WHAT’S LOVE GOT TO DO WITH IT? – THE FEDERAL CONSTITUTIONAL CASE FOR SAME-SEX MARRIAGE

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INTRODUCTION

Despite the fact that marriage is a highly legalized institution, the public often forgets or fails to recognize that it is established by the laws of the state, is subject to constitutional constraints, and must comply with the Due Process Clause, which guarantees that citizens of the United States have a fundamental right to marry, and the Equal Protection Clause of the Constitution, which boldly insists upon equal laws. While the constitutional implications of a ban on same-sex marriage are not often discussed, these issues should not be overlooked, because same-sex marriage presents “one of the most important constitutional issues facing Americans today.” Rather, the legality of a ban on same-sex marriage should be at the forefront of the public debate, because it is likely that the judiciary, and specifically the United States Supreme Court, will have the final say on same-sex marriage just as the Court has the final word on other divisive political issues, such as abortion and the death penalty. Ultimately, it is precisely because of this fact and also because marriage is subject to constitutional limitations that the debate on same-sex marriage should focus on the legal aspects of the issue as opposed to the moral and religious aspects.

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1 For the purposes of this article, gay or lesbian marriage will be referred to as same-sex marriage.
2 See Loving v. Virginia, 388 U.S. 1, 7 (1967) (“While the state court is no doubt correct in asserting that marriage is a social relation subject to the State’s police power, the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment.”); Zablocki v. Redhail, 434 U.S. 374, 399 (1978) (Powell, J., concurring) (“State power over domestic relations is not without constitutional limits.”); Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993) (“state regulation of the right of access to the marital relationship is subject to constitutional limitations or constraints”); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003) (noting that marriage is a legal institution as it is a licensing law and that “the government creates civil marriage” such that there are three consenting partners in a civil marriage: the State and the two individuals). I also recognize that marriage is undoubtedly grounded in social and religious principles, but because marriage carries significant legal benefits, it cannot be overemphasized that there is not only a political, social, and religious aspect of marriage but also a legal component of marriage constrained by constitutional commands.
Because marriage is created by the government, it is subject to constitutional review, and judges properly determine the constitutionality of marriage laws, as illustrated in *Loving v. Virginia*.\(^4\) Contrary to what the current President of the United States, George W. Bush, would have us believe, “activist judges” who have been striking down laws barring same-sex marriage do not exist.\(^5\) The issue of same-sex marriage presents serious and unsettled constitutional questions for the judiciary to decide, but President Bush speaks as if judges have no role to play in interpreting marriage laws. Based on the Supreme Court’s decision in *Marbury v. Madison*,\(^6\) however, that is precisely the job of the judiciary according to the system of checks and balances. Ever since *Marbury*, it has been the role of the courts to declare laws that contravene the Constitution invalid and, therefore, “check” the legislature.\(^7\) Judges who proclaim a prohibition on same-sex marriage unconstitutional are doing nothing more than fulfilling the mandate of judicial review so famously laid down by Chief Justice John Marshall in *Marbury*. “To label the court’s role as usurping that of, the Legislature . . . is to misunderstand the nature and purpose of judicial review.”\(^8\)

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\(^4\) The Court held that a Virginia marriage statute that prohibited marriage between individuals of different races was unconstitutional. See *Loving*, 388 U.S. at 2.

\(^5\) In his 2004 State of the Union address, the President admonished “activist judges” for “redefining court order, without regard for the people and their elected representatives” and for imposing their “arbitrary will” upon the people of the United States. He concluded by stating that “[o]ur nation must defend the sanctity of marriage.” President George W. Bush, State of the Union (January 20, 2004), http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html.

\(^6\) 5 U.S. 137 (1803).

\(^7\) See id. at 177-78 (“It is emphatically the province and duty of the judicial department to say what the law is . . . So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty. If, we, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.”).

\(^8\) *Goodridge*, 798 N.E.2d at 966. In further reviewing the state’s ban on same-sex marriage, the Supreme Judicial Court of Massachusetts observed, “[t]he Massachusetts Constitution requires that legislation meet certain criteria and not extend beyond certain limits. *It is the function of the courts to determine whether these criteria are met and whether these limits are exceeded.*” Id. (emphasis added).
The importance of an article delineating the constitutional and legal issues surrounding same-sex marriage should be clear; it is entirely because the courts will assuredly determine whether same-sex marriage is legalized in the United States that the constitutional issues involving same-sex marriage must be reviewed and discussed. Practically speaking, though, the issue of same-sex marriage is important because certain couples are being denied hundreds of legal rights, and the effects of that denial have everyday implications which opposite-sex couples likely take for granted. Challenging the ban on same-sex marriage is critical because same-sex couples are denied access to their loved one’s hospital room, barred from the opportunity to have a marriage ceremony that is highly cherished in our culture, prohibited from publicly and legally declaring their love and commitment to one another, and deprived of countless other legal and social benefits. More importantly, same-sex couples are also deprived of the respect they deserve, which could be validated by providing them with the same rights afforded to heterosexual couples. In short, this paper is important because same-sex couples have the right to demand that their relationships be respected and given legal effect.

This paper examines the constitutionality of a ban on same-sex marriage. First, this article discusses the previous legal challenges to same-sex marriage throughout the United States. Second, it analyzes the constitutional fundamental right to marry and describe why it applies to same-sex couples. This note then explains why the ban on same-sex marriage cannot meet strict scrutiny, and if the fundamental right to marry does not apply to same-sex couples, this paper argues that a ban on same-sex marriage cannot survive even rational basis review. Next, this article discusses why the Equal Protection Clause of the Fourteenth Amendment prohibits a ban on same-sex marriage as it invidiously and arbitrarily discriminates on the basis of sex and is entirely inconsistent with the principles of equality guaranteed in the Fourteenth
Amendment. In doing so, this paper explains why homosexuals should receive some form of heightened scrutiny and also why a ban on same-sex marriage is sex discrimination. Finally, this note explores the political solution of civil unions, which provide same-sex couples with the legal rights granted to opposite-sex married couples, demonstrating why it is an unconstitutional solution to same-sex marriage as it violates the prohibition of separate but equal articulated in *Brown v. Board of Education*.\(^9\) As a result of civil unions being constitutionally inadequate, the only legal remedy is to grant same-sex couples equal marital rights and thus access to the institution of marriage.

I. BACKGROUND

a. Gay Legal Issues and the Supreme Court

Homosexuals have until recently been unsuccessful in the legal arena. The Court has previously ruled against homosexuals on three major occasions. Most notably, in *Bowers v. Hardwick*, the Court asked whether there was a fundamental right for homosexuals to engage in sodomy, and the Court held that sodomy, an inherently homosexual act, could be criminalized by the government.\(^10\) As a result of *Bowers*, it became constitutional for a state to impose criminal penalties upon the sexual acts of homosexuals. The Court also ruled against homosexuals in *Boy Scouts of American v. Dale*\(^11\) and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.\(^12\) In *Dale*, a gay scoutmaster challenged his expulsion from the Boy Scouts.\(^13\) The Court held in favor of the Boy Scouts, who sought to exclude and discriminate against gays, such as the plaintiff, because they did not believe that gays were, among other things, “morally

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13 See *Dale*, 530 U.S. at 645.
clean.” The Court stated that the Boy Scouts, as a private organization, could legally exclude homosexuals from their group. The Court made this ruling even in light of New Jersey’s public accommodation law, which arguably applied and would have prohibited the Boy Scouts from excluding gays or homosexuals. Similarly, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court held that prohibiting a group of gays and lesbians from marching in the Boston’s St. Patrick’s Day parade was also constitutional even in light of the state’s public accommodation law because requiring the defendants to include the plaintiffs in the parade violated the South Boston Allied War Veterans Council’s First Amendment rights.

Until recently, the Court had only decided one case in favor of the homosexual litigant – *Romer v. Evans*. In *Romer*, the Supreme Court struck down Amendment 2 to the Colorado Constitution, which prevented homosexuals from seeking the benefits of anti-discrimination laws in areas such as employment and housing. The Court held that the amendment was invalid because it could not satisfy even the most lenient standard of review, rational basis. The Court found that the statute was purely motivated by animosity toward homosexuals, and such a justification is never valid under any standard of review. As the Court announced, Amendment 2 “identifies persons by a single trait and then denies them protection across the board.”

14 See id. at 651.
15 See id. at 656.
16 See id. at 645 (a New Jersey statute prohibited discrimination on the basis of sexual orientation in places of public accommodation).
17 See *Hurley*, 515 U.S. at 566.
19 See id. at 635-36.
20 See id. at 635.
21 See id. at 632.
22 Id. at 633.
In 2003, homosexuals enjoyed a triumph in the judicial arena due to the Court’s decision in *Lawrence v. Texas.* Lawrence overruled the Bowers holding that sodomy could be criminalized. Instead, the Court noted that there were several personal decisions that deserved respect and could not be made subject to state intervention or criminal penalty, and that included the ability to engage in private, consensual sexual behavior. “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” “Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.” The Court believed that consensual homosexual conduct that occurred in the privacy of one’s home was not constitutionally subject to government restrictions.

b. Same-Sex Marriage Legal Challenges

Even though same-sex marriage appears to be a relatively new political issue, it has been an issue in the legal arena for years. The first case to address the issue of same-sex marriage and rule favorably for the same-sex couples was *Baehr v. Lewin.* The Hawaiian Supreme Court held that strict scrutiny applied where the plaintiffs, a number of same-sex couples, challenged the constitutionality of the Hawaiian marriage statute strictly defining marriage as a union between one man and one woman. The court ruled that strict scrutiny applied because the marriage statute discriminated on the basis of sex in violation of the Hawaiian Constitution’s

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24 See id. at 578.
25 See id.
26 Id. at 562.
27 Id. at 574.
28 See id. at 578.
29 852 P.2d 44 (Haw. 1993).
30 See id. at 68.
guarantee of equal protection. Note, however, that the court did not rule that the ban on same-
sex marriage was invalid; rather, the narrow issue before the court was to determine what
standard applied, and the case was therefore remanded to the lower court to examine the statute
under strict scrutiny. Nevertheless, same-sex marriage never became legal in Hawaii because
Hawaiian citizens subsequently passed a constitutional amendment banning gay marriage.

