

SAME-SEX MARRIAGE AND THE RIGHT TO PRIVACY

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I. INTRODUCTION

Over the past decade, several state appellate courts have analyzed whether their respective state constitutions protect the right to marry a same-sex partner. Those courts addressing the issue have differed both in their analyses and in their ultimate conclusions, although there have been striking similarities among those courts upholding same-sex marriage bans and among those striking them down, differences in wording among the respective state constitutional provisions notwithstanding.

To understand the widely differing analyses regarding the right to marry someone of the same sex, it will be helpful to consider some of the background regarding the right to marry in particular and the right to privacy more generally. The United States Supreme Court has recognized that certain rights related to family matters are extremely important and cannot be abridged by the state absent a showing that compelling state interests would be undermined. A matter of some dispute involves the criteria used by the Court to determine which rights qualify for this heightened protection and how the scope of those rights should be defined.

The cases discussed in this Article have all been decided on state constitutional grounds,¹ which differ both in their wording and in the degree of protection that they offer. While a state's equal protection guarantees might provide an additional basis upon which to argue that the right to marry a same-sex partner is protected by the state constitution,² the focus of this Article is on the privacy or substantive due process analyses offered by the differing courts.

Part II of this Article examines the background right to privacy jurisprudence contained in the United States Constitution, discussing those rights that have been designated as protected and why the existing federal jurisprudence cannot plausibly be construed as affording same-sex marriage no constitutional protection. Part III discusses several of the state appellate court analyses of the right to marry that have been offered since *Lawrence v. Texas*³ was decided, and notes how several courts upholding the respective bans have offered specious or irrelevant

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¹ A case is winding its way through the courts challenging California's same-sex marriage ban on federal constitutional grounds. *See* Valerie Richardson, *Prop 8 Trial Stirs Up Questions, Emotions, Gay-Marriage Allies Optimistic*, WASH. TIMES, Feb. 8, 2010, at A01 (discussing *Perry v. Schwarzenegger*, which addresses "the federal constitutionality of California's Proposition 8").

² *See* *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) ("sexual orientation constitutes a quasi-suspect classification for purposes of the equal protection provisions of the state constitution").

³ 539 U.S. 558 (2003).

reasons that would never have been offered in any other context. The Article concludes that all of these opinions help demonstrate why the right to marry a same-sex partner should be found protected as a matter of both state and federal due process guarantees.

II. PRIVACY RIGHTS UNDER THE UNITED STATES CONSTITUTION

The United States Supreme Court has recognized that several rights related to family fall within the right to privacy and are accorded significant constitutional protection. It is a matter of some dispute, however, which rights do or should fall within the contours of the right to privacy and, further, how narrowly those rights should be defined. Yet, it is not as if there are no guidelines on this matter—the existing jurisprudence suggests both that a commonly used test for determining which rights are fundamental should not be used and that the traditional prioritizing within the right to privacy would have to be turned on its head for same-sex marriage not to be recognized as protected under the right to privacy.

A. *The United States Constitution and the Right to Privacy*

The United States Supreme Court has recognized that certain rights fall within the right to privacy including marriage, procreation, contraception, family relationships, and child rearing and education.⁴ Such a designation is important, because statutes abridging privacy rights will be struck down as unconstitutional unless they meet a very demanding standard. As the plurality explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁵ “[t]he Court has held that limitations on the right of privacy are permissible only if they survive ‘strict’ constitutional scrutiny – that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest.”⁶ In contrast, if an interest does not fall within the right to privacy and is, instead, a mere liberty interest, then a statute adversely affecting that interest will be upheld so long as that statute is rationally related to the promotion of a legitimate state interest.⁷

Given the importance of how rights are characterized, one might expect that there would be a clear test to determine which rights are fundamental and which are not. The Court explained in *Washington v. Glucksberg* that the “Due Process Clause specially protects 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

⁴ See *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

⁵ 505 U.S. 833 (1992).

⁶ *Id.* at 929.

⁷ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (“the asserted ‘right’ . . . is not a fundamental liberty interest protected by the Due Process Clause. . . . [The statute adversely affecting that interest must merely] be rationally related to legitimate government interests”).

if they were sacrificed.’’⁸ While the statement is accurate insofar as it is describing *some* of the rights that are protected, a separate question is whether the Due Process Clause offers robust protection for *only* those rights falling within the description offered by the *Glucksberg* Court.

The *Glucksberg* test, which is frequently cited in analyses holding that a particular right does *not* merit increased protection,⁹ is clear and very demanding. Very few rights evaluated in light of this test qualify as fundamental. Such a result might be thought unsurprising—if fundamental rights cannot be abridged unless very important state interests would otherwise be at risk, the recognition of many such rights would hamstring legislatures in their attempts to regulate everyday affairs.

Reasonable people might disagree about whether the constitutional test to determine fundamental rights should err on the side of giving states more discretion, for fear that legislatures would be straitjacketed, or less discretion, for fear that legislatures would run roughshod over very important rights. Yet, regardless of one’s viewpoint, a separate consideration is that any test for fundamental rights should account both for those rights that have been recognized as fundamental and for those that have not. The difficulty with the *Glucksberg* Test is that it performs its gate-keeping function too well—many of the rights currently recognized as falling within the right to privacy could neither be described as deeply rooted in this nation’s history and tradition nor as implicit in the concept of ordered liberty such that neither liberty nor justice would exist were those rights not recognized.

Consider, for example, the right to access contraception. Laws criminalizing contraception had been on the books for eighty-six years at the time that the Court found contraception for married couples to be protected by the U.S. Constitution.¹⁰ Such laws had existed for an even longer period when the Court found contraception for unmarried persons to be constitutionally protected.¹¹ Yet, a practice that had been criminalized for several decades could hardly be said to be deeply rooted in the Nation’s history and traditions or implicit in the concept of ordered liberty such that neither liberty nor justice would exist were the right not

⁸ *Id.* at 720–21 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

⁹ *See, e.g.*, *Conaway v. Deane*, 932 A.2d 571, 616–17 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 976–77 (Wash. 2006).

