal scrutiny standard.”<sup>101</sup> Gunther calls this “evolving doctrine,” a “modestly interventionist model” and “a half-way house” between the toothless rational basis of post-1937 decisions and strict scrutiny.<sup>102</sup> He advocates for the development of the trend he discovered because it “requires that there be an affirmative relation between means and ends—or, in more traditional equal protection terms, that there be a genuine difference in terms of the state’s objectives between the group within the classification and those without.”<sup>103</sup> The Court would have been well advised to follow Gunther’s advice and simply upgrade its rational basis review rather than commit itself to three distinct levels of scrutiny.

The cases leading up to the “fundamental right to marry” come under the Due Process Clause, and start with *Griswold v. Connecticut* and the right of privacy.<sup>104</sup> They end with the right to terminate a pregnancy prior to the viability of a fetus,<sup>105</sup> the right to refuse treatment,<sup>106</sup> but not the right to physician assisted suicide,<sup>107</sup> and the right to intimate association.<sup>108</sup>

The Court first found that the Constitution protects a general right of privacy in *Griswold*, the Connecticut birth control case of 1965.<sup>109</sup> By a seven to two vote, the Court invalidated a law that criminally punished the use or counseling of birth control devices.<sup>110</sup> In *Poe v. Ullman*, an earlier Connecticut birth control case, the Court had dismissed challenges to Connecticut’s birth control statutes as not ripe for decision.<sup>111</sup> I want to quote from Justice Harlan’s dissenting opinion in *Poe* because he presents what could be called a moderate, or conservative, substantive due process position: “A decision of this Court which radically departs from [tradition] could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for

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101. Gunther, *supra* note 100, at 18–19.

102. *Id.* at 1, 44.

103. *Id.* at 47.

104. *Griswold v. Connecticut*, 381 U.S. 479, 481, 485–86, 507 (1965).

105. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

106. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 280 (1990).

107. *Washington v. Glucksberg*, 521 U.S. 702, 702–04, (1997).

108. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). The Court’s finding that fundamental rights are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments goes back to two earlier and related decisions: first, the limited reading the Court gave to the Fourteenth Amendment’s Privileges and Immunities Clause in the *Slaughter-House Cases*, 83 U.S. 36, 37, 75 (1873); and second, the subsequent reading of the concept of “ordered liberty” in the Due Process Clauses in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

109. *See Griswold*, 381 U.S. at 485.

110. *Id.* at 481, 485–86, 507.

111. *Poe v. Ullman*, 367 U.S. 497, 508–09 (1961).

judgment and restraint.”<sup>112</sup> Harlan goes on to address the specific question of birth control in a manner that bears on same-sex marriage. His generally conservative position accepts the legitimacy of laws regulating sexual activity,<sup>113</sup> but he objects to the manner in which Connecticut’s law would have to be enforced.<sup>114</sup> “[Here] the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law.”<sup>115</sup> Justice Harlan and Justice Stevens might have come down on different sides of the question whether traditional marriage laws violate the Constitution, but each one would have considered the issue directly, without having recourse to “heightened scrutiny.”

In *Lawrence v. Texas*, the Court, by a vote of six to three, struck down, on due process grounds, a Texas law that criminally punished, as ““deviate sexual intercourse,”” acts of sodomy, that is, oral or anal intercourse ““with another individual of the same sex.””<sup>116</sup> The Court decided the case without determining whether there was a fundamental right to engage in sodomy.<sup>117</sup> Rather, in reconsidering and reversing its 1986 decision in *Bowers v. Hardwick*,<sup>118</sup> Justice Kennedy, who wrote the *Lawrence* opinion, repudiated such an approach: the question was not, as the *Bowers* Court put it, whether

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112. *Id.* at 542 (Harlan, J., dissenting).

113. *See id.* at 546–47.

The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis. . . . If we had a case before us which required us to decide simply, and in abstraction, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views.

But . . . we are not presented simply with this moral judgment to be passed on as an abstract proposition. The secular state is not an examiner of consciences: it must operate in the realm of behavior, of overt actions, and where it does so operate, not only the underlying, moral purpose of its operations, but also the *choice of means* becomes relevant to any Constitutional judgment on what is done.

*Id.* (citations omitted).

114. *Id.* at 548.

115. *Id.*

116. *Lawrence v. Texas*, 539 U.S. 558, 561, 563 (2003) (quoting TEX. PENAL CODE ANN. § 21.06(a) (2003)).

117. *See id.* at 577.

118. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

there was a recognized right to engage in sodomy, but whether the liberty that is protected by the Due Process Clause covers cases “[w]hen sexuality finds overt expression in intimate conduct with another person.”<sup>119</sup>

In repudiating *Bowers*, the Court noted that while the historical practice was not so much against homosexuality as against sodomy, the laws against sodomy “do not seem to have been enforced against consenting adults acting in private.”<sup>120</sup> Still, the majority acknowledged, “there have been powerful voices to condemn homosexual conduct as immoral.”<sup>121</sup> The Court went on to say that “[t]he issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”<sup>122</sup>

To support its answer to that rhetorical question, Justice Kennedy noted that the 1955 American Law Institute’s Model Penal Code “did not recommend or provide for ‘criminal penalties for consensual sexual relations conducted in private.’”<sup>123</sup> He went on to cite the European Court of Human Rights for the same position, and he noted that the number of states prohibiting sodomy had been reduced from twenty-five to thirteen, “of which [four] enforce their laws only against homosexual conduct.”<sup>124</sup>

Justice Kennedy made a point of separating the Court’s decision from the same-sex marriage controversy. First, he wrote, “[t]he statutes [in both *Bowers* and *Lawrence*] do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”<sup>125</sup> And, he concluded, “[t]he present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>126</sup>

That did not prevent dissenting Justice Scalia, who decried the decision as “the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda,” from claiming that the decision “decrees the end of all morals legislation,” including traditional marriage laws.<sup>127</sup>

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119. *Lawrence*, 539 U.S. at 567.

120. *Id.* at 569.

121. *Id.* at 571.

122. *Id.*

123. *Id.* at 572.

124. *Id.* at 573 (citation omitted). Justice O’Connor, in her concurring opinion, suggested relying on the Equal Protection Clause (since the law prohibited only homosexual sodomy), assuming, I believe, that the State would not have passed a more encompassing prohibition on sodomy—or, if it did, the law would not be enforced—and that the Court could thus avoid a decision with implications for same-sex marriage. *Id.* at 584–85 (O’Connor, J., concurring).

125. *Id.* at 567 (majority opinion).

126. *Id.* at 578.

127. *Id.* at 599, 602 (Scalia, J., dissenting).

According to Justice Scalia, “‘preserving the traditional institution of marriage’ is just a kinder way of describing the State’s *moral disapproval* of same-sex couples.”<sup>128</sup>

The Supreme Court’s decisions in *Cleburne*, *Romer*, and *Lawrence* reflect the development of what Gunther described as “rational basis with bite” scrutiny. They may also reflect a disinclination to expand the legal categories that merit “heightened” scrutiny.

The final set of Supreme Court decisions that bear on same-sex marriage are *Loving v. Virginia* (1967), *Zablocki v. Redhail* (1978), and *Turner v. Safley* (1987). In these cases, the Court affirmed a “fundamental right to marry.”<sup>129</sup> That phrase and the Court’s striking down of laws preventing interracial marriage in *Loving* have been offered as strong precedent for a decision outlawing legal prohibitions on same-sex marriage.

The *Loving* case, decided in 1967, involved the most difficult form of race-based legislation. The Virginia statutes at issue prohibited “any white person and colored person” from marrying and provided criminal punishment if such marriages occurred in the state, as well as if a racially mixed couple (one being “white”) left the state to marry and then returned.<sup>130</sup> The Lovings—a white man and a black woman—married in 1958 and were subsequently indicted, found guilty, and sentenced to a year in prison; the sentence was suspended on condition that they leave the state and not return.<sup>131</sup> From their residence in the District of Columbia, the Lovings sued to have their sentence overturned.<sup>132</sup> When the Supreme Court of Appeals of Virginia upheld the constitutionality of the anti-miscegenation statutes, the Lovings appealed to the U.S. Supreme Court.<sup>133</sup> The Court unanimously struck down the statutes, primarily on Equal Protection Clause grounds, with references to *Brown v. Board of Education* and *Korematsu v. United States*.<sup>134</sup> The Court noted that Virginia’s statute

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128. *Id.* at 601 (quoting *id.* at 585 (O’Connor, J., concurring)). Professor Laurence Tribe, who served as counsel for *Bowers*, wrote a law review article shortly after *Lawrence*, celebrating the *Lawrence* decision and agreeing with Justice Scalia (on this point only) that the decision necessarily undermined the traditional institution of marriage. See Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1948 (2003) (“[T]he evil targeted by the Court in *Lawrence* wasn’t criminal prosecution and punishment of same-sex sodomy, but the disrespect for those the Court identified as ‘homosexuals’ that labeling such conduct as criminal helped to excuse.”).

129. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 381–82 (1978); *Turner v. Safley*, 482 U.S. 78, 99 (1987).

130. Chief Justice Warren quotes the relevant portions of the Virginia code in the Court’s opinion in *Loving*, 388 U.S. at 4.

131. *Id.* at 3.

132. *Id.*

133. *Id.* at 3–4.

134. *Id.* at 9, 11–12.

“prohibit[ing] only interracial marriages involving white persons demonstrates that the racial classifications [were] measures designed to maintain White Supremacy.”<sup>135</sup>

In the final, and short, part of his unanimous opinion, Chief Justice Warren noted that the statutes also violated the Due Process Clause because “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>136</sup> Chief Justice Warren went on to quote from *Skinner v. Oklahoma* that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”<sup>137</sup> He did conclude, however, by bringing the matter back to race: “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.”<sup>138</sup>

In *Skinner*, the Court struck down a sterilization law, saying: “Marriage and procreation are fundamental to the very existence and survival of the race.”<sup>139</sup> I mention this to emphasize that the Court’s statement about the importance of marriage presupposed that the union of a man and a woman for the sake of procreation and raising the young defined the institution.<sup>140</sup>

Advocates of same-sex marriage regard their cause as simply the most recent version of the struggle for civil rights. Such an analogy between race and sexual orientation, however, presupposes that a republican, or representative, government has no more reason to take the natural difference between male and female into account when enacting laws regarding marriage than it does to take race or color into account. Since procreation depends on the division of labor between male and female and has nothing to do with racial difference or similarity, it should not be assumed that a right to racially mixed marriages implies a right to same-sex marriages.

In *Zablocki v. Redhail*, Justice Marshall delivered the opinion of the Court, in an eight to one ruling, striking down a Wisconsin law that forbade any person who was behind in child custody payments from marrying

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135. *Id.* at 11. The earlier case was *McLaughlin v. Florida*. See *McLaughlin v. Florida*, 379 U.S. 184 (1964) (holding Florida statute prohibiting an unmarried interracial couple from “habitually liv[ing] in and occupy[ing] in the nighttime the same room” denied equal protection of the laws and was invalid under Fourteenth Amendment). For a discussion of the *McLaughlin* case, see DRY, *supra* note 15.

136. *Loving*, 388 U.S. at 12.

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

138. *Id.*

139. *Skinner*, 316 U.S. at 541.

140. See *Baehr v. Lewin*, 852 P.2d 44, 55–56 (Haw. 1993) (mentioning this purpose of marriage when it rejected the plaintiffs’ “right of privacy” argument as support for a fundamental right to marry).



without first getting a court order of approval.<sup>141</sup> Justice Marshall referred to and quoted from *Loving* and *Skinner* that the freedom to marry is a “basic civil right[.]”<sup>142</sup> Noting that *Loving* was a race discrimination case, he wrote, “the right to marry is of fundamental importance for all individuals.”<sup>143</sup>

Concurring Justices Stewart and Powell both objected to the breadth of the Court’s “fundamental right to marry” approach.<sup>144</sup> Their approach instead acknowledged a liberty interest under the Due Process Clause and focused on the effect of such a law on poor individuals who desired to marry.<sup>145</sup> Even assuming the breadth of the holding regarding the fundamental right to marry, Justice Marshall’s opinion resembled *Loving* and *Skinner* in associating marriage with procreation.<sup>146</sup>

Finally, in *Turner v. Safley*, a unanimous Court applied the fundamental right to marry to invalidate a law that restricted an inmate’s right to marry.<sup>147</sup> Justice O’Connor observed that there were many other consequences of marriage, including benefits and emotional support.<sup>148</sup> But she added that “most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated.”<sup>149</sup>

### III. SAME-SEX MARRIAGE AND THE HIGHEST STATE COURTS: 1993–2009

From 1993 to 2009, the highest courts in ten states handed down opinions in cases involving same-sex marriage in this chronological order: Hawaii (1993),<sup>150</sup> Vermont (1999),<sup>151</sup> Massachusetts (2003),<sup>152</sup> New York (2006),<sup>153</sup> Washington (2006),<sup>154</sup> New Jersey (2006),<sup>155</sup> Maryland (2007),<sup>156</sup>

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141. *Zablocki v. Redhail*, 434 U.S. 374, 375, 377 (1978).

142. *Id.* at 383 (quoting *Loving*, 388 U.S. at 12; *Skinner*, 316 U.S. at 541).

143. *Id.* at 384.

144. *Id.* at 392 (Stewart, J., concurring); *id.* at 397 (Powell, J., concurring).

145. *Id.* at 392–94 (Stewart, J., concurring); *id.* at 400 (Powell, J., concurring).

146. *Id.* at 386 (majority opinion).

147. *Turner v. Safley*, 482 U.S. 78, 99 (1987).

148. *Id.* at 96.

149. *Id.*

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

151. *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999).

152. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

153. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

154. *Anderson v. King Cnty.*, 138 P.3d 963 (Wash. 2006).

