35 How. L.J. 173

Howard Law Journal
Winter, 1992

SAME-SEX MARRIAGE AND THE RIGHT TO PRIVACY: ABANDONING SCRIPTURAL, CANONICAL, AND NATURAL LAW BASED DEFINITIONS OF MARRIAGE

Andrew H. Friedman [a1]

The laws regarding human behavior in Western societies rest, to a large extent, upon the moral foundations created by scripture, medieval theological opinion, and canonical jurisprudence. In the United States this Christian world view is reflected in many areas of the law, but is particularly prominent in the laws that restrict sexual behavior and the laws that govern marriage. [1] Indeed, the fifty states ***174** have incorporated much of canon law wholecloth into their civil statutes and court decisions regarding sexual behavior and marriage. [2] Over time some of the vestiges of canon law have been purged from the secular law pertaining to sexual behavior, but the law relating to marriage has remained essentially unchanged from its roots in scripture, canon law and natural law. [3] Canonist teaching opposes premarital [4] and extramarital sexual relationships; [5] divorce; [6] remarriage following divorce; [7] adultery; [8] bigamy; [9] the use of contraception; [10] ***175** abortion; [11] oral and anal intercourse [12] (heterosexual or homosexual [13]); incest; [14] bestiality; [15] and masturbation. [16] Despite the Church's prohibition of these practices and their incorporation into early American law, [17] the legislatures and the courts have gradually eliminated many of these restrictions. Laws criminalizing adultery and fornication have existed since the creation of the thirteen colonies, but over time have been repealed or remained on the books unenforced. The United States Supreme Court has declared that individual privacy, [18] as embodied in the concept of liberty, is a right guaranteed by the Due Process Clause of the Fourteenth Amendment, which protects activities relating to contraception [19] and abortion. [20] While laws regarding oral and anal sex, [21] masturbation and ***176** homosexuality are still on the books, they are rarely enforced. Even ***177** though much of the canonically law inspired jurisprudence regulating sexual behavior receded from American civil and criminal jurisprudence, the core of medieval theological and canonical opinion regarding marriage remains in its pristine form. Indeed, the essential definition of “marriage” itself—defined by canon law as a monogamous union between one man and one woman—has remained beyond the scope of judicial [22] or legislative intervention. It has thus

provided the greatest hurdle for recognition of same-sex marriages. [23] It was from scripture, nature and natural law that canon law drew its meaning.

When modern courts decide cases involving sexual behavior and marriage, they are bound by a conceptual framework of scripture, canon law, "nature" and "natural law" so powerful that they are unable to break from it. This conceptual framework is not explicit; indeed, it is a subconscious reflection of religious values embedded in American culture. Nowhere is this conceptual framework more evident than in the case of same-sex marriage. History has shown that the courts refuse to consider whether marriage can be defined in any ***178** way other than that which was derived from natural law and set in stone by canonists and theologians.

This paper briefly examines the scriptural, natural law and canonical imperatives that established the origins for arguments against same-sex marriage which the courts have used to uphold state laws which prohibit same-sex marriages. This paper will then examine several state cases that consider the constitutionality of statutes that preclude same-sex marriages. All of these cases are implicitly and to some extent explicitly bound by a conceptual framework that precludes the use of arguments other than those based on scriptural, canonical or natural law to justify the constitutionality of these statutes. Thereafter, several cases—Griswold v. Connecticut, [24] Loving v. Virginia, [25] and Zablocki v. Redhail [26] —are considered to the extent that they lay the foundation for and establish the proposition that an individual's right to marry is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. [27] This paper then argues that the reasoning of Griswold v. Connecticut, [28] ***179** Loving v. Virginia, and Zablocki v. Redhail compels the application of strict scrutiny analysis to state restrictions on marriage. An application of strict scrutiny analysis not only compels the abandonment of canonical or natural law based justifications for prohibitions of same-sex marriage, it also requires that restrictions on same-sex marriage be struck down as unconstitutional because without the natural law, scriptural, or canonical foundations, the prohibitions against same-sex marriage do not serve a compelling state interest. Bowers v. Hardwick [29] is next examined insofar as it poses one last hurdle to arguments that the fundamental right to marriage encompasses same-sex marriages. Turner v. Safley [30] is then considered insofar as it established alternative criteria for defining the importance of marriage and the essential elements of marriage. Finally, this paper argues that a broader conception of "marriage" is needed and proposes a redefinition of "marriage" along lines similar to that in Turner v. Safley.

I. BACKGROUND

A. Natural Law, Scripture and Canonical Law: The Definition of Marriage and the Status of Homosexuals

The Old Testament provides the structure basic to any understanding of the development of Christian [31] views on sex and marriage. [32] ***180** The Old Testament teaches that "[m]arriage is good, and is the ordinary state in which man and woman are sexually related." [33] It places great emphasis on the importance of procreation [34] and also teaches that homosexuality is immoral. [35] These three values laid the foundation for Christianity. In addition to scripture, Christian and canonical theologians also relied on "nature" and "natural law" which were believed to provide verifiable answers to questions concerning sex and marriage. [36]

The vehicle for examining the Christian view of marriage and sex will primarily be the canonists, theologians and philosophers of the Middle Ages because these individuals took the somewhat inchoate views found in the Old and New Testaments and in nature or natural law and gave them concrete form. Subsequently, these individuals' concepts of marriage and beliefs about homosexuality heavily influenced Anglo-American law.

***181** 1. St. Augustine

Beginning early in the Fifth Century, Christianity began to develop a systematic theology to explain and justify its religious beliefs. [37] Among the many issues confronting the early Church Fathers was the role that sex was to play. Indeed, sex became a pivotal moral issue in Patristic thought and remains so in Catholic thought to this day. [38] At the heart of Patristic writing was an aversion to sex. [39] Patristic writers in general believed that the best way of life was that of perfect continence. [40] Indeed, they loathed sex and saw it as something that could interfere with the religious way of life. Thus, the Church Fathers viewed marriage suspiciously as a type of "indulgence" for those not morally strong enough to abstain. [41] These Patristic writers believed that "it was never good for people to have sexual relations; in marriage the evil might be mitigated, even forgiven—but only under certain circumstances." [42]

St. Augustine of Hippo, the most important of the Patristic authorities on sexual matters, reflected these prevalent views, yet adopted a slightly more positive attitude toward marriage. [43] Augustine's views on sex developed from his struggles as an adherent of the Manichaean religion and his subsequent conversion to Christianity. [44] Manichaeanism was a new Christian group which began around 225 A.D. in Babylon and which was based upon the teachings of the self-proclaimed prophet Mani. [45] The Manichees renounced marriage and procreation because they saw the universe as a struggle between light and dark. [46] They believed that in the beginning there was a ***182** kingdom of light and that this kingdom was invaded by darkness. Darkness vanquished and imprisoned the light. The Manichees thought that light was imprisoned inside of man and earth. In

order for mankind to reach salvation, man had to release the light. The light could only be released if man ate bread, vegetables, or fruit containing seeds. Procreation was to be completely avoided because it trapped light. Although the Manichees saw procreation as anathema, they taught that sex for pleasure was perfectly acceptable. [47]

Augustine was also influenced by Gnostic thought and the Stoic tradition. Gnostic belief was similar to Manichaean thought in that both groups were opposed to procreation. The Gnostic linked mankind's fall from grace with sexual intercourse. Most Gnostic believed that Adam and Eve had been innocent of sexual desires before they ate from the tree of knowledge. As soon as they introduced sex into the world, death followed. [48] The Gnostic felt that "[s]ex was paradoxically the key to death, and asexuality was the key to life." [49] The Gnostic drew biblical support from the fifth gospel, The Gospel According to the Egyptians. Specifically, a dialogue between Jesus and Salome demonstrates the evils of sex. In that dialogue Salome asks "How long shall men die?" Jesus answers, "As long as you women bear children." [50] The Gnostic felt that "[o]nly a cessation of sexual activity in the world would bring about life without death; thus so long as humans continue to marry and copulate, [the] species will be imprisoned in evil and sick unto death." [51]

The Stoic tradition also provides the backdrop for understanding relevant forces that influenced Augustine's views on sex. The Stoics had a profound distrust of sexual pleasure. [52] Seeing the surrender to sensuality as blocking out reason, the Stoics urged abstinence. The Stoics also recognized, however, that individuals could never wholly overcome sexual desire and thus urged that sex only occur in marriage and only to beget children. [53]

***183** During his eleven years as a Manichee, Augustine was unable to advance into the higher Manichaean orders partially because he was unable to control his sexual urges. [54] While a Manichee, Augustine had a mistress. He later decided that the only way he could control his sexual desires was through marriage. Thus, he ended the relationship with his mistress and became engaged to a young girl, but while awaiting the marriage he took yet another mistress. It was at this time that Augustine converted to Christianity and felt the call to celibacy. [55] Once able to accept continence, Augustine found sexual desire and intercourse to be offensive because they interfered with man's relationship with God. Augustine felt that intercourse turned man into "all flesh and brought the masculine mind down from the heights." [56] He also strongly believed that sex could simply overwhelm reason and free will. [57]

While Augustine saw virginity and celibacy as the highest state, he recognized that marriage was acceptable for those who could not abstain. However, sex within marriage must be kept to the minimum necessary for achieving procreation. Augustine believed that sex for any reason other

than procreation was a sin. Indeed, any type of sex carried on in a way to avoid procreation was a grave sin. [58] His innate hostility toward sex and his belief that sex was only justified in the context of marriage for the purpose of procreation was the unquestioned starting point from which later Church Fathers proceeded.

2. Gratian

Around the year 1140 C.E., Gratian, a canonical jurist, synthesized divergent canon law authorities into a textbook on canon law called A Harmony of Conflicting Canons (Concordia dicordantium canonum). [59] Gratian's Decretum became the foundation of the canon law of the Roman Catholic Church. [60] Indeed, the Decretum was ***184** the first comprehensive and systematic legal treatise in the history of the West, and perhaps in the history of the world. [61] Gratian was influenced by Greek, especially Stoic, philosophy, as well as the Roman law of Justinian. [62] In addition, he was also influenced by papal and royal ordinances, biblical, liturgical, patristic, and penitential texts. [63] Gratian subordinated positive law to natural law. [64] Along with the Decretum of Gregory IX, [65] Gratian's Decretal remained the "basic corpus of the canon law of the Roman Catholic Church until the adoption of the Code of Canon Law of 1918." [66]

Gratian's approach to the conceptualization of marriage is representative of the way in which nature was used by canonists to justify their view of marriage. By "nature," Gratian and other canonists and theologians "meant a theology discovered in the biological act of sexual union or in the biological characteristics of the genitals." [67] Nature revealed that "[t]he outcome of [a] heterosexual union was ... the conception of a child: offspring were found to be the purpose of the union; what prevented offspring was perceived to be unnatural." [68] Gratian looked further and saw that marriage was a joining of man and woman in a monogamous relationship. [69] This proposition, Gratian believed, was part of the natural law, ordained by God, and found both in divine revelation and in human reason and conscience. [70] Gratian also believed that sex, which should only take place in marriage, [71] should not be unnatural. [72] Unnatural sex, anal and oral intercourse, were wrong because they were an inappropriate use of the sex organs, thus running counter to natural law. [73] The canon law of Gratian's Decretum played a major role in the ***185** development of Western Law. [74]

3. Aquinas

The importance nature played in prescribing the rules of marital and sexual behavior is also evident in the writings of St. Thomas Aquinas. [75] Aquinas' Summa Theologian established "nature" as the

touchstone of Roman Catholic sexual ethics.[76] For Aquinas, the "vice against nature" was any type of sexual conduct in which the "natural way of lying together is not kept." Aquinas believed that the premise upon which natural law was founded was that everything is ordered to a specific end. If the end was good then that which was well adapted to that end was good. Because the preservation of the individual's health was good, the preservation of the race was an even greater good. Just as food was necessary to preserve the body, sex was necessary to preserve the race. Thus, Aquinas believed that sexual intercourse, adapted to the purpose of propagation, was good and natural. However, other sex acts not adapted to the generative act were unnatural vices. The generative act was vaginal intercourse. The discharge of semen not calculated to produce offspring was an unnatural vice. Aquinas broke these unnatural vices down into four essential categories: (1) self-abuse (masturbation); (2) bestiality (intercourse with another species); (3) homosexuality; and (4) any sexual act in which the natural style is not observed.[77] All of the unnatural vices had one common theme—they were not acts from which generation could follow. Aquinas did not classify sex between those incapable of reproduction (e.g., infertile women, aged men, pregnant wife, etc.) as unnatural because semen could be deposited in the vagina during intercourse. Sterility is merely incidental to the act. It was merely per accidens that a generation could not follow from the emission of the seed. By contrast, in the acts classified as ***186** unnatural, insemination was impossible as a result of the location at which the semen was deposited.

Aquinas relied on animal behavior as the final arbiter of human sexuality.[78] He examined human activities to see if they could be found in nature. If animals engaged in the activity, then it was natural and permissible for humans to engage in. If the animals did not do it, then the activity was unnatural and should not be pursued by humans. In making this comparison, Aquinas and others had to selectively choose from the animal kingdom to avoid having the very propositions for which they argued sabotaged by inconsistent or contradictory examples.[79] Despite the fact that nature could be used to justify every, or no rule regarding sexual behavior,[80] reliance on nature proved to be an unbeatable argument. Aquinas was the key formulator of the Western concepts of "unnatural sexuality."[81]

This reliance on nature and what is "natural" led Gratian, Aquinas, and others to view not only the act of homosexuality but also the homosexual individuals as unnatural. Support for the condemnation of homosexuality was found not only in nature but also in the scriptures.[82] The Old Testament states that "[y]ou shall not lie ***187** with a man as with a woman: that is an abomination."[83] And the New Testament strongly implies that women who "have exchanged natural intercourse for unnatural" and men who "burn with lust for one another" are "worthy of death."[84] In at least two places, the New Testament suggests that homosexuals will not go to heaven.[85] Aside from explicit condemnation of homosexuals and admonitions to avoid

homosexuality, the scriptures are full of basic paradigms in which marriage is seen as the union of man and woman from which homosexuals are not only excluded but are stigmatized. [86]

The natural law, scriptural, or canonical view of the world held that procreation was special; that sexual activity in which semen could not be deposited into the vagina was wrong; and that homosexuality was evil. Because the Anglo-American legal tradition took root from this religious soil, [87] it is not surprising that laws and court decisions that sprung forth from this soil insulated the definition of marriage from change and were inhospitable, to say the least, to homosexuals. With this tradition in mind, it is not surprising that laws forbidding same-sex marriages have proved resilient in the face of various constitutional attacks.