¹⁰ *See* *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J. dissenting).

¹¹ *See* *Commonwealth v. Gardner*, 15 N.E.2d 222, 223 (Mass. 1938), *overruled in part by* *Commonwealth v. Baird*, 247 N.E.2d 574 (Mass. 1969) (suggesting that the original statute limiting access to contraception was passed in 1879); *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (striking down restrictions on access to contraception for unmarried individuals).

recognized.¹² Historical prohibitions notwithstanding, the statute banning access to contraception for unmarried individuals was struck down as unconstitutional, and the right to access contraception is now considered a fundamental right falling within the right to privacy.¹³

The same point might be made about the right to abortion, which had been criminalized for over a century before it was found to be protected by the right to privacy.¹⁴ Here, too, a right recognized as falling within the right to privacy¹⁵ involved a practice long criminalized. Indeed, the *Roe* Court suggested that “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ are included in this guarantee of personal privacy.”¹⁶ By using “or” rather than “and,” *Roe* suggests that it is mistaken to believe that “fundamental” is appropriately defined in terms of what is implicit in the concept of ordered liberty. Instead, a right falling under privacy protections will be fundamental (where that term is defined independently) *or* implicit in the concept of ordered liberty.

One final illustration might be offered to establish why the *Glucksberg* Test is simply not an appropriate test to determine whether a right is fundamental. Consider the right to marry someone of a different race. Anti-miscegenation statutes had existed since before the Nation’s founding,¹⁷ so it could hardly be thought that such a right was protected by the Nation’s history and traditions. Further, when holding that the right to marry someone of another race was protected by the right to privacy, the Court did not claim or even imply that neither liberty nor justice existed in the several states prohibiting interracial unions.¹⁸

It might be thought that the reason the right to marry someone of another race is protected is because the right analyzed by the Court was not described with such specificity—the right to marry, as a general matter, is deeply rooted in this Nation’s history and traditions, even if the right to marry someone of another race

¹² See *Lawrence v. Texas*, 539 U.S. 558, 596 (Scalia, J., dissenting) (suggesting that something historically criminalized cannot be deeply rooted in the Nation’s history and traditions).

¹³ See *Glucksberg*, 521 U.S. at 726.

¹⁴ See *Roe v. Wade*, 410 U.S. 113, 174–77 (Rehnquist, J., dissenting).

¹⁵ *Id.* at 153 (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

¹⁶ *Id.* at 152 (emphasis added) (internal citation omitted).

¹⁷ See *Loving v. Virginia*, 388 U.S. 1, 6 (1967).

¹⁸ For a list of those states, see *id.* at 6 n.5 (listing fifteen states in addition to Virginia: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas and West Virginia). The Court also noted that in the past fifteen years fourteen states have repealed interracial bans: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming. See *id.*

is not. However, the same point might be made about the right to marry someone of the same sex: the right to marry, as a general matter, is deeply rooted in this Nation's history and traditions, even if the right to marry someone of the same sex is not.¹⁹ In any event, the *Loving* Court refused to address the correct level of specificity when holding that the right to marry someone of another race was protected. It was only after the Court had already recognized various rights including rights to contraception, abortion, and the right to marry someone of another race that the *Glucksberg* Court suggested that there must be a "'careful description' of the asserted fundamental liberty interest"²⁰ whenever a particular right is claimed to be fundamental. Had the right to marry someone of another race been carefully described, it could not have passed the *Glucksberg* Test.

There is no small irony in the *Glucksberg* Court's claim that the relevant interest had to be carefully described. Consider the case, *Moore v. City of East Cleveland*, cited for the proposition that fundamental rights must be deeply rooted in this Nation's history and tradition.²¹ In *Moore*, the issue was whether the City of East Cleveland was violating constitutional guarantees when defining "family" for zoning purposes. Under the city's zoning scheme, a grandmother was prohibited from living with her son and two grandsons, who were first cousins.²²

Certainly, the *Glucksberg* Court was not guilty of misquotation—the *Moore* plurality in fact suggested that the "institution of the family is deeply rooted in this Nation's history and tradition."²³ Yet, members of the lesbian, gay, bisexual, and transgender ("LGBT") community can point to the *Moore* Court's recognition of the central importance of family as a reason to recognize LGBT families, whether or not those families include children.²⁴ This is where the *Glucksberg* Court's point about "careful description" can be used to suggest that while the institution of family may be deeply rooted in the Nation's history and traditions, the institution of LGBT families is not. However, were the careful description test used in *Moore* (the very case cited with approval in *Glucksberg*), the Court would likely have reached the opposite result. As Justice White suggested in his *Moore* dissent, "[u]nder our cases, the Due Process Clause extends substantial protection to various phases of family life, but none requires that the . . . interest in residing with more than one set of grandchildren is one that calls for any kind of heightened

¹⁹ See *Lewis v. Harris*, 908 A.2d 196, 228 (N.J. 2006) (Poritz, C.J., concurring and dissenting).

²⁰ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation omitted).

²¹ *Id.* at 720–21 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

²² See *Moore*, 431 U.S. at 496–99.

²³ *Id.* at 523.

²⁴ See Danielle Epstein & Lena Mukherjee, Note, *Constitutional Analysis of the Barriers Same-Sex Couples Face in Their Quest to Become a Family Unit*, 12 ST. JOHN'S J. LEGAL COMMENT 782, 798 n.91 (1997) (suggesting that *Moore*'s boundary expansion beyond the nuclear family supports recognizing LGBT families); Julienne C. Scocca, Comment, *Society's Ban on Same-Sex Marriages: A Reevaluation of the So-Called "Fundamental Right" of Marriage*, 2 SETON HALL CONST. L.J. 719, 763–64 & n.263 (same).

protection under the Due Process Clause.”²⁵ Thus, one of the very cases cited by the *Glucksberg* Court to establish the relevant test would likely have been decided differently had the Court actually used the test that *Moore* epitomizes.