155. *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

156. *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

California (2008);<sup>157</sup> Connecticut (2008);<sup>158</sup> and Iowa (2009).<sup>159</sup> These ten state court decisions can be classified on the basis of three broadly different outcomes. First, the courts in Vermont and New Jersey held that their constitutions required equal benefits but not marriage.<sup>160</sup> Second, the courts in Hawaii, Massachusetts, California, Connecticut, and Iowa held that their constitutions required marriage for same-sex couples.<sup>161</sup> Third, the courts in New York, Washington, and Maryland held that their states' traditional marriage laws were not unconstitutional, and the desired change must come from the legislature.<sup>162</sup> Furthermore, with the exceptions of Iowa, in which the court was unanimous in mandating same-sex marriage, and Vermont, in which the court voted three to one to require at least civil unions (the dissent would have required marriage) for same-sex couples, every state court was divided by one vote.<sup>163</sup>

To provide a full range of the opinions in these cases while minimizing repetition of the constitutional arguments, I will focus on one case from each category: the cases from Vermont, Massachusetts, and New York, plus the cases from Hawaii and California.<sup>164</sup> Hawaii's was the first case; it led to the passage of a federal Defense of Marriage Act and provoked a

157. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (2008), *invalidated by* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).

158. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

159. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). I exclude the 1971 Minnesota case *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), discussed above, because it predates increased judicial scrutiny of issues related to same-sex marriage. In addition, the plaintiffs challenged the state marriage law solely on federal constitutional grounds; an independent state constitutional argument was not made. *Id.* at 186–87. In four other states—Kentucky (1973), Georgia (2002), Arizona (2003), and Indiana (2005)—the court of appeals decided against the same-sex marriage plaintiffs, and either an appeal was not taken or the highest state court refused to accept the appeal. *Standhardt v. Super. Ct. ex rel. Cnty. of Maricopa*, 77 P.3d 451 (Ct. App. Ariz. 2003); *Burns v. Burns*, 560 S.E.2d 47 (Ct. App. Ga. 2002); *Morrison v. Sadler*, 821 N.E.2d 15 (Ct. App. Ind. 2005); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973). In addition, the District of Columbia Court of Appeals, the highest court in the District, handed down a decision against same-sex marriage in 1995, a year before the *Romer* decision in the U.S. Supreme Court. *Dean v. District of Columbia*, 653 A.2d 307 (Ct. App. D.C. 1995). However, in 2009 the mayor signed a bill passed by the Council of the District of Columbia legalizing same-sex marriage. *Equal Access to Marriage*, 46 D.C. CODE § 46-401 (2010).

160. *Lewis*, 908 A.2d at 224; *Baker v. State*, 170 Vt. 194, 224, 744 A.2d 864, 886 (1999).

161. *Marriage Cases*, 183 P.3d at 453; *Kerrigan*, 957 A.2d at 482; *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993); *Varnum*, 763 N.W.2d at 906–07; *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

162. *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006); *Anderson v. King Cnty.*, 138 P.3d 963, 990 (Wash. 2006).

163. *See, e.g., Baehr*, 852 P.2d at 48 (explaining that the formal vote to apply “strict scrutiny” was three to one, but a judge whose temporary assignment to the court by reason of a vacancy expired before the opinion was filed indicated that he would have joined the dissent).

164. In my book, I also examine the state high court decisions in Washington, New Jersey, Maryland, Connecticut, and Iowa. *See DRY, supra* note 15.

constitutional amendment rescinding the state court's decision.<sup>165</sup> California's case also provoked a constitutional amendment, Proposition 8, and led to the federalizing of the constitutional controversy.<sup>166</sup>

### A. Hawaii

In *Baehr v. Lewin*, the Supreme Court of Hawaii considered two issues: whether the state constitution's "right of the people to privacy" included the fundamental right to marry, and therefore made the statute's references to "husband" and "wife" invalid; and whether the state constitution's equal protection clause made sex a suspect classification, and thus whether "strict scrutiny" had to be applied to the state's law limiting marriage to the union of a man and woman.<sup>167</sup> Justice Levinson, who wrote the court opinion, interpreted the U.S. Supreme Court precedent on the fundamental right to marry to apply to couples in principle capable of procreating, i.e., to heterosexual couples.<sup>168</sup> But then he labeled the state's marriage law as a sex-based classification and he interpreted the state's constitution<sup>169</sup> to treat such classifications as "suspect," and hence subject to "strict scrutiny."<sup>170</sup> The case was then remanded to the trial court.<sup>171</sup>

The Hawaii decision led to the congressional hearings that resulted in passage of the Defense of Marriage Act (DOMA) because opponents of same-sex marriage correctly predicted that the trial court would conclude, as it did in December 1996, that Hawaii's marriage law violated its constitution's equal protection clause.<sup>172</sup> After Congress passed DOMA in 1996,<sup>173</sup> the Hawaii legislature passed a constitutional amendment

165. HAW. CONST. art. I, § 23.

166. CAL. CONST. art. I, § 7.5.

167. *Baehr*, 852 P.2d at 55, 58.

168. *See id.* at 550–57 (discussing the right of privacy claim).

169. The Hawaii Constitution's equal protection clause reads: "[n]o person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." HAW. CONST. art. 1, § 5 (emphases added).

170. *Baehr*, 852 P.2d at 67.

171. *Id.* at 68.

172. *See Baehr v. Muike*, CIV. No. 91-1394, 1996 WL 694235, at \*22 (Haw. Cir. Ct. Dec. 3, 1996) (holding sex-based classification violated the Hawaii Constitution's equal protection clause).

173. The language of § 2 of DOMA reads:

No State territory, or possession of the United States, or Indian Tribe shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

declaring: “The legislature shall have the power to reserve marriage to opposite-sex couples.”<sup>174</sup> This amendment received the required two-thirds vote of each house and was ratified by the electorate in November 1998 (by a majority vote).<sup>175</sup> As a result, the Hawaii Supreme Court ruled that “[t]he marriage amendment ha[d] rendered the plaintiffs’ complaint moot” and that judgment should be entered “against the plaintiffs.”<sup>176</sup>

### B. *The Vermont Case: Baker v. State and Civil Unions*

Toward the end of 1999, the Vermont Supreme Court handed down its decision in *Baker v. State*.<sup>177</sup> In an opinion written by Chief Justice Jeffrey Amestoy, the court held the State’s exclusion of “same-sex couples from the benefits and protections that its laws provide to opposite-sex couples” violated chapter I, article 7 of the state’s constitution.<sup>178</sup> Writing for three other justices, the Chief Justice gave the State’s Legislature a choice: allow same-sex couples to marry or form “civil unions.”<sup>179</sup> The following year, after heated debates, the Vermont Legislature enacted a civil unions bill, thus opting for the non-marriage or “marriage-lite” alternative that the Vermont Supreme Court left open.<sup>180</sup>

The Chief Justice did not limit the state constitution’s common benefits clause to its “original meaning,” which clearly outlawed hereditary privileges.<sup>181</sup> He described the courts “as broadly deferential to the legislative prerogative to define and advance governmental *ends*, while

Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2012)).

174. HAW. CONST. art. 1, § 23.

175. 1998 HAWAII GENERAL ELECTIONS PRECINCT REPORT (Nov. 3, 1998), available at <http://hawaii.gov/elections/results/1998/general/98swgen.htm>.

176. *Baehr v. Miike*, No. 20371, 1999 WL 35643448, at \*1 (Haw. Dec. 9, 1999).

177. *Baker v. State*, 174 Vt. 194, 744 A.2d 864 (1999).

178. *Id.* at 197, 744 A.2d at 867. The relevant portion of the Vermont Constitution provides: “That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.” VT. CONST. ch. 1, art. VII.

179. *Baker*, 170 Vt. at 224–25, 744 A.2d. at 886. The court described this option as: [W]hat are typically referred to as “domestic partnership” or “registered partnership” acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners.

*Id.* at 225, 744 A.2d at 886.

180. DAVID MOATS, CIVIL WARS: A BATTLE FOR GAY MARRIAGE 240–42 (2004).

181. *Baker*, 170 Vt. at 211–12, 744 A.2d at 876–78.

vigorously ensuring that the *means* chosen bear a just and reasonable relation to the governmental objective.”<sup>182</sup>

Chief Justice Amestoy rejected the state’s argument that the marriage law served the governmental purposes of procreation and childrearing.<sup>183</sup> He found the law’s exclusion “significantly under-inclusive,” since so many opposite sex couples who marry either do not and/or cannot have children.<sup>184</sup> He also noted that the Vermont Legislature had earlier “acted affirmatively to remove legal barriers so that same-sex couples may legally adopt and rear the children conceived through such [assisted reproductive techniques].”<sup>185</sup> In addition, the state “acted to expand the domestic relations laws to safeguard the interests of same-sex parents and their children when such couples terminate their domestic relationship.”<sup>186</sup> Not only do many same-sex couples desire to have children through in vitro fertilization and/or surrogacy, but the state does not manifest any interest in restricting such techniques, which opposite-sex couples utilize as well as same-sex couples. Chief Justice Amestoy thus concluded: “[T]here is no reasonable basis to conclude that a same-sex couple’s use of the same technologies would undermine the bonds of parenthood, or society’s perception of parenthood.”<sup>187</sup> The Chief Justice acknowledged federal and state cases that upheld under-inclusive statutes, but he did not accept such a justification here, because “[t]he State does not contend . . . that the same-

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182. *Id.* at 203, 744 A.2d at 871. Chief Justice Amestoy described Cass Sunstein as having “documented the United States Supreme Court’s unacknowledged departures from the deferential rational-basis standard without defining a new kind of scrutiny.” *Id.* at 205 n.5, 744 A.2d at 872 n.5 (citing Cass Sunstein, *The Supreme Court 1995 Term Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 40, 59–61 (1996) [hereinafter Sunstein, *Leaving Things Undecided*]). He also refers to the Gunther article on equal protection, which I indicated introduced the kind of “rational basis with bite” scrutiny that Chief Justice Amestoy is applying and that he attributes to Sunstein. *Id.* (citing Gunther, *supra* note 100, at 8). Sunstein does not refer to Gunther’s 1972 *Harvard Law Review* article on the newer equal protection in his comparable *Harvard Law Review* article twenty-four years later. See Sunstein, *Leaving Things Undecided*, *supra*. Justice Dooley wrote separately to say that he objected to the Chief Justice’s use of “rational basis” analysis and would have preferred some version of heightened scrutiny. *Baker* 170 Vt. at 230–35, 744 A.2d at 889–93. Justice Johnson, in a partial concurrence and partial dissent, agreed with Justice Dooley that “some level of heightened scrutiny” was required. *Id.* at 255, 744 A.2d at 907 (Johnson, J., concurring in part, dissenting in part). The justices were not that far apart. Of their positions, I favor Chief Justice Amestoy’s because I think it results in a fairer balancing test.

183. *Baker*, 170 Vt. 216–219, 744 A.2d at 881–82.

184. *Id.* at 218–19, 744 A.2d 881–82 (referring to same-sex couples that raise children and observing that “the statutes plainly exclude many same-sex couples who are no different from opposite-sex couples with respect to these objectives”). In this respect, the law could be described as over-inclusive as well as under-inclusive with respect to couples that are excluded.

185. *Id.* at 218, 744 A.2d at 882.

186. *Id.*

187. *Id.* at 219, 744 A.2d at 882.

sex exclusion is necessary as a matter of pragmatism or administrative convenience.”<sup>188</sup>

Finally, Chief Justice Amestoy considered the contention that children are best reared by a man and a woman. After noting that experts disagree on such a contention, he observed that the state had undermined its own argument by “removing all prior legal barriers to the adoption of children by same-sex couples.”<sup>189</sup>

If anything was missing from the court opinion in *Baker*, it was a full answer to Justice Johnson, who thought that the arguments for common benefits should have led to the constitutional right to marry.<sup>190</sup> The Chief Justice and the court left that question for another day, since the plaintiffs’ “claims and arguments . . . focused primarily upon the consequences of official exclusion from the statutory benefits, protections, and security incident to marriage under Vermont law.”<sup>191</sup>

After the decision was handed down, the Vermont Legislature debated and then passed the civil union bill in April 2000 by votes of 19-11 in the Senate and 79-68 in the House; Governor Howard Dean signed the bill into law on April 26.<sup>192</sup> Act 91 made civil unions available to two people of the same sex who were otherwise qualified, by age and absence of consanguinity, to marry.<sup>193</sup> Then, in 2009, the Vermont Legislature voted for same-sex marriage, overriding Governor Jim Douglas’ veto.<sup>194</sup> The former Chief Justice might well claim credit for the result, for he gave the legislature an opportunity to play a role, and he gave the people time to experience the effect of civil unions, which probably made a vote for same-sex marriage possible.<sup>195</sup> Otherwise, Vermont may have become embroiled in a nasty constitutional controversy the way California was.

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188. *Id.* at 220, 744 A.2d at 883.

189. *Id.* at 222, 744 A.2d at 884-85.

190. *See id.* at 246-48, 744 A.2d at 901-02 (Johnson, J., concurring in part, dissenting in part).

191. *Id.* at 224, 744 A.2d at 886 (majority opinion).

192. MOATS, *supra* note 180, at 240-42.

193. VT. STAT. ANN. tit. 15, § 1204(a) (2010). The statement of benefits (section 1204) reads as follows: “Parties to a civil union shall have all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law, or any other source of civil law, as are granted to spouses in a civil marriage.” *Id.*; *see Baker*, 170 Vt. at 221, 744 A.2d at 883-84 (describing the state benefits of marriage).

194. Dave Gram, *Vermont Legalizes Gay Marriage, Overrides Governor’s Veto*, HUFFINGTON POST (May 8, 2009, 5:12 AM), [http://www.huffingtonpost.com/2009/04/07/vermont-legalizes-gay-mar\\_n\\_184034.html](http://www.huffingtonpost.com/2009/04/07/vermont-legalizes-gay-mar_n_184034.html). The vote in the House of Representatives was 100 to 49, barely reaching the required two-thirds majority. *Id.*

195. *See Sunstein, Leaving Things Undecided, supra* note 182, at 96-99 (discussing how *Romer v. Evans* could be used to imply that state bans on same-sex marriage do not have a rational basis).

