THE CONSTITUTIONALITY OF LEGAL PREFERENCES FOR HETEROSEXUAL MARRIAGE

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I. INTRODUCTION

Throughout the ages, marriage between man and woman has been essential to individual development, social progress, and communal prosperity.[1] Because of the important roles it has played in the evolution of modern society, marriage has become a "highly preferred" legal relationship.[2] Marriage's unique status is reflected in the numerous statutory and other legal preferences that have been created for the marital relationship, ranging from special tax and employment benefits to laws dealing with property ownership and intestacy.[3]

Today, however, the "highly preferred" status of marriage is under attack on several fronts. In the face of mounting divorce and abuse rates

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1 *See, e.g.*, Brigitte Berger, *The Social Roots of Prosperity and Liberty*, 35 SOC'Y, Mar.-Apr. 1998, at 44.

2 Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 29.

3 *See* Akiko Kawamura, *Neglected Stories: The Constitution and Family Values*, 1 J. L. & FAM. STUD. 89, 94 (1999) (book review). The author states:

> Justice O'Connor, writing for the majority [in *Turner v. Safley*], articulated the reasons why marriage is "especially important to constitutional conceptions of liberty and citizenship." First, marriage is a precondition for government benefits like social security. Second, marital status guarantees certain property rights under intestate succession laws. Third, in some states, marriage is a precondition for the legitimacy of children. Lastly, marriage is an expression of commitment that carries "spiritual significance" because it is often "an exercise of religious faith as well as an expression of personal dedication."

Id. (quoting Turner v. Safley, 482 U.S. 78, 96 (1987) (citation omitted)); *see also* Todd Foreman, *Nondiscrimination Ordinance 101: San Francisco's Nondiscrimination in City Contracts and Benefits Ordinance: A New Approach to Winning Domestic Partnership Benefits*, 2 U. PA. J. LAB. & EMP. L. 319, 319 n.3 (1999) ("The many benefits of marriage include immigration rights, property rights, tax benefits, and employment benefits such as 'partner insurance coverage, pension survivorship plans, and sick and bereavement leave.'") (quoting Philip S. Horne, *Challenging Public- and Private-Sector Benefit Schemes Which Discriminate Against Unmarried Opposite-Sex and Same-Sex Partners*, 4 LAW & SEXUALITY 35, 48 (1994) (citation omitted)).

and the increasingly large number of children born out of wedlock,[4] some question whether marriage has any continuing social value.[5] Other skeptics question why the historic legal preferences conferred on husbands and wives should not be conferred upon alternative partnership arrangements, such as two men or two women who wish to enjoy the benefits of a "marital" relationship. These advocates often assert that federal and state constitutions mandate the conferral of marital benefits on such partnerships.

Must the various legal preferences conferred on traditional marriage be extended to alternative partnership arrangements? The bulk of the research for this paper was completed prior to the Supreme Court's decision in *Lawrence v. Texas*.[6] *Lawrence*, however, does not fundamentally alter the conclusion that marriage—understood within the American tradition—is an institution that is properly reserved for the union of a man and a woman. Nothing in the commands of either the Due Process or Equal Protection Clauses of the Constitution dictates a contrary result.

Indeed, once outside the union of a man and a woman, there is no principled constitutional basis for distinguishing between *any* of the various possible forms of consensual sexual behavior. Recognition of a constitutional right to same-sex marriage, therefore, would open the door to legally mandated conferral of all legislative preferences now reserved for marriage upon any form of consensual sexual coupling, no matter how idiosyncratic. This recognition would be most unfortunate. Not all consensual sexual couplings have equal social value, particularly when compared with the historic union known for centuries as "marriage."

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[4] *See, e.g.*, Maria Sophia Aguirre, *Family, Economics, and the Information Society—How Are They Affecting Each Other?*, *at* http://www.worldcongress.org/gen99_speakers/gen99_aguirere.htm (last visited Aug. 31, 2003) ("For instance, one out of every three children born in the United States and over half of all children in Scandinavia are born out of wedlock.").

[5] Some of the fiercest criticism regarding the continuing social utility of marriage comes from gay rights activists who seek to "deconstruct" the very concept of marriage. *See, e.g.*, Wardle, *supra* note 2, at 3 n.2 (noting that both supporters and opponents of same-sex marriage agree "that it could dramatically alter the core social institutions of marriage and the family, as well as gender relations, sexual practices, and general social stability."). Other more subtle, but perhaps more damaging, devaluation of marriage comes from modern academicians who consistently cast marriage in a negative light. For example, a recent survey of twenty college textbooks discussing marriage found that "current textbooks convey a determinedly pessimistic view of marriage," repeatedly suggesting "that marriage is more a problem than a solution." Norval D. Glenn, *Closed Hearts, Closed Minds: The Textbook Story of Marriage*, 35 SOC'Y, Mar.-Apr. 1998, at 69.

[6] Lawrence v. Texas, 123 S. Ct. 2472 (2003).

II. CONSTITUTIONAL FRAMEWORK

Before analyzing the most common constitutional claims made by proponents of same-sex marriage, prudence suggests addressing one oft-made but inapt assertion. Television and radio talk shows, along with newspaper opinion columns, are often filled with variations of the proposition that laws preferring heterosexual marriage "impose the morals of some upon all, and the law has no business answering moral questions."[7] The Supreme Court in *Lawrence* echoed a variant of this theme, suggesting that it was the Court's duty to "define the liberty of all, not to mandate our own moral code."[8] This is engaging rhetoric, but it should not be pressed too far.