The first case to affirmatively declare that a ban on same-sex marriage was
unconstitutional was Baker v. State where the Vermont Supreme Court held that a ban on same-
sex marriage violated the Vermont Constitution’s Common Benefits Clause. The court
declared that same-sex couples could not be denied access to the same legal benefits and rights
afforded opposite-sex couples, and, therefore, for the first time a court announced that same-sex
couples deserved the same legal rights as opposite-sex couples. However, the Vermont
Supreme Court did not mandate that same-sex couples be allowed to marry; the court directed
the Vermont legislature to fashion the remedy for the constitutional violation. The court,
nonetheless, appeared to favor the civil union, also referred to as a domestic partnership or a
registered partnership, as opposed to same-sex marriage as it mentioned these legislative

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31 See id. Under the Hawaiian Constitution, classifications that discriminate on the basis of sex are considered
suspect and subject to strict scrutiny. See id. at 65.
32 The issue on appeal was whether the trial court had properly dismissed the case with prejudice for failing to state a
claim upon which relief can be granted. See id. at 48. This required the Supreme Court of Hawaii to review the
issue in a light most favorable to the plaintiffs. See id. at 52. Therefore, the court did not have to resolve the
question regarding the constitutionality of a prohibition on same-sex marriage but remanded the issue to the trial
court with instructions to apply strict scrutiny to the marriage statute. See id. at 56.
33 See GERSTMANN, supra note 3, at 44.
34 744 A.2d 864 (Vt. 1999). The Common Benefits Clause states, in relevant part, “[t]hat the 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. I, art. 7. The Vermont Supreme Court also attempted to separate the case from
any link to federal law by distinguishing the Common Benefits Clause from the Equal Protection Clause of the
United States Constitution. See Baker, 744 A.2d at 870 (noting that the Common Benefits Clause “differs
markedly” from the Equal Protection Clause).
35 See id. at 886.
36 See id. at 886-88.
responses while specifically noting in its opinion that the Vermont Constitution did not require that same-sex couples be permitted to marry.37

The most recent decision on same-sex marriage is Goodridge v. Department of Public Health.38 In 2003, the Supreme Judicial Court of Massachusetts, the highest court in the state, declared that a ban on same-sex marriage was invalid according to the state’s constitution.39 The court found that there was no rational reason for a ban on same-sex marriage, and the court redefined marriage in accordance with the principles of the Massachusetts Constitution, pronouncing that civil marriage is “the voluntary union of two persons as spouses, to the exclusion of all others.”40 Similar to the Vermont Supreme Court, the Supreme Judicial Court of Massachusetts gave the state legislature 180 days to determine how to comply with the court’s decision.41 However, when the state senate submitted a question to the Supreme Judicial Court asking if it could create a civil union law just as the Vermont Legislature had done, the Supreme Judicial Court declared that same-sex couples must be given access to marriage and that a civil

37 See id. (explaining that the “alternative legal status to marriage for same-sex couples”, such as domestic partnerships and registered partnerships, that “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; further stating “[i]t appears to assume that we hold plaintiffs are entitled to a marriage license. We do not. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. That the State could do so through a marriage license is obvious. But it is not required to do so . . . .”). The result of the Vermont legislature’s deliberations was the advent of the “civil union”, which grants same-sex couples with the same legal rights as heterosexual couples, but it refers to the conduit for those rights by a different name. See An Act Relating to Civil Unions, H.B. 847, 1999 Gen. Assem., Adjourned Sess. (Vt. 1999); VT. STAT. ANN. tit. 15, 1204 (1991); see also William N. Eskridge, Jr., Equality Practice: Liberal Reflections on the Jurisprudence of Civil Union, 84 ALB. L. REV. 853, 853 (2001).
38 798 N.E.2d 941 (Mass. 2003). At least one foreign jurisdiction, as well, has recently declared that a law banning same-sex marriage is invalid. See Halpern v. Toronto, [2003] 172 O.A.C. 276 (holding that a ban on same-sex marriage violates the human dignity clause of the Canadian Charter of Rights and Freedoms). Also, in 2001, the Netherlands legalized same-sex marriage, becoming the first country to do so. See GERSTMANN, supra note 3, at 5. Additionally, Norway, Sweden, Iceland, and France have recognized same-sex unions in the form of registered partnerships. See id.
39 “We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.” Goodridge, 798 N.E.2d at 969.
40 Id. (emphasis added).
41 See id. at 970.
union law would not be constitutionally sufficient. As a result, in May 2004, same-sex couples were allowed to marry for the first time in the United States, and currently, Massachusetts is the only state that permits same-sex marriage.

Despite Baehr, Baker, and Goodridge, most courts have held that same-sex couples do not have the right to marry. In many of these situations, the courts first declare that the current state statute does not permit same-sex marriages, and, secondly, the court concludes that the restriction on same-sex marriages is constitutional. Incredibly, in upholding a marriage law that prohibited same-sex marriage, one court declared, incorrectly as the article proves, that there are no constitutional issues requiring even a discussion of the prohibition on same-sex marriage. In addition, in an uncommon situation where two males married even though one male believed the other person was a woman, the court invalidated the marriage because the state would not allow marriages between individuals of the same sex.

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42 Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).
44 See Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973) (“It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.”); Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974) (upholding the ban on same-sex marriages because such a ban did not constitute the same invidious discrimination that was found in Loving); Adams v. Howerton, 486 F. Supp. 1119 (Cent. Dist. Cal. 1980) (applying Colorado law); De Santo v. Barnsley, 476 A.2d 952 (Pa. 1984); Storrs v. Holcomb, 645 N.Y.S.2d 286 (N.Y. Sup. Ct. 1996); Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003).
45 See, e.g., Singer, 522 P.2d at 1187-97 (upholding the marriage statute as being rational).
46 See Hallahan, 501 S.W.2d at 590 (“Baker v. Nelson considered many of the constitutional issues raised by the appellants here and decided them adversely to appellants. In our view, however, no constitutional issue is involved. We find no constitutional sanction or protection of the right of marriage between persons of the same sex.”) (emphasis added).
47 See Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971). The issue as to whether same-sex couples have the right to marry has spilled over into the legal question of whether transsexuals are allowed to marry. Unanimously, the courts have held that because the transsexual was still his or her original sex, he or she could not marry an individual of the same sex. See In re Ladrach, 513 N.E.2d 828 (Ohio Prob. 1987); Littleton v. Prange, 9 S.W.3d 223 (Tex. Ct. App. 1999); In re Estate of Gardiner, 42 P.3d 120 (Kan. 2002).
In 1996, Congress became involved in the same-sex marriage debate when it passed the Defense of Marriage Act ("DOMA" or the "Act"). The Act defined marriage as a union between only one man and one woman, thereby precluding same-sex couples from marrying and receiving federal benefits. The Act also allowed states to reject any same-sex marriage that was legalized in another state. Accordingly, Congress has clearly expressed its preference that same-sex marriage should never be legalized.

As a result of Goodridge, the debate on same-sex marriage has been pushed to the forefront of the current political landscape, and in the summer of 2004, there was an attempt by members of Congress to amend the Constitution in order to define marriage as only between one man and one woman. For the time being, that proposal has failed.

II. THE FUNDAMENTAL RIGHT TO MARRY AND DUE PROCESS

a. Does the Fundamental Right to Marry Include Same-Sex Couples?

It is by now well-settled that there is a fundamental right to marry arising out of the substantive aspect of the Due Process Clause as guaranteed by the Fourteenth Amendment.

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49 “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.” 1 U.S.C. § 7 (2004).
50 “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.” 28 U.S.C. § 1738C (2004). This statute implicates constitutional questions involving the Full Faith and Credit Clause of the United States Constitution that will not be examined in this article.
53 See Loving v. Virginia, 388 U.S. 1, 12 (1967) (“These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.”; “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.”; “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); see also U.S. CONST. amend. XIV, § 1 (“No State . . . shall . . . deprive any person of liberty, or property, without due process of law . . . .”).
However, the right to marry is not well-defined. There is little definitive guidance on who is covered by this fundamental right. Nonetheless, the case law does provide some direction and that guidance indicates that the fundamental right to marry is about choice and applies to all couples.

To qualify as fundamental, a right must be implicit in the concept of ordered liberty or deeply rooted in this nation’s history and tradition. Whether a fundamental right exists determines what standard the government must meet in order to sustain the law, and this standard often dictates the outcome of the case. If a fundamental right is involved, the Supreme Court will review decisions where those rights are denied under the most stringent of standards – strict scrutiny. In order to satisfy strict scrutiny, there must be a compelling reason for the denial of rights and the law must use the least restrictive means to achieve the stated compelling reason. As a result, if a fundamental right does apply to same-sex couples, the statute banning same-sex marriage will be presumptively invalid and the government will have the heavy burden of justifying its constitutionality. Conversely, if a fundamental right is not involved, rational basis applies, and the law will be upheld if it has a rational relation to a legitimate government interest. Rational basis is the most lenient standard of review and presumes that a law is constitutional.

Whether same-sex couples are included in the fundamental right to marry depends on the framing of the issue. Despite what opponents of same-sex marriage may believe, the issue is not whether there is a fundamental right for same-sex couples to marry. The Court has narrowly

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56 See id.
58 See Romer, 517 U.S. at 631, 632
defined similar issues in the past only to overrule them. In *Bowers v. Hardwick*, the Court framed the issue as whether there was a fundamental right for homosexuals to engage in sodomy.\(^60\) The Court answered that question with a resounding “no.”\(^61\) As the dissent in *Bowers* correctly noted and also as the majority opinion in *Lawrence* stated, that is precisely not the issue.\(^62\)

This case is no more about ‘a fundamental right to engage in homosexual sodomy’ as the Court purports to declare than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’\(^63\)

*Bowers*, however, was properly overruled in *Lawrence*.\(^64\) Therefore, the Court has clearly indicated that framing the issue too narrowly in a similar context is incorrect. In no way does a case involving same-sex marriage concern the narrow question of whether homosexuals have the right to marry or whether same-sex marriage is deeply rooted in the United States history and traditions. The issue, as illustrated by the *Bowers* dissent and *Lawrence*, is much broader than that. “Just as the Perez [v. Lippold] and Loving courts viewed their question as the fundamental right to marry, and not the fundamental right to interracial marriage, so too should courts take the same stand with respect to gay marriages.”\(^65\) As one court has wisely recognized, the proper question is whether there is a fundamental right to choose one’s own marriage partner.