*C. Massachusetts (2003)*

We turn now to the Massachusetts Supreme Judicial Court and its 2003 decision in *Goodridge v. Department of Public Health*.<sup>196</sup> *Goodridge* was the first state high court decision to hold that a traditional marriage law violated a state's constitution by not allowing same-sex couples to marry.<sup>197</sup> The Massachusetts high court handed down five opinions in the case. Chief Justice Margaret Marshall wrote the majority opinion invalidating the state's marriage law on rational basis analysis.<sup>198</sup> Justice Greaney wrote a concurrence, applying strict scrutiny, because he interpreted the "fundamental right to marry" cases to apply to same-sex couples.<sup>199</sup> Dissenting Justices Spina, Sosman, and Cordy each submitted separate opinions.<sup>200</sup>

The first two sentences of Chief Justice Marshall's opinion establish the framework for her argument: "Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society."<sup>201</sup> Chief Justice Marshall's definition moves away from procreation and the rearing of children. Using this new, and broader, definition of marriage, the Chief Justice writes: "The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not."<sup>202</sup> After

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196. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

197. *Id.* at 969.

198. *Id.* at 961. The majority opinion notes that the plaintiffs challenged the state's marriage law on both equal protection and due process grounds and that "[m]uch of what we say concerning one standard applies to the other." *Id.* at 953, 960. The court "conclude[s] that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny." *Id.* at 961.

199. *Id.* at 970–72 (Greaney, J., concurring).

200. *Id.* at 974, 978, 983.

201. *Id.* at 948.

202. *Id.* Given the emphasis on benefits, it is surprising that no justice considered Vermont's "civil unions" resolution. Only after the decision was handed down and the state senate presented as a question of law whether an equal benefits approach would satisfy the state's constitution, did the Massachusetts Supreme Judicial Court consider the question. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 568 (2004). On the authority of *Goodridge*, the court, in a five to two vote with Justice Cordy writing the majority opinion, advised the senate that prohibiting same-sex couples from using the term "marriage" assigned such couples "to second-class status" and violated the state's constitution. *Id.* at 570. Since Justice Cordy dissented in *Goodridge*, he was clearly following the logical implications of that decision. Two justices continued to dissent, however. *Id.* at 565, 579, 581. The Massachusetts Supreme Court, unlike the U.S. Supreme Court, is authorized to issue "advisory opinions" on questions

describing both sides of the controversy as reflecting “deep-seated [or] strong religious, moral, and ethical convictions,” Chief Justice Marshall proclaims, in a manner echoing Rawlsian “public reason”: “Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach.”<sup>203</sup> This is followed by a quotation from Justice Kennedy’s recent opinion in *Lawrence v. Texas*: “Our obligation is to define the liberty of all, not to mandate our own moral code.”<sup>204</sup>

“Liberty of all” in this context means choosing the less specific definition of marriage in order to allow for a more inclusive result. Chief Justice Marshall acknowledges that the court’s “decision marks a change in the history of our marriage law,”<sup>205</sup> and she refers later to “the long-standing statutory understanding, derived from the common law, that ‘marriage’ means the lawful union of a woman and a man.”<sup>206</sup> “But,” she continues, “that history cannot and does not foreclose the constitutional question.”<sup>207</sup>

Does such a substantial rejection of tradition square with “rational basis” review, even the invigorated version which Gunther first recognized over forty years ago and which the U.S. Supreme Court has used in recent cases? Let’s look at how Chief Justice Marshall argues against the state’s traditional marriage law. She identifies three reasons offered by the state in support of its marriage law—procreation, childrearing, and preserving scarce resources—and then adds a fourth—the concern about the “deinstitutionalization of marriage.”<sup>208</sup> The first two rationales, which are connected, are the most important.

To the first argument, Chief Justice Marshall replies that the law does not privilege procreative heterosexual intercourse.<sup>209</sup> Why not? The proof is that there is no law requiring proof of ability or intention to conceive children by coitus. This is a key constitutional argument for advocates of same-sex marriage. Chief Justice Amestoy used it in the Vermont case.<sup>210</sup> Chief Justice Marshall notes that fertility is not a condition of marriage or divorce.<sup>211</sup> But would that not be a preposterously illiberal law? Is it not

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of law. Wex Legal Dictionary, *Advisory Opinion*, CORNELL UNIV. LAW SCH., [http://www.law.cornell.edu/wex/advisory\\_opinion](http://www.law.cornell.edu/wex/advisory_opinion) (last visited Dec. 5, 2014).

203. *Goodridge*, 798 N.E.2d at 948.

204. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992))).

205. *Goodridge*, 798 N.E.2d at 948.

206. *Id.* at 953.

207. *Id.*

208. *Id.* at 961–65.

209. *Id.* at 961.

210. *See supra* notes 183–87 and accompanying text.

211. *Goodridge*, 798 N.E.2d at 961.



enough that it is assumed that heterosexual couples will have sexual intercourse and as a result, in most cases, they will have children? A refinement on this argument, which Chief Justice Marshall does not make, is to ask why elderly couples, especially women past the childbearing age, should be allowed to marry.<sup>212</sup>

The second, and related, rationale concerns children; namely, that the optimal family setting for children is to be raised by their biological parents, or at least by a father and a mother.<sup>213</sup> Here Chief Justice Marshall points out that Massachusetts has acted to unburden children from the stigma of illegitimacy.<sup>214</sup> But why does that assistance preclude a law that sets the standard as being raised by a mother and father, preferably one's biological parents? That is the position of dissenting Justices Sosman and Cordy.<sup>215</sup> Chief Justice Marshall's position seems to be that not allowing same-sex couples, some of which already have children by adoption or artificial means, to marry stigmatizes their children in a way similar to the stigma of illegitimacy.<sup>216</sup> In addition, the majority notes that the Department of Public Health offered no evidence showing that there would be an increase in the number of same-sex couples choosing to have and raise children if they can marry.<sup>217</sup>

The Chief Justice acknowledged that the court's decision "marks a significant change in the definition of marriage as it has been inherited from the common law . . . [b]ut it does not disturb the fundamental value of marriage in our society."<sup>218</sup> In light of the intensity of popular feelings around the issue of same-sex marriage, would that not counsel against courts getting so far out in front on the issue? For the majority, however, the issue is one of civil rights, not essentially different from racial discrimination. The court declares: "The marriage ban works a deep and

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212. In his review of Andrew Sullivan's *Virtually Normal*, James Q. Wilson responds to the analogy to sterile persons by affirming the importance of the form: "Yet people, I think, want the form observed even when the practice varies; a sterile marriage, whether from choice or necessity, remains a marriage of a man and a woman." Wilson, *Against Homosexual Marriage*, *supra* note 53, at 140. The argument regarding forms needs to be viewed in relation to an underlying argument in support of traditional marriage to be persuasive. If children are better off raised by their biological parents, or at least by a man and a woman, the right to marry need not be limited to heterosexual couples who are ready, willing, and able to procreate.

213. *Goodridge*, 798 N.E.2d at 962.

214. *Id.* at 963.

215. *Id.* at 979–80 (Sosman, J., dissenting); *id.* at 995 (Cordy, J., dissenting).

216. *See id.* at 962–63 (majority opinion).

217. *Id.* at 963.

218. *Id.* at 965.

scarring hardship on a very real segment of the community for no rational reason.”<sup>219</sup>

Justice Sosman’s dissent emphasizes the significance of the change the court is making in Massachusetts’ marriage laws without an adequate knowledge of the long-term effects of the change on childrearing.<sup>220</sup> Noting that scientific studies on the subject have “become[] clouded by the personal and political beliefs of the investigators,” she thinks it will be necessary to wait for studies “of how those children [of same-sex couples] fare as adults.”<sup>221</sup> The majority’s assumption that the sex of a child’s parents is irrelevant to that child’s well-being is, according to Justice Sosman, “a passionately held but utterly untested belief.”<sup>222</sup> Therefore, “[t]he Legislature is not required to share that belief but may, as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alteration to that institution.”<sup>223</sup>

Chief Justice Marshall, in reply, describes “[t]he history of constitutional law” as “the story of the extension of constitutional rights and protections to people once ignored or excluded.”<sup>224</sup> The Chief Justice faulted the state for failing to “articulate a constitutionally adequate justification for limiting civil marriage to opposite-sex unions.”<sup>225</sup> The “purported justifications for the civil marriage restriction . . . are starkly at odds with the comprehensive network of vigorous, gender-neutral laws promoting stable families and the best interests of children.”<sup>226</sup> Apparently, for the majority, gender neutrality is a constitutional requirement that extends to sexual orientation and hence to marriage.<sup>227</sup>

219. *Id.* at 968.

220. *Id.* at 979 (Sosman, J., dissenting).

221. *Id.* at 980.

222. *Id.*

223. *Id.*

224. *Id.* at 966 (majority opinion) (quoting *United States v. Virginia*, 518 U.S. 515, 557 (1996)).

225. *Id.* at 968.

226. *Id.*

227. *See id.* at 968.

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. The Constitution cannot control such prejudices but neither can it tolerate them. . . . Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.

*Id.* (citations and internal quotation marks omitted).

*D. The New York Case: Hernandez v. Robles (2006)*

*Hernandez v. Robles*, which the New York Court of Appeals decided in July of 2006,<sup>228</sup> is the mirror image of *Goodridge*. By a vote of four to two the highest state court upheld New York's traditional marriage law without considering a version of civil unions or domestic partnerships.<sup>229</sup> Judge R.S. Smith wrote a succinct opinion defending the law and directing same-sex advocates to the legislature for relief.<sup>230</sup> Chief Judge Kaye wrote a strong dissent.<sup>231</sup> These two opinions differ in their general approaches and in their specific treatments of the test for fundamental rights under the Due Process Clause and in their consideration of equal protection of the laws.

Applying the "rational basis" test to the plaintiffs' challenge to the state's marriage law, Judge Smith supported two constitutional grounds for the state's limitation of marriage to opposite-sex couples. "First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not."<sup>232</sup>

Judge Smith's second reason also concerns the well-being of children:

The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.<sup>233</sup>

As we have seen, this is a critical argument in the debate over same-sex marriage. The difference of opinion in the judicial context is not only over whether the statement is correct—advocates of same-sex marriage deny it—but also, if the answer is not clear, which side has the burden of proof. Stated differently, how close must the means-end relationship be to survive "rational basis with bite" scrutiny?

Judge Smith denied that the state's traditional marriage law was "founded on nothing but prejudice."<sup>234</sup> Acknowledging the injustices

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228. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

229. *Id.* at 22.

230. *Id.*

231. *Id.* (Kaye, C.J., dissenting).

232. *Id.* at 7 (majority opinion).

233. *Id.*

234. *Id.* at 8.

perpetrated against homosexuals, he noted the state's passage of the Sexual Orientation Non-Discrimination Act four years earlier.<sup>235</sup> He did not regard the limitation of marriage as a violation of the Act.<sup>236</sup> According to Judge Smith: "The idea that same-sex marriage is even possible is a relatively new one. . . . A court should not lightly conclude that everyone who held this belief was irrational, ignorant, or bigoted. We do not so conclude."<sup>237</sup>

Turning to the Due Process Clause, Judge Smith quoted Justice Souter's opinion in *Washington v. Glucksberg* to support the notion that fundamental rights are "deeply rooted in this Nation's history and tradition."<sup>238</sup> He then concluded that while the right to marry was fundamental, the right to marry someone of the same sex was not.<sup>239</sup>

Judge Smith also wrote that the plaintiffs in the case, unlike those in *Lawrence*, "seek from the courts access to a state-conferred benefit that the Legislature has rationally limited to opposite-sex couples."<sup>240</sup> In other words, the right to intimate association does not imply the right to marry for two persons of the same sex.

Judge Smith then took up the equal protection argument. Treating the law as classification by sexual orientation,<sup>241</sup> he concluded, drawing on the *Cleburne* case, that rational basis applied and that the law passed that test.<sup>242</sup> He did say that "heightened scrutiny" might be appropriate for sexual orientation discrimination "in some cases, but not where we review legislation governing marriage and family relationships."<sup>243</sup> If some classifications based on sexual orientation are more suspicious than others, it seems to be a good reason to apply "rational basis with bite," which is what the U.S. Supreme Court did in *Romer*, *Glucksberg*, and *Lawrence*.

Finally, Judge Smith replied to the plaintiffs' contention that the "means-end" fit was not close enough.<sup>244</sup> The "under-inclusiveness" was

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 9 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977))).

239. *Id.* at 10 ("We conclude that, by defining marriage as it has, the New York Legislature has not restricted the exercise of a fundamental right.").

240. *Id.*

241. *Id.* at 10–11 (rejecting the contention that the law involved sex discrimination, since it does not put men and women in different classes and was not passed to subordinate women to men or vice versa).

242. *Id.* at 11 ("[N]o more than rational basis scrutiny is generally appropriate 'where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement.'" (quoting *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985))).

243. *Id.*

244. *Id.*

not in violation of a rational relationship, since the greater concern was with unplanned pregnancies.<sup>245</sup> Nor was the “over-inclusiveness” in violation of a rational relationship, since “limiting marriage to opposite-sex couples likely to have children would require grossly intrusive inquiries, and arbitrary and unreliable line-drawing.”<sup>246</sup>

In her dissent, Chief Judge Kaye linked same-sex marriage with civil rights: “Solely because of their sexual orientation . . . that is, because of who they love[,] plaintiffs are denied the rights and responsibilities of civil marriage. This State has a proud tradition of affording equal rights to all New Yorkers. Sadly, the Court today retreats from that proud tradition.”<sup>247</sup> In response to the majority’s decision to direct the plaintiffs to the legislature (which eventually succeeded), Chief Judge Kaye responded: “It is uniquely the function of the Judicial Branch to safeguard individual liberties guaranteed by the New York State Constitution, and to order redress for their violation. The Court’s duty to protect constitutional rights is an imperative of the separation of powers, not its enemy.”<sup>248</sup>

This formulation harkens back to our founding principle that the peculiar function of the courts is “to say what the law is.”<sup>249</sup> The difficulty is that as courts expand the range of rights that they will enforce, the result is a significant narrowing of the range for legislative choice regarding the desirability of a given policy. Since, as James Madison pointed out, many legislative conflicts can be framed in terms of rights,<sup>250</sup> courts need to be careful about excessive encroachment on the legislative sphere.