B. Natural Law and Court Decisions Concerning Same-Sex Marriage

No state or federal statute has recognized the right of individuals of the same sex to marry. [88] Indeed, no state or federal court has ***188** ruled that individuals are entitled to same-sex marriage. [89] Implicit in court decisions regarding same-sex marriage are the same scriptural and natural law based rationales propounded by the canonists. The courts do not typically acknowledge the scriptural, natural law or canonical-based heritage of their arguments. The judges may not even know of this heritage, [90] but their reasoning is subconsciously affected by the scriptural, natural law and canonical precursors to their modern sounding arguments. [91]

The courts typically begin and, many times, end their reasoning by arguing that individuals of the same sex cannot enter marriage because the definition of marriage itself—one man, one woman—precludes such a relationship. [92] If the courts proceed to provide ***189** more substantive reasons why individuals of the same sex cannot marry, they tend to sound remarkably similar to Catholic theologians and canonists. This can be seen in these courts' reliance on procreation as a justification for marriage. Without the ability to reproduce, the courts fail to see how a relationship can be classified as marriage. [93]

Jones v. Hallahan [94] exemplifies how courts have merely relied on the definitional argument to reject demands of recognition for same-sex marriage. Two cases, Baker v. Nelson [95] and Singer v. Hara, [96] exemplify the connection between court decisions concerning same-sex marriage and scripture, natural law and canon law.

In Jones, two women sued to compel a county clerk to issue them a marriage license. The women claimed that the refusal to issue the license was unconstitutional. The Kentucky Court of Appeals looked to the appropriate Kentucky statutes that dealt with marriage ***190** to see if it could determine a definition of marriage. [97] Upon concluding that the statutes did not specifically

preclude same-sex marriage nor specifically authorize the issuance of a license to individuals of the same sex, the court looked to see if the statutes provided a definition of marriage. After determining that no definition of marriage was provided in the statutes, the Court turned to common usage. The court examined three dictionaries and concluded that marriage was a custom some time before the state even issued licenses. [98] In all that time, "marriage has always been considered as the union of a man and a woman" and the women were prevented from marrying not by the statutes, "but rather by their own incapability of entering into a marriage as that term is defined." [99]

Richard John Baker and James Michael McConnell, both adult males, applied for a marriage license in a Minnesota county and were refused for the sole reason that they were of the same sex. [100] They sued, arguing that the Minnesota statute governing marriage [101] did not preclude same-sex marriages and that if it did, it was a violation of the Ninth Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. [102] In a brief opinion, the Minnesota Supreme Court ruled in Baker that the Minnesota statute relied on the common definition of marriage: a "union between persons of the opposite sex." [103] The court then quickly dispatched the constitutional arguments; essentially basing its decision on two facts: (1) marriage as a union between man and woman "uniquely involves the procreation and rearing of children within a family;" [104] and (2) marriage as a union between man and woman "is as old as the book of Genesis." [105] The court supported its decision by selectively quoting passages from Griswold v. Connecticut and Skinner v. Oklahoma that dealt with the conventional structure (man - woman) and purpose (procreation) of the family in an attempt to ***191** show that these cases were only meant to protect rights emanating from the "traditional" family.

Similarly, in Singer v. Hara, [106] the court rejected a constitutional challenge to an interpretation of a state law [107] that forbid same-sex marriages. Appellants Singer and Barwick, both adult males, applied for a marriage license and were refused. They sued to compel the issuance of a marriage license arguing that the Washington marriage statute did not preclude recognition of same-sex marriages and that if it did it violated the Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. [108] The court rejected the appellants' arguments stating that the appellants "[were] being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex" [109] and that "same-sex relationships are [thus] outside the proper definition of marriage." [110] Aside from the definitional approach to marriage, the court seemed to rely on what it perceived to be society's rationale for the existence of the institution of marriage explaining that "marriage [is] the appropriate and desirable forum for procreation and the rearing of children." [111] The court underscored this point when it stated: "the refusal of the state to authorize same-sex marriage results from [the] impossibility of reproduction." [112] The court's approach to allowing

sterile individuals to marry is strikingly similar to the way in which natural law philosophers, theologians and canonists dealt with the problem. [113] The court distinguished an infertile married couple from a same-sex couple by saying that the same-sex couple does not even offer "the possibility of the birth of children by their union." [114]

An analogous case, although one not concerning the legality of ***192** a same-sex marriage per se, is Braschi v. Stahl Assocs. Co. [115] This case involved a dispute over occupancy rights to a rent controlled apartment in New York. The plaintiff, a male, was seeking to prevent his eviction from the apartment of his male lover. His lover, a rent control tenant, had died. [116] The plaintiff relied on a New York City rent and eviction regulation which provides that upon the death of a rent control tenant the landlord may not dispossess "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant." The case hinged on the determination of what the word "family" meant, as used in the rent and eviction regulation. [117]

The Supreme Court of New York issued a preliminary injunction in favor of the plaintiff concluding that the plaintiff was a member of the deceased tenant's "family." [118] The court based its decision on a finding that the long term interdependent nature of the ten year relationship between the plaintiff and the decedent "fulfills any definitional criteria of the term family." However, the appellate division concluded that the regulation only encompassed "family member[s] within traditional, legally recognized familial relationships" and reversed the lower court's decision. [119]

In a plurality opinion written by Justice Vito Titone, the New York Court of Appeals reversed. The court rejected both the appellate division's traditional, narrow definition of the term "family member" and the defendant's argument that the term "family member" should be interpreted to mean "relationships of blood, consanguinity and adoption." [120] Justice Titone held that the protections against sudden eviction should not rest on "fictitious legal distinctions" nor "genetic history." [121] Instead, the protection should find its "foundation in the reality of family life." [122] Justice Titone described the relationship between two adult lifetime partners, whose involvement was long-term and characterized by an emotional and financial ***193** commitment and interdependence, as being more realistic and certainly as valid as more traditional definitions of family. The court suggested that the existence of a "family" can be determined from an individualized examination of the following factors: (1) the exclusivity and the longevity of the relationship; (2) the level of emotional and financial commitment; (3) the manner in which the parties have conducted their everyday lives and held themselves out to society; and (4) the reliance placed upon one another for daily family services. [123] Braschi is an example of how courts and

legislatures can reject traditional definitions, based upon purely religious rationales, and adopt a more realistic and functional definition that reflects the reality of family life.

C. The Right to Privacy and Marriage as a Fundamental Right

Prior to the 1960s it would not have been possible to seriously contest the right of legislatures and courts to preclude same-sex marriage, or for that matter contest nearly any state restriction on marriage, for the United States Supreme Court had never clearly articulated that marriage was a fundamental right per se. The Court had, however, made clear that marriage was of vital importance to life. [124] Marriage, in fact, was heavily regulated by the states and the Supreme Court had recognized and approved of the states' use of their police power to regulate marriage as early as 1878. [125] The harbinger ***194** of the circumscription of the states' near plenary authority over marriage was heard in the dissenting opinion of Justice Harlan in Poe v. Ullman [126] in 1961 in which the Justice said that laws prohibiting the use of contraceptive devices and the giving of medical advice on their use, as applied to married women, was unconstitutional. Several years later, the Court would expand upon Justice Harlan's dissent and begin to more fully develop the right to privacy that would secure the fundamental status of marriage.

In 1965, in Griswold v. Connecticut, [127] the Supreme Court began to explicitly state what it had implied for nearly a century: that marriage was a fundamental right protected by the Constitution. In Griswold, the Court considered the constitutionality of a Connecticut statute [128] prohibiting the use of contraceptives by married persons. In holding that the statute was unconstitutional the Court reasoned that there was a “zone of privacy,” created by several specific guarantees in the Bill of Rights, [129] which protects individuals from invasion by the government. In writing the opinion for the majority, Justice Douglas explained:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. [130]

Justice Goldberg, concurring, and relying heavily upon Justice Harlan's dissent in Poe, agreed, writing that “the right of privacy is a fundamental personal right” [131] and that “[t]he entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees ***195** demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.” [132] The Court thus recognized that marriage is

part of the right to privacy guaranteed by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

In the 1967 case of Loving v. Virginia [133] the Supreme Court considered the constitutionality of a Virginia statute which automatically voided all marriages between "a white person and a colored person." [134] In writing the majority opinion, Chief Justice Warren recognized that marriage was a "social relation" subject to the state's police power. However, he circumscribed that power by declaring that the state's power to regulate marriage was limited by the Fourteenth Amendment. The Court then held that the Virginia anti-miscegenation statute was unconstitutional not only because it violated the Equal Protection Clause of the Fourteenth Amendment, but also because it violated the Due Process Clause of the Fourteenth Amendment. The Court stated that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." [135] The Court then recognized the fundamental nature of the right to marriage, stating that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." [136] The Court concluded by holding that "this fundamental freedom" could not be abridged on a basis of racial classifications without violating the Fourteenth Amendment's guarantee of liberty and without due process of law. The Court implicitly recognized that the right to marry cannot be limited to the mere opportunity to marry, but must extend to protect an individual's choice of marriage partner. [137]

In 1973, the Wisconsin state legislature enacted a statute [138] that precluded divorced Wisconsin residents with minor children not ***196** in their custody, and whom they were obligated to support, from marrying without first obtaining a court order granting permission to marry. Appellee Redhail, unable to marry because of his failure to comply with the statute, sued to have the statute declared unconstitutional as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In 1978, the Supreme Court in Zablocki v. Redhail, [139] held the Wisconsin statute unconstitutional in that it violated the Equal Protection Clause. In so holding, the plurality reaffirmed and squarely established the notion that marriage is a fundamental right. The Court stated that previous cases had established that "the right to marry is of fundamental importance for all individuals" [140] and that it was "reaffirming the fundamental character of the right to marry." [141]

In Cleveland Bd. of Educ. v. LaFleur, [142] the Supreme Court explicitly recognized that an individual's decision of whom to marry was a fundamental right by finding that the 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.

II. ANALYSIS

A. The Fundamental Right to Marry and Prohibitions on Same-Sex Marriage

1. Fundamental Rights and Strict Scrutiny Analysis

The Supreme Court has held that whenever a statute significantly interferes with the exercise of a fundamental right it will be subjected to heightened judicial review. To pass constitutional muster, the state must show that the statute has more than a rational relationship to the effectuation of a proper state purpose—the regulatory scheme must be supported by sufficiently important, "compelling" state interests and must be closely tailored to effectuate only those interests. Even if the interests of the government are legitimate and substantial, "[the] purpose cannot be pursued by means that ***197** broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." [143] However, in recognizing that marriage is a fundamental right, the Court also noted that marriage has always been regulated by the state and that this regulation is consistent with the fundamental right to marry. [144] The Court continued to allow the state to place some restrictions on the right to marry. The Court has, however, drawn some distinctions between those restrictions on marriage compatible with the fundamental right to marry and those restrictions that were not. [145]

2. Constitutionally Approved Limits on the Fundamental Right to Marry

In holding that the right to marry is a fundamental right, the Supreme Court did not mean to suggest that all state statutes indirectly affecting concomitant rights or the preconditions for marriage would be subjected to strict scrutiny analysis. [146] Indeed, in Turner v. Safley [147] the Court stated that the fundamental right of prisoners to marry was subject to substantial state restrictions. [148] In declaring marriage a fundamental right, the Court was protecting against unreasonable state efforts aimed at abridging the choice to get married. The Court stated in Zablocki v. Redhail that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may be legitimately imposed." [149] The Court meant to prevent direct and substantial interference with an individual's decision to marry. [150] Zablocki suggested this proposition by ***198** distinguishing Zablocki from Califano v. Jobst. [151] Jobst involved several sections of the Social Security Act that provided for the termination of benefits to dependent children upon marriage to a person not entitled to benefits under the Social Security Act. The Court upheld the constitutionality of the sections at issue over a due process challenge that the fundamental right to marry was impermissibly burdened. The Court stated that the "rule is not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because

some who did marry were burdened thereby." [152] The Zablocki Court distinguished Jobst on the basis of the directness and substantiality of the interference with the right to marry. The Court stated that the rule at issue in Jobst "was not 'an attempt to interfere with the individual's freedom to make a decision as important as marriage,' " [153] that the "Social Security provisions placed no direct legal obstacle in the path of persons desiring to get married," and that "there was no evidence that the [Social Security] laws significantly discouraged, let alone made 'practically impossible,' any marriages." [154]

An analysis of Zablocki and Jobst reveals the Court's intention to apply strict scrutiny analysis only upon a showing that a state regulation is a direct and substantial interference with the right to ***199** marry. [155] Indirect interferences with the right to marry are examined solely under the rational basis test. [156]

3. Prohibitions on Same-Sex Marriage are Direct and Substantial Restrictions on the Right to Marry and Thus Must be Analyzed Under the Strict Scrutiny Standard

Legal prohibitions against same-sex marriages are a direct and substantial interference with an individual's decision to marry. These restrictions do not purport to merely limit same-sex marriages to individuals who can meet certain requirements, but rather, wholly proscribe the ability of individuals to enter marriage with a partner of their choice. Indeed, the statutes operate to deprive individuals of the choice of marrying one half of the total population of eligible individuals. These statutes are similar to the statutes at issue in Loving v. Virginia which prevented individuals of one race from marrying individuals of another race. Just as Loving established that the freedom to marry a person of another race resided with the individual and not the state, so too should courts rule that the decision to marry a person of the same sex resides with the individual and not the state.