\(^60\) “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.” 478 U.S. at 190.

\(^61\) See id. at 191.

\(^62\) See *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting); see also *Lawrence*, 539 U.S. at 567 (“To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”).

\(^63\) See *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (internal citations omitted); see also *Lawrence*, 539 U.S. at 567.

\(^64\) “Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.” *Lawrence*, 539 U.S. at 578.

In *Brause v. Bureau of Vital Statistics*, the Alaska Superior Court stated that the question is not “whether same-sex marriage is so rooted in our traditions that it is a fundamental right”; rather, the real question is “whether the freedom to choose one’s own life partner is so rooted in our traditions” to render it a fundamental right that would include *all* individuals and not only heterosexuals.66

However, *Brause* was a state court decision and not based on federal law, which prompts the question of how the *federal* right to marry is defined. Is it limited only to heterosexual couples? Does the right extend to same-sex couples? Interracial couples? *All* couples? With the exception of *Loving*, these questions have never been directly decided by the Court. What is clear is that the Court has never *held* that the right to marry applies only to heterosexual couples. While there may be an assumption that this right has only previously applied to opposite-sex couples, there has been no holding by the Court that would bind it to preclude same-sex couples from falling within the purview of the fundamental right to marry. Upon further review of the case law, though, it is clear that the fundamental right to marry applies to all couples and it is based upon choice just as the Alaska court in *Brause* stated.67

The Supreme Court has explained the fundamental right to marry in numerous cases. The Court first mentioned marriage in *Maynard v. Hill*, declaring that it is “the most important relation in life” and is “the foundation of the family and of society, without which there would be neither civilization nor progress.”68 Also, the Court previously described marriage as “fundamental to the very existence and survival of the race.”69 In *Meyer v. Nebraska*, the Court

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67 See id. at *1 (“The court finds that marriage, i.e., the recognition of one’s *choice* of a life partner is a fundamental right.”; emphasis added).
68 125 U.S. 190, 205, 211 (1888).
linked marriage to the Constitution, stating that the right to marry is central to an individual’s liberty protected by the Due Process Clause of the Constitution.\textsuperscript{70} The Court later said that

\begin{quote}
[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.\textsuperscript{71}
\end{quote}

The personal decision relating to marriage is one the Court has said is a decision that “an individual may make without unjustified government interference.”\textsuperscript{72} For some reason, however, this “noble purpose” and “personal decision” is denied to same-sex couples.

However, this language from the Court does not adequately describe the precise scope of the right to marry, which was most significantly affirmed in \textit{Loving}, where the court struck down Virginia’s anti-miscegenation law.\textsuperscript{73} The Virginia laws voided all marriage agreements between individuals of different races and precluded interracial marriage.\textsuperscript{74} But the Court held that those laws were unconstitutional in light of the fundamental right to marry.\textsuperscript{75} Among other things, the Court stated that “[u]nder our Constitution, the freedom to marry, or not marry, a person of another race \textit{resides with the individual} and cannot be infringed by the State.”\textsuperscript{76} The

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\item \textsuperscript{70}262 U.S. 390, 399 (1923).
\item \textsuperscript{71}See Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
\item \textsuperscript{73}\textit{Loving}, 388 U.S. at 2.
\item \textsuperscript{74}Section 20-57 of the Virginia Code stated, “\textit{Marriages void without decree. – All marriages between a white person and a colored person} shall be absolutely void without any decree of divorce or other legal process.” \textit{Id.} at 5. Section 20-54 said, in relevant part, “\textit{Interracial marriages prohibited; meaning of term ‘white persons.’} – It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian.” \textit{Id.} Additionally, the Virginia marriage laws imposed criminal sanctions on interracial couples. \textit{See id.} at 4 (“\textit{Punishment for marriage. – If any white person intermarry with a colored person, or any colored person intermarry a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.”).
\item \textsuperscript{75}See \textit{id.} at 12 (emphasis added).
\item \textsuperscript{76}\textit{Id.}
\end{itemize}
fundamental right to marry was later reaffirmed in other cases, such as *Zablocki v. Redhail* and *Turner v. Safley.*

While the underlying assumption is that the fundamental right to marry has applied only to heterosexual couples, what lies at the heart of the fundamental right to marry, as illustrated by *Loving,* is not heterosexuality but the issue of choice and the ability of an individual to choose whom he or she wishes to marry without governmental interference. The Court’s decisions have unequivocally linked marriage to personal choice. Several state courts have explicitly recognized that marriage, above all else, is related to choice and is a “right of individuals.”

“Clearly, the right to choose one’s life partner is quintessentially the kind of decision which our culture recognizes as personal and important. Though the choice of a partner is not left to the individual in some cultures, in ours it is no one else’s to make.”

According to the Supreme Judicial Court of Massachusetts’ view on marriage, “the right to marry means little if it does not include the right to marry the person of one’s choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare.” The court says quite clearly that marriage is a matter of personal, private choice but not just for heterosexuals. “Whether and whom to marry, how to express sexual intimacy, and whether

77 434 U.S. 374 (1978); 482 U.S. 78 (1987). *Zablocki* held that it was unconstitutional for the state of Wisconsin to pass a statute requiring certain individuals – those under obligations to pay child support - to obtain a court order before marrying. *See Zablocki,* 434 U.S. at 390-91. The Court stated “the right to marry is of fundamental importance for all individuals.” Id. at 384. In *Turner,* the Court ruled that a prison rule that did not permit inmates to marry while incarcerated unless the marriage was approved by prison superintendent was unconstitutional. *See Turner,* 482 U.S. at 99. The Court, however, applied rational basis review because the case involved a prison. *See id.* at 94 (“The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration.”). The restriction could not withstand that standard. *See id.* at 98.

78 *See Loving,* 388 U.S. at 12 (discussing the “freedom of choice” to marry).

79 *See, e.g., id.*


81 *Brause,* 1998 WL 88743, at *4 (emphasis added).

82 *Goodridge,* 798 N.E.2d at 958 (emphasis added).

83 “The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many ‘right’ ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose
and how to establish a family – these are among the most basic of every individual’s liberty and
due process rights.”84 Choosing one’s partner is central to marriage. Notably missing from these
decisions, however, is an explicit link between marriage and heterosexuality.

While these cases demonstrate that marriage is, first and foremost, about choice, they are not
decisions that bind the United States Supreme Court. Nonetheless, like the state courts, the
Supreme Court has recognized that the fundamental right to marry is about choice. “This Court
has long recognized that freedom of personal choice in matters of marriage and family life is one
of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”85 Most
importantly for same-sex marriage advocates, though, is that one of the seminal cases involving
the fundamental right to marry – Loving – constantly refers to the fundamental right as the
“freedom to marry” and as the “freedom of choice to marry,” indicating the inherent nature of
marriage as a choice that cannot be infringed upon by the government.86 For example, the Court
stated “[t]he Fourteenth Amendment requires that the freedom of choice to marry not be
restricted by invidious racial discrimination. Under our Constitution, the freedom to marry, or
not to marry, a person of another race resides with the individual and cannot be infringed upon
by the State.”87 In no uncertain terms, Loving expressly classifies the right to marry as an issue
of choice, which extends to all couples and does not only apply in circumstances involving race.
There is no reference in Loving to marriage being limited to only couples of the opposite sex, and
the Court specifically rejected the fact that marriage was limited to only couples of the same
race.

84 Goodridge, 798 N.E. at 959.
85 Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (emphasis added); see also Moore v. City of East
Cleveland, 431 U.S. 494, 499 (1977); Whalen v. Roe, 429 U.S. 589, 600 (1977); Carey, 431 U.S. at 685.
86 See Loving, 388 U.S. at 12.
87 Id. (emphasis added).
The Court’s decisions in *Turner* and *Zablocki* further suggest that choice is a vital aspect of the right to marry. In *Zablocki*, the Court held that the state of Wisconsin could not prevent parents who owed child support from marrying, and in *Turner*, the Court similarly held that a prison could not enforce a rule that prohibited prisoners from marrying while incarcerated. Without specifically mentioning the principle of choice, both decisions inherently rely on the fact that the choice to marry is an individual’s decision to make and cannot be restrained by the state. In invalidating the Wisconsin law and the prison’s policy, the Court indicated that it does not permit any restrictions on the ability of an individual to choose whether he or she wishes to marry or whom he or she wishes to marry. Choice, then, was critical in these decisions.

The Court’s decision in *Lawrence* further supports the contention that the fundamental right to marry relates to choice and not the sex of the individuals involved. *Lawrence* held that sodomy could not be criminalized because there are certain decisions, such as the ability to engage in consensual sexual conduct that must be respected by the state. “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution

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88 See *Zablocki*, 434 U.S. at 376 (affirming the trial court’s decision declaring that the Wisconsin statute was unconstitutional); *Turner*, 482 U.S. at 81.
89 See, e.g., id. at 98 (“where the inmate wishes to marry a civilian, the decision to marry . . . is a completely private one”).
90 The Court in *Zablocki* was greatly concerned with the government’s interference in the decision to marry and stated that when the government interferes with that decision, strict scrutiny applies; otherwise rational basis applies to reasonable regulations of “the marital relationship.” See *Zablocki*, 434 U.S. at 386-87 (“reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.”).
91 Obviously, *Lawrence* is not directly on point since it involves the constitutionality of a criminal sodomy statute, but there are numerous examples of persuasive language in *Lawrence* that support the right to marry as a matter of choice. The fact that *Lawrence* is not directly on point does not hurt this argument because there is no binding decision directly on point for the issue of same-sex marriage. All support, then, is merely persuasive. This paper merely argues that the cases cited throughout are more highly persuasive than any others to the contrary.
92 See *Lawrence*, 539 U.S. at 578.
allows homosexual persons the right to make this choice.”93 Just as choice is a central aspect of what sexual relations one is to engage in, so too is it a central aspect of marriage. If the state must recognize individual autonomy and personal decisions on issues of intimate sexual behavior, it follows that the state must also respect individual decisions regarding marriage since marriage is a fundamental right and is in a similar relation to decisions of sexual intimacy.94 Marriage, like the choice to engage in consensual sexual conduct, is also an intimate personal decision, possibly the most personal decision one may ever make, and the Court has recognized marriage as being such.95 If the Court has ruled that personal and private decisions regarding consensual sexual conduct must be respected, it is logical to conclude that the personal and private decision of whom to marry should similarly be respected regardless of the sex of one’s partner.