Chief Judge Kaye acknowledged that the doctrine of “fundamental rights” refers to those ““which are, objectively, deeply rooted in this Nation’s history and tradition, . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.””<sup>251</sup> But that did not prevent her from asserting that,

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245. *Id.*

246. *Id.* at 11–12.

247. *Id.* at 22 (Kaye, C.J., dissenting).

248. *Id.* at 34.

249. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* THE FEDERALIST NO. 78, at 498 (Alexander Hamilton) (Robert Scigliano ed., 2001) (“The interpretation of the law is the proper and peculiar province of the courts.”).

250. THE FEDERALIST NO. 10, at 56 (James Madison) (Robert Scigliano ed., 2001) (“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons but concerning the rights of large bodies of citizens?”).

251. *Hernandez*, 855 N.E.2d at 23 (Kaye, C.J., dissenting) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721–22 (1997)). Chief Justice Rehnquist’s remarks in *Glucksberg* drew on two due process opinions from the 1930s: *Snyder v. Massachusetts* and *Palko v. Connecticut*. *See Glucksberg*,

“fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.”<sup>252</sup> She thereby assumes that “the fundamental right to marry” should apply to same-sex couples when the court’s statements assumed the traditional definition of marriage.

For Chief Judge Kaye, the historical and traditional approach to fundamental rights fails because once upon a time racial segregation was supported.<sup>253</sup> For her, as for the majority in the *Goodridge*,<sup>254</sup> there is no difference between the race issue that was laid to rest in *Loving* and any government preference for heterosexuality.<sup>255</sup>

When she turns to equal protection, Chief Judge Kaye writes that “the question before us is not whether the marriage statutes properly benefit those they are intended to benefit—any discriminatory classification does that—but whether there exists any legitimate basis for *excluding* those who are not covered by the law.”<sup>256</sup> She argues that “[h]omosexuals meet the constitutional definition of a suspect class” because, “[o]bviously, sexual orientation is irrelevant to one’s ability to perform or contribute.”<sup>257</sup>

Chief Judge Kaye also thought the law failed even rational basis review. In other words, it was not enough for the state to have a legitimate interest in recognizing or supporting opposite-sex marriages. Rather, “[t]he relevant question here is whether there exists a rational basis for *excluding* same-sex couples from marriage, and, in fact, whether the State’s interests in recognizing or supporting opposite-sex marriages are rationally *furthered*

521 U.S. at 720–21 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969)) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *overruled in part by* *Malloy v. Hogan*, 378 U.S. 1 (1964)). Interestingly, Justice Rehnquist took issue with Justice Souter’s formulation, in his concurrence, of the fundamental rights doctrine. *See id.* at 721–22. According to Justice Rehnquist, Justice Souter was wrong to follow Justice Harlan’s *Poe v. Ullman* opinion, restated in *Griswold*, because it allowed for a more open-ended judicial scrutiny than the Court had ever endorsed. *See id.* But Justice Souter’s account also relied on the *Snyder* language, repeated in *Palko*, emphasizing “‘principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” *Id.* at 768 (Souter, J., concurring) (quoting *Palko*, 302 U.S. at 325 (quoting *Snyder*, 291 U.S. at 105)).

252. *Hernandez*, 855 N.E.2d at 23 (Kaye, C.J., dissenting).

253. *See id.* at 25 (explaining that under the state constitution, discriminatory views cannot stop same-sex couples from marrying any more than they could different-race couples).

254. *See Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 971–72 (Mass. 2003) (“The equal protection infirmity at work here is strikingly similar to (although, perhaps, more subtle than) the invidious discrimination perpetuated by Virginia’s anti-miscegenation laws . . .”).

255. *See Hernandez*, 855 N.E.2d at 26 (Kaye, C.J., dissenting) (predicting that the opposition to same-sex marriage will fade away, as did the opposition to different-race marriage).

256. *Id.* at 27.

257. *Id.* at 27–28. Chief Judge Kaye also regards the state’s marriage law as classifying by sex in not allowing same-sex couples to marry, and she restates the fundamental rights argument in the equal protection context. *Id.* at 27, 30.

by the exclusion.”<sup>258</sup> To the suggestion offered by the majority that the state’s concern accounts for the current marriage laws, Chief Judge Kaye replies: “There are enough marriage licenses to go around for everyone.”<sup>259</sup>

*E. California: In re Marriage Cases (2008)*

California’s same-sex marriage cases were complicated and distinctive. They were complicated by the fact that the Supreme Court of California had recently ruled that public officials in San Francisco had unlawfully issued marriage licenses to same-sex couples.<sup>260</sup> The California cases were distinctive, as compared with previous state court cases, because the California Legislature had, in a series of acts in recent years, established domestic partnerships for same-sex couples that gave those partners virtually the same rights that married couples had.<sup>261</sup> The issue was not, as it was in Vermont and New Jersey, merely whether the state constitution required extending the rights of marriage to same-sex couples who wanted to marry; rather, the issue was whether the rights of marriage without the name “marriage” sufficed in light of either a fundamental right to marry or the requirements of the Equal Protection Clause.<sup>262</sup>

At the outset of his opinion, in a four to three decision, Chief Judge George indicated that the fundamental right to marry included same-sex couples.

[The] core substantive rights [associated with marriage] include, most fundamentally, the opportunity of an individual to establish—with the person with whom the individual has chosen to share his or her life—an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.<sup>263</sup>

Chief Judge George did not provide a source for the constitutional weight he applies to the terms “respect and dignity,” although it seems to be

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258. *Id.* at 30.

259. *Id.*

260. *Lockyer v. City & Cnty. of San Francisco*, 95 P.3d 459, 499 (Cal. 2004).

261. *In re Marriage Cases*, 183 P.3d 384, 398 n.2, 416–17 n.24, (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (2008), *invalidated by Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).

262. *Marriage Cases*, 183 P.3d at 398.

263. *Id.* at 399.

Dworkin, who himself cites Rawls.<sup>264</sup> The effect of such a constitutional mandate is to disallow any political compromise in the form of “civil unions” or “domestic partnerships.”

Judge Baxter, in his dissent, criticized the court for not allowing the California Legislature, which had enacted a generous domestic partnership plan, further time to work things out.<sup>265</sup> Judge Baxter claimed that the majority used its interpretation of the legislature’s acts to nullify the people’s initiative.<sup>266</sup>

Chief Judge George claimed that it is unfair to suggest that the plaintiffs seek a new right, because they are not attempting “to change, modify, or . . . ‘deinstitutionalize’ the existing institution of marriage.”<sup>267</sup> And yet, he acknowledged that marriage has never meant the union of any two persons.<sup>268</sup> Still, the majority interpreted the state legislation prohibiting discrimination on the basis of sexual orientation as reflecting an “equal legal status” that requires same-sex marriage.<sup>269</sup> In other words, the majority’s analysis of the fundamental right to marry presents a logically straightforward result that goes against, or beyond, tradition and the considered judgment of several legislatures and the people through a legislative initiative, and requires a new definition of marriage. To the dissenting judges, this may be a change for the better, but it should come from the legislature.

When the Chief Judge addressed the “historical matter” that marriage in California has always “been limited to a union between a man and a woman,” he replied that reliance on tradition alone does not suffice to justify the restriction of a fundamental right.<sup>270</sup> That, of course, begs the question of whether the meaning of the “fundamental right to marry” extends to two persons of the same sex. That is undoubtedly a question, since when the court announced the doctrine it was considering, the court was surely only thinking of marriage as the union of a man and a woman.

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264. See RONALD DWORGIN, *TAKING RIGHTS SERIOUSLY* 180–83 (1977) (discussing the ideas of equal concern and respect in society in Rawls’ *A Theory of Justice*) (citing JOHN RAWLS, *A THEORY OF JUSTICE* 501, 272–78 (Harvard Univ. Press 1971)).

265. *Marriage Cases*, 183 P.3d at 457–58 (Baxter, J., dissenting).

266. *Id.* (“[T]he majority suggests that, by enacting *other statutes* which *do* provide substantial rights to gays and lesbians—including domestic partnership rights which, under [the initiative], the Legislature *could not call* ‘marriage’—the Legislature has given ‘explicit official recognition’ to a California right of equal treatment which, because it includes the right to marry, thereby invalidates [the initiative].” (citations omitted) (quoting *id.* at 428 (majority opinion))).

267. *Id.* at 421 (majority opinion).

268. *Id.* at 427.

269. *Id.* at 428–29.

270. *Id.* at 427.



Did the majority think that the failure to change the law to include same-sex couples indicated discrimination based on sexual orientation? While he does not say so explicitly, Chief Judge George did note the change in attitudes toward homosexuals:<sup>271</sup> what was considered an illness is now understood as a condition that, while not simply determined genetically, is not freely chosen and which characterizes a small but distinct minority of the population.<sup>272</sup> Hence, “we now . . . recognize that an individual’s homosexual orientation is not a constitutionally legitimate basis for withholding or restricting the individual’s legal rights.”<sup>273</sup> And, he might have added, marriage is simply a contract which healthy adults have a right to enter into, subject, I suppose, to reasonable age and consanguinity restrictions.

Chief Judge George replied to David Blankenhorn’s argument concerning the importance of “promot[ing] a stable relationship for the procreation and raising of children” by noting that “the constitutional right to marry never has been viewed as the sole preserve of individuals who are physically capable of having children.”<sup>274</sup> In other words, the class of individuals who are allowed to marry is not limited to those who are able and willing to procreate. In addition, same-sex couples are able to have children “through adoption or through means of assisted reproduction.”<sup>275</sup>

Finally, Chief Judge George found inadequate the argument that the state has a greater concern about regulating the sexual activities of heterosexuals, since unintended pregnancies put children at risk, whereas same-sex couples have to plan to have children. Chief Judge George replied that by recognizing the right of same-sex couples to marry, the court does nothing to “alter or diminish either the legal responsibilities that biological parents owe to their children or the substantial incentives that the state provides to a child’s biological parents to enter into and raise their child in a stable, long-term committed relationship.”<sup>276</sup> The question is whether a democratically responsible legislature may choose to limit marriage to the family arrangements it prefers to encourage, while at the same time lending

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271. *See id.* at 428–29 (discussing the “change” in California’s “past treatment of gay individuals and homosexual conduct”).

272. *See* RICHARD A. POSNER, *SEX AND REASON* 100–08, 291–93 (1992) (detailing homosexuality and genetics and challenges to homosexuals based on social policy).

273. *Marriage Cases*, 183 P.3d at 429.

274. *Id.* at 431 (citing *Baker v. Baker*, 13 Cal. 87, 103 (1859)); BLANKENHORN, *THE FUTURE OF MARRIAGE*, *supra* note 29, at 23–125.

275. *Marriage Cases*, 183 P.3d at 431.

276. *Id.* at 432–33.

equal financial resources to same-sex couples under the domestic partnership law.<sup>277</sup>

Judges Baxter and Corrigan, in largely dissenting opinions (concurring in only minor parts), emphasized the significance of the break with tradition, maintaining that the change should come from the democratic process.<sup>278</sup> But neither opinion developed the case for the traditional position, which requires a positive argument concerning the importance of every child having a father and a mother. The majority's response to the dissents' separation of powers argument was that "a court has an *obligation* to enforce the limitations that the California Constitution imposes upon legislative measures, and a court would shirk the responsibility it owes to each member of the public were it to consider such statutory provisions to be insulated from judicial review."<sup>279</sup>

The hard question is whether the understanding of the fundamental right to marry, whereby restrictions on same-sex marriage are viewed as constitutionally analogous to restrictions on interracial marriage, is sound. Surely there is a difference between the two kinds of classification when they are considered in relation to marriage and raising children.

#### IV. MAKING A FEDERAL CASE OUT OF IT

##### *A. Transition: Pushback from the People*

In response to the California Supreme Court's decision, the people of California, by a 52% to 48% vote, passed a constitutional amendment in the form of a ballot initiative known as Proposition 8.<sup>280</sup> By affirming that "[o]nly marriage between a man and a woman is valid or recognized in California,"<sup>281</sup> the action nullified the court's decision in the *Marriage Cases*. Supporters of same-sex marriage brought suit in the California

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277. The rest of the majority opinion explained: (1) for Equal Protection Clause purposes, the statutes discriminated on the basis of sexual orientation; (2) the statutes had to be subject to "strict scrutiny," as California had a two tier system, with no intermediate scrutiny and sexual orientation satisfied the requirements of "heightened scrutiny"; and (3) there was no compelling state interest "in limiting the designation of marriage exclusively to opposite-sex couples." *See id.* at 435–52. Since the majority had already concluded that the fundamental right to marry extended to same-sex couples, the only new part consisted of the unsurprising conclusion that the law limiting marriage to opposite-sex couples failed "strict scrutiny." *See id.* at 443–52.

278. *Id.* at 456 (Baxter, J., concurring and dissenting); *id.* at 469–70 (Corrigan, J., concurring and dissenting).

279. *Id.* at 448 (majority opinion) (emphasis omitted).

280. DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 6–7 (2008), available at [http://www.sos.ca.gov/elections/sov/2008-general/sov\\_complete.pdf](http://www.sos.ca.gov/elections/sov/2008-general/sov_complete.pdf).

281. *See* Strauss v. Horton, 207 P.3d 48, 59 (Cal. 2009) (quoting CAL. CONST. art. I, § 7.5).