By examining the statues at issue in Zablocki and Jobst and then categorizing the statutes prohibiting same-sex marriages as being more similar to that in Zablocki or more similar to that in Jobst, it is possible to see whether the statues are a "direct" or "substantial" restriction on the right to marry. The alleged burden on marriage in Jobst was a regulation that terminated the benefits to dependent children upon marriage to a person not entitled to benefits under the Social Security Act. This regulation did not wholly proscribe ***200** marriage for any individual; in fact it did not even prevent the named plaintiff from getting married. [157] Indeed, the named plaintiff suffered only a de minimis burden because of his choice to get married—he and his wife received only $20.00 a month less than he would have without the so-called restriction on marriage. [158] The Court made clear that a rule which merely deters some people from getting married or that burdens others who choose to get married does not necessarily violate the fundamental right to marry. [159] In upholding the constitutionality of the rule, the Court explained that it "[could not] be criticized as merely an unthinking response to stereotyped generalizations about a traditionally

disadvantaged group, or as an attempt to interfere with the individual's freedom to make a decision as important as marriage." [160] The Court further explained that Congress, in adopting the rule, "was [not] motivated by antagonism toward any class of marriages...." [161] The prohibition against same-sex marriages can thus be distinguished from constitutionally acceptable restrictions on marriage on two grounds. First, the restriction placed on same-sex marriages is not a mere hurdle to some and a burden to others—rather it is a complete and utter prohibition. Second, the prohibition against same-sex marriages was an "unthinking response to stereotyped generalizations about a traditionally disadvantaged group" and was certainly "motivated by antagonism toward [a] class of marriage[s]." [162] In sum, the prohibition against same-sex marriages is thus not similar to the constitutionally acceptable regulation in Jobst.

The regulation in Zablocki prevented Wisconsin citizens with minor children not in their custody, and who were under an obligation to support the minor children, from marrying without a court order. Essentially, under this regulation any individual could marry by meeting his/her child support obligations. This regulation did not completely ban a class of people from marrying the person of their ***201** choice, for it provided a way to meet the regulation requirements, namely, pay child support. [163] Yet the Supreme Court ruled that this regulation was a direct and substantial burden on the right to marry. This restriction on same-sex marriages not only falls on the same side of the fence as Zablocki, but is a much more direct and substantial interference with the right to marry than the regulation at issue in Zablocki. Again, the prohibition against same-sex marriages is a complete prohibition on the individual to marry the person of his/her choice. There is absolutely nothing that the individual can do to marry the person of his or her choice. Indeed, the restriction precludes the individual from even considering one half the world's population as potential marriage partners. On the spectrum between Jobst and Zablocki, the prohibition against same-sex marriages clearly falls on the Zablocki side of the fence—a "direct and substantial" restriction on the right to marry.

Boddie v. Connecticut [164] also supports the proposition that the prohibition on same-sex marriages is a "direct and substantial" interference with the right to marry. Boddie is similar to Zablocki in that the Court considered the constitutionality of a statute requiring payments prior to divorce rather than marriage. The average cost to an individual seeking a divorce was $60.00. [165] The Court concluded that because of the importance of marriage in society's "hierarchy of values," and the state monopolization of means for legally dissolving a marriage, due process prohibited "a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." [166] The complete preclusion of all people, under any and all conditions, from the choice to enter a same-sex marriage is a much more restrictive limit on the right to marry than the unconstitutional statute in Boddie.

***202** The statute in Jobst was not intended to, and did not directly impede an individual's decision to marry. In contrast, the statutes in Zablocki and Boddie absolutely prohibited individuals who did not have the financial means from either remarrying or obtaining divorce. To a much greater extent than Zablocki and Boddie, the prohibitions against same-sex marriages are absolute barriers to an individual's choice to marry. Because statutes forbidding same-sex marriage make certain choices as to marital partners illegal, precedent establishes that the prohibition of same-sex marriages is a "direct," "substantial" and intentional interference with the fundamental right to marriage. Thus, the application of strict scrutiny analysis to the prohibition of same-sex marriage is appropriate.

4. Prohibitions on Same-Sex Marriage Cannot Withstand Strict Scrutiny Analysis

Once it has been established that prohibitions on same-sex marriages are "direct" and "substantial" interferences with the fundamental right to marry, the Court should apply strict scrutiny analysis to the interests the state is seeking to protect by refusing to allow individuals to enter into same-sex marriages. In order to justify the prohibition on same-sex marriages the states must show that the interests they are trying to protect are "compelling" state interests and that the restrictions on same-sex marriages are closely tailored to effectuate only those interests. These state interests cannot be justified by non-secular rationale found in scripture, canon law, or natural law.[167] Thus far, the courts that have considered the constitutionality of same-sex marriages have recognized only two state interests that might justify the ban on same-sex marriage: the state's interest in procreation[168] and the state's interest in the care of children.[169] In ***203** addition to interests mentioned by the courts, many other interests have been put forth by commentators to support the constitutionality of prohibitions on same-sex marriage. Some of these interests include: discouraging illegal homosexual activity;[170] reducing the incidence of homosexual activity;[171] promoting the dominant culture's moral norms;[172] supporting the traditional family;[173] preventing social ostracism;[174] and history and tradition.[175] Because courts have already recognized arguments that the state's interests in "procreation" and "caring for children" justify prohibitions against same-sex ***204** marriage, "procreation" and "caring for children" will be analyzed. Because the belief that homosexuality is "against nature" and is immoral underlies and perhaps subconsciously drives the opinions of the courts, the state's interest in prohibiting homosexuality will also be considered. These three "interests" are the foundations upon which the ban on same-sex marriages is justified; therefore, only these interests will be considered in connection with strict scrutiny analysis. The other previously enumerated interests implicitly rest upon this foundation, such that if the foundation crumbles then the other possible interests will not be enough to save the ban on same-sex marriages.[176]

a. The State's Interest in Procreation: "Increase and Multiply"

Beginning as early as the Old Testament, humans have believed they have an obligation to procreate. Whether this belief came from passages in Genesis, where God commanded that humans should "increase and multiply; fill the earth and subdue it," [177] or from the teachings of scholars like St. Augustine, who taught that only heterosexual intercourse for the purpose of procreation was moral, it has been adopted by the state as an important tenet. Presumably procreation is deemed to be so important because it is inevitably necessary for the survival of the human race and of the state itself. In Skinner v. Oklahoma, [178] the Supreme Court recognized that procreation was important to the state for this very reason, and found that the state therefore had an interest in encouraging reproduction. [179] Putting biblical and theological imperatives aside, it is necessary to critically analyze the proposition that procreation is an important enough state interest to justify the prohibitions against same-sex marriages. Assuming procreation is a compelling state interest, it is then necessary to decide whether prohibitions against same-sex marriage are the least restrictive alternative to accomplishing that objective.

***205** There are at least two responses to the assertion that "procreation" is a compelling state interest justifying the prohibition of same-sex marriage: (1) the country has evolved so far from its creation that procreation is not as essential to its successful survival as it once was; and (2) the procreation argument is merely pretextual.

Traditionally, the argument that procreation was necessary for the survival of the race and the country was a persuasive one. The cry of "go west" was heard frequently in the first two-thirds of the nation's history. This exhortation not only indicated that fortunes could be made in the west, but also that land was laying unclaimed and fallow and that the country would not be able to grow and prosper without greater use of its natural resources. The country also needed more people to become productive and thus, effectively compete on an international scale. Families often needed to be large to survive [180] and the high infant mortality rate caused families to have many children just to ensure the survival of some. The state also needed to have vast multitudes of bodies available in case of war.

Much has changed in the last few decades, primarily due to the rapid advances in technology. No longer can underpopulation be seen as a problem for this country or the world. Overpopulation is a much more real threat. Similarly, there is no longer too much land, but rather too little. The country has grown tremendously from the early days and today competes on an international scale. It is arguable that the birth of more people will not make the country more competitive, but will actually drain its resources. No longer must families be large to survive, indeed economic realities make it more likely that smaller families can survive better than large families. The infant mortality rates have declined. In the age of atomic weapons and mechanized delivery systems, it is no longer as necessary that a huge pool of bodies stand ready for war. The future of the country no longer lies in the quantity of its citizens, but rather in the quality of those citizens.

The pretextual nature of the state's "procreation" argument can be seen by examining other laws relating to marriage and reproduction. The Supreme Court has held that individuals have a constitutionally ***206** protected right to reproductive autonomy.[181] This means, at least, that individuals have the right to choose whether or not they want to have children.[182] Thus, the Court has declared laws prohibiting the use of contraceptives,[183] preventing abortions,[184] and causing involuntary sterilization[185] to be unconstitutional. Griswold and its progeny have clearly established the right of married couples to prevent conception through the use of contraceptives. Roe v. Wade has established the right of pregnant women to abort their fetuses at any time prior to the end of the first trimester. These cases establish the right of individuals, not the state, to regulate reproduction. If individuals have the constitutional right to decide whether to have children or not, it is difficult to see how the state can have a compelling interest in procreation.

Even assuming that the state laws prohibiting same-sex marriages are truly designed to facilitate the compelling state interest in procreation, the laws must be struck down as unconstitutional for three reasons: (1) they are vastly over-inclusive; (2) they are vastly under-inclusive; and (3) they are not narrowly tailored to effectuate the state's interest in procreation.

State laws prohibiting same-sex marriage are over-inclusive because the laws do not contain exceptions for those individuals who are physically incapable of producing offspring. State laws forbidding same-sex marriages are also under-inclusive because they do not preclude heterosexual couples who cannot or do not want to have ***207** children from getting married.[186] Sterile men and women are allowed to marry despite the fact that they can not procreate.[187] Indeed, in some states transsexuals who are physically incapable of becoming pregnant or inseminating another are allowed to marry.[188] Men and women may marry even if they have no intention of having children. "If underpopulation were a genuine state concern, compelling enough to justify the denial of same-sex marriage licenses, it seems likely that the state would have a plethora of like-motivated laws governing heterosexual unions,"[189] but the states do not.[190] Furthermore, state law prohibitions against same-sex marriage may well lead many same-sex couples to decide not to raise children precisely because their relationship is not sanctioned by the state—thus discouraging procreation.[191] If the states were merely concerned with procreation, they would allow sterile or menopausal lesbians and sterile homosexual men to enter same-sex marriages. Indeed, allowing individuals to enter same-sex marriages who plan to use artificial means of insemination or surrogate motherhood to raise a family would seem to be required as well.[192] The "procreation" argument ignores the fact that homosexual couples are having and raising children within their families.[193]

***208** State laws prohibiting same-sex marriage are also unconstitutional because they are not the least restrictive means of accomplishing the states' objective of procreation. The state could attain its interest in reproduction in a manner much less intrusive than preventing individuals of the same-sex from marrying. An alternative less intrusive means would be to simply pay individuals to have children or to create tax or other incentives for having children.

The state's interest in encouraging procreation is not compelling.[194] And even if it were, prohibitions on same-sex marriages must fail because the state has not used the least restrictive means to achieve its interest.

b. The States' Interest in the Care of Children

In Lassiter v. Department of Social Servs.[195] and Santosky v. Kramer,[196] the Supreme Court recognized that the state has a legitimate interest in protecting children from harm.[197] There are apparently three possible sources of harm to children from same-sex marriages: (1) physical and sexual abuse; (2) psychological harm; and (3) indoctrination of gay sexual practices.

1. Physical and Sexual Abuse

The state has an ongoing interest in preventing the physical and sexual abuse of children. However, the state cannot justify its prohibition of same-sex marriages on this ground for several reasons. As a ***209** means of protecting children, prohibitions on same-sex marriages are not only over-inclusive and not drawn in the least restrictive manner, but more importantly, they also are based on insupportable suppositions. The laws are overbroad because they prohibit individuals who either cannot or do not want to have children from entering into same-sex marriage. State prohibitions on same-sex marriage are not the least restrictive means of effectuating the state's interest in protecting children. The least restrictive manner of protecting children from sexual and physical abuse would not be outlawing certain types of marriages, but rather creating and enforcing laws directly prohibiting the sexual and physical abuse of children. Thus, to the extent that the state has an interest in protecting children from the physical or sexual harm that the state believes may flow from same-sex marriages, that interest is already protected by statutes apart from the prohibitions against same-sex marriages.

If homosexuals actually posed a greater threat to children than heterosexuals then the state might be justified in taking some action to protect children from homosexuals. However, the empirical data does not support the prejudices that are implicit in prohibiting same-sex marriages out of concern for the physical well-being and sexual integrity of children.[198] Children of same-sex marriages are no more likely to be sexually molested than children of heterosexual marriages. Indeed, children of homosexual men are less likely to be molested than children of heterosexual men.[199]

***210** 2. Psychological Harm

The second type of harm that the state might fear will injure children of homosexual marriages is psychological harm arising from society's prejudice against homosexuals and same-sex marriages. The Supreme Court's decisions in the context of racial prejudice and custody awards provide some precedent to support the contention that the consideration of society's prejudice is illegitimate. State concerns about the psychological effects of same-sex marriages on children due to prejudice should be addressed toward removing the prejudice. While the state cannot unilaterally end society's prejudices, it can remove the state's official sanction of such prejudices by recognizing the validity of same-sex marriages. A recognition of same-sex marriages would not only legitimize same-sex marriage, but would also legitimize the children of those marriages and create a positive atmosphere in which the children can be raised.

3. Indoctrination of Gay Sexual Practices

A third type of harm used by the states to justify prohibitions on same-sex marriages is the state's fear that the children of same-sex marriages will be indoctrinated by their homosexual parents and will grow up to be homosexuals. Even assuming that the state can have a legitimate interest in the development of children's sexual preferences, the state's attempt to achieve this goal through a blanket prohibition on same-sex marriages fails for two reasons. One, the underlying assumptions about the effects of same-sex marriages on children's sexual preferences are false. Empirical studies show that children of same-sex marriage are no more likely to become homosexuals than children of heterosexual marriages. [200] Two, prohibitions on same-sex marriages are over-inclusive because they would prohibit those individuals who do not have and who do not intend to have children, from entering a same-sex marriage.