Modern pundits, and even the Supreme Court, must recognize that all law—including Supreme Court opinions—enforce a moral vision. *Lawrence* itself unquestionably seeks to alter the moral landscape of America. Everyone involved in the American marriage debate must recognize that *both* sides of this controversy are seeking to enforce a moral code. The controversy is not, as some would have it, whether marriage will be governed by "morality" or by "law." As Justice White noted in an earlier decision, "[t]he law . . . is constantly based on notions of morality."[9] Marriage has always involved moral judgments. The present marriage debate is heated precisely because it posits the question whether the Constitution demands that a long-standing moral consensus regarding marriage must be replaced by a new moral position.

The competing moral claims for marriage in the United States generally focus upon two constitutional provisions: the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[10] Under both

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[7] For example, consider this letter to the editor published in a local Utah newspaper:

> There is not a single, truly non-secular reason for denying same-sex couples the right to marry, to adopt children, or to be foster parents, that can withstand any real objective scrutiny. It is simply a majority using the government to impose their unverifiable, religious beliefs on the many reasonable and responsible people with different religious beliefs and practices regarding God's plan for us all. This denial is therefore an establishment of religion specifically prohibited by the U.S. Constitution, and an immoral infringement on the fundamental and equal rights of gay people.

Stuart McDonald, *Equal Rights for Gay People*, DAILY HERALD (Provo, Utah), Feb. 11, 2000, at A6 (on file with REGENT U. L. REV.).

[8] *Lawrence*, 123 S. Ct. at 2480 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992) (plurality)).

[9] Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *rev'd*, *Lawrence*, 123 S. Ct. 2472. While the express holding of *Bowers* was reversed in *Lawrence*, the observation cited here remains consistent with current constitutional law.

[10] The Fourteenth Amendment provides in relevant part: "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due

clauses, the constitutional analysis of legislative action is quite similar. If legislative line-drawing intrudes upon a "fundamental right" or "suspect classification," the challenged regulation will be subjected to strict judicial scrutiny.[11] By contrast, if a "fundamental right" or "suspect classification" is *not* involved, the legislative judgment (in the vast majority of cases) will be sustained.[12]

The on-going debate whether legislative and other legal preferences for heterosexual marriage pass constitutional muster has already

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process of law." U.S. CONST. amend. XIV. The key word in this passage is "liberty," which has long been settled to be a substantive word—one conferring independent constitutional rights not otherwise expressly provided for in the text of the Constitution or its amendments. *See Casey*, 505 U.S. at 846.

This paper does not address claims based upon state constitutional law. Because the federal courts (at least prior to *Lawrence*) generally were unreceptive to the submission that the Constitution provides special protection for homosexual conduct (*see, e.g., Bowers*, 478 U.S. 186, *rev'd, Lawrence*, 123 S. Ct. 2472), litigants in the recent past often rested same-sex marriage claims on state constitutional provisions, where success has been more forthcoming. *See, e.g.*, Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) (holding that individuals have a fundamental right to choose a life partner and that current marriage statutes constituted sex-based discrimination subject to strict scrutiny); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (Hawaii's marriage statute discriminated on the basis of sex and was therefore subject to strict scrutiny); Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (concluding after remand of *Lewin* that Hawaii's marriage statute was unconstitutional); Baker v. State, 744 A.2d 864 (Vt. 1999) (holding same sex couples entitled to receive same marital benefits as heterosexual couples). *But see* ALASKA CONST. art. I, § 25 ("To be valid or recognized in this state, a marriage may exist only between one man and one woman.") (enacted in response to *Brause*); HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.") (enacted in response to *Lewin* and *Miike*). While state courts may prove more receptive to same-sex marriage claims than the federal judiciary, an analysis of the possible claims arising out of 50 state constitutions is well beyond the purview of a 5,000 word essay. Moreover, the federal due process and equal protection analysis set out above is generally applicable to the outcome of legal arguments based upon analogous state constitutional provisions.

[11] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997). "As we stated recently in *Flores*, the Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Id.* at 721 (alteration in original) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)); *see also, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

> At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the "most rigid scrutiny," and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

Loving, 388 U.S. at 11 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).

[12] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440.

consumed thousands of pages in the law reviews.[13] Somewhat surprisingly, however, virtually all of the literature concludes[14] that current statutory or legal preferences for heterosexual marriage are either irrational or subject to purportedly fatal strict scrutiny.[15]

With due respect, and knowing that the opinion expressed in this essay is in the decided academic minority, the current consensus is seriously flawed. *Lawrence* does not fundamentally alter this conclusion. Laws preferring heterosexual marriage are not subject to strict scrutiny. Statutory and other legal preferences for heterosexual marriage do not intrude upon a fundamental right nor are they based on a suspect classification. Moreover, even if strict scrutiny is invoked, marriage survives judicial analysis because it furthers the most imperative of all governmental interests: "the very existence and survival of the race."[16] Current statutory and other legal preferences for heterosexual marriage, therefore, are plainly constitutional.

III. PREFERENCES FOR HETEROSEXUAL MARRIAGE DO NOT TRIGGER STRICT SCRUTINY

Far from suggesting that statutory preferences for heterosexual marriage should be subjected to strict scrutiny, a straightforward reading of the Supreme Court's opinions establish that rational basis review is the relevant judicial benchmark. Legislative preferences for heterosexual marriage do not intrude upon any fundamental right or impermissibly harm any suspect class. Accordingly, statutory and other legal preferences for heterosexual marriage need only be reasonably related to a rational objective; this hurdle is readily cleared.