Supreme Court, as an original writ of mandate, challenging the proposition's constitutionality.<sup>282</sup> The basis for the suit consisted in the state's constitutional distinction between amendments and revisions.<sup>283</sup> The California Supreme Court had to decide whether Proposition 8 was a constitutional amendment, and hence valid, or a constitutional revision, and hence invalid.<sup>284</sup> The judges on the court, who voted four to three that the state's constitution required same-sex marriage, now voted 6-1 that Proposition 8 was valid.<sup>285</sup> In the course of concluding that Proposition 8 was valid, Chief Judge George characterized the state Attorney General's argument as amounting to the complaint "that it is just too easy to amend the California Constitution through the initiative process."<sup>286</sup> Chief Judge George responded to this formulation by saying that it was for the people, not the court, to change the amendment provisions of the constitution.<sup>287</sup>

The California Supreme Court interpreted the scope of the new constitutional provision to repeal its own holding in the *Marriage Cases* concerning the right of same-sex couples to marry, but it did not interpret the provision to, in any way, detract from the "familial rights of same-sex couples"<sup>288</sup> that the legislature had already granted in the form of domestic partner legislation.<sup>289</sup>

### *B. Making the Federal Case: Perry v. Schwarzenegger (2010)*

The next step for the Proposition 8 case was federal district court, with attorneys Ted Olsen and David Boies (adversaries in the famous *Bush v. Gore* case)<sup>290</sup> joining together to represent the advocates of same-sex

282. *Id.* at 68–69.

283. *Id.* at 60.

284. Amendments and revisions both require the vote of a majority of the people for ratification. But, an amendment may be proposed either by two-thirds of both houses of the legislature or by an initiative petition signed by a number of voters equal to at least 8% of the votes cast in the last election for governor, while a revision requires the vote of two-thirds of both houses. CAL. CONST. art. XVIII, § 1; *see also Strauss*, 207 P.3d at 61–62 (discussing the difference between an amendment and a revision).

285. *See Strauss*, 207 P.3d at 65–66 (explaining how Proposition 22's language was used for Proposition 8).

286. *Id.* at 64.

287. *Id.*

288. *Id.* at 76.

289. California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421 § 4, 2003 Cal. Stat. 89, 89 (codified as amended at CAL. FAM. CODE § 297.5 (West 2007)); *see Strauss*, 207 P.3d at 76. In addition, following precedent on retroactivity, the court interpreted the provision to be prospective only, and hence to not affect any same-sex couple that had been married in the year since the *Marriage Cases* decision. *Strauss*, 207 P.3d at 76. The court said they were doing this to avoid possible due process challenges concerning the taking away of vested rights. *Id.* at 121.

290. *Bush v. Gore*, 531 U.S. 98, 99 (2000).

marriage in federal court.<sup>291</sup> Many same-sex marriage advocates disagreed with the decision to take the case to federal court because they feared a loss before the U.S. Supreme Court, and the results were at least mixed in the state courts.<sup>292</sup> District Court Judge Vaughn Walker presided over a trial that lasted over five months, from January to June 2009, and on August 4, 2009, he delivered his decision in favor of the plaintiffs.<sup>293</sup>

The basic arguments against Proposition 8 were: first, that it violated a gay person's fundamental right to marry; and second, that it disadvantaged homosexuals, allegedly a suspect class, and therefore violated the Equal Protection Clause.<sup>294</sup> The basic argument presented in support of Proposition 8 was that it intended to protect marriage<sup>295</sup> and was not "an attack on the gay lifestyle."<sup>296</sup> In his opinion, Judge Walker made it abundantly clear that he found no merit in the argument for restricting marriage to the union of a man and a woman.<sup>297</sup> Moreover, while he presented the views of David Blankenhorn, the major expert witness offered by the proponents, he concluded that neither Blankenhorn's credentials nor his testimony qualified him as an expert witness.<sup>298</sup> In his "Findings of Fact" section, Judge Walker indicated that he would invalidate Proposition 8 on broad constitutional grounds.<sup>299</sup> A telling moment in the testimony occurred when Judge Walker pressed defendants' counsel to explain "how permitting same-sex marriage impairs or adversely affects that interest" and finally got the response, "I don't know. I don't know."<sup>300</sup> Later in his opinion, Judge Walker used Blankenhorn's candid

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291. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 926–27 (N.D. Cal. 2010); see also *THE CASE AGAINST 8* (HBO 2014) (showing the full account of the collaboration).

292. See Chuleenan Svetvilas, *Challenging Prop. 8: The Hidden Story: How Activists Filed a Federal Lawsuit to Overturn California's Same-Sex Marriage Ban*, DAILY J. CORP. (Jan. 2010), <http://www.callawyer.com/Clstory.cfm?eid=906575> (chronicling the decision to challenge Proposition 8 in federal court, including conservative lawyer Ted Olsen persuading liberal lawyer David Boies to join him on the brief).

293. *Perry*, 704 F. Supp. 2d at 921, 1004.

294. *Id.* at 929.

295. *Id.* at 930.

296. *Id.* (emphasis omitted) (quoting Ron Prentice et. al, *Argument in Favor of Proposition 8*, in CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 4, 2008 OFFICIAL VOTER INFORMATION GUIDE 56, available at [http://librarysource.uchastings.edu/ballot\\_pdf/2008g.pdf](http://librarysource.uchastings.edu/ballot_pdf/2008g.pdf)).

297. *Id.* at 993.

298. *Id.* at 931, 945.

299. *Id.* at 960, 979.

300. *Id.* at 931 (internal quotation marks omitted). Jonathan Rauch posed a similar question to Blankenhorn in Rauch's forward to Blankenhorn's book. See Jonathan Rauch, *Preface to DAVID BLANKENHORN, THE FUTURE OF MARRIAGE* xi, xiii–xix (2007) (critiquing Blankenhorn's arguments against same-sex marriage); see also DRY, *supra* note 15.

acknowledgement that there would be benefits to same-sex marriage against him.<sup>301</sup>

In his summary of the evidence, Judge Walker identified three main questions:

Whether any evidence supports California's refusal to recognize marriage between two people because of their sex; whether any evidence shows California has an interest in differentiating between same-sex and opposite-sex unions; and whether the evidence shows Proposition 8 enacted a private moral view without advancing a legitimate government interest.<sup>302</sup>

Addressing the first question, Judge Walker contrasted the views of historian Nancy Cott with those of Blankenhorn.<sup>303</sup> Cott said:

[M]arriage is "a couple's choice to live with each other, to remain committed to one another, and to form a household based on their own feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life."<sup>304</sup>

Blankenhorn "testified that marriage is 'a socially-approved sexual relationship between a man and a woman' with a primary purpose to 'regulate filiation.'"<sup>305</sup> Judge Walker noted that Blankenhorn acknowledged the benefits of extending marriage to gays but opposed it because he thought the resulting harm to children would be worse.<sup>306</sup> Judge Walker asserted, "[t]he trial evidence provides no basis for establishing that California has an interest in refusing to recognize marriage between two people because of their sex," by which he meant two people of the same sex.<sup>307</sup> In elaboration, Judge Walker analogized racial restrictions to the

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301. *Perry*, 704 F. Supp. 2d at 934. Blankenhorn consistently acknowledged that there would be benefits to same-sex couples who wished to have and raise children; but, initially he thought that the resulting harm to marriage as an institution, and hence to a larger number of children, outweighed the benefit to same-sex couples with children. *Id.* For his change of mind on this important political question, see Blankenhorn, *View on Gay Marriage*, *supra* note 70 ("[I]f fighting gay marriage was going to help marriage over all, I think we'd have seen some signs of it by now.").

302. *Perry*, 704 F. Supp. 2d at 932.

303. *Id.* at 933–34.

304. *Id.* at 933.

305. *Id.*

306. *Id.* at 934, 938.

307. *Id.* at 934. Judge Walker discusses the trial evidence in points nineteen through forty-one of his Findings of Fact. *See id.* at 956–63 (discussing whether there is evidence supporting California's refusal to recognize same-sex marriage).

limitation on same-sex marriage: he argued that once gender-based restrictions on employment, in the name of a division of labor, were eliminated, there is no remaining justification for the prohibition on same sex marriage.<sup>308</sup> This assumes that the difference between a mother and a father is identical to the difference between a parent who works outside the home and a parent who works inside the home.

Addressing the second question, concerning the state's interest in preferring opposite-sex over same-sex unions, Judge Walker cited psychologists who concluded, "same-sex couples are in fact indistinguishable from opposite-sex couples in terms of relationship quality and stability."<sup>309</sup> Consequently, Proposition 8 "provides state endorsement of private discrimination" and "increases the likelihood of negative mental and physical health outcomes for gays and lesbians."<sup>310</sup> Moreover, studies comparing families headed by same-sex couples with families headed by opposite-sex couples "show conclusively that having parents of different genders is irrelevant to child outcomes."<sup>311</sup>

Noting that the last point, made by Psychology Professor Michael Lamb, conflicted directly with Blankenhorn's emphasis on "the importance of biological parents," Judge Walker stated, "none of the studies Blankenhorn relied on isolates the genetic relationship between a parent and a child as a variable to be tested."<sup>312</sup> Lamb testified, "children conceived using sperm or egg donors are just as likely to be well-adjusted as children raised by their biological parents."<sup>313</sup> Judge Walker even quoted Blankenhorn as "agree[ing] with Lamb that adoptive parents 'actually on some outcomes outstrip biological parents in terms of providing protective care for their children.'"<sup>314</sup>

The third question concerned evidence showing that Proposition 8 enacted a private moral view without advancing a legitimate government interest.<sup>315</sup> In response, Judge Walker drew from the testimony of historian George Chauncey on the history of discrimination against gays, the testimony of political scientist Gary Segura on the effect of negative stereotypes on gays, and the testimony of supporters of Proposition 8 whose

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308. *See id.* at 958–59 (discussing racial restrictions on marriage and division of family labor based on gender in points twenty-five through twenty-seven).

309. *Id.* at 935.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 936–38.

arguments were based on their religious beliefs.<sup>316</sup> Judge Walker observed, “the voters’ determinations must find at least some support in evidence” and “the moral disapprobation of a group or class of citizens” will not suffice. He concluded that “[t]he evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in such disapproval.”<sup>317</sup>

Judge Walker required relatively little space to state his conclusions of law. On the due process claim, he found that the fundamental right to marry applied to same-sex couples.<sup>318</sup> He replied to the argument from “the history, tradition and practice of marriage” by implicitly likening the issue of same-sex marriage to that of interracial marriage.<sup>319</sup> He then took the elimination of legally enforced gender roles to amount to a refutation of any argument based on a natural difference between men and women.<sup>320</sup> He added, “[n]ever has the state inquired into procreative capacity or intent before issuing a marriage license.”<sup>321</sup> Hence the natural difference between the sexes becomes an archaic requirement once women are legally permitted to pursue any career.<sup>322</sup>

Judge Walker’s conclusions on these questions were based on his acceptance of the expert testimony of Professor Lamb.<sup>323</sup> Lamb “offer[ed] two broad opinions[:]. . . [F]irst . . . children raised by gay and lesbian parents are just as likely to be well adjusted as children raised by heterosexual parents. And [second] . . . for a significant number of these children, their adjustment would be promoted were their parents able to get married.”<sup>324</sup>

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316. *Id.* at 937.

317. *Id.* at 938.

318. *Id.* at 991–93.

319. *Id.* at 992.

320. *Id.* at 992–93.

321. *Id.* at 992.

322. *See id.* at 993 (“[T]he exclusion [of same-sex couples from marriage] exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed.”).

323. *Id.* at 940, 943. When he testified, Professor Lamb, head of the Department of Social and Developmental Psychology at Cambridge University, identified himself as a long-time researcher of issues concerning children’s social and emotional development. *See* Transcript of Proceedings at 1004, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (2010) (No. C 09-2292-VRW), available at <http://www.afer.org/wp-content/uploads/2010/01/Perry-Vol-5-1-15-10.pdf>. His testimony drew on a review of hundreds of studies of children being raised by gay and lesbian parents. *Id.* at 1005–08. Lamb subsequently published a summary of those studies. Michael Lamb, *Mothers, Fathers, Families and Circumstances: Factors Affecting Children’s Adjustment*, 16 APPLIED DEVELOPMENTAL SCI. 98, 98–99, (2012).

324. *See* Transcript of Proceedings, *supra* note 323, at 1009–10 (describing Dr. Lamb’s broad opinions on the adjustment of children raised by gay and lesbian parents). Lamb began his testimony by defining a well-adjusted child as one “who had no significant behavioral or psychological problems,” who could “interact effectively” with others and perform well in school. *Id.* at 1004–05; *see also* Lamb,

Drawing on research from over thirty plus years, Lamb described a consensus on three factors affecting child development: “the quality of the relationships that children have with their parents”; “the relationships between the individuals who are raising the child”; and whether the family has “adequate economic resources” and “social and emotional supports.”<sup>325</sup>

In his cross-examination of Professor Lamb, attorney Terry Thompson made the following points: (1) many studies, including some that Lamb wrote, coauthored, or edited, emphasized the importance of fathers remaining in the family for the well-being of children, especially as role-models for sons; (2) at least some of the studies emphasized the importance of biological parents for the well-being of children; and (3) none of the studies were based on a statistically random sample and in many, if not all, cases the “control group” for a comparison of same-sex with heterosexual parents included some from the latter group who were not married, thus introducing another variable.<sup>326</sup> Professor Lamb’s responses, either directly to attorney Thompson or to attorney Matthew McGill on redirect, were: (1) his and others’ studies on fathers were done in the 1970s or 1980s and more recent data have called into question the importance of fathers and mothers, in contrast to two caring parents; (2) while conceding that the studies he reported on did not contain strict random samples, at least of a size adequate for confident generalization, he referred to a later study covering the entire universe of gay couples with children in the United States with results similar to those of the reported studies; and (3) it seemed to make sense to compare all heterosexual couples with children to all gay and lesbian couples with children.<sup>327</sup>

Attorney McGill made every effort to show that political preferences accounted for the position that Lamb advocated. For example, he got Lamb to concede that at least part of a statement by the American Academy of Child and Adolescent Psychiatry was based on “non-scientific considerations.”<sup>328</sup> On the claim that if gay and lesbian couples could marry, their children would be better off, Lamb acknowledged that no study

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*supra* note 323, at 99, 102, 104 (“Well-adjusted individuals have sufficient social skills to get along with others (at school, in social settings, and at work), to get along and comply with rules and authority, to function well at school and in the workplace, and to establish and maintain meaningful intimate relationships.”).