***211 c. State Hostility Toward Homosexuality**

As the Supreme Court in Bowers v. Hardwick [201] recognized, the state has tried to outlaw homosexuality throughout the history of Western Civilization. [202] Homosexuality was, at times, considered a crime punishable by death. The history of homosexuality in America is no different from its treatment in the rest of the Western world. All fifty states outlawed sodomy until 1961. [203] That these values, antithetical to homosexuality, were spawned from religious doctrine is clear. [204] Yet, unless these principles have some independent justification, apart from religion, they cannot be used by the courts in fashioning their decisions, nor by the legislature in forming its laws. [205] The state may well respond that religious concerns do not solely motivate its desire to punish homosexuality, but rather, that it is relying on the will of the majority and tradition. The simple

fact that the majority of the country would like to concertize its moral beliefs in the laws of the land is not enough to justify those laws.[206] In many ways the Constitution is designed to be counter-majoritarian.[207] The Constitution provides that democratic principles will decide some of the important issues of the day, but that others are specifically removed from consideration by the popular will. The framers' attempt to protect the minority from the majority can be seen in two strategies: (1) the protection of certain rights through the creation of the Bill of Rights; and (2) the creation of a form of government in which the formation of a majority would be unlikely.[208] Similarly, reliance ***212** on tradition cannot be enough to justify laws that trample individuals solely because they are in the minority.[209] The Constitution's protections of liberty should not stop at only those rights recognized in the 18th century, but rather should extend to other rights as time reveals the injustice of non-protection.[210] Although the state has evinced a great degree of hostility toward homosexuals, the state has no legitimate interests in the repression or punishment of homosexuals. Thus, the state should not be allowed to let its historic oppression of homosexuals justify prohibitions on same-sex marriages.

The states' interest in procreation and hostility toward homosexuality are derived from roots firmly implanted in “natural law” theories, scripture and canon law. By stripping away the fertile soil of religion and natural law that sustain the states' procreation and anti-homosexuality arguments against same-sex marriages, all that remains is the concern for children. When the sociological and psychological effects of same-sex marriage on children are carefully examined, it becomes clear that this concern, though legitimate, is not warranted. Without any compelling state interests left to justify the ban on same-sex marriage the fundamental right to marriage compels a determination that prohibitions against same-sex marriages are unconstitutional.

Were the line of cases construing the fundamental right to privacy to end at Roe v. Wade this would undoubtedly be the constitutionally required outcome. However, there is one more hurdle that looms large in any attack on the constitutionality of laws prohibiting same-sex marriage: Bowers v. Hardwick.[211] While the Bowers holding does not preclude a state from recognizing same-sex marriages, it does seem to preclude an individual from successfully asserting that same-sex marriage is a fundamental right guaranteed by the United States Constitution.

*213 d. The Monkey Wrench: Bowers v. Hardwick

In August 1985, Michael Hardwick and his lover, an adult male, were engaged in consensual oral sex when the Atlanta police broke into the bedroom of Hardwick's home. Michael Hardwick was then arrested and temporarily jailed[212] for violating Georgia's anti-sodomy law.[213] When the Georgia State Attorney General decided not to pursue the case further, Hardwick brought suit in federal court claiming that the statute was unconstitutional. In Bowers v. Hardwick the

Supreme Court considered and rejected Hardwick's claim stating: "there is no such thing as a fundamental right to commit homosexual sodomy." [214] The Court ruled that prior case law dealing with the fundamental right to privacy did not apply to Hardwick because "[n]o connection between family, marriage, or procreation ... and homosexual activity ... ha[d] been demonstrated ...." [215] Rather than relying on this traditional line of cases to determine whether Hardwick's activity encompassed protected activity, the Court enunciated a new test for determining the existence of fundamental rights. The Court fashioned this new two-pronged test out of language from Palko v. Connecticut [216] and Moore v. City of East Cleveland, Ohio. [217] Under this new test, an activity must either be " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed" [218] or the activity must be "deeply rooted in this Nation's history and tradition." [219] The Court then reached back to a millennium of Judeo-Christian values and stated that it found that neither prong of this newly announced fundamental rights test was satisfied because ***214** "[p]roscriptions against [consensual homosexual sodomy] have ancient roots." [220]

The dissent roundly criticized the majority for mischaracterizing the case as being about " 'a fundamental right to engage in homosexual sodomy' " [221] when in fact the case was really about " 'the right to be let alone.' " [222] The dissent went on to argue that homosexual sodomy was protected by two lines of constitutional cases: those cases finding a protected right to engage in certain individual decisions regarding personal autonomy and those cases finding a protected privacy interest inherent in certain places.

The decision in Bowers v. Hardwick upholding state statutes prohibiting homosexual sodomy deals a serious, if not fatal, blow to any arguments that state prohibitions against same-sex marriages are unconstitutional. This paper will not attempt to analyze the Bowers v. Hardwick decision in detail, but rather, will suggest one way, perhaps the only way, [223] in which prohibitions of same-sex marriage can be struck down as unconstitutional. This approach [224] requires a broader, and more faithful, reading of the line of cases establishing the fundamental right to privacy than the Bowers' Court was prepared to recognize. This approach also requires that the Bowers v. Hardwick decision be overturned because it is simply at odds with the cases establishing and the principles underlying the fundamental right to privacy. [225] Prior to analyzing the fundamental right to privacy ***215** and Bowers v. Hardwick in conjunction with state prohibitions against same-sex marriages, it is interesting to briefly consider the motivations driving the Court's decision.

Implicitly underlying the majority's decision in Bowers is the belief that there is simply nothing wrong with prohibiting "abominable crimes[s] not fit to be named among Christians." [226] The Court tries to justify its conclusion that the right to privacy does not encompass homosexual sex by resting on history, religion and nature. The majority points out that throughout the history of Western Civilization the state has prohibited homosexual conduct. The majority explains

that sodomy was prohibited by the original thirteen states and that in 1986 twenty-five states still outlawed sodomy and thus there was no way that sodomy could be protected by the right to privacy.[227] The Court refers to the condemnation of homosexual acts by the Jewish and Christian religions. The Court also quotes from Blackstone who believed homosexual sex to be an " 'infamous crime against nature' "[228] and a heinous act " 'the very mention of which is a disgrace to human nature....' "[229] The Court's rigid reliance on the historical discrimination against homosexuals to justify laws prohibiting individuals from engaging in homosexual sodomy prompted the dissent to quote from Justice Holmes and declare: " '[i]t is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.' "[230] The majority's reliance on religion prompted the dissent to note that "the Bible's command to be fruitful and multiply"[231] has nothing to do with the Constitution's protections of decisions about childbearing. ***216** Indeed, the dissent proclaims that "[t]he legitimacy of secular legislation depends ... on whether the State can advance some justification for its law beyond its conformity to religious doctrine."[232] The decision in Bowers v. Hardwick shows that, despite the first amendment's requirement of separation of church and state, arguments supported merely by scripture, canonical law and nature are still alive with force even within the chambers of the Supreme Court. Removal of religious dogma from consideration as possible state justifications vitiates claims that homosexual sodomy is not protected by the fundamental right to privacy as an act of self-definition.

The Court's decisions in Meyer v. Nebraska, Skinner v. Oklahoma, Griswold v. Connecticut, Eisenstadt v. Baird, Carey v. Population Servs. Int'l and Roe v. Wade go beyond constitutional solicitude for marriage and family.[233] One should not be restricted to a literal or textual reading of these cases. A Dworkinian[234] analysis—that is, looking at the underlying principles behind these cases—is necessary. The rights protected by these cases must be seen as stemming from the constitutional concern for the ability of the individual to define oneself. Just as Stanley v. Georgia[235] was not about "a fundamental right to watch obscene movies" and just as Katz v. United States was not about "a fundamental right to place interstate bets from a telephone booth,"[236] Bowers v. Hardwick was not concerned with a fundamental right to engage in homosexual sodomy. Much more was at stake in Bowers than merely the right to engage in a certain type of sexual conduct—namely oral sex. The right of the individual to express oneself, to determine the meaning of one's life, was the real issue in Bowers. The line of cases beginning with Meyer v. Nebraska and running through Roe v. Wade protect this right. These cases address "decisions" made by individuals concerning their autonomy. The fundamental right to privacy, if it is to mean anything, must at least encompass those decisions regarding intimate human associations such as sexual relations and reproduction. ***217** However, the right to privacy goes beyond protecting sexual relations and reproductive choices; it protects those decisions that define

personal autonomy, identity and self. One way in which individuals define themselves is through intimate associations, and it is this self-definition process implicit in intimate association that should be protected by the fundamental right of privacy.

IV. THE NATURE OF MARRIAGE

These cases demonstrate that individuals of the same sex must overcome constraints imposed by the legislatures' and the courts' a priori definition of marriage as the union between one man and one woman before they are able to marry. These courts contend that it is the nature of marriage itself that precludes state recognition of same-sex marriage. This definition of marriage comes directly from scriptural, canonical, and natural law based beliefs. Human history demonstrates how inaccurate this definition of marriage is.[237] The ***218** application of strict scrutiny analysis to prohibitions of same-sex ***219** marriage, and the removal of religious based imperatives concerning ***220** the institution of marriage, not only lead to the determination that the prohibitions against same-sex marriage are unconstitutional, but also lead to the destruction of the traditional definition of marriage. If marriage is to be more than a certificate issued by the state upon the request of adults, then the void left by removing purely religious dictates must be filled by substance. The next section is a brief attempt at formulating a redefinition of marriage.[238]

V. REDEFINING MARRIAGE

Rather than defining marriage by prescribing who may enter it, the definition of marriage is best explained by describing certain ***221** qualitative elements of the state of marriage. Attempting to define marriage by describing its component qualities may prove to be a false step. However, this approach is not wholly without precedent.[239] Indeed, in Turner v. Safley[240] the Supreme Court attempted to describe some of the qualities that make up the relationship called marriage. It is with Turner v. Safley, then, that a redefinition of marriage begins.

In Turner v. Safley, the Court considered the constitutionality of regulations promulgated by the Missouri Division of Corrections that prohibited inmates from marrying other inmates or civilians unless they obtained the permission of the superintendent of the prison in which they resided. The regulations further provided that permission was to be given only when there were compelling reasons to do so. The term “compelling” was never defined in the regulations but was interpreted by prison officials to encompass only pregnancy or the birth of an illegitimate child. The Court stated that under Zablocki v. Redhail and Loving v. Virginia, the decision to marry was a fundamental right and for this reason, the Court rejected the petitioner's contention that a rule different from Zablocki and Loving ought to be applied in a prison forum. The Court acknowledged that the right to marry, like many other rights, was subject to substantial restrictions as a result of imprisonment. However, the Court also recognized that “[m]any important attributes of marriage

remain[ed]" even "after taking into account the limitations imposed by prison life" and that "these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context." [241] The Court then proceeded to describe several of the attributes of marriage.

First, the Court recognized that marriages are "expressions of emotional support and public commitment" and the Court affirmed the notion that these elements are an "important and significant aspect ***222** of the marital relationship." [242]

Second, the Court acknowledged that marriage has a "spiritual significance" for many individuals and that the commitment of marriage might well be "an exercise of religious faith as well as an expression of personal dedication." [243]

Third, the Court seemed to state that it is important that most inmate marriages take place with the intention that they will be fully consummated.

Additionally, the Court recognized that marital status is often a precondition for certain government benefits. The Court stated that these incidents of marriage were unaffected by the fact of confinement and taken together were "sufficient to form a constitutionally protected marital relationship in the prison context." [244] The Court then examined the question of whether the Missouri marriage regulations impermissibly burdened the right to marry. Based on the prison context in which the case arose, the Court applied a lower level of scrutiny than is normally applied in cases involving fundamental rights. Utilizing the reasonable relationship test, the Court concluded that the marriage restrictions were not reasonably related to legitimate peneological objectives, namely security and rehabilitation.

The Court seemed to identify what it considered to be the essential and minimum attributes that must be possessed by a relationship in order for the Court to recognize that relationship as a marriage. The Court characterized these components as: "expressions of emotional support," "public commitment," and "expression of personal dedication." These can be reduced to two qualities: personal commitment and emotional attachment. These seem to be perfectly reasonable components to attribute to any definition of marriage. However, the Court then goes on and seems to state that the intention to fully consummate the relationship is a prerequisite for deeming a relationship a marriage. The requirement of an expectation that the relationship be consummated is a constitutionally impermissible prerequisite. As the entire line of cases involving the fundamental right to privacy demonstrates that the state cannot peer into the sexual activities ***223** of a married couple, it would seem rather odd that the couple would have to earn the right to privacy by demonstrating that they had fully consummated their marriage. The right to privacy cases would not allow the state to rend asunder, or refuse to recognize, the marriages of the impotent. Proof of consummation [245] cannot be made the doorkeeper to the house of marital bliss.

The Court has recognized that personal commitment and emotional attachment are two of the essential attributes of marriage and it is from this core that constitutional questions regarding marriage must be decided. The Court should be hesitant to try to identify further components of what it sees as the correct definition of marriage. The essence of marriage is the bond or community of interest existing between individuals. The analogy of marriage to a contract has often been made. In the sense that this analogy recognizes that marriage is formed by individuals' mutual consent it is correct, but this analogy also implicitly brings with it the baggage developed in contract law. In contract law, the state is allowed to create the substantive and procedural requirements for entering into a contract and for terminating a contract. The state may fix the penalties for breaching the contract—in some cases awarding damages and in other cases awarding specific performance. The state may also declare the contract void on the basis of public policy. Courts should be reluctant to apply traditional contract concepts in the field of intimate human relations. Many valid reasons exist for arguing that the state should not be able to void the marriage contract on the grounds of public policy, nor should the state be able to prescribe conditions, other than the necessity for adult consent, for entering into the marriage contract, terminating the marriage contract, or entering into a new marriage contract.

Any successful and accurate definition of marriage must reflect the fact that marriage is a relationship that exists through the mutual will of individuals, and that the denial of state recognition merely prevents the parties from obtaining benefits provided by the state. Neither by state, by legislation, nor by court pronouncement, should a union of individuals be stripped of the validity of the name ***224** of marriage.

III. CONCLUSION

Many areas of American law were forged in the heat of scriptural, canonical and natural law based commandments and theories. Indeed, in the area of matrimony and sexual relations, the laws of many states were simply taken wholecloth from canon law. In American law the definition of marriage as the monogamous relationship between one man and one woman, as well as the near primordial hostility toward homosexuals, can be seen as stemming directly from precepts absorbed from scripture, canon law and natural law. Although American jurisprudence has begun to diverge from its canonical origins in the area of laws governing sexual relations, these forces continue to shape, if not control, legislative and judicial decisions regarding the definition of marriage and who will be privileged to enter the matrimonial state. Legislators and judges do not rely on scripture, canon law and natural law to justify their decisions, so much as they seem bound by this conceptual framework so powerful that they are unable to break out of it. So far, this conceptual framework has made the traditional Christian view of marriage impregnable to attacks by individuals demanding that the state recognize the relationship they have entered as a marriage. One of the relationships that states refuse to recognize as legitimate is same-sex marriage.