As the opinion in *Lawrence* makes clear,[17] any claim that preferences for heterosexual marriage intrude upon a "fundamental right" necessarily rests upon some variation of an assertion first made by a plurality of the Supreme Court in *Planned Parenthood v. Casey*.[18] In the course of reaffirming the abortion right announced in *Roe v. Wade*,[19] Justices O'Connor, Kennedy, and Souter wrote, "At the heart of liberty is

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[13] *See, e.g.*, Wardle, *supra* note 2, at 18-20 (noting the extent of the literature on the subject).

[14] Most of these articles base their analysis on some variant of the due process or equal protection analyses explored above. Professor Wardle specifically examines due process claims based upon the "right to marry," the "constitutional zone of privacy," and the "right of intimate association," and equal protection claims that flow from analogies to racial and gender-based discrimination. *Id.* at 26-95.

[15] *See, e.g., id.* at 18-20 (surveying relevant literature).

[16] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[17] Lawrence v. Texas, 123 S. Ct. 2472, 2481-82 (2003) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (plurality)).

[18] *Casey*, 505 U.S. at 851.

[19] Roe v. Wade, 410 U.S. 113 (1973).

the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[20] Advocates of same-sex marriage essentially submit that this broadly phrased dicta guarantees them the right to demand that the label "marriage"—as well as all of marriage's statutory and other legal preferences—be attached to their own idiosyncratically defined sexual couplings. Some scholars may argue that *Lawrence* fortifies this claim because the *Lawrence* Court not only repeated the *Casey* dicta, but also concluded that the Constitution allows homosexual adults the right to "choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[21] Such assertions do not render the marital laws of all fifty states unconstitutional.

Take *Lawrence*'s privacy analysis first: the Court recognized that a homosexual couple has the right to be "let alone."[22] This holding is unquestionably remarkable. Nevertheless, the rhetoric—as well as the reasoning—of the case is exhausted once that couple steps out of its private home and into the public sphere. Marriage is an exceptionally public institution. Indeed, the current claimants for same-sex marriage do not seek to be "let alone" but rather to be accorded public recognition, status, and benefits.[23] Whatever the merits of these claims, they are not addressed by the privacy analysis of *Lawrence*.[24] Indeed, any attempt to

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[20] *Casey*, 505 U.S. at 851.

[21] *Lawrence*, 123 S. Ct. at 2478, 2481-82.

[22] The "zone of privacy," according to Justice Douglas, is a concept even "older than the Bill of Rights." Griswold v. Connecticut, 381 U.S. 479, 484, 486, 494 (1965).

[23] *See generally* RICHARD POSNER, SEX AND REASON 312-14 (1992); John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1052-76 (1994) (arguing that decriminalization and privatization of homosexual behavior are justified but not public acceptance or promotion of sex outside of marriage); John Finnis, *Liberalism and Natural Law Theory*, 45 MERCER L. REV. 687, 697-98 (1994).

[24] *See generally Lawrence*, 123 S. Ct. 2472. It is impossible, of course, to predict the precise future contours of the privacy right announced in *Lawrence*. As a result, and contrary to the textual assertion above, *Lawrence*'s privacy right may well expand to include constitutional protection for same-sex marriage. Indeed, the Supreme Court's privacy jurisprudence has demonstrated an uncanny ability to overcome all legal boundaries placed in its way. For example, a privacy right was first created to provide constitutional protection for intimate marital relationships. *Griswold*, 381 U.S. 479. Nothing in *Griswold*'s analysis suggested that privacy would have a broader scope. Nevertheless, a mere seven years later—and without further discussion—the Court extended *Griswold*'s protection to non-marital sexual relationships. Eisenstadt v. Baird, 405 U.S. 438 (1972). Accordingly, the analysis of *Lawrence* may be extended well beyond the legal (and analytical) boundaries purportedly inherent in the reasoning and structure of the opinion. In short, the post-*Lawrence* Due Process Clause may pack significantly more "punch" than has been recently assumed. *Compare* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (looking to specific, identifiable "fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'" to mark the substantive boundaries of the Due Process Clause) *with Lawrence*, 123 S. Ct. at 2472 (using *Casey*'s "concept of existence" dicta to construe the outer boundaries of the clause).

transform a privacy shield into a policy sword turns the concept of "privacy" on its head: the assertion becomes, not that homosexual conduct is private, but that it must be publicly acknowledged, condoned, recognized, and normalized. *Lawrence* does not extend this far.

The broader "fundamental right" claim premised on the reasoning of *Casey* fares no better. Not *every* personal preference connected with "one's own concept of existence," "meaning," and "mystery" can (or should) be recognized as a "fundamental right." State policymakers, for example, can require policemen to adhere to dress and grooming standards—no matter how mysterious and meaningful a pony tail or beard might be to a particular law enforcement officer.[25] Were it otherwise, our Constitution would cease to be the written document construed by Chief Justice Marshall in *Marbury v. Madison*[26] and would devolve into a vessel into which a bare majority of the Supreme Court could pour their personal predilections at will. The Court has never adopted such an arbitrary notion of fundamental rights under the Due Process Clause.

Accordingly, and far from protecting all notions of liberty that may be central to an individual's definition of "existence" and the "mystery of life," the Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'"[27] and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[28] Moreover, the Court has required a "'careful description' of the asserted fundamental liberty interest."[29] In short, even deeply held

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[25] Kelly v. Johnson, 425 U.S. 238 (1976).