325. Transcript of Proceedings, *supra* note 323, at 1010–11.

326. *See id.* at 1058–1124, 1129–84 (transcribing Attorney Thompson’s cross-examination on these points).

327. *See id.* (transcribing Attorney Thompson’s cross examination); *id.* at 1185–1207 (transcribing Attorney McGill’s redirect).

328. *Id.* at 1053–54.



looked at the quality of life of children raised by gay or lesbian couples in a domestic partnership.<sup>329</sup>

Professors Leon Kass and Harvey Mansfield offered an alternative interpretation of the state of social science evidence on the question of family structure and childrearing: the data are not yet extensive enough, in number or time, to allow for a scientifically significant conclusion.<sup>330</sup> Then the question becomes, which party has the burden of proof?<sup>331</sup> If the burden falls to defenders of traditional marriage, there are risks, although it is hard to be certain of their extent. As Amy Wax pointed out in her law review article, *The Meaning of Marriage: The Conservative's Dilemma: Traditional Institutions, Social Change and Same-Sex Marriage*, conservatives do not want to risk losing the benefits of marriage as it exists in order to test what might happen to marriage if it were changed to include same-sex couples: "To satisfy social science standards, conservatives must come forward with data that systematically compares the effects of established arrangements with innovations they resist."<sup>332</sup> Wax reports that Jonathan Rauch, a strong advocate of same-sex marriage, is aware that the long-term effects of such a change in the marriage laws are uncertain.<sup>333</sup>

Wax concluded her article, which sympathetically considers the conservative, tradition-based case for marriage, by supporting another argument that Rauch put forward: since procreation and childrearing are becoming less important and caregiving is becoming more important as people live longer, the differences between same-sex and opposite-sex couples are thus reduced in significance.<sup>334</sup> Such a point merits consideration. Wax did not expressly say whether it would justify judicial action enforcing this change in marriage laws. One can infer that she would not oppose what happened in Vermont and New York. But I think her argument supports my contention that legislatures, not courts, should make that decision.

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329. *Id.* at 1184.

330. Brief for Leon R. Kass et al. as Amici Curiae Supporting Petitioners at 3–4, 17–18, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144). Professor Mansfield has stated that Nelson Lund, counsel of record, and Professor of Law at George Mason University School of Law, wrote the amicus brief. E-mail from Harvey Mansfield, Professor of Government, Harvard University, to Murray Dry, Professor of Political Science, Middlebury College (Sept. 3, 2014) (on file with author).

331. *See id.* at 31 (noting challenges with producing evidence to support either side of the same-sex marriage debate).

332. Wax, *supra* note 34, at 1082–83.

333. *Id.* at 1099.

334. *Id.* at 1101–03.

*C. The Court of Appeals' Decision: Perry v. Brown*

When the governor of California declined to appeal the district court's decision in *Perry v. Schwarzenegger*, the proponents of Proposition 8 appealed to the Ninth Circuit Court of Appeals.<sup>335</sup> The Ninth Circuit asked the California Supreme Court to determine whether the proponents had standing to appeal the case.<sup>336</sup> The California Supreme Court replied that when public officials decline to appeal a judgment invalidating a state law, "the official proponents of a voter-approved initiative measure are authorized to assert the state's interest in the initiative's validity."<sup>337</sup> The circuit court, in an opinion written by Judge Reinhardt, accepted that position and then turned to the merits of the case.<sup>338</sup> After reciting the two bases for the district court's invalidation of Proposition 8—due process and equal protection—Judge Reinhardt presented a third position, one which the plaintiffs (and San Francisco, a plaintiff-intervenor) introduced:

Proposition 8 singles out same-sex couples for unequal treatment by *taking away* from them alone the right to marry, and this action amounts to a distinct constitutional violation because the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason.<sup>339</sup>

Such an approach, which relied on the Supreme Court's *Romer* decision, does not affirm an unqualified right of same-sex marriage and, consequently, only affected California. Judge Smith dissented on this point, arguing that Colorado's Amendment 2 can be distinguished from Proposition 8 in terms of its greater breadth.<sup>340</sup> Here is another difference: in the Colorado case, the constitutional referendum known as Amendment 2 rescinded state and local governmental acts of the legislative and executive branches.<sup>341</sup> In this case, Proposition 8 repealed the decision of the California Supreme Court that went beyond what the U.S. Supreme Court

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335. *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (2012).

336. *Id.*

337. *Id.* at 1072 (quoting *Perry v. Brown*, 265 P.3d 1002, 1033 (Cal. 2011)).

338. *Id.*

339. *Id.* at 1076 (citing *Romer v. Evans*, 517 U.S. 620, 634–35 (1996)).

340. *Id.* at 1104 (Smith, J., dissenting).

341. *Id.* at 1080 (majority opinion).

had held the U.S. Constitution to require, as well as what the people of California thought their constitution required.<sup>342</sup>

In his dissent, Judge N.R. Smith noted that whereas the *Romer* Court concluded that “animus” accounted for Amendment 2, the California Supreme Court acknowledged reasons for the traditional marriage law apart from animus.<sup>343</sup> The proposition passed rational basis review, in Judge Smith’s opinion, on the basis of the people’s interest in responsible procreation and optimal parenting.<sup>344</sup> The plaintiffs and the California Supreme Court argued that a law that excluded a class of persons from marriage did not advance these legitimate interests.<sup>345</sup> This objection applied to the second reason as well as the first because California did not prohibit same-sex couples from raising children. Judge Smith replied: “[I]t does not necessarily follow that the optimal parenting rationale is an *illegitimate* governmental interest.”<sup>346</sup> To the plaintiffs’ argument that Proposition 8 would have to change the laws regarding childrearing in order to be rationally related to optimal parenting, Judge Smith replied, “this argument subjects Proposition 8 to heightened scrutiny review.”<sup>347</sup> I think his argument here would have been stronger if he had asserted the people’s right to govern via the popular constitutional referendum, which California provides.

The Ninth Circuit upheld the district court’s invalidation of Proposition 8 in such a way as to limit the decision’s reach to California and the few other states that may elect to move back from a decision for same-sex marriage, be it by legislative or judicial action.<sup>348</sup> Because the U.S. Supreme Court refused to decide the case on the merits, and because it did decide a related case that has a bearing on the main issue concerning same-sex marriage on the merits, I want to discuss this successful legal challenge to the Federal Defense of Marriage Act.

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342. *Id.* at 1090.

343. *Id.* at 1102–05 (Smith, J., dissenting).

344. *Id.* at 1104–12.

345. *Id.* at 1110.

346. *Id.* at 1108.

347. *Id.* at 1111.

348. *Id.* at 1096. In June of 2012, the Ninth Circuit denied Proposition 8 supporters’ motion to rehear the case en banc. *Perry v. Brown*, 681 F.3d 1065, 1066 (9th Cir. 2012); see also Doug Mataconis, *Ninth Circuit Declines En Banc Review of Proposition 8 Decision*, OUTSIDE THE BELTWAY (June 5, 2012), <http://www.outsidethebeltway.com/ninth-circuit-declines-en-banc-review-of-proposition-8-decision/>. The supporters of Proposition 8 sought Supreme Court review on July 31, 2012. American Foundation for Equal Rights, *US Supreme Court Asked to Hear Prop. 8 Case*, MARRIAGE NEWS BLOG (July 31, 2012), <http://www.afer.org/blog/u-s-supreme-court-asked-to-hear-prop-8-case/>.

*D. The Other Federal Case: Section 3 of DOMA*

Congress passed DOMA in 1996.<sup>349</sup> Section 2 of DOMA guaranteed the several states that they were not obliged to recognize same-sex marriages celebrated in other states.<sup>350</sup> But Congress also passed § 3, which reflected its refusal to recognize same-sex marriages for the purpose of federal benefits. Section 3 provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.<sup>351</sup>

*United States v. Windsor* arose in November 2010, when Edith Windsor sought a refund on the federal estate tax (of \$363,053) that she was required to pay as executor of the estate of her late spouse, Thea Spyer.<sup>352</sup> The two women lived together in New York City for over forty years. In 2007, when Spyer became ill, the women traveled to Canada to get married.<sup>353</sup> The marriage was recognized in New York before the state passed its own law enabling same-sex couples to marry.<sup>354</sup> Several months after the suit commenced, in February 2011, Attorney General Eric Holder announced that the Department of Justice would no longer defend § 3 of DOMA because the Attorney General and the President concluded “that a heightened standard of scrutiny should apply to classifications based on sexual orientation.”<sup>355</sup> This was unusual in a double sense. First, the Justice Department was changing its mind about a law it had initially considered constitutional and in the absence of any judicial decision invalidating the law. Second, it concluded that “heightened scrutiny” had to be applied to all laws concerning sexual orientation, even though neither the Supreme Court nor any other federal court had come to that conclusion.

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349. Defense of Marriage Act, Pub. L. 104-199, §§ 2(a), 3(a), 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012), 28 U.S.C. § 1738(c) (2012)).

350. Defense of Marriage Act § 2(a), 28 U.S.C. § 1738(c) (2012).

351. Defense of Marriage Act § 3(a), 1 U.S.C. § 7 (2012), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

352. *Windsor v. United States*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012), *aff’d*, 699 F.3d 169 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013).

353. *Id.*

354. *Id.* at 398–99.

355. *Id.* at 397.

The Justice Department's change of mind regarding the law's constitutionality did not require that broader conclusion. In the district court, Judge Barbara Jones, after citing the Supreme Court's *Cleburne* case for the reluctance of courts "to create new suspect classes," nonetheless held that § 3 of DOMA was unconstitutional as applied to the plaintiff.<sup>356</sup> She rejected arguments regarding the tradition of marriage, procreation and childrearing as only indirectly affected by the law.<sup>357</sup>

DOMA did not define who *could* marry, and it did not say who *could* adopt and raise children.<sup>358</sup> Rather, in limiting the legal definition of "marriage" to a union between a man and woman, DOMA did not provide a federal incentive to same-sex couples.<sup>359</sup> And a genuine desire for consistency would have required federal rules for age of consent and degree of consanguinity.<sup>360</sup>

In a divided opinion, the Second Circuit affirmed the decision of the district court. After reviewing the Supreme Court's discussion of the relevant considerations for determining when heightened scrutiny applies,<sup>361</sup> Judge Jacobs, writing for the court, held that "homosexuals compose a class that is subject to heightened scrutiny."<sup>362</sup>

#### *E. In the Supreme Court: Hollingsworth and Windsor (2013)*

The U.S. Supreme Court granted certiorari in both the Proposition 8 case and the Second Circuit's DOMA case on December 7, 2012.<sup>363</sup> The Court handed down its decisions in both cases on June 26, 2013.<sup>364</sup> In *Hollingsworth*, the case raising the fundamental constitutional question concerning same-sex marriage, the Court, in a 5-4 decision, held that the

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356. *Id.* at 401, 406 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985)).

357. *Id.* at 403-05.

358. See Defense of Marriage Act, Pub. L. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

359. *Id.*

360. See *Windsor*, 833 F. Supp. 2d at 405-06 (noting that "DOMA operates to reexamine the states' decisions concerning same-sex marriage" not to actually define any particular requirements for marriage).

361. *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013). The major case is *Cleburne*, in which the Court struck down a zoning regulation without concluding that mental retardation merited "heightened scrutiny." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985).

362. *Windsor*, 699 F.3d at 185.

363. Nancy Campbell & Kevin J. Hogan, *Supreme Court Review of Same-Sex Marriage Cases Could Require Significant Changes to Employee Benefits*, JD SUPRA, <http://www.jdsupra.com/post/contentViewerEmbed.aspx?fid=26097932-aa20-495d-8d5c-40073f6f43bb> (last visited Dec. 8, 2014).

364. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2652 (2013); *United States v. Windsor*, 133 S. Ct. 2675, 2675 (2013).

proponents of Proposition 8 lacked standing.<sup>365</sup> Chief Justice Roberts wrote that petitioners could demonstrate no particularized injury or interest in the outcome.<sup>366</sup> Justice Kennedy wrote a dissent, which three other justices joined.<sup>367</sup> In the *Windsor* case, Justice Kennedy wrote the Court opinion, holding that the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) had standing to sue on behalf of Congress and that § 3 of DOMA violated the concept of equal protection as the Court has read it into the Fifth Amendment's Due Process Clause.<sup>368</sup> Justices Ginsburg, Breyer, Kagan and Sotomayor joined the Court's opinion.<sup>369</sup> Justices Roberts, Scalia, and Alito wrote dissenting opinions discussing the merits of the case as well as the standing question.<sup>370</sup>

Justice Kennedy tipped his hand when he noted that New York, along with other states, had decided that "[t]he limitation of lawful marriage to heterosexual couples" was "an unjust exclusion."<sup>371</sup> He then noted that marriage is primarily a state law matter and, with very few and limited exceptions, the federal government accepts the state's marriage laws when it provides federal benefits for married couples or surviving spouses.<sup>372</sup> Then he shifted his emphasis from federalism to the substantive marriage issue: "The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism."<sup>373</sup> The federal Defense of Marriage Act

requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.<sup>374</sup>

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365. *Hollingsworth*, 133 S. Ct. at 2659, 2668.

366. *Id.* at 2659.

367. *Id.* at 2668 (Kennedy, J., dissenting).

368. *Windsor*, 133 S. Ct. at 2675, 2680.

369. *Id.* at 2681.

370. *Id.* at 2696 (Roberts, C.J., dissenting); *id.* at 2697 (Scalia, J., dissenting); *id.* at 2711 (Alito, J., dissenting). Justice Alito agreed with the majority in finding that BLAG had standing, so his dissent was limited to the merits. *Id.* at 2712, 2714 (Alito, J., dissenting). The other dissenting justices disagreed with both the standing decision and the decision on the merits. *Id.* at 2696 (Roberts, C.J., dissenting); *id.* at 2697 (Scalia, J., dissenting).

371. *Id.* at 2689 (majority opinion).

372. *Id.* at 2689–90.