Therefore, combining the statements in Lawrence, the holdings of several state courts, and, most importantly, the Court’s language and holdings in Loving, LaFleur, Zablocki, and Turner, it becomes clear that the fundamental right to marry is linked to choice and not to sexual preference. Certainly it is a factor for heterosexuals that their marriage partner is a member of the opposite sex, but that is the inherent nature of being a heterosexual. What is more fundamental to this right is the ability to choose whom one wants to marry without anyone else, especially the government, deciding whom he or she must marry and to make that decision according to personal choice and love. It is deeply rooted in this nation’s history that an individual has the ability to choose his or her own marriage partner.96 In short, marriage is not

93 Id. at 567.
94 “The case does involve two adults, who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.” Id. at 578.
95 See Griswold, 381 U.S. at 486.
just about a man and a woman. The sex of one’s partner is important in the decision to marry, but it is not the primary part of the decision; that part is about love, which can be achieved by heterosexuals and homosexuals equally. It is not fundamental that the couple be members of the opposite sex, but “[i]t is the decision itself that is fundamental.”

b. Strict Scrutiny

Assuming that the fundamental right to marry does apply to all couples, including same-sex couples, the government can still deny them the right to marry if the government’s justifications satisfy strict scrutiny. In that case, the government must establish a compelling reason for prohibiting same-sex couples from marrying, and the statute prohibiting same-sex marriage must use the least restrictive alternative to achieve this compelling reason.

Three major arguments have been asserted to justify the exclusion of same-sex couples from marriage. Proponents of defining marriage as a union between only a man and a woman claim that marriage has traditionally been defined that way and should remain so defined. Opponents of same-sex marriage further contend that marriage is sacred and should not be altered to allow the inclusion of same-sex couples. Finally, the ban on same-sex marriage has been justified on the grounds that same-sex couples cannot procreate. Despite these assertions, none of these arguments are compelling and sufficiently narrowly tailored and, thus, fail under strict scrutiny.

The argument that marriage should be defined as only between a man and a woman simply because that is the way it has traditionally been defined is not a compelling reason to justify excluding same-sex couples from marrying. As several courts have noted, this argument

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97 Id. at *6.
is circular and does not justify a ban on same-sex marriage.99 “It is not enough to say that ‘marriage is marriage’ and accept without any scrutiny the law before the court. It is the duty of the court to do more than merely assume that marriage is only, and must only be, what most are familiar with.”100 To justify a statute because of its definition makes little sense in light of the fact that the definition is precisely what is being challenged. Simply relying on the proposition that marriage is defined a certain way does not create a compelling reason for prohibiting same-sex marriage when the definition itself is what is at issue. “The issue . . . is whether the State may continue to deprive same-sex couples of the benefits of marriage. This question is not resolved by resorting to a historical definition of marriage; it is that very definition that is being challenged . . . .”101 This argument, therefore, is circular, unhelpful, and certainly not compelling.102 As Justice Oliver Wendell Holmes so poignantly and persuasively declared, it is “revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV.”103 As this quote illustrates, it is not a compelling reason to maintain the status quo simply because it is the status quo. There must be some further justification. This argument alone, then, is not a compelling reason to prevent same-sex couples from marrying.

In addition, definitions are arbitrary and can change to meet constitutional requirements.104 The Court accepted this proposition when it previously redefined marriage in Loving. At the time of Loving, the definition of marriage in Virginia was not just that of a union

99 See Baehr, 852 P.2d at 61; see also Goodridge, 798 N.E.2d at 961, n.23; Brause, 1998 WL 88743, at *2.
100 Id.
101 Baker, 744 A.2d at 906 (Johnson, J., concurring in part and dissenting in part).
102 Justice O’Connor, in her concurring opinion in Lawrence, stated “Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage.”102 To note, however, Justice O’Connor does not explain why the preservation of the traditional institution of marriage is a legitimate state interest. For the reasons stated above, it cannot be a legitimate interest merely because marriage has been traditionally defined a certain way. Justice O’Connor, therefore, must have some other justification for believing that a ban on same-sex marriage and preserving traditional marriage involves a legitimate state interest, whatever “traditional” marriage may be, but her statement alone discloses no such legitimate or compelling interest.
104 See GERSTMANN, supra note 3, at 21.
between a man and a woman but a union between a man and a woman of the same race. The Court held that this definition of marriage was unconstitutional. In effect, the Supreme Court redefined Virginia’s definition of marriage to conform to constitutional principles that prohibit a state from limiting marriage to only couples of the same race. Therefore, the Court can and will redefine marriage to square with the Constitution in the appropriate situation. Accordingly, the Court has the power to declare the current laws defining marriage as a union between a man and a woman unconstitutional, and the Court also has the authority to then redefine marriage as a union between two individuals and, of course, without restrictions on race.

Opponents of same-sex marriage further defend excluding same-sex couples on the grounds that marriage is a sacred institution and the traditional notion of marriage involves only a man and a woman. One problem with this argument is that marriage may not be as sacred as many believe. It is common knowledge that approximately half of all marriages fail and result in divorce. American society now includes television shows where individuals marry or propose marriage after only knowing a person for a short period of time. Additionally, many couples get married for the “wrong” reasons and not because of love, commitment, and the other factors that typically result in a stable marriage. In many respects, marriage is not always the sacred and romantic institution of a man and a woman making the ultimate commitment to one another. The current institution of marriage is flawed, and society’s sacred institution is not so sacred anymore.

Regardless, denying marriage to same-sex couples because it is sacred is not a compelling justification because, similar to the argument above, simply labeling an institution as sacred is not a compelling reason that justifies the exclusion of a group to that institution. There

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105 See Loving, 388 U.S. at 4-5 (citing Virginia’s-then marriage statutes).
106 See id. at 2.
must be some further explanation and rationale that explains why it is so sacred that it justifies the exclusion of same-sex couples. Again, this argument by itself is not a valid legal basis for denying same-sex couples access to marriage. Just as “history cannot and does not foreclose the constitutional question” relating to whether a ban on same-sex marriage is constitutional, neither does referring to an institution as “sacred” foreclose the constitutional and legal inquiry.107 Unequivocally, alleging that marriage is “sacred” would not have saved the state of Virginia’s argument in Loving, and it should also not be sufficient to exclude same-sex couples from marrying. There simply must be more to explain why same-sex couples are denied this fundamental right.

Moreover, the fact that marriage is sacred weighs against the exclusion of same-sex couples from the institution of marriage. Since marriage is sacred and highly valued in our society, it should be denied to a group of individuals only for the most compelling reasons, and this is essentially what the Supreme Court has held. However, no such reason exists in this situation. Additionally, there is no reason to believe that allowing same-sex couples to marry will hurt the institution of marriage. “Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.”108 The Court’s decision in Loving did not ruin marriage, and, similarly, permitting same-sex couples to marry would not destroy the sacred institution of marriage.

Further, no one can reasonably deny that same-sex couples can love, commit, and form a long-lasting bond with each other just as opposite-sex couples do. Goodridge clearly

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107 Goodridge, 798 N.E.2d at 953.
108 Id. at 965.
demonstrates that same-sex couples are entirely capable of this and any belief to the contrary is blatantly mistaken. As the Supreme Judicial Court in Massachusetts noted, the same-sex couples in Goodridge were not only entirely capable of engaging in normal family activities, such as raising children, aiding in the care of a partner’s parent, etc., but they had, in fact, engaged in those activities. Also, in Turner, the Court held that prisoners could not be prohibited from marrying and that in prison they still could engage in “expressions of emotional support and public commitment.” If prisoners can do this, there is absolutely no reason to believe that same-sex couples are somehow incapable of the same, if not better, “expressions of emotional support and public commitment.” It simply cannot be denied that same-sex couples can fulfill the typical functions of a marriage and a family. To suggest that homosexuals are not capable of creating a normal family relationship is repugnant to all those homosexuals who have proven that to be untrue.

The final major argument against same-sex marriage is that same-sex couples cannot procreate on their own and marriage is sanctioned by the state to further procreation and the existence of the human race. Marriage statutes, however, do not require that heterosexual couples have the ability to procreate before the state allows them to marry, but, as the argument goes, that requirement is the dispositive issue in prohibiting same-sex couples from marrying. The legal issue concerning procreation, therefore, centers on whether same-sex couples can be excluded from marrying when other couples who also cannot procreate are allowed to marry. The procreation argument, however, does not survive strict scrutiny analysis because (1) there is no compelling interest in excluding same-sex couples from marriage on procreation grounds and

\[\text{Source: } \text{Goodridge, } \text{Turner, } \text{at 949 (describing the plaintiffs' relationships and noting that at least one couple had been together for thirty years).}\]

\[\text{Source: } \text{at id.}\]

\[\text{Source: } \text{at id.}\]

\[\text{Source: } \text{Turner, 482 U.S. at 95.}\]
(2) even if there is a compelling interest, the government has not used the least restrictive means to achieve that interest.

Undeniably, there is some link between marriage and procreation. Fostering the institution of marriage certainly cultivates procreation, and the state has an interest in advancing this relation because of that fact. But marriage is not simply about procreation, nor is it even primarily about procreation. "Procreation or child rearing are not necessarily the defining characteristics of a traditional marriage; rather, such a limiting characteristic is grossly underinclusive." Marriage is about much more than just procreation. "First and foremost, marriage requires a commitment to a relationship." Marriage is also about love and being able to choose with whom one will spend the rest of his or her life. Marriage is about forming a bond with another individual. Marriage is, in part, about procreation, but it is also a multitude of other important factors.

Therefore, it is not a compelling reason for the government to deny same-sex couples the ability to marry simply because they cannot physically engage in one aspect of marriage that is important to some married couples. Same-sex couples can fulfill the other important aspects of marriage, such as fostering a long and loving bond and commitment to one another. *Goodridge* proves that any argument to the contrary is simply false. Accordingly, it is not compelling for the state to prohibit same-sex marriage even though same-sex couples cannot satisfy one of the aspects of marriage yet can fulfill all the rest. The government simply cannot select an arbitrary

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112 In *Goodridge*, the court rejected the trial court’s holding that a ban on same-sex marriage was constitutional because procreation is the primary purpose of marriage. *See Goodridge*, 798 N.E.2d at 961; *see also* Zambrowicz, *supra* note 65, at 926 (“While procreation is an important element of most marriages, it is most assuredly not the only, nor always the most important, element.”).