The states have erected a complete prohibition on same-sex marriage even though the Supreme Court has held that marriage is a fundamental right. The Supreme Court has indicated that regulations of marriage that directly and substantially interfere with this fundamental right are subject to strict scrutiny analysis. If anything is a direct and substantial interference with marriage, a complete prohibition on the ability to enter into marital relations with the person of ones choice certainly is. In order for this type of state regulation to pass constitutional muster, it must be supported by a compelling state interest and it must be narrowly tailored to effectuate only those state interests. Typically two state interests are argued to justify the prohibition on same-sex marriages: procreation and the care of children. A third interest which is never explicitly mentioned but which plays a great role in justifying the prohibitions is a fear of and ***225** a hostility toward homosexuals. Upon close examination these interests simply do not measure up to the compelling state interest standard. Furthermore, even if these interests were deemed a compelling state interest, the means by which they are protected—prohibitions against same-sex marriages—are unconstitutional because they are not narrowly tailored and are also both over-inclusive and under-inclusive.

Once the constitutional challenge to state laws prohibiting same-sex marriages are successful, assuming the right to privacy doctrine is not abolished, there inevitably will be a need for the redefining of marriage. The Supreme Court has stated that marriage consists of two elements: personal commitment and emotional attachment. These two elements seem to be the best ground for beginning any discussion of what types of relationships constitute a marriage. But because marriage is essentially the public recognition of a relationship contract between two individuals, the courts and legislatures should be hesitant to move beyond these core elements when deciding what relationships the state should recognize as a marriage.

Footnotes

a1 Associate, Paul, Hastings, Janofsky & Walker; Judicial Law Clerk to the Honorable John T. Nixon, United States District Court for the Middle District of Tennessee, 1989-90; J.D. Cornell Law School 1989; B.A. Vanderbilt University 1986. The author is grateful for comments by Professor Charles J. Reid, Marina O. Lowy, Harry A. Zinn and Karen L. Brodtin. The author also wishes to thank Joanee Antista for her assistance in preparation of this article. Finally, the author thanks the National Danish Organization for Gays and Lesbians for providing an English translation of and materials explaining Denmark's Registered Partnership Act.

1 JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 587 (1987) (“Virtually all restrictions that now apply to sexual behavior in Western societies stem from moral convictions enshrined in medieval canonical jurisprudence. The attitudes and beliefs of canonists and theologians about marriage, divorce, family structure, women's status, human psychology, gender roles, and a host of other controversial topics are woven into the very fabric of our legal system.”). See, e.g., VERN L. BULLOUGH, HOMOSEXUALITY: A HISTORY 17 (1979) (“Historically the most important force in setting western attitudes toward homosexuality has been religion, and in both Judaism and Christianity homosexuality has been regarded as a sin.”); Bowers v. Hardwick, 478 U.S. 186, 211 n. 6 (1986) (Blackmun, J., dissenting) (“The theological nature of the origin of Anglo-American antisodomy statutes is patent.”); Ellen M. Barrett, Legal Homophobia and the Christian Church, 30 HASTINGS L.J. 1019 (1979) (examining the role of the Christian Church in providing the roots for American legal homophobia). Compare VERN L. BULLOUGH, HOMOSEXUALITY: A HISTORY 31 (1979) (“As far as modern American and modern European law is concerned,

the foundations for modern legal attitudes toward homosexuality can be found in Roman sources. Although Roman legislation on the subject of homosexuality probably dates back as early as the third century B.C., it is the imperial legislation of Christian Rome that has most influenced modern western attitudes.").

2 Adams v. Howerton, 486 F.Supp. 1119, 1123 (C.D.Cal.1980), aff'd, 673 F.2d 1036 (9th Cir.1982), cert. denied, 458 U.S. 1111 (1982) ("The definition of marriage, the rights and responsibilities implicit in that relationship, and the protections and preferences afforded to marriage, are now governed by the civil law. The English civil law took its attitudes and basic principles from canon law, which, in early times, was administered in the ecclesiastical courts."); 52 AM.JUR.2D Marriage § 2 (1970) ("[T]he American law of marriage has its origin in the English matrimonial law, administered by the ecclesiastical courts. Thus it has been said that the law of marriage as administered by the English ecclesiastical courts is part of the common law of this country, except as it has been altered by statute. The English matrimonial law in turn came from the ancient canon law, which in large part consisted of the decrees of the various popes.") (footnotes omitted); BRUNDAGE, supra note 1, at 587, 588, 616 ("The institution of marriage itself retains a generous measure of its medieval antecedents.... Virtually the whole gamut of medieval theological and canonical opinion about marriage formation has been incorporated at some point or other in the civil jurisprudence of the United States."); Peter J. Riga, Residue of Romano-Canonical Marriage Law in Modern American Law, 5 WHITTIER L.REV. 37, 56 (1983) ("From canon law, as shaped by Germanic and English common law pressures, came the values embodied [in marriage law] in most United States jurisdictions today....").

3 By "natural law" I refer to various schools of natural law that prevailed in the Middle Ages, as opposed to modern natural law theories. The preeminent example of medieval natural law was, of course, Thomas Aquinas.

4 BRUNDAGE, supra note 1, at 164-65, 173.

5 Id. at 164-65, 205-07.

6 Id. at 200.

7 Id. at 203.

8 BRUNDAGE, supra note 1, at 207-09.

9 Id. at 196.

10 JOHN T. NOONAN, CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS, 162, 238 (1986) ("[N]ever had it been admitted by a Catholic theologian that complete sexual intercourse might be had in which, by deliberation, procreation was excluded."). While canonist teaching did not directly address the rhythm method of birth control, primarily because it wasn't known until the mid-1800s, it should be remembered that Augustine felt it was wrong to have intercourse on sterile days. Id.

11 NOONAN, supra note 10, at 362. For an in-depth treatment of the history of the Catholic stance on abortion, see Congressional Research Service of the Library of Congress, Catholic Teaching on Abortion: Its Origin and Later Development (1981).

12 BRUNDAGE, supra note 1, at 212-14; NOONAN, supra note 10, at 91, 162, 238. Appendix A of the Amicus Curiae Brief of Americans United for Separation of Church and State at Appendix A, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

13 The term "homosexual" is defined in this paper as one who has sexual desire for others of the same sex. For a historical treatment of the definition of "homosexual," see JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY 41-59 (1980).

14 BRUNDAGE, supra note 1, at 191-93.

15 Id. at 212-14; NOONAN, supra note 10, at 238.

16 BRUNDAGE, supra note 1, at 165-66, 212-14.

17 Id. at 6 ("The doctrines constructed by medieval thinkers have furnished the foundations for sexual theory and practice in the West today. Thus, the legal regulation of marriage and divorce, together with the outlawing of bigamy and polygamy and the imposition of criminal sanctions on fornication, adultery, sodomy, fellatio, cunnilingus, and bestiality—whether these activities are pursued for

fun or profit—are all based in large measure upon ideas and beliefs about sexual morality that became law in Christian Europe during the Middle Ages.").

18 Recently, the Supreme Court has begun to abandon the "right to privacy," preferring instead to utilize the Fourteenth Amendment's liberty interest. See, e.g., Bowers v. Harwick, 478 U.S. 186, 194-95 (1986); Cruzan v. Director Mo. Health Dep't, 497 U.S. 261, 279 n. 7 (1990).

19 Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

20 Roe v. Wade, 410 U.S. 113 (1973). While Roe still remains standing, if somewhat weakened, recent Supreme Court rulings suggest that Roe will soon be overturned or at least dramatically curtailed. See, e.g., Webster v. Reproductive Servs., 492 U.S. 490 (1989) (upholding statutory regulations on abortions including: (1) prohibiting the use of public funds for counseling a woman to have an abortion, not necessary to save her life; (2) prohibiting the use of public employees or facilities to perform or assist abortions not necessary to save the mother's life; (3) requiring the physician, prior to performing an abortion, to determine whether the unborn child is viable if the physician believes the unborn child to be twenty or more weeks old; also including a preamble stating that life begins at conception); Hodgson v. Minnesota, 497 U.S. 417 (1990) (upholding a two-parent notification requirement for a minor's abortion, as long as judicial bypass is available, and 48 hour waiting period); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) (upholding Ohio's prohibition of abortion on minors without either: (1) parental notice; (2) parental consent; (3) judicial bypass; or (4) judicial inaction).
At least one Supreme Court Justice has stated explicitly that the Constitution does not protect a woman's right to have an abortion. See, e.g. Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1990) (Scalia, J. concurring) ("I share Justice Blackmun's view ... [that this opinion] effectively would overrule Roe v. Wade. I think that should be done, but would do it more explicitly."); Ohio v. Akron Reproductive Health Center, 497 U.S. 502 (1990) (Scalia, J. concurring) ("I continue to believe, however, as I said in my separate concurrence last Term in Webster v. Reproductive Health Services that the Constitution contains no right to abortion.") (citations omitted).

21 As the Court in Bowers pointed out, at the time the original thirteen colonies ratified the Bill of Rights all prohibited sodomy:
Criminal sodomy laws in effect in 1791: 1 Public Statute Laws of the State of Connecticut, 1808, Title LXVI, ch. 1, § 2 (rev. 1672).
Delaware: 1 Laws of the State of Delaware, 1797, ch. 22, § 5 (passed 1719).
Georgia had no criminal sodomy statute until 1816, but sodomy was a crime at common law, and the General Assembly adopted the common law of England as the law of Georgia in 1784. The First Laws of the State of Georgia, pt. 1, p. 290 (1981).
Maryland had no criminal sodomy statute in 1791. Maryland's Declaration of Rights, passed in 1776, however, stated that the "the inhabitants of Maryland are entitled to the common law of England," and sodomy was a crime at common law. 4 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 372 (1975).
Massachusetts: Acts and Laws passed by the General Court of Massachusetts, ch. 14, Act of Mar. 3, 1785.
New Hampshire passed its first sodomy statute in 1718. Acts and Laws of New Hampshire 1680-1726, p. 141 (1978).
Sodomy was a crime at common law in New Jersey at the time of the ratification of the Bill of Rights. The State enacted its first criminal sodomy law five years later. Acts of the Twentieth General Assembly, Mar. 18, 1796, ch. DC, § 7.
New York: Laws of New York, ch. 21 (passed 1787).
At the time of ratification of the Bill of Rights, North Carolina had adopted the English statute of Henry VIII outlawing sodomy. See COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA, ch. 17, p. 314 (Francois Xavier Martin ed., 1792).
Pennsylvania: Laws of the Fourteenth General Assembly of the Commonwealth of Pennsylvania, ch. CLIV, § 2 (passed 1790).
Rhode Island passed its first sodomy law in 1662. The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719, 142 (1977).
South Carolina: Public Laws of the State of South Carolina, p. 49 (1790).
At the time of the ratification of the Bill of Rights, Virginia had no specific statute outlawing sodomy, but had adopted the English common law. 9 HENNING'S LAWS OF VIRGINIA, ch. 5, § 6, p. 127 (1821) (passed 1776). Bowers, 478 U.S. at 194.
Today 18 states have laws prohibiting both heterosexual and homosexual sodomy:
Alabama, Arizona, Florida, Georgia, Idaho, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, and Virginia.
Five states outlaw only homosexual sodomy: Arkansas, Kansas, Montana, Nevada and Texas.
Twenty-seven states no longer have laws forbidding sodomy: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Maine, Michigan, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota,

Ohio, Oregon, Pennsylvania, South Dakota, Vermont, Washington, West Virginia, Wisconsin, Wyoming. PLAYBOY, Jan. 1991, at 46.

22 Indeed, the Supreme Court has upheld state laws forbidding polygamy. See, e.g., Davis v. Beason, 133 U.S. 333 (1890); the Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1 (1890).

23 The Christian world view regarding the definition of marriage and its prior preclusion of same-sex marriages is no longer a monolithic view. While the Catholic Church's official position against same-sex marriage is a monolithic one, there are dissenters within the Church. See, e.g., C. CURRAN, Moral Theology and Homosexuality, in HOMOSEXUALITY AND THE CATHOLIC CHURCH (Jeannine Gramick ed., 1983). See also Jewish Group Urges Full Equality for Homosexuals, L.A. TIMES, Feb. 15, 1992, at F17, col. 5 (reporting that the federation of Reconstructionist Congregations and Havurot issued a statement granting, in effect, legitimate same-sex marriages); Peter Steinfels, What God Really Thinks About Who Sleeps With Whom, N.Y. TIMES, June 2, 1991, § 4, at 4, col. 3 (reporting that the Episcopal Church's Standing Comm. on Human Affairs recommended that the Church "support and bless with some kind of ritual, short of marriage, persons of the same sex who are in faithful, committed relationships).

24 Griswold v. Connecticut, 381 U.S. 479 (1965).

25 Loving v. Virginia, 388 U.S. 1 (1967).

26 Zablocki v. Redhail, 434 U.S. 374 (1978).

27 Section 1 of the Fourteenth Amendment provides:
All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
U.S. CONST. amend. XIV, § 1 (emphasis added).
This Note will only examine the Due Process Clause argument available to individuals seeking a same-sex marriage. A variety of other possible constitutional arguments might be utilized to claim the right to same-sex marriage including the First, Eighth, and Ninth Amendments as well as the Fourteenth Amendment's Equal Protection Clause. See Elvia Rosales Arriola, Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority, 10 WOMEN'S RTS.L.RPT. 143 (1988); Note, The Legality of Homosexual Marriage, 82 YALE L.J. 573 (1973); Note, Homosexual's Right to Marry: A Constitutional Test and a Legislative Solution, 128 U.PA.L.REV. 193 (1979); and Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 HARV.L.REV. 1285 (1985) (discussing the Fourteenth Amendment's Equal Protection Clause).

28 For the moment the Supreme Court has not begun the massive dismantling of Griswold that it has with Roe. Webster v. Reproductive Health Servs., 492 U.S. at 520 (1989) (Justice Blackmun "takes us to task for our failure to join in a 'great issues' debate as to whether the Constitution includes an 'unenumerated' general right to privacy as recognized in cases such as Griswold v. Connecticut ... and Roe. But Griswold v. Connecticut, unlike Roe, did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply. As such, it was far different from the opinion, if not the holding, of Roe v. Wade....") (citations omitted).