[26] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[27] *Glucksberg*, 521 U.S. at 720-21 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)); *accord* Hawkins v. Freeman, 195 F.3d 732, 739 (4th Cir. 1999). The *Hawkins* court reasoned:

> The first step in [substantive Due Process analysis] is to determine whether the claimed violation involves one of those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. The next step depends for its nature upon the result of the first. If the asserted interest has been determined to be "fundamental," it is entitled in the second step to the protection of strict scrutiny judicial review of the challenged legislation. If the interest is determined not to be "fundamental," it is entitled only to the protection of rational-basis judicial review.

Hawkins, 195 F.3d at 739 (internal quotes and citations omitted).

[28] *Glucksberg*, 521 U.S. at 721 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[29] *Id.* (citing Reno v. Flores, 507 U.S. 292, 302 (1993); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277-78 (1990)).

contemporary notions of "existence," "meaning," and "mystery"[30] do not provide the judicial map for substantive due process excursions. It is rather "[o]ur Nation's history, legal traditions, and practices [that] provide the crucial 'guideposts for responsible decisionmaking.'"[31]

Nothing in our nation's history, legal traditions, or practices supports the notion that "marriage" has been or should be expanded beyond the notion of a consensual coupling of a man and a woman.[32] To the contrary, in the course of adjudicating marital rights or opining on the marital relationship, the Supreme Court has consistently linked its opinions to the traditional family structure of one man, one woman, and their children by emphasizing the marital functions of conception,[33] procreation,[34] child rearing and education,[35] and traditional family relationships in general.[36]

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[30] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (plurality).

[31] *Glucksberg*, 521 U.S. at 721 (quoting *Collins*, 503 U.S. at 125). *Michael H. v. Gerald D.* is a powerful example of the limits of "responsible decisionmaking." Michael H. v. Gerald D., 491 U.S. 110 (1989). There, the Court addressed the constitutionality of a century-old California statute granting a nearly irrefutable presumption that a child born to a married woman was the child of the woman's husband. *See* CAL. EVID. CODE § 621(a) (West 1989) (repealed 1994). The plaintiff established a 98% probability of paternity. Nevertheless, the lower courts, consistent with California law, refused to allow the plaintiff to establish a relationship with the child. In affirming, the Supreme Court denied the plaintiff's substantive due process argument because, when analyzed in accordance with history and tradition, the values protected by the California law—namely the sanctity of the marriage relationship—outweighed any individual rights the biological father may have had in a child conceived out of wedlock. *Michael H.*, 491 U.S. at 126-30. Emphasizing the power of the legislature to govern and protect the marital union, the Court stated: "Where . . . the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter." *Id.* at 129.

[32] Professor Eskridge has suggested that, while same-sex marriage has not been recognized in the West, same-sex marriage has been practiced and accepted in other cultures and countries throughout the world. *See* William N. Eskridge Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1511 (1993). In his article, however, Professor Eskridge carelessly assumes that a state-sanctioned 'same-sex union' and 'same-sex marriage' are the same thing. A state-sanctioned union and marriage are *not* the same, and recent research supports the proposition that nations and cultures of the world recognize that marriage is between a man and woman. *See* Peter Lubin & Dwight Duncan, *Follow the Footnote or the Advocate As Historian of Same-Sex Marriage*, 47 CATH. U. L. REV. 1271, 1324-25 (1998).

[33] *See* Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (calling the "traditional relation of the family" a "relation as old and as fundamental as our entire civilization").

[34] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *see also Casey*, 505 U.S. at 851 ("Our law affords constitutional protection to personal decisions relating to marriage, procreation.").

[35] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[36] *See* Prince v. Massachusetts, 321 U.S. 158, 165 (1944); *see also* Paul v. Davis, 424 U.S. 693, 713 (1976) (stating that activities implicit in the concept of ordered liberty were

This analysis forecloses any serious assertion that statutory preferences for heterosexual marriage unconstitutionally infringe upon a fundamental right under the Due Process Clause. Other scholars have persuasively shown that the same conclusion is warranted for the assertion that such preferences unconstitutionally target a "suspect class" under the Equal Protection Clause.[37] Legal preferences for heterosexual marriage, therefore, are *not* subject to strict (and generally fatal) judicial scrutiny.

IV. ESTABLISHED MARITAL PREFERENCES ADVANCE COMPELLING SOCIAL INTERESTS

Even if marriage were to be subjected to some form of heightened judicial review, that review should not result in court-ordered deconstruction. The reason why is straightforward: marriage between a man and a woman provides the very foundation of society.

The Supreme Court has had frequent opportunities to expound upon the fundamental importance of marriage to society.[38] Over a century ago, the Court called marriage "the most important relation in life . . . having more to do with the morals and civilization of a people than any other institution."[39] More recently, the Court described marriage as an "association that promotes a way of life, not causes; a

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"matters relating to marriage, procreation, contraception, family relationships, and child rearing and education").

[37] In general, a "suspect class" is characterized by an immutable trait (such as race) which subjects the class to unique social disadvantages. While some state courts have recently applied this analysis to same-sex marriage, *see* Tanner v. Or. Health Scis. Univ., 971 P.2d 435 (Or. App. 1998); Baker v. State, 744 A.2d 864 (Vt. 1998), any claim that homosexuality is "immutable" or that "gayness" (in today's social milieu) imposes unique social disadvantages is unpersuasive. As Professor Lynn Wardle correctly states, while race—the classic suspect class—

> is *passive*, homosexual behavior is active. Race is undeniably an immutable, *biologically determined* condition, which homosexual behavior has *not* been shown to be. Intuitively, there is a distinction between immutable racial classifications, which are logically irrelevant to legitimate policies, and personal sexual behavior choices, which are of substantial social concern, especially regarding marriage.