113 *Id.* at 921.

characteristic of marriage and base the exclusion of same-sex marriage on that one factor when marriage is about much more than just being able to have children.

It appears to be even more questionable that same-sex couples are denied the ability to marry because they cannot procreate when being married involves many more rights, responsibilities, and benefits that in no way relate to procreation. There are numerous benefits and advantages granted to married couples.\textsuperscript{115} This is the reward society has given to married couples who wish to form long-lasting stable bonds. Those benefits include receiving certain rights such as joint tax filing, tenancy by entirety, homestead rights, the rights to inherit the property of a deceased spouse who does not have a will, a right to elective share under intestacy laws, entitlement owed to a deceased employee, preferential treatment under pension plans, medical coverage or benefits, alimony rights, and the right to bring claims for wrongful death of one’s spouse, among many other legal as well as social benefits.\textsuperscript{116} As this list makes evident, marriage confers rights to married couples well beyond anything that is remotely related to procreation. Therefore, justifying the exclusion of same-sex couples from the right to marry and excluding them from these numerous rights and benefits simply because they cannot physically engage in an act unrelated to those rights and benefits is not a compelling rationale.

Since it is not a requirement that couples be able to have children or even have intentions to procreate before marrying, the denial of marriage to same-sex couples on procreation grounds is troublesome. Even Justice Scalia recognizes that this argument is tenuous at best. “[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples

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\textsuperscript{115} “The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that ‘hundreds of statutes’ are related to marriage and to marital benefits.” Goodridge, 798 N.E.2d at 955.

\textsuperscript{116} This list is not exhaustive but merely notes some of the rights by reference as indicated by the Supreme Judicial Court of Massachusetts in Goodridge. See id. at 955-56. For other rights conferred by marriage see Baehr, 852 P.2d at 59, and Eckols, supra note 114, at 404-05.
exercising ‘the liberty protected by the Constitution’? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.” Heterosexuals who cannot procreate, such as those mentioned in Justice Scalia’s quote, can still marry. However, same-sex couples who also cannot physically procreate are not permitted to marry. Procreation, therefore, is not a compelling reason for excluding same-sex couples. To select procreation as the defining characteristic of marriage and then exclude the ability to marry to some and not others who cannot fulfill that aspect is absolutely arbitrary.

It must also be noted that it is simply not the case that same-sex marriage would negatively affect procreation. It makes little sense to deny same-sex couples the right to marry on procreation grounds when allowing them to marry would not negatively affect or even decrease procreation. If the decision to allow same-sex couples to marry would adversely impact the furtherance of the human race, the government may have a compelling reason to prohibit that practice, but no one could rationally argue that same-sex marriage would affect opposite-sex couples’ ability to have children. “Certainly there is no . . . empirical data submitted which demonstrates that marriage is nothing more than a refuge for persons deprived by legislative fiat of the option of consensual sodomy outside of the marital bond.” It is simply not the case that by denying same-sex couples the right to marry, homosexuals would marry members of the opposite sex and have children. Allowing same-sex marriage would not preclude individuals who would normally procreate from doing so. What same-sex couples did with their marital relation would not prevent opposite-sex couples from procreating and continuing the human race. As a result, because procreation is not a compelling reason to prohibit same-sex marriage

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117 Lawrence, 539 U.S. at 605 (Scalia, J., dissenting).
and because same-sex marriage will not negatively impact procreation, it is not a valid justification to exclude same-sex couples from the right to marry under strict scrutiny.

Assuming *arguendo* that there is a compelling reason for the government to deny same-sex couples the right to marry because they cannot procreate, the marriage laws still cannot survive strict scrutiny because they do not use the least restrictive means to achieve the compelling purpose. Statutes subject to strict scrutiny are upheld only if they are “‘necessary to promote a compelling government interest,’” meaning that the government must use the least restrictive methods in achieving that compelling interest.\textsuperscript{119} Since marriage laws do not use the least restrictive methods to achieve the presently assumed compelling purpose of procreation, they are patently unconstitutional.

In order to satisfy this standard, the marriage statutes would only allow couples that could procreate to marry. Marriage laws, however, impose no such requirement. Instead, there is nothing to bar infertile couples, elderly couples who physically cannot procreate, or even couples who have no intention of having children from marrying.\textsuperscript{120} Yet same-sex couples cannot marry, as the argument goes, because they cannot physically procreate on their own. As one New York court correctly noted, “it cannot be held as a matter of law that the physical incapacity to conceive is a bar to entering the marriage state.”\textsuperscript{121} “If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means.”\textsuperscript{122} As the quote rightly points out, marriage laws do not employ the least restrictive alternatives in promoting

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\item Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972) (quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969)).
\item See Wendel v. Wendel, 52 N.Y.S. 72, 74 (N.Y. App. Div. 1898). After *Lawrence*, “the passions incident to that state” cannot be criminalized for same-sex couples.
\item *Id.*; see also *Lawrence*, 539 U.S. at 605.
\item *Goodridge*, 798 N.E.2d at 962.
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procreation. Since it is plainly not a prerequisite that a couple have the ability to procreate in order to marry, the marriage laws violate the Constitution and cannot bar same-sex marriage.

To note, one of the fears that many opponents of same-sex marriage have is that if same-sex couples are permitted to marry, the judicial floodgates will open and polygamists, children, brothers and sisters, humans and animals, etc. will be allowed to marry.123 This fear is completely unfounded. There is a major distinction to be made in this situation; there are compelling reasons to prevent the abovementioned individuals from marrying but there is no such compelling interest in prohibiting same-sex couples from marrying.

Polygamists, children, siblings, and others denied the ability to marry the person of their choice all have the right to ask the government to articulate sufficient justifications explaining their exclusion from the institution of marriage.124 As explained above, the fundamental right to marry applies to all individuals, and, accordingly, it can only be denied provided the government satisfies strict scrutiny review. The difference, though, is that compelling reasons exist in each of these circumstances whereas no such compelling reason is present in the state’s prohibition of same-sex marriage. “For example, states . . . may and do prohibit marriage for such ‘compelling’ reasons as consanguinity (to prevent incest), immature age (to protect the welfare of children), presence of venereal disease (to foster public health), and to prevent bigamy.”125 Also, specifically with regards to polygamy, it has historically presented problems of abuse, such as forced marriages, exploitation of minors, and welfare dependency, that substantiate any

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123 For example, in his dissent in *Lawrence*, Justice Scalia bemoans the idea that “laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity” are effectively ended because of the Court’s decision. *See Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting). “If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the abovementioned laws can survive rational-basis review.” *Id.* Justice Scalia’s concerns are sorely misplaced. Those laws are not automatically overruled; rather, the law merely requires that there be some justification other than the fact that society believes them to be immoral.

124 “[P]olygamists have the same right as same-sex couples to go to court and demand that the state give real reasons – not just stereotypes and unsupported generalizations – for banning their marriage.” *Gerstmann*, supra note 3, at 105.

125 *Bahr*, 852 P.2d at 59, n.19.
Arguments that the legalization of same-sex marriage will allow just about any type of marital relationship are misguided. Just as with the issue of same-sex marriage, the government must justify its reasons for denying marriage to any individual. The government, however, cannot justify the marital exclusion of same-sex couples, but it can justify the exclusion of other relationships.

c. Rational Basis

If the Supreme Court does not hold that the fundamental right to marry applies to same-sex couples, the marriage laws must still satisfy rational basis review. However, it is a very different question to ask whether the denial of same-sex marriage invokes legitimate state interests as opposed to compelling ones because rational basis review is highly deferential to the legislative branch, whereas strict scrutiny is, of course, strict and favors the unconstitutionality of a law. Laws reviewed under rational basis will be upheld if there is a legitimate governmental interest and the law is rationally related to that interest. Any rational reason will be sufficient to uphold the law even if it is not the legislature’s stated purpose. If the law is arbitrary or capricious, it cannot survive under rational basis review. Additionally, laws based on animus towards a specific group are never constitutionally justified. Because marriage laws arbitrarily deny same-sex couples the right to marry and are based on animus towards homosexuals and same-sex couples, they are patently unconstitutional.

In analyzing the same factors as mentioned above, neither the argument that marriage is defined as a man and a woman or that marriage is sacred is a rational reason to deny same-sex

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126 See GERSTMANN, supra note 3, at 102.
128 See Romer, 517 U.S. at 633.
129 See Beach Communications, Inc., 508 U.S. at 313-15.
130 See McLaughlin v. Florida, 379 U.S. 184, 190 (1964) (“Arbitrary selection can never be justified by calling it classification.”).
131 See Romer, 517 U.S. at 632
couples the right to marry. As Justice Stevens said in his dissent in *Bowers*, which was explicitly accepted by the *Lawrence* majority, “neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”132 Similarly, history and tradition are not *legitimate* government interests in excluding same-sex couples from marrying. Merely labeling marriage as sacred or citing historical purposes for the exclusion of same-sex couples are circular and are not legitimate for the same reasons they are not compelling; these arguments sidestep the constitutional issues. If laws were upheld because that was the traditional method of doing things, time would be the relevant inquiry and not the rationality of the law. Moreover, if courts could uphold laws simply because that is the way things have always been, Virginia’s anti-miscegenation law would have been affirmed in *Loving*, Texas’ anti-sodomy law would have been ruled constitutional in *Lawrence*, and the Court could not have overturned *Plessy v. Ferguson* and the doctrine of separate but equal.133 “In some parts of our nation mere acceptance of the familiar would have left segregation in place”, and it is now almost universally accepted today that the change in favor of desegregation was the proper choice.134 The purpose of asserting constitutional claims is to allow groups redress for the wrongs society has denied to them in the past, and it is simply not rational to uphold those wrongs based upon tradition or by calling those traditions sacred. There must be some further explanation for the state to establish a legitimate interest.