29 Bowers v. Hardwick, 478 U.S. 186 (1986).

30 Turner v. Safley, 482 U.S. 78 (1987).

31 Certainly the Old Testament plays a great role in the shaping of Judaic views toward marriage and sex, but the influence of Judaism on the development of American or even Western laws concerning sex and marriage is virtually nonexistent when compared to the influence of Christianity. Thus, the Judaic influence will be largely ignored in this paper. See, e.g., HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 588 (1983):
While a direct influence of Jewish law on Western law cannot be identified, Jewish thought did contribute to the general intellectual climate of the times. This came about in two ways. First, there was the influence of Jewish thought directly—in particular, the allegorical tradition of reasoning present in the Midrash.... The second form of influence was more subtle. As Christian scholars sought contacts with Jewish intellectuals in order to clarify their understandings of the Old Testament, they found that the Jews frequently had translated words and phrases differently and had interpreted passages in a wholly different way. This forced the Christians to reexamine their sources and their arguments, and often to devise new explanations to counter Jewish knowledge and criticism.

Nevertheless, neither Jewish thought nor Jewish law seems to have had any substantial influence on the legal systems of the West, at least so far as the surviving literature shows.
Id. at 588.

32 NOONAN, supra note 10, at 30.

33 NOONAN, supra note 10, at 30.

34 Id. at 30-33. See also BRUNDAGE, supra note 1, at 51.

35 Leviticus 20:13 ("If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; and their blood shall be upon them."); 18:22 ("Thou shalt not lie with mankind as with womankind, it is an abomination."). The destruction of Sodom and Gomorrah add to this view condemning the homosexual. Genesis 18-19. But see BOSWELL, supra note 13, at 92-98 (arguing that the destruction of Sodom and Gomorrah was not related to homosexual behavior, but rather due to the inhospitality of citizens of those cities to outsiders or, perhaps, because the citizens of Sodom tried to rape the angels); HARVARD MONTGOMERY HYDE, THE LOVE THAT DARED NOT SPEAK ITS NAME: A CANDID HISTORY OF HOMOSEXUALITY IN BRITAIN 29-30 (1970) (arguing that the destruction of Sodom and Gomorrah was not related to homosexual behavior, but rather due to the inhospitality of the citizens of those cities to outsiders). Homosexuality, in fact, merited death by stoning. BRUNDAGE, supra note 1, at 57.

36 BRUNDAGE, supra note 1, at 7 ("Yet another common belief about sexual matters in the Western Christian tradition is the notion that 'nature' constitutes a reliable test of the morality of various types of sexual behavior.").

37 BRUNDAGE, supra note 1, at 78-79.

38 James A. Brundage, Allas! That Evere Love was Synne: Sex and Medieval Canon Law, THE CATH.HIST.REV. 4 (1986) [hereinafter Brundage, Allas!].

39 Id. at 9. This bias against sexual pleasure was not grounded in the Gospels or St. Paul, nor was it original among these writers. Rather, this "Christian hostility to sex sprang in large part from the sexual morality of the late philosophical schools, especially from the vulgarized stoicism current in the late Roman empire." Id. at 5-6.

40 BRUNDAGE, supra note 1, at 89.

41 Brundage, Allas!, supra note 38, at 1.

42 Id.

43 BRUNDAGE, supra note 1, at 30; BOSWELL, supra note 13, at 161.

44 NOONAN, supra note 10, at 119-126.

45 Id. at 107.

46 Id. at 107-09; HENRY CHADWICH, AUGUSTINE 13 (1986); VERN L. BULLOUGH & JAMES A. BRUNDAGE, SEXUAL PRACTICES AND THE MEDIEVAL CHURCH 9 (1982).

47 BRUNDAGE, supra note 1, at 173.

48 Id. at 62.

49 Brundage, Allas!, supra note 38, at 4.

50 NOONAN, supra note 10, at 61.

51 Brundage, Allas!, supra note 38, at 4.

52 Id. at 8.

53 Id.

54 BULLOUGH & BRUNDAGE, supra note 46, at 10.

55 BULLOUGH & BRUNDAGE, supra note 46, at 10-11.

56 NOONAN, supra note 10, at 126; see also BULLOUGH & BRUNDAGE, supra note 46, at 11.

57 Brundage, Allas!, supra note 38, at 8.

58 BRUNDAGE, supra note 1, at 89.

59 Id. at 229.

60 BOSWELL, supra note 13, at 227.

61 BERMAN, supra note 31, at 143.

62 Id. at 146.

63 BULLOUGH & BRUNDAGE, supra note 46, at 60.

64 BERMAN, supra note 31, at 146.

65 The Decretals of Gregory IX are also known as the Liber Extra.

66 BERMAN, supra note 31, at 203.

67 JOHN T. NOONAN, Genital Good, COMMUNIO 198, 214 (1981) [hereinafter NOONAN, COMMUNIO].

68 Id.

69 BRUNDAGE, supra note 1, at 235.

70 Id. at 235; BERMAN, supra note 31, at 145.

71 BRUNDAGE, supra note 1, at 246.

72 Id. at 241.

73 Id.

74 BERMAN, supra note 31, at 143 ("Probably the most striking single example of the role of the scholastic dialectic in the formation of Western legal science is the great treatise of the Bolognese monk Gratian.").

75 Unlike Gratian, Thomas Aquinas was not a canonist. Rather, Aquinas was a philosopher-theologian who tried to explain the correctness of the Christian world view through rational reasoning.

76 BOSWELL, supra note 13, at 318.

77 See, e.g., BULLOUGH & BRUNDAGE, supra note 46, at 65.

78 BOSWELL, supra note 13, at 319.

79 BOSWELL, supra note 13, at 319.

80 BRUNDAGE, supra note 1, at 7. ("[M]edieval writers used the term [[[natural] as inconsistently as unreflective moralists still do. Thus, for example, many mammals other than humans do not usually copulate in the missionary position; many of them mate in such a way the male penetrates the female from the rear. Moralists therefore reject dog-style coitus as unnatural for humans, because it is common among animals of other species. For other types of sexual behavior, however, the test of what is natural becomes, inconsistently enough, the sexual behavior of other animals. Thus homosexual relations and masturbation are labeled

'unnatural' because it is widely (but incorrectly) believed that animals do not engage in these practices. In point of fact, every type of copulation that can be conceived, every posture that is anatomically possible, every 'unnatural' deviation that can be imagined occurs somewhere in 'nature.' "); see, e.g., NOONAN, supra note 10, at 75 ("In each sense of the term, the 'natural' was selectively chosen. An agricultural phenomenon was considered where human effort was completed by physical forces; the example of human beings damming a river to prevent a flood was not used as an example of 'nature.' Not all animal behavior was found appropriate to follow; the hyena, for instance, popularly supposed to have a set of organs serving a sexual but not a generative purpose, was an example to avoid. The human sexual organs functioned for a variety of purposes; some of them were 'unnatural.'); BULLOUGH & BRUNDAGE, supra note 46, at 65. As John T. Noonan has pointed out, what constituted natural was selectively chosen."

81 BULLOUGH & BRUNDAGE, supra note 46, at 57.

82 But see BOSWELL, supra note 13, at 105-17 (arguing that the passages in the New Testament that had been traditionally read as condemning homosexuals have been read incorrectly).

83 Leviticus 18:22.

84 Romans 1:26-32.

85 I Corinthians 6:9 ("Know ye not that the unrighteous shall not inherit the kingdom of God? Be not deceived: neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor abusers of themselves with mankind.) (emphasis added); I Timothy 1:10 ("For whoremongers, for them that defile themselves with mankind, for menstealers, for liars, for perjured persons, and if there be any other thing that is contrary to sound doctrine.") (emphasis added).

86 NOONAN, COMMUNIO, supra note 67, at 220.

87 BULLOUGH & BRUNDAGE, supra note 46, at 53. ("[S]uch a belief [that certain sexual activities were against nature] became a dominant factor in forming Western attitudes about sex not only in the religious sense but also in the legal sense, since what ultimately was defined as a 'sin against nature' also came to be regarded as a 'crime against nature.').

88 Peter G. Guthrie, Annotation, Marriage Between Persons of the Same Sex, 63 A.L.R.3d 1199 (1975) ("In all the cases so far discovered which have considered the question whether persons of the same sex may marry each other, the view has been taken that since the marriage relationship has always been the union of a man and a woman as husband and wife, there may be no valid marital contract entered into between persons of the same sex."); see infra note 236 regarding domestic partnership laws.

89 See, e.g., Slayton v. State, 633 S.W.2d 934 (Tex.Ct.App.1982) ("In this state, it is not possible for a marriage to exist between persons of the same sex."). See also Gajouski v. Gajouski, No. 14866, slip op. at 5, aff'd, 577 N.E.2d 660 (Ohio 1991) (Ohio is likewise without a mechanism by which to recognize homosexual marriage); Men Plan to Marry Despite License Snub, SEATTLE TIMES, May 29, 1991, at 62 (describing King County Courthouse's refusal to grant a marriage license to two men); A.G. Refuses to Hire Lesbian, ABA J., Dec. 1991, at 32 (Georgia Attorney General rescinds offer of employment to a woman who married another woman because same-sex marriage violated Georgia law); In re Bascot, 502 So.2d 1118, 1130 (La.Ct.App.1987), cert. denied, 503 So.2d 466 (La.1987) ("There is not now, nor has there ever been in our law a legal mechanism for recognizing marriage between persons of the same sex."); Constant A. v. Paul C.A., 496 A.2d 1, 6 (Pa.Super.1985) ("Homosexual marriages are not permitted...."); DeSanto v. Barnsley, 476 A.2d 952 (Pa.Super.1984) (holding that homosexuals can not marry by statute or by common law).

90 BRUNDAGE, supra note 1, at 8. ("Christian ideals about sex so permeate Western mentality that we generally accept them without examining or identifying them as particularly Christian, although people in other societies find them distinctly odd....").

91 JOHN D'EMILIO & ESTELLE FREEDMAN, INTIMATE MATTER: A HISTORY OF SEXUALITY IN AMERICA 11 (1988) ("Over the course of the century, new meanings were attached to these terms [non-procreative sexual acts between men]. At first, the language of religion remained prominent in discussions of sodomy. For example, an 1810 Maryland Court indictment for sodomy stated that the defendant had been 'moved and seduced by the instigation of the devil.' After the American Revolution, the phrase 'crimes against nature' increasingly appeared in the statutes, implying that acts of sodomy offended a natural order rather than the will of God.").

92 Note, Homosexuals' Right to Marry: A Constitutional Test and A Legislative Solution, 128 U.PA.L.REV. 193, 194 (1979) ("All courts faced with [the issue of same-sex marriages] have relied on the premise that a lawful marriage, by definition, can be entered into only by two persons of opposite sex."); Adams v. Howerton, 486 F.Supp. 1119, 1123 (C.D.Ca.1980) ("[T]here has been for centuries

a combination of scriptural and canonical teaching under which a 'marriage' between persons of the same sex was unthinkable and, by definition, impossible.... In light of this history, it seems clear to me that Congress, as a matter of federal law, did not intend that a person of one sex could be a 'spouse' to a person of the same sex...."); Deb Price, Promises to Keep: A Gay Couple Vows to Fight the Government for the Right to Marry, DETROIT NEWS, Feb. 12, 1992, at 1D. Superior Judge Shellie F. Bowers denied a gay couple's request for a marriage license, holding: "Plaintiffs were denied a marriage license because of the nature of the marriage itself, requiring, as it does, that the parties thereto be a male and a female." Id. at 2D. See also John D. Ingram, A Constitutional Critique of Restrictions on the Right to Marry—Why Can't Fred Marry George—or Mary and Alice at the Same Time?, 10 J.CONTEMP.L. 33, 45 (1984) ("The traditional definitions of marriage, of course, have their origins in the earliest teachings of the Bible.... The state courts have relied almost entirely on these definitions in same-sex marriage cases."). See, e.g., 52 AM.JUR.2D Marriage § 82 (1970) ("To the basic rule that a marriage valid where contracted is valid everywhere there are some universally recognized exceptions[:] ... marriages contrary to natural law ...").

93 See, e.g., Price, supra note 92 (stating that "... procreation is a crucial part of marriage and that because gay couples cannot reproduce, they cannot marry.").

94 Jones v. Hallahan, 501 S.W.2d 588 (Ohio 1973). See also Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (N.Y.Sup.Ct.1971) ("The law makes no provision for a 'marriage' between persons of the same sex. Marriage is and always has been a contract between a man and a woman."); Corbett v. Corbett, 2 All E.R. 33, 48 (P.D. & Adm.) (1970) ("[Marriage] ... is and always has been recognized as the union of man and woman."); B. v. B., 355 N.Y.S.2d 712, 716 (N.Y.Sup.Ct.1974) ("[M]arriage has always been considered as the union of a man and a woman...."); Desanto v. Barnsley, 476 A.2d 952 (Pa.Super.1989) (holding that common law marriage is regarded as a relationship between two persons of the opposite sex); Constant A. v. Paul C.A. 496 A.2d 1, 6 (Pa.Super.1984) ("inherent in [the definition of marriage] is the union of man and woman....").

95 Baker v. Nelson, 191 N.W.2d 185 (Minn.1971).

96 Singer v. Hara, 522 P.2d 1187 (Wash.Ct.App.1974).

97 Jones, 501 S.W.2d at 589.

98 Id.

99 Id.

100 Baker, 191 N.W.2d at 185.

101 MINN.STAT. § 517 (1949).

102 Baker, 191 N.W.2d at 185-86.

103 Id. at 186.

104 Id.

105 Id.

106 Singer v. Hara, 522 P.2d 1187 (Wash.Ct.App.1974).

107 WASH.REV.CODE § 26.04.010 (1986).

108 Singer, 522 P.2d at 1188-89. The appellants also alleged that the statutes violated the Equal Rights Amendment to the Washington State Constitution.

109 Singer, 522 P.2d at 1195.

110 Id.

111 Id.

112 Id.

113 See supra notes 34-85 and accompanying text.

114 Singer, 522 P.2d at 1192.

115 Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y.1989).