Wardle, *supra* note 2, at 82; *see also id.* at 75; Joseph Nicolosi et al., *Retrospective Self-Reports of Changes in Homosexual Orientation: A Consumer Survey of Conversion Therapy Clients*, 86 PSYCHOL. REP. 1071, 1083 (June 2000) (the study concludes that "20% to 30% of the participants [in voluntary conversion therapy] said they shifted from a homosexual orientation to an exclusively or almost exclusively heterosexual orientation," belying any assertion that homosexual orientation is "immutable").

[38] *See* Griswold v. Connecticut, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring); Reynolds v. United States, 98 U.S. 145, 164-65 (1878); *see also* Lynn D. Wardle, Loving v. Virginia *and the Constitutional Right to Marry, 1790-1990*, 41 HOW. L.J. 289, 301 (Winter 1998) (noting that *Griswold* "underscored that marriage is linked with, and the basis for, the traditional family and child-rearing").

[39] Maynard v. Hill, 125 U.S. 190, 205 (1888).

harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."[40] But, no matter how ornate the rhetoric, the Supreme Court's discussions of marriage continually emphasize a surpassingly important reality that quite curiously is often overlooked in the modern debates surrounding same-sex marriage: the unquestionable relationship between marriage and child-rearing. This biological and social relationship is profoundly important.

As the Court noted in *Skinner v. Oklahoma*,[41] "Marriage and procreation are fundamental to the very existence and survival of the race."[42] In *Zablocki v. Redhail*,[43] the Court reemphasized this connection between marriage, procreation, and child-rearing by placing the "decision to marry" on "the same level of importance as decisions relating to procreation, childbirth, child-rearing, and family relationships."[44] It did so precisely because if the "right to procreate means anything at all, it must imply some right to enter" the marital relationship.[45] The very concept of marriage is indissolubly linked to the societal imperatives of procreation and child-rearing. In addition, a growing volume of social science data underscores the importance of children being reared within a stable, two-parent, and opposite-sex marriage.[46]

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[40] *Griswold*, 381 U.S. at 486.

[41] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[42] *Id.* at 541.

[43] Zablocki v. Redhail, 434 U.S. 374 (1978).

[44] *Id.* at 386.

[45] *Id.*

[46] *See, e.g.*, Berger, *supra* note 1, at 51. The author posits,

> Although of late we can witness a public rediscovery of the salutary role of the nuclear family of father, mother, and their children living together and caring for their individual and collective progress, policy elites appear neither to have fully understood that public life lies at the mercy of private life, nor do they seem to have apprehended the degree to which the [traditional] virtues and [traditional] ethos continue to be indispensable for the maintenance of both the market economy and civil society.

Id.

One researcher has found that "the single most important factor in determining if a male will end up incarcerated later in life is . . . whether or not he has a father in the home." MICHAEL GURIAN, THE GOOD SON: SHAPING THE MORAL DEVELOPMENT OF OUR BOYS AND YOUNG MEN 182 (1999) (referring to research studies conducted by the University of Pennsylvania and Princeton University). The mother-child relationship is equally important. "As mothers spend less time with infants and toddlers . . . the boys' developing brains, and thus their behavioral systems, are affected." *Id.* at 42-43. Children without this crucial early bonding are "more likely to start out on a path of later narcissism and out-of-control behavior as [they] compensate[] for [the] early deprivation." *Id.* at 43.

Gurian notes that today there is a cultural strain on the early bond between both mothers and fathers:

> Most boys lose their mothers not because of death but because the importance of the mother-son bond has been gradually diminishing in our culture, and thus in the home. Pressures on contemporary mothers are

Organized society has a substantial interest in drawing legal lines that responsibly channel and encourage procreation. This theme has permeated Supreme Court decisions from its very beginning. Whenever the Court addresses family issues, it usually recites the basic precept that individuals have a unique interest in marriage because of its close connection to procreation and child-rearing.[47] Judicial recognition of this individual right to marry and procreate, however, necessarily demands recognition of a correlative social interest held by the state: a substantial—indeed surpassing—interest in channeling and promoting responsible procreative behavior. Only individuals marry and procreate. Even so, society has a profound interest in the conduct and outcome of these individual behaviors because these activities are fundamental to society's "very existence and survival."[48]

These interests continue to survive despite modern claimants for alternative marital unions who seek to sever sexuality completely from any relationship to procreation and child-rearing. Such a severance of sexuality from reproduction has significant legal, sociological, moral and philosophical consequences that have been discussed by, among others, Professors Robert George, Gerard Bradley,[49] and Hadley Arkes.[50] According to these scholars, heterosexual relationships (and, in particular, marital relationships) differ significantly from other possible sexual acts. Sexual relations between a man and a woman bound in marriage are described as an "intrinsic (or . . . 'basic') human good."[51] This statement is true (in large measure) because a heterosexual relationship has the biological potential for reproduction. Indeed, stripped of this reproductive potential, sexual relationships become nothing more than physically (and emotionally) agreeable genital stimulation.

> such that many mothers can't mother their sons as they wish and need to. Similar pressures have for years frayed the father-son bond . . . .

Id. at 42. Gurian also notes:

> The reason the question of working mothers and child care is so developmentally crucial now is that mother-child attachment itself has changed a great deal by force of culture. Our economic system forces many mothers to work far away from their babies, and the 'aunties' — the child-care workers provided by our culture — are generally so slightly paid that they don't stay around long enough to form bonds. This situation is potentially dangerous to the developing child.