Even though the procreation argument is the best argument opponents of same-sex marriage have for upholding the current marriage laws as constitutional, the problem with the current marriage laws is that they are not rational but arbitrary. It is undeniably arbitrary to tell

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132 *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting); see also *Lawrence*, 539 U.S. at 578 (“Justice Stevens’ analysis, in our view, should have been controlling in *Bowers* and should control here.”).
one group of individuals who cannot procreate that they are allowed to marry but then exclude another group who cannot procreate and justify their exclusion on those grounds. Obviously, there must be some reason that same-sex couples have been excluded but other couples who cannot procreate are allowed to marry. That reason, however, is not related to procreation, and, therefore, there must be another explanation for the ban on same-sex marriage, but the only other reason would be the arguments made above, but those arguments are neither compelling nor rational. “[I]f the purpose of the statutory exclusion of same-sex couples is to ‘further [I] the link between procreation and child rearing,’ it is significantly underinclusive. The law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal.”135 Clearly, then, the reasons for denying same-sex couples the right to marry are “completely unrelated to any rational reason for excluding same-sex couples from obtaining the benefits of marriage”, leading to the conclusion that any ban on same-sex marriage is nothing more than animus toward same-sex couples and constitutionally invalid.136 Because the current marriage laws arbitrarily deprive same-sex couples from marrying, they cannot satisfy rational basis review.

Finally, in his dissent in Lawrence, Justice Scalia scolds the majority because, he believes, they erode the possibility that a society may be able to ban a certain practice because they find it to be immoral.137 The inherent flaw in Justice Scalia’s reasoning is that merely claiming that a practice is immoral does not and should not satisfy rational basis review. The Court’s “obligation is to define liberty of all, not to mandate [its] own moral code.”138

135 Baker, 744 A.2d at 881.
136 Baker, 744 A.2d at 911 (Johnson, J., concurring in part and dissenting in part). “The absence of any reasonable relationship . . . suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.” Goodridge, 798 N.E.2d at 968; see also Romer, 517 U.S. at 632.
137 “The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are ‘immoral and unacceptable’ . . . .” Lawrence, 539 U.S. at 599 (Scalia, J., dissenting).
138 Lawrence, 539 U.S. at 571 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).
that a group can be prevented from doing something simply because it is immoral without further justification is not rational or legitimate. As Justice Stevens correctly noted in his dissent in *Bowers*, which, as mentioned above, was expressly adopted in *Lawrence*, “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . .”

To satisfy rational basis review, there must be some legitimate explanation to deny same-sex couples the right to marry. Just because a large number of people believe a certain practice is immoral does not mean it is rational to preclude that practice.

**III. Equal Protection, Same-Sex Marriage, and Sex Discrimination**

**a. Homosexuals or Sexual Orientation as a Suspect Class?**

In unequivocal terms, the Fourteenth Amendment of the Constitution proclaims that no state shall deny anyone equal protection of the laws. Regarding equality, Justice Robert Jackson announced,

> [t]he framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

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139 *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting); see also *Lawrence*, 539 U.S. at 578.

140 “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. As we know from the Supreme Court’s precedent, the Equal Protection Clause is not absolute even though the specific language of the amendment would appear to be so. The Supreme Court has allowed States to deny an individual the equal protection of the laws provided that the government satisfy the applicable standard of review, either strict scrutiny, intermediate scrutiny, or rational basis. See *Gerstmann*, supra note 3, at 14-19.

These wise words espoused by Justice Jackson indicate that the Fourteenth Amendment’s dedication to equality is one of the United States’ most highly regarded values. Yet denying same-sex couples the ability to marry strikes at the heart of equality and rejects the fundamental principle of the Fourteenth Amendment. Because the current marriage laws are inconsistent with the principles of equality that are deeply entrenched in the United States’ history, those laws cannot withstand constitutional scrutiny.

For Equal Protection purposes, the Court has held that certain classifications are inherently “suspect”, requiring more rigid judicial scrutiny when a law discriminates against those individuals according to that characteristic. The three classifications that currently receive strict scrutiny review are race, national origin, and alienage. Similarly, the Court has held that other classifications, while still somewhat suspect, do not implicate as harmful or as invidious discrimination as race, national origin, and alienage. In those situations implicating quasi-suspect classifications, the Court applies a heightened standard of review above rational basis though not as stringent as strict scrutiny. That standard of review is intermediate scrutiny. Classifications that receive intermediate scrutiny are gender/sex and non-marital children. If a classification does not involve a suspect group, rational basis applies. As mentioned above, this standard of review is deferential to the separation of powers inherent in the United States form of government, and courts will typically defer to the legislature as long as there is a rational

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142 It should be noted, however, that “[t]he Fourteenth Amendment guarantees equal laws, not equal results.” Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 274 (1979).
143 As one scholar has correctly stated, the current bar to same-sex marriage “is one of the issues that most directly challenge our commitment to genuine legal equality.” GERSTMANN, supra note 3, at 3.
144 See id. at 14.
146 See Romer, 517 U.S. at 631.
basis for the law. Classifications that receive rational basis review include, for example, age and wealth, among others.¹⁴⁷

The major factors that the Court considers when determining whether to label a group as suspect are (1) whether the classification is based upon an immutable characteristic; (2) whether the group has suffered a long history of discrimination in the United States; and (3) whether the group can protect itself through the legislative process.¹⁴⁸ Presently, sexual orientation has not been labeled a suspect classification by the Supreme Court.¹⁴⁹ Nevertheless, laws delineating classifications according to sexual orientation should receive strict scrutiny, or, at minimum, intermediate scrutiny.

First, sexual orientation is immutable.¹⁵⁰ This has been a point of contention for years among the general public, and many believe that sexual orientation results from choice and is not innate. Studies have shown this to be false and at least two courts, the Ninth Circuit and the Colorado Supreme Court, have indicated that being homosexual is not a choice.¹⁵¹ Sexual orientation is something with which an individual is born and is beyond the power of the individual to determine. “[S]cientific research indicates that we have little control over our


¹⁴⁹ However, the Ninth Circuit held that sexual orientation should be a suspect and protected class and that laws discriminating on the basis of sexual orientation should be reviewed under strict scrutiny analysis. See Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988) (“Having concluded that homosexuals constitute a suspect class, we must subject the Army’s regulations facially discriminating against homosexuals to strict scrutiny.”). This decision was later vacated but affirmed in favor of the plaintiff on different grounds by a full Ninth Circuit panel. See Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc).

¹⁵⁰ See GERSTMANN, supra note 3, at 31 (noting that homosexuality is, in part, genetically determined). At minimum, there is a triable issue of fact as to whether homosexuality is an immutable characteristic. See Dean v. District of Columbia, 653A.2d 307, 330 (D.C. 1995).

¹⁵¹ The Ninth Circuit stated, “we have no trouble concluding that sexual orientation is immutable for the purposes of equal protection doctrine.” Watkins, 847 F.2d at 1348. Also, the Colorado Supreme Court rejected the argument that “laws prohibiting discrimination against gay men, lesbians and bisexuals will undermine marriage and heterosexual families because married heterossexuals will ‘choose’ to ‘become homosexual’ if discrimination is prohibited.” Evans, 882 P.2d at 1347.
sexual orientation."\textsuperscript{152} Likely, there are some individuals who choose to be homosexual, but, for
the most part, sexual orientation is a characteristic that cannot be changed. Upon sufficient
expert testimony, a court should be able to conclude that sexual orientation is in fact an
immutable characteristic.

Additionally, homosexuals have been discriminated against throughout the history of the
United States, and to this day there exists widespread hostility toward homosexuals and same-sex
couples.\textsuperscript{153} As one scholar explains, “[h]omosexuals are more severely stigmatized than any
other group in America.”\textsuperscript{154} Further, “it is indisputable that ‘homosexuals have historically been
the object of pernicious and sustained hostility.’”\textsuperscript{155} This is illustrated by the numerous court
challenges to exclude homosexuals from all parts of society. For example, the only reason there
were court challenges in Hurley and Dale is because the South Boston Allied War Veterans
Council wanted to exclude a gay rights activist group from the St. Patrick’s Day Parade and
because the Boy Scouts did not want homosexuals as scout leaders. Similarly, the case of Romer
v. Evans occurred only because the citizens of Colorado passed a law excluding homosexuals
from asserting any discrimination claim they might have if they were not hired for a job or did
not receive housing solely because they were gay or lesbian. In Bowers, the Court ruled that
homosexuals did not have the right to engage in typical homosexual sexual activity even in their
own home, one of the locations that the Court has held to be the most sacred of all places. Also,
there are numerous examples of how homosexuals have been treated with malice by the general
public, such as the brutal murder of Matthew Shepard, a gay man, in 1998. In short,

“[h]omosexuals have been the frequent victims of violence and have been excluded from jobs,

\textsuperscript{152} Watkins, 847 F.2d at 1348
\textsuperscript{153} See GERSTMANN, supra note 3, at 18.
\textsuperscript{154} Pamela S. Katz, The Case for Legal Recognition of Same-Sex Marriage, 8 J.L. Pol’y 61, 65 (1999).
\textsuperscript{155} Watkins, 847 F.2d at 1345 (citing Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan,
J., dissenting from denial of cert.)).
schools, housing, churches, and even families.  

Thus, it is incontestable that there has been widespread discrimination against homosexuals.

To fully emphasize this point, the fact that same-sex couples and homosexuals have been excluded from the institution of marriage and the public antipathy and hostility towards any attempt by homosexuals to seek the same legal rights and benefits provided to every other couple in the United States shows in and of itself that there is public aversion towards same-sex partners and homosexuals in general. This issue has become so important in the political spectrum that many politicians, including President George W. Bush, have called for a constitutional amendment defining marriage as a union between only one man and one woman. After the Hawaiian Supreme Court’s decision in *Baehr*, which did not even declare that the state’s marriage laws were unconstitutional but only held that those laws were subject to strict scrutiny analysis, the hostility towards same-sex marriage was so immense that the court’s decision never came into effect because the citizens of Hawaii passed a constitutional amendment prohibiting same-sex marriage. This unending and furious opposition to providing same-sex couples with equal rights shows the dramatic and drastic public hostility toward homosexuals.