116 Braschi, 543 N.E.2d at 51.

117 Id.

118 Id.

119 Id.

120 Braschi, 543 N.E.2d at 53-54.

121 Id. at 53.

122 Id.

123 Braschi, 543 N.E.2d at 55.

124 Maynard v. Hill, 125 U.S. 190, 205, 211 (1888) (explaining that marriage was "the most important relation in life," and that it was "the foundation of the family and of society, without which there would be neither civilization nor progress"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing that the right "to marry, establish a home, and bring up children" is a central part of the liberty protected by the Due Process Clause"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating that marriage is one of the "basic civil rights of man, fundamental to our very existence and survival").

125 See, e.g., Maynard, 125 U.S. at 205 ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature."); Pennoyer v. Neff, 95 U.S. 714, 734-35 (1878) ("The State ... has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."); Sosna v. Iowa, 419 U.S. 393, 404 (1975) (same); Boddie v. Connecticut, 401 U.S. 371, 385 (1971) (Douglas, J., concurring) ("The power of the States over marriage and divorce is, of course, complete except as limited by specific constitutional provisions."); Carolyn S. Bratt, Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?, 18 FAM.L.Q. 257, 263 (1984) ("The states have long had the power to regulate the incidents of, or prerequisites to, marriage as embodiments of a collective societal judgment.").

126 Poe v. Ullman, 367 U.S. 497 (1961).

127 Griswold v. Connecticut, 381 U.S. 479 (1965).

128 CONN.GEN.STAT. §§ 53-32, 54-196 (1958).

129 These guarantees included U.S. CONST. amends. I, III, IV, V and IX.

130 Griswold, 381 U.S. at 486.

131 Id. at 494.

132 Griswold, 381 U.S. at 495.

133 Loving v. Virginia, 388 U.S. 1 (1967).

134 VA.CODE ANN. § 20-57 (Michie 1960).

135 Loving, 388 U.S. at 12.

136 Id.

137 Alissa Friedman, The Necessity for State Recognition of Same-Sex Marriage, 3 BERKELEY WOMEN'S L.J. 134, 156 (1987).

138 WIS.STAT. § 245.10(1) (1973).

139 Zablocki v. Redhail, 434 U.S. 374 (1978).

140 Id. at 384. See, e.g., United States v. Kras, 409 U.S. 434 (1973) (stating that the Court has recognized marriage as a fundamental right).

141 Zablocki, 434 U.S. at 386.

142 Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

143 Shelton v. Tucker, 364 U.S. 479, 488 (1960).

144 Hodgson v. Minnesota, 497 U.S. 417 (1990) ("State regulation of travel and marriage is obviously permissible.... [T]he State has a legitimate interest in the creation and dissolution of the marriage contract.").

145 See, e.g., Hodgson v. Minnesota, 110 S.Ct. 2426, 2943 (1991).

146 See Zablocki, 434 U.S. at 386 (stating "we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny.").

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

148 Id. at 88.

149 Zablocki, 434 U.S. at 386.

150 But see Zablocki, 434 U.S. at 396 (Powell, J., concurring). Powell argues that the majority's decision to subject all state regulations that "directly and substantially" interfere with the right to marry to strict scrutiny analysis sweeps too broadly into an area that has traditionally been subject to pervasive state regulation. Powell would only require an application of strict scrutiny analysis to state regulations that interfere with " 'choices concerning family living arrangements' in a manner which is contrary to deeply rooted traditions." Id. at 399 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 499, 503-504 (1977)). Thus, Powell would not apply strict scrutiny analysis to state marriage bans on incest, bigamy, homosexuality or state requirements of blood tests prior to marriage or state requirements of fault on the part of one of the partners prior to divorce. Id. One commentator, Kenneth L. Karst, The Freedom of Intimate Association, 89 YALE L.J. 624, 670-71 (1980), after recognizing that Powell rightly feared the expansive nature of the majority's opinion in Zablocki, wrote: "[t]he freedom of intimate association does not stop at the protection of traditional marriage against absolute bans. Properly understood, Zablocki implies a thoroughgoing reassessment of the constitutionality of a wide range of state laws limiting the right to marry and restricting other nonmarital forms of intimate association").

151 Califano v. Jobst, 434 U.S. 47 (1977).

152 Id. at 54.

153 Zablocki, 434 U.S. at 387 n. 12 (quoting from Califano v. Jobst, 434 U.S. 47, 54 (1977)).

154 Zablocki, 434 U.S. at 387 n. 12.

155 See Mapes v. United States, 576 F.2d 896, 901 (Ct.Cl.1978), cert. denied, 439 U.S. 1046 (1978) ("[W]e read the Jobst and Zablocki cases together to imply that the application of strict scrutiny [analysis] is appropriate only where the obstacle to marriage is a direct one, i.e., one that operates to preclude marriage entirely for a certain class of people.").

156 Carolyn S. Bratt, Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry? 18 FAM.L.Q. 257, 263 (1984) ("If a state regulation was meant to directly interfere with the exercise of an individual's choice to marry, the statute must be supported by a sufficiently important state interest and must be closely tailored to effectuate only that interest. Whereas, if a statute, intended to accomplish some other purpose, only incidentally and unsubstantially affects an individual's decision to marry, the Court will subject it to only minimal scrutiny as to its purpose and effect.") (footnotes omitted).

157 Jobst, 434 U.S. at 48.

158 Id. at 57 n. 17.

159 Id. at 54 ("That general rule is not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby.").

160 Id.

161 Jobst, 434 U.S. at 58.

162 Id. at 54, 58.

163 The Court stated that three groups were affected by the law: persons who lacked the financial means to make the support payments and who were thus "absolutely prevented from getting married;" persons who were able in theory to satisfy the support payments, but who would be sufficiently burdened by the requirement that they would forgo their right to marry; and those persons who can be persuaded to meet the child support payments, but who will "suffer a serious intrusion into their freedom of choice in an area" held to be fundamental. Zablocki, 434 U.S. at 396.

164 Boddie v. Connecticut, 401 U.S. 371 (1971).

165 Id. at 372.

166 Id. at 374.

167 Bowers v. Hardwick, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting) ("[t]he legitimacy of secular legislation depends ... on whether the State can advance some justification for its law beyond its conformity to religious doctrine.").

168 Singer v. Hara, 522 P.2d 1187, 1195 (Wash.Ct.App.1974) ("[T]he refusal of the state to authorize same sex marriage results from [the] impossibility of reproduction rather than from an invidious discrimination on account of sex."); Adams v. Howerton, 486 F.Supp. 1119, 1123 (C.D.Ca.1980) ("[I]f propagation of the race is basic to the concept of marriage and its legal attributes, marriage is again impossible and unthinkable between persons of the same sex."); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn.1971) ("The institution of marriage as a union of man and woman, uniquely involving procreation and the rearing of children within a family, is as old as the book of Genesis."). See, e.g., Warren v. Vick Chem., 325 N.Y.S.2d 499, 500 (N.Y.Sup.Ct.1971) (ruling that "marriage" between two males was invalid, the court stated: " 'The mere fact that the law provides that physical incapacity for sexual relationship shall be ground for annulling a marriage is of itself sufficient indication of the public policy that such relationship shall exist with the result and for the purpose of begetting offspring.' ") (quoting from Mirizio v. Mirizio, 150 N.E. 605, 607 (N.Y.1926)); Constant A. v. Paul C.A., 496 A.2d 1, 6 (Pa.Super.1985) ("Inherent in [the definition of marriage] is the union of man and woman for the purpose of procreation and rearing of children."); B. v. B., 355 N.Y.S.2d 712, 716 (N.Y.Sup.Ct.1974) ("The marriage relationship exists with the result and for the purpose of begetting offspring.").

169 Singer v. Hara, 522 P.2d at 1195 (Wash.Ct.App.1974) ("The state recognize[s] that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children."); Adams v. Howerton, 486 F.Supp. at 1124 ("[I]t seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised. This has always been one of society's paramount goals."); Baker v. Nelson, 191 N.W.2d at 186 ("The institution of marriage as a union of man and woman, uniquely involving the procreation and the rearing of children within a family, is as old as the book of Genesis.").

170 See Friedman, supra note 137, at 164; Ingram, supra note 92, at 49-50.

171 See Friedman, supra note 137, at 165. See also NOONAN, COMMUNIO, supra note 67, at 216 (summarizing the argument that without some repression homosexuality would thrive and heterosexuality would wilt).

172 See Friedman, supra note 137, at 167; G. Sidney Buchanan, Same-Sex Marriage: The Linchpin Issue, 10 U. DAYTON L.REV. 541, 557-562 (1985); Ingram, supra note 92, at 47-49; Note, Developments in the Law: Sexual Orientation and the Law, 102 HARV.L.REV. 1508, 1610 (1989).

173 See Friedman, supra note 137, at 168; Buchanan, supra note 171, at 565-570; David A. Richards, Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution, 30 HASTINGS L.J. 957, 993-96

(1979); Stacey Lynn Boyle, Note, Marital Status Classifications: Protecting Homosexual and Heterosexual Co-Habitators, 14 HASTINGS CONST.L.Q. 111, 133 (1986); Note, Same Sex Marriage and the Constitution, 6 U.C. DAVIS L.REV. 275, 282 (1973).

174 Ingram, supra note 92, at 50.

175 Buchanan, supra note 171, at 562-565.

176 Note, Developments in the Law: Sexual Orientation and the Law, 102 HARV.L.REV. 1508, 1609 (1989) (arguing that the states cannot articulate any legitimate interests rationally related to prohibiting against same-sex marriage).

177 Genesis 1:28.

178 Skinner v. Oklahoma, 316 U.S. 535 (1942).

179 Id. at 541 ("Procreation [is] fundamental to the very existence and survival of the race.").

180 INGRAM, supra note 92, at 46 ("Traditionally, large families were common, since children were needed to work and help support the family.").

181 See LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1337-62 (1988). Cf. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Skinner v. Oklahoma, 316 U.S. 535 (1942); and Roe v. Wade, 410 U.S. 113 (1973).

182 Eisenstadt, 405 U.S. at 453 ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") (emphasis in original).

183 Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down a law prohibiting the sale of contraceptives); Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating a law making contraceptives less available to single people than married people); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (invalidating a state ban on commercial distribution of nonmedical contraceptives).

184 Roe v. Wade, 410 U.S. 113 (1973) (holding that right to privacy extended to a woman's choice to have abortion).

185 Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating a state statute providing for involuntary sterilization of persons convicted for two or more felonies).

186 See Note, Developments in the Law: Sexual Orientation and the Law, 102 HARV.L.REV. 1508, 1610 (1989).

187 Philo has observed that there is no difference between sterile married individuals and homosexuals. PHILO, THE SPECIAL LAWS 3, 36 (1935-39). But as Noonan has pointed out, this fact could benefit homosexuals by shattering the "procreation" justification for prohibiting homosexuals from marrying. NOONAN, COMMUNIO, supra note 67, at 215.

188 M.T. v. J.T., 355 A.2d 204 (N.J.Super.Ct.App.Div.1976), cert. denied, 364 A.2d 1076 (N.J.1976) (allowing individual born male, now female, to marry male despite the fact that the state does not recognize same-sex marriage).

189 Friedman, supra note 137, at 161-62.

190 See, e.g., Marks v. Marks, 191 Misc. 448, 449, 77 N.Y.S.2d 269, 270-71 (N.Y.Sup.Ct.1948) (holding that an inability to procreate is not grounds for preventing people from marrying).

191 Note, Developments in the Law: Sexual Orientation and the Law, 102 HARV.L.REV. 1508, 1610 (1989).

192 Id. at 1508.

193 Friedman, supra note 137, at 134; E. Donald Shapiro & Lisa Schultz, Single-Sex Families: The Impact of Birth Innovations Upon Traditional Family Notions, 24 J.FAM.L. 271 (1985-86). In fact, the number of homosexual couples who choose to raise children has grown so tremendously that publishers of children's books have begun to create books designed specifically for the children of same-sex couples. See Daddy is Out of the Closet, NEWSWEEK, Jan. 7, 1991, at 60 (describing two such books: DADDY'S ROOMMATE

AND HEATHER HAS TWO MOMMIES). See also Scott Harris, 2 Moms or 2 Dads—and a Baby, L.A. TIMES, Oct. 20, 1991, at 1, col. 1 (describing gay couples raising children).

194 See, e.g., Webster v. Reproductive Health Servs., 492 U.S. 490, 569 (1989) (Stevens, J., concurring in part and dissenting in part) ("There have been times in history when military and economic interests would have been served by an increase in population. No one argues today, however, that Missouri can assert a societal interest in increasing its population as its secular reason for fostering potential life. Indeed, our national policy, as reflected in legislation the Court upheld last Term, is to prevent the potential life that is produced by 'pregnancy and childbirth among unmarried adolescents.' ").

195 Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981) ("[T] he State has an urgent interest in the welfare of the child....").

196 Santosky v. Kramer, 455 U.S. 745, 766 (1982) (the state has a "parens patriae interest in preserving and promoting the welfare of the child").

197 See also Hodgson v. Minnesota, 497 U.S. 417 (1990) ("The state has a strong interest in the welfare of its young citizens....").

198 As pointed out in Note, Developments in the Law: Sexual Orientation and the Law, 102 HARV.L.REV. 1508, 1636-57 (1989), many studies have demonstrated that homosexual parents are just as capable of parenting as heterosexual parents. These studies include: Mary B. Harris & Pauline H. Turner, Gay & Lesbian Parents, 12 J. HOMOSEXUALITY 101, 103 (1985-86); David J. Kleber, Howell & Alta Lura Tibbits-Kleber, The Impact of Parental Homosexuality in Child Custody Cases: A Review of the Literature, 14 BULL.AM.ACAD. PSYCHIATRY & L. 81, 86 (1986); see also McCandlish, Against All Odds: Lesbian Mother Family Dynamics, GAY AND LESBIAN PARENTS, 24 (citing other sources); Note, The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied, 12 SAN DIEGO L.REV. 799, 860 (1975) [hereinafter Lesbian Mother].

199 Friedman, supra note 137, at 163 (citing R. Achtenberg, Preserving and Protecting the Families of Lesbians and Gay Men 4 (1987)) (unpublished manuscript on file at the Lesbian Rights Project, 1370 Mission St., Fourth Floor, San Francisco, CA. 94103) (citing SAM HOUSTON STATE UNIVERSITY CRIMINAL JUSTICE CENTER, RESPONDING TO CHILD SEXUAL ABUSE: A REPORT TO THE 67TH SESSION OF THE TEXAS STATE LEGISLATURE (1980)).