Id. at 74.

47 *See supra* notes 30-34 and accompanying text.

48 Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

49 Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 302 (1995).

50 Hadley Arkes, *Questions of Principle, Not Predictions: A Reply to Macedo*, 84 GEO. L.J. 321 (1995).

51 George & Bradley, *supra* note 49, at 301-02.

One need not dispute that mutually agreeable genital stimulation can have emotional, mental, and physical overtones. Such stimulation may be the result of—or, indeed, result in—intense attachments to a sexual partner. Nevertheless, absent any relation to procreation, the sexual act is reduced to a purely sensory (be it physical, mental or emotional) experience.[52]

At this point, homosexual activists argue that if marital law exists to advance society's procreative imperative, why should legal protection be extended to infertile (whether by choice or otherwise) heterosexual unions? This argument, however, misses the mark. Traditional marriage, unlike any other sexual relationship, furthers society's profound interest in the only sexual relationship that has *any biological potential* for reproduction: union between a man and a woman.

Procreation *requires* a coupling between the two sexes. Sexual relations between a man and a woman, therefore, even if infertile, fundamentally differ from homosexual couplings. Homosexual couplings do *not* have the biological potential for reproduction: children are possible *only* by means of legal intervention (e.g., adoption) or medical technology (e.g., artificial insemination). Accordingly, and by their very nature, sexual relationships between a man and a woman (even if infertile) differ in kind from couplings between individuals of the same sex. Heterosexual couplings *in general* have the biological potential for reproduction; homosexual couplings *never* do. This potential procreative power is the basis for society's compelling interest in preferring potentially procreative relationships over relationships founded primarily upon mutually agreeable genital stimulation.[53]

The institution of marriage promotes not only sensory experience, but society's very survival.[54] The law, moreover, has never been ignorant of the vital distinction between purely sensory experience and procreation. Constitutional law, for its part, *must* take continuing cognizance of this biologically obvious distinction. Constitutional

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[52] Professors George and Bradley argue that the notion of sex as pure sensory experience compromises the important values of personal dignity and integrity:

> [M]arriage provides a noninstrumental reason for spouses, whether or not they are capable of conceiving children in their acts of genital union, to perform [sexual] acts. In choosing to perform nonmarital orgasmic acts, including sodomitical acts—irrespective of whether the persons performing such acts are of the same or opposite sexes (and even if those persons are validly married to each other)—persons necessarily treat their bodies and those of their sexual partners (if any) as *means* or *instruments* in ways that damage their personal (and interpersonal) integrity; thus, regard for the basic human good of integrity provides a conclusive moral reason not to engage in sodomitical and other nonmarital sex acts.

Id. at 302.

[53] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[54] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

decision making, above all other forms of judicial decision making, must be grounded in both principle and reason.[55] When it comes to the constitutional protection for marriage, the undeniable and well-grounded principle that has guided mankind for generations (from local, state, and national levels of government since this country's founding) is straightforward: there is a fundamental difference between potentially procreative sexuality and non-procreative sexuality. Reproduction is the only human act for which the two sexes indisputably require the other. A woman can do everything in her life without a man, except reproduce. The same law of nature holds true for a man. Thus, the sexuality that unites a man and a woman is unique in kind. This uniqueness, in fact, is the very basis of the religious, historical, and metaphysical notion that marriage indeed makes the two one flesh.[56]

Furthermore, should constitutional law abandon the principle that reproductive sex has a unique role, there will be no basis left upon which to draw principled constitutional distinctions between sexual relations that are harmful to individuals or society, and relations that are beneficial. In fact, the same arguments that would seemingly require constitutional protection for same-sex marriage would also require constitutional protection for any consensual sexual practice or form of marriage. After all, once the principled line of procreation is abandoned, we are left with nothing more than sex as a purely sensory experience. The purely sensory experience cherished by any given sexual partnership will be no more or less precious than the purely sensory experience valued by another sexual partnership, no matter how socially repugnant. Should courts depart from the established heterosexual definition of marriage, there will be little (if any) principled ground upon which to deny marital status to any and all consensual sexual

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[55] *See supra* notes 30-36 and accompanying text; *see also* LEARNED HAND, THE BILL OF RIGHTS 73 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.").

[56] Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2497 (1997). Professors Bradley and George

> defend an alternative conception of marriage—one which we believe to be reflected in traditional American and British marriage law, especially in the law governing consummation of marriage. We argue that marriage is a one-flesh (i.e., *bodily*, as well as emotional, dispositional, and spiritual) union of a male and a female spouse consummated and actualized by sexual acts that are reproductive in type. Such acts consummate and, we maintain, actualize the intrinsic good of marriage whether or not reproduction is desired by the spouses in any particular marital act, or is even possible for them in a particular act or at all.

Id.; *see also Genesis* 2:24.

groupings.[57] Bigamy, group marriage, and even consensual incestuous coupling, could all (and probably would all) accurately lay claim to the same legal entitlements.