373. *Id.* at 2692.

374. *Id.*

Justice Kennedy referenced the House Report on DOMA, which expressed moral disapproval of homosexuality, and concluded: “[I]nterference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute.”<sup>375</sup> DOMA “places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify.”<sup>376</sup> Thus, the Court held “that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”<sup>377</sup>

Suppose another state refuses to recognize a same-sex marriage performed in New York? Section 2 of DOMA expressly protects each state’s right to decide such questions.<sup>378</sup> While Justice Kennedy made no reference to § 2 of DOMA, his discussion of the harm of taking away the “dignity” that marriage confers<sup>379</sup> led several lower federal courts to conclude that such non-recognition was unconstitutional.<sup>380</sup>

The three dissenting opinions treat the merits question in distinctive ways, although each justice disagreed with the majority’s characterization of DOMA as intending to injure or harm same-sex couples. Justice Scalia’s opinion, which Justice Thomas joined, restated what he wrote in his *Lawrence* dissent: “[T]he Constitution does not forbid the government to enforce traditional moral and sexual norms,” and it “neither requires nor forbids our society to approve of same-sex marriage.”<sup>381</sup> Justice Alito contrasted the traditional definition of marriage, which he called “conjugal,” with the newer view, which he called “consent-based,” and concluded that the Constitution does not require one or the other while the Court’s *Windsor* decision implicitly endorsed the consent-based view of marriage.<sup>382</sup> Chief Justice Roberts’ brief dissent took one paragraph to disagree with the majority’s contention that DOMA’s “‘principal purpose’ . . . was a bare desire to harm.”<sup>383</sup> He was much more interested in

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375. *Id.* at 2693.

376. *Id.* at 2694 (citation omitted).

377. *Id.* at 2695.

378. Defense of Marriage Act, Pub. L. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738(c) (2012)).

379. *Windsor*, 133 S. Ct. at 2694.

380. *See infra* note 389.

381. *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting) (citation omitted).

382. *Id.* at 2718 (Alito, J., dissenting).

383. *Id.* at 2696 (Roberts, C.J., dissenting) (quoting *id.* at 2694 (majority opinion)). Justice Kennedy actually wrote DOMA’s “principal purpose is to impose inequality.” *Id.* at 2694 (majority opinion).

confining the reach of the Court opinion to this case, lest any of Justice Kennedy's statements suggest a comparable decision in a future case contesting a state's traditional marriage law.<sup>384</sup> He quoted what Justice Kennedy said at the very end of his opinion, that "[t]his opinion and its holding are confined to those lawful marriages" which states allowing same-sex marriage have already chosen to recognize.<sup>385</sup>

Chief Justice Roberts disagreed with Justice Scalia's description of this part of the Court's opinion as a "bald, unreasoned disclaim[e]r."<sup>386</sup> Rather he stressed that this "disclaimer is a logical and necessary consequence of the argument the majority has chosen to adopt."<sup>387</sup> Where Chief Justice Roberts wants to emphasize the federalism aspect of the Court's opinion, Justice Scalia seems to have concluded, with even more conviction than when he wrote his *Lawrence* dissent, that Justice Kennedy has already decided that the Constitution requires all states to recognize same-sex marriage and, as a result, the Court will make that decision in the next case to raise the issue that comes before it. Justice Scalia spells that out by quoting three distinct passages from the Court's opinion and by showing how little needs to be changed to use the same argument to strike down a state's limitation on marriage to the union of a man and a woman.<sup>388</sup>

#### *F. Post Hollingsworth and Windsor: From the Lower Federal Courts Back to the Supreme Court*

By the summer of 2014, thirteen federal district courts, starting with the United States District Court for the District of Utah in *Kitchen v. Herbert*, had struck down state laws or constitutional amendments that prohibited same-sex marriages.<sup>389</sup> In addition, the Tenth Circuit Court of

384. *See id.* (Roberts, C.J. dissenting) ("The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States . . . may continue to utilize the traditional definition of marriage.")

385. *Id.* (quoting *id.* (majority opinion)).

386. *Id.* at 2696–97 (quoting *id.* at 2709 (Scalia, J. dissenting)).

387. *Id.* at 2697.

388. *Id.* at 2709–10 (Scalia, J., dissenting) (quoting *id.* at 2694 (majority opinion)). For example, Justice Scalia substitutes "[t]his state's law" for "DOMA" and "constitutionally protected sexual relationships" for "state sanctioned marriages" in his first example. *Id.* at 2709.

389. *Baskin v. Bogan*, Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 1:14-cv-00406-RLY-MJD, 2014 WL 2884868, at \* 1 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982, 987 (W.D. Wis. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1139 (D. Or. 2014); *Latta v. Otter*, No. 1:13-cv-00482, 2014 WL 1909999, at \*1 (D. Idaho May 13, 2014); *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395, at \*18 (S.D. Ohio Apr. 14, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 768 (E.D. Mich. 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 544 (W.D. Ky. 2014); *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL 997525, at \*9 (M.D. Tenn. Mar. 14, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 666 (W.D. Tex.



Appeals, by a vote of two to one, upheld Judge Shelby's ruling in *Kitchen v. Herbert*<sup>390</sup> and the Fourth Circuit upheld Judge Allen's ruling in *Bostic v. Rainey*.<sup>391</sup> The Seventh and Ninth Circuits handed down similar decisions in September and October of 2014 respectively.<sup>392</sup>

Judge Richard Posner wrote the court opinion for the Seventh Circuit. He focused on equal protection and cited Supreme Court decisions dealing with race and the Court's *Windsor* decision to argue that heightened scrutiny should be applied to the Indiana and Wisconsin laws that prohibited same-sex marriage.<sup>393</sup> He focused on the harm to children who are raised by same-sex parents who are not permitted to marry.<sup>394</sup> He did not address moral arguments in support of the states' laws since their attorneys did not make those arguments. Still, he presented John Stuart Mill's limited view of the harms that government may address with approval and with the implication that the U.S. Constitution embodies Mill's principle.<sup>395</sup>

Judge Stephen Reinhardt wrote the court opinion for the Ninth Circuit. He cited a Ninth Circuit decision that interpreted the Supreme Court's *Windsor* decision to establish heightened scrutiny for classifications based on sexual orientation.<sup>396</sup> The court had no difficulty rejecting arguments based on the superiority of having children raised by two parents of the opposite sex as without adequate support.<sup>397</sup>

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2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 459 (E.D. Va. 2014), *aff'd sub nom.* *Bostic v. Schaefer*, No. 14-1167, 2014 WL 3702493 (4th Cir. July 28, 2014); *Bishop v. Smith*, 962 F. Supp. 2d 1252, 1258 (N.D. Okla. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1216 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014).

390. *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *aff'g* 961 F. Supp. 2d 1181 (D. Utah 2013).

391. *Bostic v. Schaefer*, 760 F.3d 352, 367 (4th Cir. 2014), *aff'g* *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014). The Sixth Circuit scheduled a hearing on the four cases arising out of its geographic area: *Beshear*, *DeBoer*, *Himes*, and *Tanco*. Steve Delchin, *Sixth Circuit Gearing up to Hear Same-Sex Marriage Appeals on August 6, 2014*, SIXTH CIRCUIT APPELLATE BLOG (July 21, 2014), <http://www.sixthcircuitappellateblog.com/news-and-analysis/sixth-circuit-gearing-up-to-hear-same-sex-marriage-appeals-on-august-6-2014/>.

392. *Baskin v. Bogan*, 766 F.3d 648, 653, 672 (7th Cir. 2014), *aff'g* 12 F. Supp. 3d 1144 (S.D. Ind. 2014), *and* *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014); *Latta v. Otter*, Nos. 14-35420, 14-35421, 12-17668, 2014 WL 4977682, at \*1, 10-11 (9th Cir. Oct. 7, 2014), *aff'g* No. 1:13-cv-00482, 2014 WL 1909999 (D. Idaho May 13, 2014), *and rev'g* *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012).

393. *Baskin*, 766 F.3d at 653, 654-56.

394. *Id.* at 660-64, 672.

395. *Id.* at 669-70.

396. *Latta*, 2014 WL 4977682, at \*4 ("*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." (quoting *SmithKline Beacham Corp. v. Abbott Laboratories* 740 F. 3d 471, 481 (9th Cir. 2014))).

397. *See id.* at \*8-9.

Most recently, the Sixth Circuit handed down a 2-1 decision reversing the district courts and upholding the bans on same-sex marriage in Michigan, Kentucky, Ohio, and Tennessee.<sup>398</sup> As a result, there is now a split in the circuits, making it more likely that the Supreme Court will agree to hear one of these same-sex marriage cases. The only question as this Article goes to press is whether it will put such a case on the docket in its current term or the next.

The near unanimity of support for advocates of same-sex marriage stands in contrast to the closely divided results in the highest state courts discussed above.<sup>399</sup> Clearly, the previous Supreme Court decision on same-sex marriage, *Baker v. Nelson*, in which the Court dismissed the case for failure to raise a substantial federal question,<sup>400</sup> had been superseded by the Court's decisions on sex and sexual orientation classifications (*Romer*<sup>401</sup> and *Lawrence*<sup>402</sup>). The other main reason for the shift in outcomes has to be the Court's *Windsor* decision: in particular, parts of Justice Kennedy's majority opinion, as well as Justice Scalia's dissent.

The Court's *Windsor* opinion emphasized the "dignity" that the right to marry accords couples, and the ensuing harm that results from taking away that status.<sup>403</sup> Hence that argument can easily be extended to cover a state's refusal to deny this "fundamental right" to same-sex couples, including those who were married in another jurisdiction, whether in another state or in Canada, as well as those who wish to marry in their own state. In striking down § 3 of DOMA, the *Windsor* Court said nothing about § 2,<sup>404</sup> which guarantees each state the right to determine its own marriage laws regardless of what other states do.<sup>405</sup> Nor did any of the lower federal court opinions discuss that question.<sup>406</sup>

If *Windsor* is read as primarily a federalism case, § 2 of DOMA should remain good law, and if a state's public policy opposes such marriages, that

398. *DeBoer v. Snyder*, Nos. 14-1341, 3057, 3464, 5291, 5297, 5818, 2014 WL 5748990, at \*1-4, 27 (6th Cir. Nov. 6, 2014), *rev'g* *Obergefell v. Wymso*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *Bourke v. Beshear*, 966 F. Supp. 2d (W.D. Ky. 2014), *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014), and *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014).

399. *See* DRY, *supra* note 15.

400. *Baker v. Nelson*, 409 U.S. 810, 810 (1972).

401. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

402. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

403. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

404. *See id.* at 2682-96 (failing to discuss § 2 of DOMA).

405. Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738(c) (2012)).

406. *See, e.g., DeBoer v. Snyder*, 973 F. Supp. 2d 757, 760, 772, 774 (E.D. Mich. 2014) (discussing DOMA § 3 but not § 2); *De Leon v. Perry*, 975 F. Supp. 2d 632, 661 (W.D. Tex. 2014) (mentioning DOMA § 2 only briefly in stating defendants' argument).

position should be constitutional. But if *Windsor* is interpreted to include a substantive due process conception of “dignity,” then the difference between federal non-recognition of such marriages and a state’s non-recognition seems slight. And if a state has to recognize marriages performed in other states, how can it justify not allowing such marriages in its own jurisdiction?

The lower federal courts grappled with the same constitutional issues that the state high courts did. The two main constitutional arguments concerned, on the one hand, the Due Process Clause and the cases establishing marriage as a fundamental right and, on the other hand, the Equal Protection Clause and the level of scrutiny to be accorded a classification by sexual orientation.<sup>407</sup> The due process issue requires judges to decide whether the Court’s understanding of the fundamental right to marry can legitimately be applied to this new context of same-sex couples. For example, the Tenth Circuit came to that conclusion and then had an easy time demonstrating that the state’s interests in supporting procreation and the raising of children were not narrowly tailored to the exclusion of same-sex couples from marriage.<sup>408</sup> In several places, the majority emphasized that it was applying strict scrutiny.<sup>409</sup> Interestingly, other courts, having declined to assume that the fundamental right to marry includes same-sex couples, applied “rational basis” scrutiny in the equal protection context and came to the same conclusion.<sup>410</sup> This is because in applying “rational basis” scrutiny, the judges focused on justifications for what they regarded as suspicious exclusions.

For almost all of the lower federal court judges so far,<sup>411</sup> the combination of judicial recognition of the “normalcy” of homosexuality—reflected in the *Lawrence* decision—plus the emphasis on the dignity that marriage accords has yielded the conclusion that sexual orientation is as

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407. See, e.g., *DeBoer*, 973 F. Supp. 2d at 759 (stating plaintiffs’ equal protection and due process arguments); *De Leon*, 975 F. Supp. 2d at 656, 649–50 (noting equal protection and due process arguments).

408. See *Kitchen v. Herbert*, 755 F.3d 1193 1224–25 (10th Cir. 2014) (describing the state’s lack of a narrowly tailored interest).

409. See, e.g., *id.* at 1226 (applying strict scrutiny to state’s reasoning).

410. See, e.g., *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1139–40 (D. Or. 2014) (discussing the Ninth Circuit’s review of discrimination based on sexual orientation as requiring merely the rational basis test).

411. In the two circuit court decisions reported as of August 10, 2014, the votes were two to one to affirm the district court decisions. *Bostic v. Schaefer*, 760 F.3d 352, 367 (2014), *aff’g* *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1198, 1230 (10th Cir. 2014), *aff’g* 961 F. Supp. 2d 1181 (D. Utah 2013).

irrelevant to legitimate government action as race is.<sup>412</sup> This goes against the Court's more conservative approach to fundamental rights as stated in *Washington v. Glucksberg*.<sup>413</sup> The emphasis on what was deeply rooted in the country's history and tradition seems to be trumped by a tacit conviction that only a desire to harm, or at the least a moral disapproval of homosexuals, can explain opposition to same-sex marriage.

Of all the lower court opinions, those of the Sixth Circuit are perhaps the most instructive. This is because the Sixth Circuit opinions encompass the two fundamentally different approaches that judges have taken to the same-sex marriage controversy.