The third factor that the Court analyzes to determine if a group should receive heightened scrutiny is whether that group has been able to adequately redress their grievances through the legislative process. This factor also weighs in favor of labeling sexual orientation as a suspect class. Each of the examples mentioned above show that homosexuals and same-sex couples

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156 *Id.* The court also noted that “the discrimination faced by homosexuals in our society is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens or people of a particular national origin.” *Id.*

157 Anyone who claims that homosexuals or same-sex couples are attempting to have “special rights” granted to them as Justice Scalia claimed in *Romer* is misguided. See *Romer*, 517 U.S. at 638-40. The debate on same-sex marriage is nothing more than same-sex couples asking for access to the same institution that all heterosexuals have.


159 See GERSTMANN, *supra* note 3, at 44.
have little power through the legislative arena. In Romer, the citizens of Colorado took the extreme position of passing an initiative forbidding homosexuals from asserting legal claims for discrimination. The political process surely did not aid homosexuals in Colorado.\textsuperscript{160} Similarly, the Hawaiian Supreme Court’s decision in Baehr never made an impact in Hawaii because the citizens passed a constitutional amendment banning same-sex marriage.\textsuperscript{161} The political process there, as well, was no help to homosexuals. As discussed earlier, there is a large amount of opposition to same-sex marriage, and President Bush supports a constitutional amendment banning same-sex marriage.\textsuperscript{162} The current animosity toward legalizing same-sex marriage is proof enough that homosexuals are legislatively disadvantaged.\textsuperscript{163} Most significantly, homosexuals had little support for their rights in Congress when it passed the Defense of Marriage Act, which expressly denies same-sex couples any legal recognition of their relationship by the federal government.\textsuperscript{164} Simply stated, the legislative process certainly has not been conducive to adequately safeguarding the rights of homosexuals and same-sex couples.\textsuperscript{165}

\textsuperscript{160} It should be noted, however, that Amendment 2 was proposed in response to the success of local ordinances in the cities of Aspen and Boulder and the County of Denver banning discrimination on the basis of sexual orientation. See Romer, 517 U.S. at 623-24. Amendment 2 repealed these ordinances. See id. at 624.

\textsuperscript{161} See GERSTMANN, supra note 3, at 44.


\textsuperscript{163} Even if a state did allow same-sex marriage, there are further impediments for same-sex couples, such as the fact that their marriage would not be recognized by another state. See Eskridge, supra note 37, at 862 (“As of October 2002, thirty-four states have adopted junior-DOMAs, that is, statutes providing that their courts should not recognize same-sex marriages validly entered into in another jurisdiction or state.”). For example, Alaska’s version of the Defense of Marriage Act states, “(a) A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state. (b) A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.” A.S. 25.05.013 (cited in Brause, 1998 WL 88743, at *1).


\textsuperscript{165} Most of the major changes in favor of homosexual rights have occurred through the judicial, rather than the legislative, process. The Supreme Court in Romer intervened and informed the citizens of Colorado that it could not constitutionally deny homosexuals the right to claim discrimination. The highest court in the state of Massachusetts had to enlighten its legislature that it could not legally ban same-sex marriage; Vermont did as well except it only notified the Vermont legislature that it was constitutionally required to provide same-sex couples with equal rights but not necessarily access to marriage.
In short, homosexuals deserve protection through some form of heightened scrutiny. Because homosexuals satisfy the above criteria, strict scrutiny should apply. However, if, for example, the Court finds that homosexuality is not immutable, the other two criteria are easily satisfied, and, at minimum, intermediate scrutiny should apply when laws discriminate against homosexuals. Suffice it to say, there are overwhelming reasons for the Court to apply some form of heightened scrutiny when facing classifications based upon sexual orientation.

b. The Ban on Same-Sex Marriage as Sex Discrimination

A ban on same-sex marriage is sex discrimination. The basic argument for the prohibition of same-sex marriage as sex discrimination is as follows: X is a homosexual female who wants to marry Y, who is also a homosexual female; Z is a heterosexual male. According to the present state of the marriage laws, X can marry Z but X cannot marry Y. Therefore, X cannot marry whom she wants because of the sex of the partner, and this is sex discrimination because “but for” the sex of the partner, X could marry whomever she chose. This is the argument that the Hawaiian Supreme Court used to support its decision in *Baehr* to apply strict scrutiny to the state’s marriage law. Clearly, the counterargument is that the marriage laws truly do not discriminate on the basis of sex because the law applies equally to both men and

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166 For a further discussion on this issue see generally Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).
167 See *Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring) (“That the classification is sex based is self-evident. . . an individual’s choice of marital partner is constrained because of his or her own sex.”). This does not mean that a ban on same-sex marriage is not also discrimination on the basis of sexual orientation or that such a statute would discriminate between opposite-sex and same-sex couples. See *Baker*, 744 A.2d at 880 (holding that Vermont’s marriage statute “exclude[s] anyone who wishes to marry someone of the same sex”). This classification is important because if a court finds that a marriage statute discriminates on the basis of sex, intermediate scrutiny applies, which carries a presumption of unconstitutionality. See *Boren*, 429 U.S. at 197 (“classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives”).
168 See, e.g., *Gerstmann*, supra note 3, at 15, 43, 45.
169 “It is the state’s regulation of access to the statute of married persons, on the basis of the applicant’s sex, that gives rise to the question of whether the applicant couples have been denied the equal protection of the laws in violation of . . . the Hawaii Constitution.” *Baehr*, 852 P.2d at 56 (emphasis added).
women in that men can only marry women and women can only marry men.\textsuperscript{170} Men and women, according to this argument, are treated equally under the law. While this position may seem persuasive because it is factually correct, it is still discrimination on the basis of sex according to the Supreme Court’s definition of discrimination articulated in \textit{Loving}.

In \textit{Loving}, the Court held that a law prohibiting interracial marriage was unconstitutional because it discriminated against individuals on the basis of race.\textsuperscript{171} The state of Virginia asserted the same argument as above, namely that the law did not discriminate on the basis of race because the law treated both races - whites and blacks - the same.\textsuperscript{172} Blacks could only marry blacks and whites could only marry whites, and, therefore, the statute applied equally to both groups. Unfortunately for the state of Virginia and opponents to same-sex marriage but luckily for those who believe in all forms of equality, that argument failed.\textsuperscript{173} The Court held that the law did, in fact, discriminate on the basis of race and was found to be unconstitutional in violation of the Fourteenth Amendment.\textsuperscript{174}

By analogy, the same argument should now fail for those who oppose same-sex marriage. If the law in \textit{Loving} discriminated on the basis of race, the marriage laws discriminate on the basis of sex. “[J]ust as it is race discrimination for the state to deny marriage licenses to black-white couples because of the race of one partner, so it is sex discrimination for the state to deny

\textsuperscript{170} For example, in \textit{Lawrence}, Justice Scalia, in dissent, argues that the prohibition of homosexual sodomy was not discriminatory because “[o]n its face [the Texas statute] applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition on deviate sexual intercourse with someone to have sex.” \textit{Lawrence}, 539 U.S. at 599 (Scalia, J., dissenting).
\textsuperscript{171} See \textit{Loving}, 388 U.S. at 12.
\textsuperscript{172} “Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race.” \textit{Id.} at 8.
\textsuperscript{173} “There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races.” \textit{Id.} at 11.
\textsuperscript{174} See \textit{id.} at 12.
marriage licenses to female-female couples because of the sex of one partner.”175 “The equal protection infirmity at work here is strikingly similar to (although, perhaps, more subtle than) the invidious discrimination perpetuated by Virginia’s antimiscegenation laws and unveiled in the decision of *Loving v. Virginia* . . .”176 It would be contradictory of the Court to now hold that this same argument with regards to same-sex marriage is inapplicable. This argument analogizing the present situation to *Loving* is logically and legally sound. If there was discrimination on the basis of race in *Loving*, there is discrimination on the basis of sex in the current marriage laws. To hold that the marriage laws do not discriminate on the basis of sex, the Court would be repudiating its own logic and it would, therefore, overrule the basis and reasoning of *Loving*. Discrimination is discrimination whether it is based on race or sex, and a ban on same-sex marriage is sex discrimination according to what the Supreme Court has defined as discrimination.

c. **Strict Scrutiny, Intermediate Scrutiny, & Rational Basis**

Since this paper has already explained why a ban on same-sex marriage does not satisfy either strict scrutiny or rational basis, there is little need to repeat those arguments here, except that some brief comments specifically relating to same-sex marriage, rational basis, and equal protection should be mentioned. Also, an analysis on the issue of whether a prohibition on same-sex marriage can meet intermediate scrutiny, whether it applies because the marriage laws discriminate on the basis of sex or because homosexuals are a quasi-suspect class for equal protection purposes, is not necessary because, for the reasons discussed previously, it cannot. If a denial of marriage to same-sex couples involves no rational relation to a legitimate state interest, it certainly cannot meet the more stringent intermediate scrutiny.

175 Eskridge, *supra* note 37, at 856.
176 *Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring).
Regarding rational basis, “the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination.” A law subject to the Equal Protection Clause that “identifies persons by a single trait and then denies them protection across the board” and cannot be adequately justified does not conform to constitutional requirements. Since a ban on same-sex marriage arbitrarily denies homosexuals the opportunity to marry, the only justification for the ban is due to the invidious discrimination against homosexuals and same-sex couples. If the government cannot satisfy rational basis, the purpose of the law is inherently and purposefully to injure the discriminated group. However, “[i]f . . . ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” Realizing that there is no rational basis for the denial of same-sex marriage, it is clear that the law is based on nothing more than animus towards homosexuals. Yet the “[m]oral disapproval of [homosexuals] . . . is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.” Accordingly, a marriage law barring same-sex couples from marrying is not rational; it is discrimination of the worst kind because it is based on animosity toward homosexuals.