The *Glucksberg* Test, especially when requiring a “careful description” of the interest at issue, provides an extremely effective bulwark against courts recognizing that interests have or deserve constitutional protection, although the test’s very effectiveness counsels against it being helpful in determining which rights are fundamental and which are not. Indeed, it should be noted that the “implicit in the concept of ordered liberty” test comes from *Palko v. Connecticut*.²⁶ In *Palko*, the Court offered a catalog of those rights in the criminal context which would *not* qualify under the applicable test as being fundamental, including the right to a trial by jury, the right against compulsory self-incrimination, and the right not to be subjected to double jeopardy.²⁷ All of these rights are now viewed as fundamental.²⁸

B. The Federally Protected Right to Marry

The right of privacy is understood to protect the right to marry, and it would be helpful to examine the cases in which the Court developed this jurisprudence. The Court first recognized that the right to marry was protected by the U.S. Constitution in *Loving v. Virginia*, where Virginia’s anti-miscegenation statute was held to violate both equal protection and due process guarantees.²⁹

The Due Process analysis was surprisingly underdeveloped in that case. The Court observed that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,”³⁰ a description that might be made of individuals regardless of their sexual orientation. The Court noted that marriage “is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival,”³¹ and then explained that to “deny

²⁵ *Moore*, 431 U.S. at 549 (White, J., dissenting).

²⁶ 302 U.S. 319 (1937).

²⁷ *Id.* at 325. The *Palko* Court discusses the right to a jury trial and self-incrimination to illustrate the notion that a Constitutional right may exist without being “fundamental.” The *Palko* Court ultimately held that the right against double jeopardy was not fundamental. *See id.* at 328, a holding that was overruled in *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

²⁸ *See Schiro v. Summerlin*, 542 U.S. 348, 358 (2004) (“The right to jury trial is fundamental to our system of criminal procedure”); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (“The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants.”); *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (“the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage”).

²⁹ *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”).

³⁰ *Id.*

³¹ *Id.*

this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . , is surely to deprive all the State's citizens of liberty without due process of law."³² The Court concluded its analysis by suggesting that the "freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."³³

This analysis needs to be unpacked. For example, the Court fails to explain why marriage is fundamental to our very existence and survival. Possible reasons include the kinds of benefits that marriage provides to those in the relationship; the kinds of benefits that marriage provides to those children who might be brought up within that setting including their being taught important societal values;³⁴ and other kinds of societal benefits, such as alleged domesticating effects of marriage on individuals who might otherwise be "wild" and irresponsible singles.³⁵

The Court's suggestion that marriage is fundamental to the existence and survival of humankind might be interpreted to be saying something about assuring that there will be future generations, although the *Loving* Court nowhere expressly discusses children in the opinion and only obliquely mentions them in the discussion of the state's justifications for its anti-miscegenation statutes.³⁶ The Court noted that in *Naim v. Naim*³⁷ the Virginia Supreme Court announced that "the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride.'"³⁸ When eschewing the desirability of having "mongrel citizens," Virginia was invoking one of the arguments that had long been made with respect to why interracial marriages should *not* be allowed, namely, that the children of such marriages were allegedly inferior to the children produced when the couples were composed of individuals of the same race.³⁹ The United States Supreme Court dismissed such purposes as an obvious "endorsement of the doctrine of White Supremacy."⁴⁰ Nonetheless, the Court was strikingly reluctant to discuss the role, if any, that children play in making the right to marry fundamental, perhaps because the Court desired to shift the argument away from

³² *Id.*

³³ *Id.*

³⁴ See *Zablocki v. Redhail*, 434 U.S. 374, 397 (1978) (Powell, J., concurring in the judgment) ("the Court has acknowledged the importance of the marriage relationship to the maintenance of values essential to organized society").

³⁵ See Susan Frelich Appleton, *Toward a "Culturally Cliterate" Family Law?* 23 BERKELEY J. GENDER L. & JUST. 267, 282 (2008) (discussing the claim that "marriage's purpose is to domesticate men").

³⁶ See *Loving*, 388 U.S. at 7.

³⁷ 87 S.E.2d 749 (Va. 1955).

³⁸ *Loving*, 388 U.S. at 7 (quoting *Naim*, 87 S.E.2d at 756).

³⁹ See *Scott v. State*, 39 Ga. 321, 1869 WL 1667, at *3 (Ga. June Term 1869) ("The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race.").

⁴⁰ *Loving*, 388 U.S. at 7.

Virginia's contention that the anti-miscegenation statutes should be *upheld* to promote the interests of children.

The Court was much less reticent about children when it again discussed the right to marry in *Zablocki v. Redhail*.⁴¹ At issue was a Wisconsin statute making it difficult for noncustodial parents to marry if they could not establish their ability to support their children.⁴² The state believed that if indigent, noncustodial parents were prevented from marrying, fewer children would be born to those parents and there would be fewer children in need of public assistance.⁴³

The *Zablocki* Court explained that while the *Loving* Court had talked about the importance of the right to marry in the context of a challenge to a law banning interracial marriage, the "right to marry is of fundamental importance for all individuals."⁴⁴ This time, however, the Court explained why the right to marry has such significance:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.⁴⁵

Zablocki provides some guidance with respect to which factors are relevant when analyzing which kinds of families can and should receive constitutional protection. First, the Court is not restricting protection to traditional nuclear families. The Court obviously understood that children are not only born into existing marriages. Roger Redhail had fathered a child out of wedlock while he was still in high school,⁴⁶ and later had conceived a child with a different woman whom he wanted to marry.⁴⁷ Regardless of his marital status, he was the father of one child and would soon be the father of another. The state's refusal to permit him to marry his pregnant fiancé would not reduce the number of children produced but would instead simply increase the number of children not living in a marital home.