Judge Jeffrey Sutton began his opinion in *DeBoer v. Snyder* by saying that at this time "the question is not whether American law will allow gay couples to marry; it is when and how it will happen."<sup>414</sup> His limited reading of precedent, including *Windsor*, is informed by what could be called a conservative approach toward constitutional change: "The theory of the living constitution rests on the premise that every generation has the right to govern itself. If that premise prevents judges from insisting on principles that society has moved past, so too should it prevent judges from anticipating principles that society has yet to embrace."<sup>415</sup>

For her part, dissenting Judge Martha Craig Daughtrey provided a spirited defense of judicial activism. Disagreeing with Judge Sutton's claim that an unconstitutional animus does not fairly describe opponents of same-sex marriage, she wrote:

[T]he Supreme Court has instructed [us] that an exclusionary law violates the Equal Protection Clause when it is based not upon relevant facts, but instead upon only a general, ephemeral distrust of, or discomfort with, a particular group, for example when legislation is justified by the bare desire to exclude an unpopular group from a social institution or arrangement.<sup>416</sup>

I do not think there is any way to determine how Justice Kennedy will vote when the underlying issue comes back to the Court. I do think that

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412. For a discussion of race, see *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("To deny [the] fundamental freedom [of marriage] on so unsupportable basis as . . . racial classifications . . . is surely to deprive all the State's citizens of liberty without due process of law.").

413. See *Washington v. Glucksberg* 521 U.S. 702, 721–22 (1997) (adopting a more conservative approach regarding fundamental rights).

414. *DeBoer v. Snyder*, Nos. 14-341, 3057, 3464, 5291, 5297, 5818, 2014 WL 5748990, at \*1 (6th Cir. Nov. 6, 2014).

415. *Id.* at \*22.

416. *Id.* at \*41 (Daughtrey, J. dissenting).

based on the briefs on the merits in the *Hollingsworth* case, the issue will turn on the amount of weight that the Court, and Justice Kennedy in particular, gives to the significance of procreation and childrearing, along with their consideration of the possible long-term effects of having children raised by same-sex parents. Differently stated, the able lawyers for *Perry* argued that the issue is the same as race, either as decided in *Brown* and/or *Loving*;<sup>417</sup> the lawyers in support of Proposition 8 emphasized the distinctiveness of the biological factor in the act of procreation and childrearing, and the importance of government by consent.<sup>418</sup>

### CONCLUSION

I have attempted to illustrate how the political and legal controversy over same-sex marriage in the United States illustrates important features of U.S. constitutionalism. My principal concern has been to present and assess the work of the courts in light of the tension, inherent in the U.S. Constitution, between judicial review and republican government. The founders' commitment to written constitutions, for the states as well as the nation, reflects a judgment that fundamental principles and rules of governance should be set down so that everyone knows the basic rule of law. At the federal level, this included the construction of a separate and independent judiciary. And here is where a tension arises between an independent judiciary and consent of the governed. While I think it was generally understood that the federal courts would review laws "arising under this Constitution,"<sup>419</sup>—even Jefferson thought so in 1789, when he gave it as a reason for supporting a bill of rights<sup>420</sup>—the scope of that judicial review could not possibly be determined with any certainty. What, for example, does "contrary to the manifest tenor," the phrase in Federalist 78,<sup>421</sup> tell us about any difficult constitutional case? And as much as it is "the proper and peculiar province of the courts"<sup>422</sup> to interpret the laws, including the Constitution, Madison reminds us in Federalist 10 that the line between what could be called "political" rights and "vested" rights,

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417. See Brief for Respondents at 1–4, 26, 48, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

418. See Reply Brief of Petitioners at 1–12, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

419. See U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . .").

420. Letter from Thomas Jefferson to James Madison (March 15, 1789), in *THE PORTABLE THOMAS JEFFERSON*, at 438–440 (Merrill D. Peterson ed., 1975).

421. *THE FEDERALIST* NO. 78, at 497 (Alexander Hamilton) (Robert Scigliano ed., 2001).

422. *Id.* at 498.

meaning rights set by the legislative process and rights determined by courts, is not always clear.<sup>423</sup> Given the Framers' assumption that the courts would follow the common law tradition and work from earlier decisions—either by following them, distinguishing them, or overturning them—it is not surprising that judicial review in practice has threatened to become judicial supremacy, thereby overcoming the self-government part of modern republicanism.

The same-sex marriage controversy in the United States is a perfect example of this tension between judicial review and republican government. That is because the political debate, which is over the wisdom, or desirability, of the proposed change in marriage laws, may yield a different result from the legal debate, which considers what a state constitution or the federal Constitution requires. In examining the case for and the case against same-sex marriage, I have concluded that, while close, the clear benefits for some seemed to outweigh the speculative harms for others.<sup>424</sup> In addition, as long as same-sex couples were going to live together and have children, it made sense to allow the couples to marry.

However, that does not amount to saying that a state's decision to retain the traditional definition of marriage is unconstitutional discrimination. In the context of marriage, sex is different from race because the natural difference between male and female is essential to procreation, and procreation allows for children to be raised by their biological parents. Some people regard this as the optimal condition for childrearing. Short of the optimal condition, those same people think it is best for children to have a father and a mother, rather than two fathers or two mothers. As for the Court's finding that marriage is a "fundamental right," in each of those decisions the Court viewed marriage as the union of a man and a woman.

If the burden is placed on the challengers to traditional marriage laws to show why those laws should be held unconstitutional, that burden cannot be met. And that has indeed been the case in every state where its highest court has considered the issue using heightened scrutiny. In every state but one where the high court considered the issue, the outcome corresponded to whether "rational basis" or "heightened" scrutiny was applied.<sup>425</sup> The Massachusetts high court purported to use "rational basis" analysis to find the state's then-existing marriage law unconstitutional. But the majority opinion did so by starting from a revised definition of marriage, as "the exclusive commitment of two individuals to each other," and then applied a

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423. THE FEDERALIST NO. 10, at 56 (James Madison) (Robert Scigliano ed., 2001).

424. See DRY, *supra* note 15.

425. For a listing of state high court decisions on same-sex marriage, see *supra* notes 150–59.

version of “rational basis” that criticized the law for its under- and over-inclusiveness, typically the approach of heightened or strict scrutiny.<sup>426</sup>

The supporters of same-sex marriage initially pursued a litigation strategy that has highlighted the significance of federalism in the United States. This strategy of focusing on state constitutional law, over which the highest state courts have the final decision in a particular case, has resulted in the variety of state laws regarding same-sex marriage. This variety will continue to exist as long as the Supreme Court interprets the Constitution to allow states to retain the traditional view of marriage as the union of a man and a woman.

One way to describe and defend the position I am advocating—that “not unconstitutional” should not be equated with desirable or wise—is to apply what the Supreme Court said about the relationship between the two religion clauses—“there is room for play in the joints”<sup>427</sup>—whenever a court is confronted with a constitutional challenge to legislation. Prominent constitutional scholars who advocate judicial action to require same-sex marriage do not appreciate the importance of this “space” for deliberation and choice in the political process.<sup>428</sup>

When the Supreme Court is next confronted with the same-sex marriage controversy, which will be soon, it will probably follow its approach in *Romer* and *Lawrence* and not explicitly invoke “heightened scrutiny,” while tacitly applying what Gunther called “rational basis with bite.” On a proper application of such a standard, I think the right decision is for the Court to find that the traditional marriage requirement that a man unite with a woman is constitutional. And that is what makes the controversy an ideal vehicle for distinguishing between political and judicial power. The key point is that while the Constitution establishes

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426. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

427. *Locke v. Davey*, 540 U.S. 712, 718 (2004).

428. See Tribe, *supra* note 128, at 1950–51 (arguing that the logic of *Lawrence* requires same-sex marriage); Mary Anne Case, *Of “This” and “That” in Lawrence v. Texas*, 2003 SUP. CT. REV. 75, 138–39 (arguing, with Tribe, that the *Lawrence* holding on intimate association necessarily requires gay marriage); Sunstein, *Leaving Things Undecided*, *supra* note 182, at 97–98 (suggesting that courts overruling bans on same-sex marriage could jeopardize the authority of the judiciary); Cass R. Sunstein, *What Did Lawrence Hold: Of Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 27–31 (“[T]he Court’s remarkable decision in *Lawrence v. Texas* is best seen as a successor to *Griswold v. Connecticut*: judicial invalidation of a law that had become hopelessly out of touch with existing social convictions.” (citations omitted)). Yet Sunstein’s latest reflections on the issue indicate that he views the *Windsor* Court’s treatment of “dignity” as correct and implying the correctness of a decision requiring same-sex marriage. Cass R. Sunstein, *Gay-Marriage Ruling Safeguards Human Dignity*, BLOOMBERG VIEW (June 26, 2013, 4:15 PM), <http://www.bloombergvew.com/articles/2013-06-26/gay-marriage-ruling-safeguards-human-dignity>.

boundaries for the political branches of government, those boundaries are not so limited that only the soundest policy is constitutional.

To illustrate my contention that a law can be constitutional even if it could be improved, I think David Blankenhorn was right to conclude that opposing same-sex marriage does more harm than good.<sup>429</sup> That is because same-sex couples may live together and may raise children together—through adoption, surrogacy, artificial insemination, etc.—and are likely to do so whether or not they are permitted to marry. On the other hand, the possible harm to heterosexual marriage that the examples of same-sex marriage might pose is speculative. And, finally, as Jonathan Rauch and Amy Wax pointed out, as couples live longer, the caregiving function becomes increasingly important.

Both sides can appeal to uncertainty about the long term effects of extending marriage to same-sex couples, and thereby redefining the institution to support their position. The clear and distinct benefits to same-sex couples if they may marry can support a legislative decision for such marriages. At the same time, genuine uncertainty about the long-term consequences of such a change in marriage, especially as it may affect children, can support a cautious judicial approach.<sup>430</sup>

I want to close by making a case for a legal recognition of natural difference and religious belief, in so far as that belief is connected to natural difference. To do this, I draw on a remark of Eva Brann, distinguished long-time St. John's College faculty member. In the lead essay in her recently published *Homage to Americans*, Ms. Brann engages in an extended

429. See Blankenhorn, *View on Gay Marriage*, *supra* note 70 (“[T]he time has come for me to accept gay marriage and emphasize the good that it can do.”). Blankenhorn’s first stated reason was:

[T]he most important [good thing] is the equal dignity of homosexual love. I don’t believe that opposite-sex and same-sex relationships are the same, but I do believe, with growing numbers of Americans, that the time for denigrating or stigmatizing same-sex relationships is over. Whatever one’s definition of marriage, legally recognizing gay and lesbian couples and their children is a victory for basic fairness.

*Id.* Noting that fighting gay marriage had not improved marriage as an institution, he decided to try a new strategy: “Instead of fighting gay marriage, I’d like to help build new coalitions bringing together gays who want to strengthen marriage with straight people who want to do the same.” *Id.*

430. Amy Wax notes the following:

To satisfy social science standards, conservatives must come forward with data that systematically compares the effects of established arrangements with innovations they resist. In most cases, this circle cannot be squared. The data either do not yet exist or are radically inconclusive. The requirement to produce rational or “scientific” justification in the political arena also ensures that remote and collective effects get little weight.

Wax, *supra* note 34, at 1083–84.



meditation on tolerance. Here is a part that resonates with me as a result of my study of same-sex marriage:

Some people are intolerant from a terminal clotting of the soul's flux. . . . But others, both our fellow-citizens and our engaged enemies, are intolerant because they are seriously preoccupied by first and last things, to which they are more devoted than to the middle, the mediocre things. . . .

Tolerance is the chief locus of the truth of experience: For life to be livable you have to curtail thinking. (Socrates, to be sure, says—literally—the opposite: “The unexamined life is *not* livable.” That is true too, and thereby hangs my tale, I suspect.) But some human beings, decent and deep of soul, care less about the livability of life than its consecration. The party of tolerance rarely comes to grips with the party of faith—or rather, “coming to grips” probably isn’t the right mode to begin with. . . . This seems to be the difficulty: to entertain the two notions that freedom might be of less value than orthodoxy—first, that being right with God comes long before living as you like, and second, that no salvation of soul is achievable individually, that humans are first and last (not just in daily public life) communal. God cares infinitely. We must care desperately—in communion.<sup>431</sup>

The same-sex marriage controversy demonstrates that there are different principles of government contending within the U.S. constitutional polity, and some form of accommodation is necessary. The case for the traditional notion of marriage as the union of a man and a woman has a natural support that distinguishes it from a ban on interracial marriage. And it remains even with our gender-neutral rule of law. The position that children are best reared by a father and a mother (and by their biological parents in the best case<sup>432</sup>) is not refuted by equal work opportunities for women. And while religious belief supports the related preference for procreation over artificial forms of reproduction, the natural principle of love of one’s own also supports the preference. Conservative supporters of gay marriage such as Andrew Sullivan and Jonathan Rauch both

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431. EVA BRANN, *Mile-High Mediation: My Take on How to Think and How to Be*, in *HOMAGE TO AMERICANS* 3, 7–8 (2010).

432. Parents who adopt children do not have the advantage of the distinctive bond to their children that biological parents have. Of course, many parents who choose to adopt may well make up for that with their special commitment to having children, and in many cases that may well make them better parents. However, in the best case, I think one would want to have the benefit of the natural, which is to say, biological tie.

acknowledged the natural limitations of homosexuality precisely on that point.

None of this refutes the arguments in support of allowing same-sex couples that wish to have children and raise them as well as other parents to attain the recognition of marriage. But for the sake of our republican form of government, I think that decision should come from the people through their legislatures and not be foisted on them by the courts.<sup>433</sup>

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433. I recognize that my preferred resolution will require constitutional amendments in those states that passed constitutional amendments prohibiting same-sex marriage. Those amendments resulted from a fear of state court decisions like the one in California. And while civil unions, or domestic partnerships, do not mean the same as marriage, the state high courts that refused to consider or allow such a resolution made it more difficult for the political process to get to that result.