200 Friedman, supra note 137, at 162 (citing Lawrence J. Cohen, Children of Homosexuals Seem Headed Straight, PSYCHOLOGY TODAY, Nov. 1978, at 44-45; and Hoeffer, Childrens' Acquisition of Sex-Role Behavior in Lesbian-Mother Families, 51 AM.J. ORTHOPSYCHIATRY 536, 542 (1981)).

201 Bowers v. Hardwick, 478 U.S. 186 (1986).

202 Id. at 196 (Burger, C.J., concurring).

203 Id. at 192-93.

204 See supra note 1.

205 Bowers v. Hardwick, 478 U.S. 186, 211-12 (1986) (Blackmun, J. dissenting) (quoting in part from Palmore v. Sidoti, 466 U.S. 429 (1984)) ("A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. 'The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.' " (citations omitted)).

206 Bowers, 478 U.S. at 210 (Blackmun, J., dissenting) ("I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny.").

207 JOHN HART ELY, DEMOCRACY AND DISTRUST 62 (1980) ("[P]art of the point of the Constitution is to check today's majority.") (footnote omitted).

208 Id. at 79-80.

209 Bowers, 478 U.S. at 210 (Stevens, J., dissenting) ("[T]he 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; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (footnote omitted).

210 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1422 (1988) (quoting from National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949)) (Frankfurter, J., dissenting) “Great concepts like ... ‘liberty’ were purposely left to gather meaning from experience[,] [f]or ... only a stagnant society remains unchanged.” Id.

211 Bowers v. Hardwick, 478 U.S. 186 (1986).

212 Hardwick spent the day in jail following his arrest. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1425 (1988).

213 GA.CODE ANN. § 16-6-2 (1984) (providing in part: “(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another ...”).

214 Bowers, 478 U.S. at 196 (Burger, C.J., concurring).

215 Id. at 191.

216 Palko v. Connecticut, 302 U.S. 319 (1937).

217 Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977).

218 Bowers, 478 U.S. at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

219 Id. at 191-92 (quoting from Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

220 Bowers, 478 U.S. at 192.

221 Id. at 199 (quoting C.J. Burger at 191).

222 Id. at 199 (quoting Olmstead v. United States, 277 U.S. 438 (1928)).

223 It is probably worth considering the constitutional implications for all anti-sodomy laws that one state's recognition of same-sex marriage would have.

224 This approach will only be sketched out since so many others have detailed the failings of Bowers. See Bowers, 478 U.S. at 199 (Blackmun, J., dissenting); Id. at 214 (Stevens, J., dissenting). See, e.g., Michael L. Engleman, Note, Bowers v. Hardwick: The Right of Privacy—Only Within the Traditional Family?, 26 J.FAM.L. 373 (1987-88); Anne B. Goldstein, History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick, 97 YALE L.J. 1073 (1988). Western intellectual and legal tradition—especially Christian tradition—reveal a far more profound bias against homosexuality than Goldstein is willing to admit. Note, Developments in the Law: Sexual Orientation and the Law, 102 HARV.L.REV. 1508 (1989).

225 Indeed, in 1990 former U.S. Supreme Court Justice Lewis F. Powell said that he “probably made a mistake” in joining and thereby creating the 5-4 majority in Bowers. Anand Agneshwar, Powell Concedes Error In Key Privacy Ruling, N.Y.L.J., Oct. 26, 1990, at 1, col. 3. Powell added that after re-reading Bowers, he decided that “the dissent had the better of the arguments.” Id. While Powell's change of heart may undercut the moral force of Bowers, it is unlikely to have an effect on the current Rehnquist Court.

226 Herring v. State, 721 46 S.E. 876, 882 (Ga.1904).

227 The majority neglected to mention that the thirteen original states all banned interracial marriage and that in 1966, sixteen states prohibited interracial marriage; and yet the Court found a way to declare in Loving v. Virginia, 388 U.S. 1 (1967), that the fundamental right to privacy compelled the Court to strike down the miscegenation statutes.

228 Bowers, 478 U.S. at 197 (Burger, C.J., concurring) (quoting 4 W. BLACKSTONE, COMMENTARIES 215).

229 Id.

230 Id. at 199 (Blackmun, J., dissenting).

231 Id. at 205 (Blackmun, J., dissenting).

232 Bowers, 478 U.S. at 211 (Blackmun, J., dissenting).

233 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1423 (1988).

234 See, e.g. Ronald Dworkin, The Model of Rules, 35 U.CHI.L.REV. 14 (1967); and RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

235 Stanley v. Georgia, 394 U.S. 557 (1969).

236 See Bowers, 478 U.S. at 199 (Blackmun, J., dissenting).

237 BRUNDAGE, supra note 1, at 52. ("Household structure among the ancient Hebrews, as among other ancient Near Eastern peoples, was polygamous. Men who could afford them kept numerous wives and concubines simultaneously, and monogamy was common because of poverty, not principle."); NOONAN, supra note 10, at 32 (polygamy is permitted in the world of the Old Testament); BOSWELL, supra note 13, at 82 (detailing homosexual relationships that were consecrated by legal marriage at various times in the Roman Empire and Republic); JOHN D'EMILIO AND ESTELLE FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 6 (1988) ("Many native American tribes accepted ... polygamy, or institutionalized homosexuality...."); NOONAN, COMMUNIO, supra note 67, at 207 ("The civilization of Islam flourished though it was polygamous. The patriarchs of Israel were polygamists...."). On near eastern polygamy, see also LOUIS M. EPSTEIN, MARRIAGE LAWS IN THE BIBLE AND THE TALMUD (1942).
Indeed, today at least one country—Denmark—recognizes same-sex marriages. On May 26, 1989, the Danish Parliament enacted the Registered Partnership Act. This law allows two persons of the same sex to register their partnership. The registration of a partnership has nearly the same legal effect as marriage. There are several exceptions, however: (1) no adoption of non-related children nor of each other's children; (2) no common custody of children; (3) no "official" church wedding; and (4) no partnership unless one of the partners is Danish. The law provides as follows:

REGISTERED PARTNERSHIP
Section 1. Two persons of the same sex may have their partnership registered.

Registration
Section 2. Part 1 and section 12 and section 13, subsection (i) and subsection (ii), clause 1 of the Marriage Act shall be similarly applicable to the registration of a partnership, though see subsection (ii).
Subsection (ii). A partnership can only be registered if both or one of the partners is domiciled in this country and has Danish citizenship.
Subsection (iii). The rules and procedures for the registration of partnerships, including the decision on whether the conditions required for the registration of a partnership have been fulfilled, shall be laid down by the Minister of Justice.

Legal Effect
Section 3. With the exceptions mentioned in section 4, the registration of a partnership shall have the same legal effect as marriage.
Subsection (ii). The provisions of Danish legislation concerning marriage and spouses shall have corresponding application in the case of a registered partnership and registered partners.
Section 4. The provisions of the Adoption Act concerning spouses shall not be applicable in the case of a registered partnership.
Subsection (ii). The provisions about married couples in section 13, clause 3 and section 15, subsection (iii) of the Child Custody Act shall not be applicable in the case of a registered partnership.
Subsection (iii). Provisions of Danish legislation containing special regulations concerning one of the parties in a marriage determined by the sex of the party shall not be applicable in the case of a registered partnership.
Subsection (iv). Provisions in international treaties shall not be applicable to registered partnerships without the assent of the other contracting parties.

Dissolution
Section 5. The provisions of parts, 3, 4 and 5 of the Marriage Act and of part 42 of the Administration of Justice Act shall be similarly applicable to the dissolution of a registered partnership, though see subsections (ii) and (iii).
Subsection (ii). Section 46 of the Marriage Act shall not be applicable to the dissolution of a registered partnership.
Section (iii). Notwithstanding the provisions of section 448 c of the Administration of Justice Act, a registered partnership can always be dissolved in this country.

Coming into force etc.

Section 6. The Act will come into force from 1st October 1989.
Section 7. The Act shall not apply to the Faroe Islands and Greenland, though it, or parts of it, can be made to apply to these territories by Royal decree, with such variations as the special circumstances of the Faroe Islands and Greenland may required.
On November 6, 1990, a voter initiative amended the San Francisco Administrative Code to provide for recognition of domestic partnerships. This amendment explicitly recognizes intimate and committed relationships of lesbians and gays. The amendment provides in full as follows:

RECOGNITION OF DOMESTIC PARTNERSHIPS

Sec. 1. PURPOSE
The purpose of this ordinance is to create a way to recognize intimate committed relationships, including those of lesbians and gay men who otherwise are denied the right to identify the partners with whom they share their lives. All costs of registration must be covered by fees to be established by ordinance.

Sec. 2. DEFINITIONS
(a) Domestic Partnership. Domestic Partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring, who live together, and who have agreed to be jointly responsible for basic living expenses incurred during the Domestic Partnership. They must sign a Declaration of Domestic Partnership, and establish the partnership under section 3 of this chapter.
(b) “Live Together.” “Live together” means that two people share the same living quarters. It is not necessary that the legal right to possess the quarters be in both of their names. Two people may live together even if one or both have additional living quarters. Domestic Partners do not cease to live together if one leaves the shared quarters but intends to return.
(c) “Basic Living Expenses.” “Basic living expenses” means the cost of basic food and shelter. It also includes the expenses which are paid at least in part by a program or benefit for which the partner qualified because of the domestic partnership. The individuals need not contribute equally or jointly to the cost of these expenses as long as they agree that both are responsible for the costs.
(d) “Declaration of Domestic Partnership.” A “Declaration of Domestic Partnership” is a form provided by the county clerk. By signing it, two people agree to be jointly responsible for basic living expenses which they incur during the domestic partnership and that this agreement can be enforced by anyone to whom those expenses are owed. They also state under penalty of perjury that they met the definition of domestic partnership when they signed the statement, that neither is married, that they are not related to each other in a way which would bar marriage in California, and that neither had a different domestic partner less than six months before they signed. This last condition does not apply if the previous domestic partner died. The form will also require each partner to provide a mailing address.

Sec. 3. ESTABLISHING A DOMESTIC PARTNERSHIP
(a) Methods. Two persons may establish a Domestic Partnership by either:
1. presenting a signed Declaration of Domestic Partnership to the County Clerk, who will file it and give the partners a certificate showing that the Declaration was filed; or
2. having a Declaration of Domestic Partnership notarized and giving a copy to the person who witnessed the signing (who may or may not be the notary).
(b) Time Limitation. A person cannot become a member of a Domestic Partnership until at least six months after any other Domestic Partnership of which he or she was a member ended. This does not apply if the earlier domestic partnership ended because one of the members died.
(c) Residence Limitation. The county clerk will only file Declaration of Domestic Partnership if:
1. the partners have a residence in San Francisco; or
2. at least of one the partners works in San Francisco.

Sec. 4. ENDING DOMESTIC PARTNERSHIPS
(a) When the Partnership Ends. A Domestic Partnership ends when:
1. one partner sends the other a written notice that he or she has ended the partnership; or
2. one of the partners dies; or
3. one of the partners marries or the partners no longer live together.
(b) Notice the Partnership has ended.
1. To Domestic Partners. When a Domestic Partnership ends, at least one of the partners must sign a notice saying that the partnership has ended. The notice must be dated and signed under penalty of perjury. If the Declaration of Domestic Partnership was filed with

the county clerk, the notice must be filed with the clerk; otherwise, the notice must be notarized. The partner who signs the notice must send a copy to the other partner.
2. To Third parties. When a Domestic Partnership ends, a Domestic Partner who has given a copy of a Declaration of Domestic Partnership to any third party, (or, if that partner has died, the surviving member of the domestic partnership) must give that third party a notice signed under penalty of perjury stating the partnership has ended. The notice must be sent within 60 days of the end of the Domestic Partnership.
3. Failure to Give Notice. Failure to give either of the notices required by this subsection will neither prevent nor delay termination of the Domestic Partnership. Anyone who suffers any loss as a result of failure to send either of these notices may sue for actual losses.

Sec. 5. COUNTY CLERK'S RECORDS
(a) Amendments to Declarations. A Partner may amend a Declaration of Domestic Partnership filed with the County Clerk at any time to show a change in his or her mailing address.
(b) New Declarations of Domestic Partnership. No person who has filed a declaration of Domestic Partnership with the county clerk may file another declaration of Domestic Partnership until six months after a notice the partnership has ended has been filed. However, if the Domestic Partnership ended because one of the partners died, a new Declaration may be filed anytime after the notice the partnership ended is filed.
(c) Maintenance of County Clerk's Records. The County Clerk will keep a record of all Declarations of Domestic Partnership, Amendments to Declarations of Domestic Partnership and all notices that a partnership has ended. The records will be maintained so that Amendments and notices a partnership has ended are filed with the Declaration of Domestic Partnership to which they apply.
(d) Filing Fees. The Board of Supervisors will set the filing fee for Declarations of Domestic Partnership and Amendments. No fee will be charged for notices that a partnership has ended. The fees charged must cover the city's cost of administering this ordinance.

Sec. 6. LEGAL EFFECT OF DECLARATION OF DOMESTIC PARTNERSHIP
(a) Obligations. The obligations of domestic partners to each other are those described by the definition.
(b) Duration of Rights and Duties. If a domestic partnership ends, the partners incur no further obligations to each other.

Sec. 7. Upon adoption, the Clerk of the Board shall codify this amendment into the San Francisco Administrative Code.

238 Lauren Anderson, Note, Property Rights of Same-sex Couples: Toward a New Definition of Family, 26 J.FAM.L. 357 (1987-88) (discussing homosexuals' use of adoption to try and to gain the benefits of marriage and family).

239 In In re Adult Anonymous, 452 N.Y.S.2d 198, 201 (N.Y.App.Div.1982), the New York Supreme Court allowed the adoption of a forty-three year old male by his thirty-two year old gay partner and acknowledged that the traditional “nuclear family” was no longer the “only model of family life in America.” The Court stated that the “best description of a family is a continuing relationship of love and care, and an assumption of responsibility for some other person.”

240 Turner v. Safley, 482 U.S. 78 (1987).

241 Id. at 95-96.

242 Turner, 482 U.S. at 95-96.

243 Id. at 96.

244 Id. at 96.

245 To speak in the Court's own conceptual framework: would they deny that the paradigm marriage—that of Mary and Joseph—was invalid simply because it was never consummated?

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