Nor can the Court be thought to be asserting that legal, as opposed to biological, parenthood must occur in the context of marriage. That approach had

⁴¹ 434 U.S. 374 (1978).

⁴² *Id.* at 375.

⁴³ *Id.* at 375 (noting that the "statute specifies that court permission cannot be granted unless the marriage applicant submits proof of compliance with the support obligation and, in addition, demonstrates that the children covered by the support order 'are not then and are not likely thereafter to become public charges'"). *Id.* at 377-390.

⁴⁴ *Id.* at 384.

⁴⁵ *Id.* at 386.

⁴⁶ *Id.* at 377-78.

⁴⁷ *Id.* at 379 ("appellee and the woman he desired to marry were expecting a child in March 1975 and wished to be lawfully married before that time").

already been rejected in *Stanley v. Illinois*, where the Court recognized that unwed fathers have constitutionally protected rights.⁴⁸

The *Zablocki* Court suggested that decisions relating to: (1) procreation, (2) childbirth, (3) child rearing, and (4) family relationships all have the same level of importance, and *each* of these involves a constitutionally protected, fundamental interest.⁴⁹ In addition, the Court criticized the state's unjustified effort to establish barriers to the creation of legally recognized families.⁵⁰

When describing marriage as the foundation of family, the Court had at least two relationships in mind: the relationship between the adults and the relationship between the parent(s) and child. The Court noted that the marital setting was the only context in which sexual relations could legally take place,⁵¹ referring to one of the important aspects of the relationship between the adults. (It was still permissible at the time for a state to criminalize non-marital relations, and Wisconsin had a law making sexual relations between unmarried, consenting adults a misdemeanor.⁵²)

Marriage is important to the adults in the relationship for other reasons as well, since it involves an expression of “emotional support and public commitment,”⁵³ and may have religious significance for the parties.⁵⁴ Further, it is a precondition for a variety of state or federal benefits.⁵⁵ In short, marriage implicates a variety of interests of the adults in the relationship even when they have no ability or desire to have children.

Marriage is also important for those individuals who have or plan to have children, and the *Zablocki* Court pointed out that it made little sense to recognize the fundamental nature of the relationships between parents and their children while not permitting the parents to marry.⁵⁶ Yet, members of the LGBT community are having, and raising, children, and those relationships both trigger constitutional protection and are of fundamental importance.⁵⁷ It makes no more

⁴⁸ *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972). *See also* *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Steward, J., dissenting) (“In some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father.”) (referring to *Stanley* opinion).

⁴⁹ *See Zablocki*, 434 U.S. at 386.

⁵⁰ *Id.* at 388 (“We may accept for present purposes that these are legitimate and substantial interests, but, since the means selected by the State for achieving these interests unnecessarily impinge on the right to marry, the statute cannot be sustained.”).

⁵¹ *Id.* at 386.

⁵² *Id.* at 386 n.11 (“Wisconsin punishes fornication as a criminal offense: ‘Whoever has sexual intercourse with a person not his spouse may be fined not more than \$200 or imprisoned not more than 6 months or both.’ Wis.Stat. § 944.15 (1973).”).

⁵³ *Turner v. Safley*, 482 U.S. 78, 95–96 (1987).

⁵⁴ *Id.* at 96.

⁵⁵ *See id.*

⁵⁶ *Zablocki*, 434 U.S. at 386.

⁵⁷ Matt Larsen, Note, *Lawrence v. Texas and Family Law: Gay Parents’ Constitutional Rights in Child Custody Proceedings*, 60 N.Y.U. ANN. SURV. AM. L. 53, 92 (2004) (“Gay parents still possess a substantive due process right to raise their children.”).

sense for states to deny same-sex couples the right to marry when they have children to raise than it did to deny Redhail the right to marry.

The *Zablocki* Court was careful to qualify its holding, noting that “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”⁵⁸ Thus, the Court was not precluding states from enacting regulations regarding marriage. Nonetheless, where “a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”⁵⁹ But any statute *precluding* an individual from marrying a same-sex partner is significantly interfering with that person’s ability to enter into such a relationship. A separate issue is whether the state has sufficiently important reasons to justify the prohibition, but same-sex marriage bans are not an insignificant stumbling block for members of the LGBT community wishing to marry a same-sex partner.

Consider how courts analyze the claim that polygamous marriage is protected by the Constitution. Rather than say that the Court did not have polygamous marriage in mind when recognizing that the Constitution protects the fundamental right to marry, courts instead analyze whether the state can meet the relevant burden to justify the prohibition.⁶⁰

The *Zablocki* Court did not expressly mention members of the LGBT community when striking down the Wisconsin law at issue. However, Justice Powell noted in his concurrence that the Court’s analysis might have ramifications for same-sex relations and relationships as well.⁶¹

The Court’s analysis of the fundamental right to marry suggests that marriage implicates a host of issues for the adults, including their relationship with each other (sexual and otherwise), their ability to make a public statement about their relationship, their ability to fulfill religious duties or aspirations, and their ability to receive a variety of governmental benefits.⁶² Yet, a discussion of the adults’ relationship should not obscure the importance of marriage both for the children being raised and for the adults raising those children. Notwithstanding that all of these interests are implicated in families, whether the parents are of the same sex or of different sexes, courts and commentators have somehow come to the conclusion that states are permitted to ban same-sex marriage.⁶³

⁵⁸ *Zablocki*, 434 U.S. at 386.

⁵⁹ *Id.* at 388.

⁶⁰ *See, e.g., Potter v. Murray City*, 585 F. Supp. 1126, 1138-43 (D. Utah 1984) (discussing the state’s “compelling state interest in prohibiting polygamy”).

⁶¹ *See Zablocki*, 434 U.S. at 399 (Powell, J., concurring).

⁶² *See supra* notes 56–58 and accompanying text.

⁶³ *See, e.g., infra* text accompanying notes 85–108 & 117–85 (discussing appellate cases holding that same-sex marriage is not constitutionally protected).