Advocates of same-sex marriage may nonetheless argue that denying same-sex couples the opportunity to marry is really just sex discrimination.[58] This assertion conflates and confuses the concepts of "sex" (a biological status) and "sexual conduct" (the way one uses the genitalia provided by a person's biological status). The law has indeed provided substantial protection against unthinking or stereotypical classifications based on sex.[59] But these decisions simply reflect the biological reality[60] that the human race is composed of women and men who, for the most part, are similarly situated and who, therefore, may not be treated differentially. Thus, for example, the rules for buying beer must be the same for women as they are for men,[61] and a military school may not preclude women without a compelling justification.[62] These decisions, however, do not protect, nor have they ever protected, sexual *conduct*; rather, the established line of sex discrimination cases protects women and men from unfounded classifications based upon the biological status of *being* a woman or a man.[63] Any assertion that classifications based on sexual conduct are "sex based" ignores the vital distinction between status (i.e., femaleness or maleness) and conduct (i.e., heterosexuality, homosexuality, bisexuality, incest, or bestiality).[64]

Advocates of same-sex marriage also assert that homosexual behavior harms no one, so the government has no interest in denying that privilege. Nobody will be worse tomorrow, the argument goes, because their homosexual neighbors are married today. While this contention may have some appeal, it is shortsighted. No one knows *what* impact same-sex marriage will have on society. Moreover, it certainly has *not* been shown that society will be *improved* by same-sex marriage.

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[57] Professors George and Bradley cogently ask how society can, in principle, reject the claim of the pederast once it accepts the marital claim of the homosexual couple. *See* George & Bradley, *supra* note 49, at 311.

[58] *See* Andrew Koppelman, *Essay One: Discrimination Against Gays Is Sex Discrimination, in* MARRIAGE AND SAME-SEX UNIONS: A DEBATE 209 (Lynn D. Wardle et al. eds., 2003).

[59] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532-33 (1996).

[60] The only exceptions exist for rare genetic anomalies such as hermaphroditism, which has only a few recorded occurrences. 9 WORLD BOOK ENCYCLOPEDIA 211 (2001); Kenneth N. Anderson ed., MOSBY'S MEDICAL, NURSING, AND ALLIED HEALTH DICTIONARY 732 (4th ed. 1994).

[61] Craig v. Boren, 429 U.S. 190 (1976).

[62] *Virginia*, 518 U.S. at 531.

[63] *Id.* at 532-33.

[64] While some gay activists have argued that "gayness" is an immutable, non-chosen behavior, research belies such a claim. *See supra* note 37.

For centuries, societies have been built upon the foundation of traditional families.[65] As the family is weakened so, too, is society.[66] For instance, in the 1970s some argued convincingly that the loosening of divorce laws would inflict relatively minor pain on society. But thirty years later, the evidence tells a compelling story of the increased injury society endures every time the divorce rate rises and the traditional family is weakened.[67]

Making divorce easier to obtain seemed progressive then, but now, when divorce has become a national norm and many households consist of unmarried individuals with no children, society is beginning to grasp that the divorce revolution has imposed high societal costs.[68] The American experience with the "divorce revolution" should be instructive, and the lesson to be learned is one of caution.

We do not know the precise costs of altering our long-standing notion of marriage. Sound social science evidence shows that homosexual parenting results in different outcomes for children.[69] Moreover, the

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[65] *See* Lubin & Duncan, *supra* note 32, at 1324-25.

[66] *See* Berger, *supra* note 1, at 44.

[67] JUDITH WALLERSTEIN et al., THE UNEXPECTED LEGACY OF DIVORCE 294-316 (2000). The authors assert, among other things, that modern easy access to divorce "has increased the suffering of children." *Id.* at 295.

[68] *Id.* As Dr. Wallerstein explains, during the past 30 years

> we've created a new kind of society never before seen in human culture. Silently and unconsciously, we have created a culture of divorce. It's hard to grasp what it means when we say that first marriages stand a 45 percent chance of breaking up and that second marriages have a 60 percent chance of ending in divorce. What are the consequences for all of us when 25 percent of people today between the ages of eighteen and forty-four have parents who divorced? What does it mean to a society when people wonder aloud if the family is about to disappear? What can we do when we learn that married couples with children represent a mere 26 percent of households in the 1990s and that the most common living arrangement nowadays is a household of unmarried people with no children? These numbers are terrifying. But like all massive social change, what's happening is affecting us in ways that we have yet to understand.

Id. at 295-96 (footnote omitted).

[69] While it has long been claimed that there are "no differences" in behavioral outcomes for children raised by homosexual (as compared to heterosexual) parents, a recent re-analysis of prior studies challenges this conclusion. Two researchers sympathetic to the cause of homosexual households have now concluded that the "[e]vidence . . . does not support the 'no differences' claim." Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, AM. SOC. REV., Apr. 2001, at 159, 176. These researchers conclude that "[c]hildren with lesbigay parents appear less traditionally gender-typed and more likely to be open to homoerotic relationships. In addition, evidence suggests that parental gender and sexual identities interact to create distinctive family processes whose consequences for children have yet to be studied." *Id.* at 176. Thus, the social impact of same-sex marriage is presently unknown, but is likely to be significant. Society, therefore, should be exceptionally careful before dramatically re-structuring the very foundation of society itself: marriage and the family.

homosexual lifestyle[70] is quite removed from the lifestyle of the vast majority of married heterosexual couples.[71] These realities suggest that

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[70] Homosexual sex involves risky behavior. Anal intercourse is especially conducive to HIV infection. Warren Winklestein, Jr. et al., *Sexual Practices and Risk of Infection by the Human Immunodeficiency Virus*, 257 JAMA 321, 325 (1987); Mads Melbye & Robert J. Biggar, *Interactions Between Persons at Risk for AIDS and the General Population in Denmark*, AM. J. EPIDEMIOLOGY, Mar. 1992, at 601. Anal sex increases the exposure to human feces and correspondingly a large number of related diseases. Lawrence Corey & King K. Holmes, *Sexual Transmission of Hepatitis A in Homosexual Men*, NEW ENG. J. MED. Feb. 1980, at 435-38.; Janet R. Daling et al., *Sexual Practices, Sexually Transmitted Diseases, and the Incidence of Anal Cancer*, NEW ENG. J. MED., Oct. 1987, at 973-77.; Thomas C. Quinn et al., *The Polymicrobial Origin of Intestinal Infections in Homosexual Men*, NEW ENG. J. MED., Sept. 1983, at 576-82. "Gay Bowel" syndrome is another problem associated with homosexual behavior. Glen E. Hastings & Richard Weber, *Letter to the Editor*, AM. FAM. PHYSICIAN, Feb. 1994, at 582.