IV. WHY CIVIL UNIONS ARE UNCONSTITUTIONAL: REVISITING BROWN V. BOARD OF EDUCATION AND THE DOCTRINE OF SEPARATE BUT EQUAL

The most politically attractive response for those who support equal rights for same-sex couples but are skeptical of allowing them access to marriage is the civil union. The civil union provides same-sex couples the same rights as married couples, such as the opportunity to adopt

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177 Loving, 388 U.S. at 10; see also Eisenstadt v. Baird, 405 U.S. 438, 447 (1972) (“A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”) (emphasis added).
178 Romer, 517 U.S. at 633.
180 Lawrence, 539 U.S. at 582 (O’Connor, J., concurring).
children together, to collect alimony upon the dissolution of the relationship, to qualify for family health insurance, and receive several other benefits that are provided by the state to opposite-sex couples but only through a different institution.\(^{181}\) The civil union was first created in the United States by the Vermont legislature in response to the state’s supreme court’s declaration in \textit{Baker v. State} that a ban on same-sex marriage was unconstitutional.\(^{182}\) The Vermont Constitution, according to the court, only required that the legislature provide same-sex couples with the same rights as married couples, but it did not necessarily require that same-sex couples be allowed to marry.\(^{183}\) Therefore, the court allowed the legislature to develop a remedy to fit the Vermont Constitution’s mandate.\(^{184}\) The Vermont legislature’s answer was the civil union.\(^{185}\)

After \textit{Goodridge}, the Massachusetts legislature attempted to follow the lead of Vermont and legalize civil unions.\(^{186}\) The legislature asked the Supreme Judicial Court whether a civil union would be a constitutional response to \textit{Goodridge}, and the court emphatically rejected the possibility of the legislature enacting civil unions.\(^{187}\) “Segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or ‘preserve’ what we stated in \textit{Goodridge} were the Commonwealth’s legitimate interests in procreation, child rearing, and the conservation of resources.”\(^{188}\) Rather, the court correctly noted that the only appropriate remedy

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\begin{itemize}
\item \(^{181}\) \textit{See} GERSTMANN, \textit{supra} note 3, at 5.
\item \(^{182}\) \textit{See} Baker, 744 A.2d at 867 (“We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law.”).
\item \(^{183}\) \textit{See id.} at 886.
\item \(^{184}\) \textit{See id.} at 886-88.
\item \(^{186}\) \textit{See Opinions of the Justices}, 802 N.E.2d at 566.
\item \(^{187}\) \textit{See id.} at 572.
\item \(^{188}\) \textit{See id.} at 569.
\end{itemize}
would be to provide same-sex couples with the ability to marry. As of May 2004, same-sex marriage is legal in Massachusetts.

The Supreme Judicial Court correctly held that civil unions are legally unacceptable, and on the federal level, the same is true because of the Court’s famous decision of *Brown v. Board of Education* where the Court struck down the notion that the doctrine of separate but equal was a valid constitutional response to race relations in the United States. The Court stated that to have the doctrine of separate but equal for educational facilities resulted in an inherent inequality for blacks. As a result of the separation, blacks were viewed as inferior by simply being separated and implicitly unworthy or unequal to whites, and they were, essentially, a group of second-class citizens. In *Brown*, the Court rightfully held that this doctrine could no longer be an adequate legislative choice.

Keeping students separate on account of race truly did render African-American children inferior. “Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.” African-American children were not equal because the facilities that were provided to them were well below the type of facilities that were provided to white children. But more importantly in the Court’s eyes was the fact that African-American children simply felt inferior because they were not allowed access to the same schools as whites. This is what truly made

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189 *See id.*
191 *See id.* at 495.
192 *See id.* at 494.
193 *Id.*
194 *See id.*
them inferior. Because they were kept separate, they viewed themselves as inferior and believed that society treated them as second-class citizens.

It is notable that the Court rejected the doctrine of separate but equal in light of the fact that education has never been considered a fundamental right. Nonetheless, the court stated that education was one of the most important functions that state and local governments serve. In fact, the Court considered education to be the “very foundation of good citizenship”, and it doubted whether a child could reasonably succeed in life without the proper education. Therefore, the Supreme Court felt that this was an issue that must be equal on all fronts for each child. If the Court held that separate but equal applies even though it was not dealing with a fundamental right, it surely must apply in the present situation involving same-sex marriage where a fundamental right is involved.

The same issues facing Brown are present in the same-sex marriage debate. The civil union analogy is not quite on point with the situation of children in schools because in Brown the African-American children were actually provided with lower standard facilities and educational materials. It would be much more difficult for the government to do the same with regards to marriage; it would be easier to determine if same-sex couples did not have the same legal rights as other couples. In that sense, then, the civil union is much closer to being constitutionally permissible than the doctrine of separate but equal that occurred in Brown. However, this discussion only relates to rights and privileges granted at the state level.

On the federal level, if a state legislature enacted a civil union law as opposed to providing same-sex couples access to marriage, the couples would still be denied certain federal

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196 See Brown, 347 U.S. at 493.
197 Id.
198 “Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” Id.
statutory rights. Under the Defense of Marriage Act, federal law defines marriage as a union between a man and a woman, and, as a result, same-sex couples joined in a civil union would not be entitled to the same federal benefits as heterosexual married couples even though they would receive equal rights on the state level. 199 The federal rights that would still be denied to same-sex couples include the benefits of joint filing for federal income tax purposes, the benefit of estate taxation, Social Security benefits, and many other federal requirements premised on the existence of a validly-recognized marriage. 200 Therefore, even if a state were to allow civil unions for same-sex couples, they would not truly be equal until federal law recognized same-sex marriage or the federal equivalent of the civil union. In this sense, this issue becomes closer to the Brown analogy because same-sex couples given civil union rights still would not be fully granted equal rights according to the law. 201

However, what makes the civil union issue even more closely analogous to Brown is that it will likely have the same effect of creating second-class or inferior citizens. 202 In declaring that a ban on same-sex marriage violated its state constitution, the Supreme Judicial Court of Massachusetts announced that such a ban was unconstitutional because “[t]he Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens”, implying that same-sex couples would indeed be considered second-class citizens.

200 Opinions of the Justices, 802 N.E.2d at 575 (Sosman, J.).
201 The author recognizes that this argument fails if the Supreme Court rules DOMA unconstitutional, but the analogy to Brown and its prohibition on creating second-class citizens, which was the significant holding from Brown and the most important analogy with regards to this issue, remains nonetheless.
202 To note, Justice Scalia, in Lawrence, states “[t]oday’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.” Lawrence, 539 U.S. at 602 (Scalia, J., dissenting). To the contrary, I believe that Justice Scalia’s dissent is perpetuating society’s mistaken belief that a homosexual is somehow less of a person simply because he/she is different from a heterosexual. Justice Scalia makes it sound as if homosexuals are somehow wrong to claim that they deserve the same rights that individuals, such as Justice Scalia himself, have.
if they were not allowed the right to marry. The court further re-emphasized this point in its opinion to the state senate on the issue of civil unions by stating “[b]ecause the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status.” The civil union, ultimately, “is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.”

By providing same-sex couples with their own legal relationship that is separate and distinct from that afforded opposite-sex couples, same-sex couples will undoubtedly feel inferior. In turn, society will also likely treat same-sex couples as less worthy than heterosexual couples because they cannot marry and cannot have the same access to marriage as every other couple. Society will, therefore, always be skeptical of same-sex couples and view them as somehow less than everyone else. “Clearly, society broadcasts a message that the marital relationship should be respected, so if same-sex marriage is allowed, the message would be that those relationships are worthy of respect.” Conversely, denying them marriage but relegating same-sex couples to a separate institution would render them inferior and inherently unequal to heterosexual married couples.

These are the reasons the Supreme Court used to ultimately strike down the doctrine of separate but equal in *Brown*. It was not so much that individuals could not have separate yet equal rights; the problem was the *effect* of separate but equal resulting in inferiority to the excluded group, who were segregated for the reason that society did not view them as being worthy of equal respect and deserving of truly equal rights. Therefore, civil unions as a response

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203 Goodridge, 798 N.E.2d at 948.
204 Opinions of the Justices, 802 N.E.2d at 569.
205 Id. at 570.
206 GERSTMANN, supra note 3, at 35.
to the same-sex marriage debate, while politically attractive, is nonetheless unconstitutional.
Even though same-sex couples would have the same legal rights as opposite-sex couples, at least on the state level, they will still be treated differently and viewed as less respected than other legally married couples. As the Court stated in *Brown*, the law will not tolerate this type of distinction. If the doctrine of separate but equal did not survive for race relations, it should not survive the same-sex marriage debate for the same reasons – it creates a class of individuals who are separate and who are viewed as inherently inferior. Civil unions do nothing more than stamp same-sex couples with the label of second-class citizens, which is constitutionally impermissible.

**CONCLUSION**

In the public debate, the legal aspect of the same-sex marriage dispute is often ignored. However, a constitutional inquiry into same-sex marriage will likely be dispositive on the issue of whether it will ever be legal in the United States. This issue presents intriguing constitutional questions, which are overlooked and unmentioned by the public. Whether a citizen agrees with homosexuals or the lifestyle they lead is irrelevant. One should at least recognize that our Constitution stands for certain principles, such as freedom and equality, and that these principles are unquestionably being denied to same-sex couples. What is important is that every citizen’s rights under the law and the Constitution be protected regardless of his or her sexual orientation. Above all, the Constitution protects the rights of every individual, not just the rights of heterosexuals.

This paper presents the constitutional case for same-sex marriage and explains why any ban on same-sex marriage is constitutionally inconsistent. Our society has declared that marriage is an institution of fundamental importance. Because marriage is important, it cannot be easily denied to a group of individuals. The author admits that the arguments made above are
not flawless, but few arguments are. There will always be people who believe that the homosexual lifestyle is a sin or simply not the “right” lifestyle, just as there are those who still oppose interracial marriage today despite the Court’s ruling in *Loving*. Yet unfortunately for those who oppose same-sex marriage, there is not a sound legal argument that can withstand constitutional scrutiny. The Constitution guarantees certain rights to individuals and groups in spite of the fact that many people are adverse to their position or because of social animosity toward the group. The Constitution protects and enforces minority views and positions where applicable. In this case, the Constitution confers rights to heterosexuals and homosexuals alike that preserve their right to marry. Under the Constitution, marriage cannot be defined as only a union between a man and a woman; it must include same-sex couples.

In responding to the potential failure of a constitutional amendment banning same-sex marriage, Senator Majority Leader Bill Frist (R-Tenn.) said, “Will activist judges not elected by the American people destroy the institution of marriage, or will the people protect marriage as the best way to raise children? My vote is with the people.” My vote, however, is with the Constitution.

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207 In November 2000, Alabama’s citizens voted to repeal the state’s ban on interracial marriage, the last state to have such a law. See Somini Sengupta, *November 5-11: Marry at Will*, N.Y. Times, Nov. 12, 2000, § 4, at 2. However, 40% of Alabama’s citizenry (approximately 526,000 people) voted to keep the interracial marriage ban. See id.