C. Regulation of Sexual Activity

One of the perceived stumbling blocks to the recognition of same-sex marriage has been that up until 2003, when the Supreme Court overruled *Bowers v. Hardwick*,⁶⁴ states were permitted to criminalize same-sex sexual relations. In *Bowers*, the Court upheld a Georgia statute prohibiting sodomy, reasoning that there was no connection between family, marriage, or procreation on the one hand and same-sex sexual relations on the other.⁶⁵

Yet, the *Bowers* Court's inability to see this connection cannot go unexamined. There was no connection between marriage and same-sex relations because no state allowed same-sex couples to marry. There was no connection between same-sex relations and family because, in the Court's eyes, two individuals of the same sex who were not related by blood or adoption could not be members of the same family. While it is of course true that acts of sodomy, whether between individuals of the same sex or of different sexes, are not directly related to procreation, that hardly establishes that such relations may be criminalized.

The *Bowers* analysis was disappointing in a number of respects, because much of the reasoning could have been used to justify laws prohibiting sexual relations between members of different races. Before *Loving v. Virginia*, various states prohibited interracial marriage,⁶⁶ so it could not be argued that there was a connection between interracial coupling and marriage in those states. Further, because the marriages were prohibited, the families were not recognized—indeed, any children produced through such unions would be illegitimate, which might have resulted in those children being disadvantaged in various ways.⁶⁷ Finally, even the potentially procreative aspect of such unions would be used in a modified form to justify the prohibition. Just as Virginia had claimed that interracial marriage bans should be upheld to avoid the production of allegedly inferior, biracial children,⁶⁸ states prohibiting interracial sexual relations would attempt to justify their bans by appealing to the same theory.⁶⁹

In 2003, the United States Supreme Court overruled *Bowers* in *Lawrence v. Texas*, taking the unusual step of suggesting not only that *Bowers* was no longer good law, but that the case had been wrongly decided at the time the opinion was

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

⁶⁵ *See id.* at 191.

⁶⁶ *See supra* note 18 (listing states with anti-miscegenation laws pre-*Loving*).

⁶⁷ *See Pickett v. Brown*, 462 U.S. 1, 8 (1983) (noting “the history of treating illegitimate children less favorably than legitimate ones”).

⁶⁸ *See supra* notes 40–44 and accompanying text (discussing Virginia's justification for prohibiting interracial marriage).

⁶⁹ *See McLaughlin v. Florida*, 379 U.S. 184, 195 (1964) (Florida's “interracial cohabitation law, § 798.05, is likewise valid, it is argued, because it is ancillary to and serves the same purpose as the miscegenation law itself.”).

issued.⁷⁰ *Lawrence* is noteworthy for several reasons. While refusing to address whether same-sex marriage was constitutionally required, the Court went out of its way to explain that when “sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”⁷¹ Here, the Court suggested that the relationship itself has value independent of the sexual relations.

Justice Scalia in his *Lawrence* dissent complained that the Court had laid the foundation for a federal constitutional right to same-sex marriage.⁷² He may well be correct, although not because *Lawrence* somehow constitutionally protected adultery and bestiality,⁷³ but because the Court removed a barrier that had falsely been thought to prevent recognition of a right to marry a same-sex partner.⁷⁴ After *Lawrence*, same-sex adults’ consensual sexual relations could not be criminalized, although the Court had already made clear in *Zablocki* that there was nothing incompatible with a state’s criminalizing sexual relations outside of marriage while protecting such relations within marriage.⁷⁵

Traditionally, the Constitution has prioritized relationships over sexual relations—marital relations were found to be constitutionally protected in 1964,⁷⁶ and marriage itself was found to be a fundamental right in 1967 in *Loving*. However, the right to have sexual relations outside of marriage was not recognized until 2003 in *Lawrence*.

Almost fifty years ago, Justice Harlan argued that

laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed

⁷⁰ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁷¹ *Id.* at 567.

⁷² *Id.* at 604 (Scalia, J., dissenting).

⁷³ *Id.* at 599 (Scalia, J., dissenting).

⁷⁴ See Jeffery Hubins, Note, *Proposition 22: Veiled Discrimination or Sound Constitutional Law?* 23 WHITTIER L. REV. 239, 252 (2001) (“[C]ourts have held that marriage is a fundamental right, protected by the right to privacy. As such, this fundamental right to privacy does not protect same-sex marriages because the Supreme Court held in *Bowers* that the fundamental right to privacy does not extend to homosexual sex.”).

⁷⁵ See *supra* note 52 and accompanying text (noting that in Wisconsin at the time sexual relations could only take place legally within the context of marriage).

⁷⁶ See *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Griswold* is understood to preclude the state from regulating voluntary sexual relations within a marriage absent some compelling justification. Stacie L. Lude, Student Work, *After Farley v. Sartin: The Consequences of Declaring a Nonviable Fetus a “Person” for the Purpose of Wrongful Death*, 99 W. VA. L. REV. 339, 342 (1996) (“the Court, in *Griswold v. Connecticut*, recognized a zone of privacy, inherent within the Constitution, which protects an individual’s right to privacy concerning intimate family relations”).

into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.⁷⁷

Justice Harlan described a world in which same-sex relations only occur outside the familial context and children are usually born and raised within that context. Whether or not that picture was accurate when offered, it certainly is not accurate now.⁷⁸ Same-sex couples are living together as families, sometimes with children and sometimes without.⁷⁹ It simply is not true that same-sex relationships should somehow be considered contrary to marriage and family.

Nonetheless, Justice Harlan captured something important when he suggested that family provides the foundation upon which the jurisprudence in this area is based. That insight provided the underpinning for *Zablocki*.⁸⁰ Yet, one can build upon that foundation. Starting with the family does not mean that the jurisprudence cannot go beyond the family. Adult, consensual sexual relations, even outside of marriage, are sufficiently central to individual identity and autonomy that they should not be subject to state control absent some compelling justification.