Homosexual conduct also has consequences for mental health. There is a well-documented correlation between homosexuality and suicide and mental illness. *See, e.g.*, Theo B. M. Sandfort et al., *Same-Sex Sexual Behavior and Psychiatric Disorders: Findings from the Netherlands Mental Health Survey and Incidence Study*. 58 ARCHIVES GEN. PSYCHIATRY 85 (Jan. 2001) ("The findings support the assumption that people with same-sex sexual behavior are at greater risk for psychiatric disorders."); Richard Herrell et al., *Sexual Orientation and Suicidality*, 56 ARCHIVES GEN. PSYCHIATRY 867 (Oct. 1999) ("Same-gender sexual orientation is significantly associated with each of the suicidality measures" and "is unlikely to be due solely to substance abuse or other psychiatric co-morbidity"); David M. Fergusson et al., *Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?*, 56 ARCHIVES GEN. PSYCHIATRY 876 (Oct. 1999) ("Findings support recent evidence suggesting that gay, lesbian, and bisexual young people are at increased risk of mental health problems, with these associations being particularly evident for measures of suicidal behavior and multiple disorder."). While some may argue that these findings are "caused by societal oppression" (J. Michael Bailey, *Homosexuality and Mental Illness*, 56 ARCHIVES GEN. PSYCHIATRY 883, 884 (Oct. 1999)), this is not the only possible explanation. The survey of findings from the Netherlands Mental Health Survey and Incidence Study found a significant greater risk for psychiatric disorders among homosexuals, even though "the Dutch social climate toward homosexuality has long been and remains considerably more tolerant" than most of the world. Sandfort, *supra*, at 89. Other possible explanations include hypotheses that "homosexuality represents a deviation from normal development and is associated with other such deviations that may lead to mental illness," and that "increased psychopathology among homosexual people is a consequence of lifestyle differences associated with sexual orientation." Bailey, *supra*, at 884.

[71] As one homosexual advocate stated:

> Gay culture has . . . never had a time-based hierarchy that rates relationships based on their longevity. . . .
>
> . . . Most of us keep our exes in our tight circle of friends. When the hot and steamy love affair is over, we part and each add [sic] the other to our support network.
>
> It's foolish . . . to invest all this love in a person and then want nothing more to do with them when we find we don't want to stay involved sexually.

Gareth Kirkby, *The Taming of Queers*, XTRA! (on-line magazine), *at* http://www.xtra.ca/site/toronto2/arch/body202.shtm (June 3, 1999). The level of promiscuity among the gay population is also *very* different from mainstream society. The Kinsey Institute published a study showing that 28 percent of male homosexuals have had sexual encounters with *one thousand* or more partners with almost half of white homosexual

the social consequences of same-sex marriage may well be profound. Are we prepared to base social policy upon the as-yet-unproven assertion that any sexual relationship (no matter how idiosyncratic or far removed from procreation) has the same benefit as traditional marriage?

The judicial system should not be tempted to stray from the course marked by history and tradition, a course that is soundly built on society's interest in encouraging and protecting the very sexual relationship upon which the future of any society depends. Justice White, in *Bowers v. Hardwick*, noted that "it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes . . . . We are unwilling to start down that road."[72] After *Lawrence*, adultery, incest, and other sexual crimes may, in fact, no longer be subject to state regulation. We may soon learn whether this road leads to social progress or something else.

But, wherever the road created in *Lawrence* leads, American courts should be exceptionally wary with any journey into the landscape of marriage. The potential consequences are simply too profound. American courts, both at the state and federal levels, must eschew the task of judicially defining what sexual partnerships—among all the possibilities ranging beyond that of a man and a woman—must be legitimated with the long-honored title of "marriage."

V. CONCLUSION

Because legislative preferences for heterosexual marriage do not infringe upon fundamental rights or target a suspect class, such preferences need only reasonably advance a rational objective. Society has an undeniable interest in preferring heterosexual marriage over alternative sexual relationships. Heterosexual marriage, unlike same-sex partnerships, has the biological potential for procreation. There is no gainsaying the importance of this societal interest. As the Supreme Court has recognized, procreation involves the "very existence and survival" of mankind.[73] Laws protecting and preferring heterosexual marriage are a principled and necessary means of furthering this most fundamental of all governmental objectives.

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males having more than 500 different sexual partners in a lifetime. JOSEPH NICOLOSI, REPARATIVE THERAPY OF MALE HOMOSEXUALITY: A NEW CLINICAL APPROACH 124 (Jason Aronson Inc. 1991).

[72] Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986), *rev'd*, Lawrence v. Texas, 123 S. Ct. 2472 (2003).

[73] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); *see also* Zablocki v. Redhail, 434 U.S. 374, 383, 386 (1978) (recognizing the "right to marry is of fundamental importance" because "[if the] right to procreate means anything at all, it must imply some right to enter the only relationship in which [the State] allows sexual relations legally to take place").