Lawrence protects single adults engaging in consensual sexual relations whether or not those individuals are in a committed relationship. Yet, if Justice Harlan is correct that marriage and family are the bedrock of privacy jurisprudence, then one would expect that if sexual relations between individuals engaging in a one-night stand are constitutionally protected, then consensual sexual relations between individuals in a committed relationship are also constitutionally protected.⁸¹ Further, *Zablocki* counsels that the same-sex relationship itself should be afforded constitutional protection, especially if those individuals are raising children.

The claim here is not that the state must recognize same-sex marriage and LGBT families at the expense of undermining a state's very important interests. Rather, a state refusing to accord such recognition to LGBT families should

⁷⁷ See *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

⁷⁸ See, e.g., Valerie Boateng, *A Good Morning for Bonding with Dad*, COSHOCTON TRIB., Feb. 6, 2010, available at 2010 WLNR 2536513.

The Ohio Commission of Fatherhood has declared 26.2 percent of households in Ohio are single, and 40.4 percent of children are born to unmarried parents, according to the commission. Nationally, 40 percent of children have not seen their father in the past year, and 50 percent of children have not even seen their fathers home.

⁷⁹ See Maura Dolan, *Proposition 8 Trial Turns Its Attention to Children Witness for Opponents of the Gay Marriage Ban Says Those Raised by Same-Sex Couples Are Not Worse Off*, L.A. TIMES, Jan. 16, 2010, at 11 (“Thompson said 2000 census data showed that 33% of lesbian households and 22% of gay male households were raising children.”).

⁸⁰ See *supra* notes 48–53 and accompanying text (discussing *Zablocki*'s recognition that a constellation of family rights all implicate fundamental interests).

⁸¹ See *supra* note 74 and accompanying text (discussing the *Lawrence* Court's point that sexual relations may be one element of an enduring personal bond).

identify what substantial or compelling interests justify that refusal, and provide an analysis of how those interests would be adversely affected if LGBT families were given legal recognition. In several cases decided since the Court issued its *Lawrence* opinion, courts in different jurisdictions have discussed the state justifications for the respective same-sex marriage bans.

III. STATE COURT ANALYSES OF SAME-SEX MARRIAGE BANS

Several state appellate courts have recently addressed whether their respective state constitutions protect the right to marry a same-sex partner. The analyses are instructive because of the states' strikingly differing "legitimate" objectives. Ultimately, both those opinions upholding same-sex marriage bans, and those striking them down, demonstrate why such bans cannot survive the relevant constitutional test.

A. Arizona

An Arizona appellate court was one of the first to examine the constitutionality of a same-sex marriage ban in light of *Lawrence*.⁸² The *Standhardt* court correctly noted that the *Lawrence* Court did not hold that the right to marry a same-sex partner was protected by the Constitution.⁸³ That issue had not been before the Court, so it is unsurprising that the Court had refused to reach the question. Nonetheless, the Arizona court paid too little attention to what the Court said in *Lawrence*, and to local law, to offer a persuasive analysis of the implicated legal issues.

The *Standhardt* court understood that using the *Glucksberg* Test to deny that there was a fundamental right to marry a same-sex partner was undercut by *Loving*, given Virginia's longstanding anti-miscegenation laws.⁸⁴ However, the court tried to distinguish between interracial and same-sex marriage by suggesting that the former was a mere expansion of the traditional scope of the fundamental right to marry, rooted in procreation, whereas recognizing same-sex marriage would involve redefining the term.⁸⁵ Yet, by this point in time, it was not as if same-sex marriage was unimaginable and would involve a radical redefinition of marriage.⁸⁶ Many thought that Hawaii would be the first to recognize same-sex marriage in this country years before the question was addressed by the *Standhardt* court,⁸⁷ civil

⁸² See *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003).

⁸³ *Id.* at 457.

⁸⁴ *Id.* at 458 (noting that "historical custom supported such anti-miscegenation laws").

⁸⁵ *Id.*

⁸⁶ Regrettably, some commentators still speak as if same-sex marriage involves a radical redefinition of marriage. See, e.g., Lynn D. Wardle, *The "End" of Marriage*, 44 FAM. CT. REV. 45, 45–46 (2006) (arguing that "court decisions raise and illustrate the possibility of a radical judicial redefinition of marriage").

⁸⁷ Cf. Mark Strasser, *The Legal Landscape Post-DOMA*, 13 J. GENDER RACE & JUST. 153, 157 (2009):

unions were already recognized in Vermont,⁸⁸ and the Netherlands had already started recognizing same-sex marriages.⁸⁹ To expand a definition is to include what had not previously been included, and the difference between expansion and redefinition is too slim a reed to base a refusal to recognize something as fundamental as the right to marry one's life-partner.⁹⁰

Therefore, courts tend to distinguish between interracial unions and same-sex unions by appealing to procreation in order to justify affording constitutional protection to the former but not the latter relationship.⁹¹ However, this distinction is misguided for two reasons. First, the *Loving* Court tried very hard to avoid discussing the children of interracial couples when discussing why Virginia was precluded from arbitrarily prohibiting interracial couples from marrying.⁹² Second, the procreation aspect of marriage is a reason to recognize rather than refuse to recognize same-sex marriage.⁹³

Consider the claim that marriage is necessary to the survival of the human race. Presumably, this is because marriage is to provide a setting in which the young may be produced, raised, and nurtured. Yet, both same-sex and different-sex couples are providing environments in which children can grow and thrive,⁹⁴

Members of Congress anticipated that Hawaii would recognize same-sex marriage and that individuals from other states would go to Hawaii, marry their same-sex partners, and then return to their domiciles claiming that their home states had to recognize their marriages. Passage of DOMA allegedly permitted domiciles to refuse to recognize same-sex marriages validly celebrated in Hawaii.

(DOMA was passed in 1996). *See also* Jackie Gardina, *The Tipping Point: Legal Epidemics, Constitutional Doctrine, and the Defense of Marriage Act*, 34 VT. L. REV. 291, 304 (2009).

⁸⁸ *See* Greg Johnson, *In Praise of Civil Unions*, 30 CAP. U. L. REV. 315, 320 (2002) (noting that by "April 2000, the [Vermont] legislature had . . . passed the civil unions law as a legal alternative to marriage for same-sex couples").

⁸⁹ *See* Paul Borghs & Bart Eeckhout, *LGB Rights in Belgium, 1999–2007: A Historical Survey of a Velvet Revolution*, 24 INT'L J.L. & POL'Y & FAM. 1, 21 (2010) ("The Netherlands was the first country in the world to open up civil marriage and domestic adoption to same-sex couples on 1 April 2001.").

⁹⁰ *Cf.* *Wingo v. Wedding*, 418 U.S. 461, 480 (1974) ("The fulfillment of the purposes [at issue] . . . should not hang on such a slim reed.").

⁹¹ *See* *Standhardt v. Superior Court*, 77 P.3d 451, 458 (Ariz. Ct. App. 2003).

⁹² *See supra* notes 40–44 and accompanying text (discussing the *Loving* Court's shifting the focus of its analysis away from children).

⁹³ *See infra* notes 97–98 and accompanying text.

⁹⁴ *See* *Varnum v. Brien*, 763 N.W.2d 862, 874(Iowa 2009):

Many leading organizations, including the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, and the Child Welfare League of America, weighed the available research and supported the

whether those children are biologically related to neither parent, one parent, or both parents. While it is true that a child's biological parents can provide such a setting, others can too, and the human race will continue as long as children are born, and these nurturing homes are provided.⁹⁵

The *Standhart* court accepted that Arizona had a legitimate interest in promoting procreation and childrearing in stable homes, and that limiting marriage to different-sex couples was rationally related to promoting that end. Yet it was unclear how the latter promoted the asserted goal. The court recognized that same-sex couples are having and raising children and that those children would benefit were their parents able to marry.⁹⁶ However, the court accepted that the marital restriction would somehow benefit children when the only evidence presented undermined that very conclusion—the same-sex marriage ban would not help children raised by different-sex parents and would positively harm those raised by same-sex parents.⁹⁷

To add insult to injury, a brief review of Arizona law undercuts the state's commitment to limiting marriage to those capable of reproducing through their union. For example, Arizona does not bar individuals who are beyond their procreative years from marrying,⁹⁸ which one might have expected were Arizona only interested in having marriages among those able to reproduce.

Although the U.S. Supreme Court has never stated that those beyond their procreative years retain the fundamental right to marry, the Court would presumably so hold precisely because of the irrationality of limiting marriage that

conclusion that gay and lesbian parents are as effective as heterosexual parents in raising children.

⁹⁵ Cf. Amy L. Wax, *The Family Law Doctrine of Equivalence*, 107 MICH. L. REV. 999, 1006 (2009) (noting that children “thrive on certainty, predictability, and routine”). Certainty, predictability and routine do not depend upon the orientation of the parents, and can be enhanced if the parents are permitted to marry.

⁹⁶ *Standhardt*, 77 P.3d at 462 (“Petitioners more persuasively argue that the State’s attempt to link marriage to procreation and child-rearing is not reasonable because . . . same-sex couples also raise children, who would benefit from the stability provided by marriage within the family.”).

⁹⁷ Cf. *Hernandez v. Robles*, 855 N.E.2d 1, 32 (N.Y. 2006) (Kaye, C.J., dissenting):

The State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it. Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare.

⁹⁸ Arizona specifies who is too young to marry, see ARIZ. REV. STAT. ANN. § 25-102 (2010), but does not have any limitations on those who are too old to marry.

way.⁹⁹ But this means that the fundamental right to marry does not rest on one's ability to have children.

Suppose that Arizona were to argue that it would preclude the elderly from marrying, but that the United States Constitution bars the state from doing so. Even if one were to ignore the very low probability that the state would embrace or ever articulate such a policy given the political firestorm that would result among the many retired individuals in Arizona, there is additional reason to doubt that the state values procreation so highly. Arizona, one of several states that bars first cousins from marrying,¹⁰⁰ permits such marriage *only* if the first cousins can show that they are *unable* to have a child through their union.¹⁰¹

There is no caselaw suggesting that Arizona must provide such an exception as a constitutional matter. This means that Arizona goes out of its way to permit such marriages, which might well be sensible as a public policy matter but is antithetical to the state's alleged commitment to limiting marriage to those capable of producing children through their union.

The state offered, and the court accepted, other articulations of alleged state policy that were surprising at best. For example, the court implied that the state only had an interest in promoting fidelity among those who might have children.¹⁰² Yet, the state's criminal prohibition of adultery does not include an exception for those who do not have or, perhaps, cannot have children.¹⁰³

The *Standhart* court argued that Arizona would be unwise to insist that different-sex individuals must show that they were able and willing to procreate before allowing them to marry. The court reasoned that it would be intrusive to find out whether couples had the ability and willingness to have children; couples who do not intend to have children at the time of their marriages might later change their minds; those unable to have children at the time of marriage might later be aided by improved medical technology; or the couple might decide to adopt.¹⁰⁴

The court's points would be well-taken were the hypothesized requirement really at issue, but rang rather hollow in the context under discussion. While it is true that different-sex couples currently unable to have children may be helped by scientific breakthroughs or might decide to adopt, those same points might also be made about same-sex couples. That couples sometimes have a change of heart and later wish to have children is true, but might be said of couples regardless of

⁹⁹ Cf. *Lawrence v. Texas*, 539 U.S. 558, 605 (Scalia, J., dissenting) (noting that "the elderly are allowed to marry").

¹⁰⁰ See, e.g., 750 ILL. COMP. STAT. 5/212(4) (2010); IND. CODE § 31-11-8-3 (2010); IOWA CODE § 595.19 (1)(c) (2010); MICH. COMP. LAWS §§ 551.3 & 551.4 (2010); 23 PA. CONSOL. STAT. § 1304(e) (2010); UTAH CODE ANN. § 30-1-2 (2010).

¹⁰¹ ARIZ. REV. STAT. ANN. § 25-101(B) (2010). Other states with similar laws include Illinois, see 750 ILL. COMP. STAT. ANN. 5/212(4) (2010), Indiana, see IND. CODE § 31-11-8-3 (2010), and Utah, see UTAH CODE ANN. § 30-1-1 (2010).

¹⁰² See *Standhart v. Superior Court*, 77 P.3d 451, 461 (Ariz. Ct. App. 2003).

¹⁰³ See ARIZ. REV. STAT. ANN. § 13-1408 (2010).

¹⁰⁴ *Standhart*, 77 P.3d at 462.

whether they are composed of individuals of the same sex or of different sexes. The alleged difficulty in asking members of a couple about their ability to have children does not prevent the state from requiring that first cousins establish their *inability* to have children in some cases. Basically, all of the points made were either undercut by existing practices or might also have been made about the very couples whose denial of access to marriage was being upheld by the court.

Those challenging Arizona's marriage law were not trying to preclude different-sex couples unable or unwilling to have children from marrying. On the contrary, the challengers were suggesting that those couples should be permitted to marry, as should same-sex couples. The court seemed to accept that the mere *possibility* that different-sex couples might have children was reason to permit them to marry, but that the *actuality* of same-sex couples having children to raise was not enough to justify their having the opportunity to marry.

B. Massachusetts

In the same year that the Arizona court upheld a challenge to that state's same-sex marriage ban, the Supreme Judicial Court of Massachusetts struck down that state's ban in *Goodridge v. Department of Public Health*.¹⁰⁵ The court noted the numerous benefits that marriage provides,¹⁰⁶ and analyzed whether the state had adequate reasons to justify excluding those wishing to marry a same-sex partner from receiving those benefits. The court rejected the argument that the state had an interest in limiting marriage to those who could procreate through their union, noting that the state promoted adoption and the production of children through noncoital means.¹⁰⁷ Indeed, Massachusetts recognizes second-parent adoption,¹⁰⁸ so two members of a same-sex couple might each be recognized as the legal parent of the same child. The court understood that prohibiting the same-sex partners from marrying would inure to the detriment of those adults and to any children that they were raising¹⁰⁹ without providing any offsetting benefits to different sex couples and their children.¹¹⁰

A surprising claim in one of the *Goodridge* dissenting opinions was that reserving marriage for different-sex couples was rationally related to the state's desire to provide an optimal setting in which children might be raised.¹¹¹ Suppose that one brackets that children raised by same-sex parents are thriving and that various national organizations whose mission is to promote the interests of children have recognized the parenting abilities of members of the LGBT community.¹¹² Even so, the position offered in the *Goodridge* dissent imposes

¹⁰⁵ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

¹⁰⁶ *Id.* a 955–56.

¹⁰⁷ *Id.* at 962.

¹⁰⁸ *See Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993).

¹⁰⁹ *Goodridge*, 798 N.E.2d at 964.

¹¹⁰ *Id.*

¹¹¹ *See id.* at 997 (Cordy, J., dissenting).

¹¹² *See Varnum*, 763 N.W.2d at 874.

opportunity costs on the children raised by same-sex couples, i.e., a denial of those tangible and intangible benefits that would have accrued had the parents been permitted to marry, without any offsetting benefits for anyone else. But it makes no sense to justify a denial of the parents' right to marry by appealing to the interests of children when the denial harms rather than helps children.

C. Indiana

A new justification was offered for limiting marriage to different-sex couples in *Morrison v. Sadler*.¹¹³ The Indiana court recognized that many same-sex couples are having and raising children. However, the court noted, there is a key difference between same-sex and different-sex couples, namely, the ease of procreation:

Those persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. "Natural" procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or planning. All that is required is one instance of sexual intercourse with a man for a woman to become pregnant.¹¹⁴

The court suggested that this difference in the ways that couples might reproduce justified the state's promoting the institution of different-sex marriage so as to increase the likelihood that children would be born within wedlock. The court apparently believed that the great emotional and financial investment associated with adoption or assisted reproduction would make it sufficiently likely that the couple would stay together with or without marriage, which suggested that the state did not need to provide the benefits of marriage to such couples.¹¹⁵

This is a very unusual view of the purpose of marriage, because it frames marriage as an institution designed to provide stability for children *only* in those cases where the stability would likely not exist but for the marriage. The same

¹¹³ 821 N.E.2d 15 (Ind. App. 2005).

¹¹⁴ *Id.* at 24.

¹¹⁵ *See id.*:

What does the difference between "natural" reproduction on the one hand and assisted reproduction and adoption on the other mean for constitutional purposes? It means that it impacts the State of Indiana's clear interest in seeing that children are raised in stable environments. Those persons who have invested the significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the "protections" of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place.

rationale would support barring the marriage of two individuals of different sexes if it could be shown that those individuals were so committed to each other that only death would make them part. This rationale would also support prohibiting marriage for the infertile or elderly.¹¹⁶ Unsurprisingly, this view of the purpose of marriage does not reflect Indiana public policy more generally. For example, like Arizona, Indiana limits marriage to first cousins who cannot have a child through their union.¹¹⁷ One would not expect a state committed to affording marriage only to those who might accidentally have children to make an express exception only for those first cousins who cannot have a child together. While there might be public policy rationales to justify such an exception, one would not find them in the *Morrison* opinion.

According to the *Morrison* court, Indiana believes that the difficult part of parenting is in producing rather than in raising children. If, however, raising children involves numerous challenges,¹¹⁸ then the state has an interest in promoting couples staying together even when their relationship is rather stable when there are children produced. All couples may face trying times during the course of their relationship. If marriage encourages couples to stay together¹¹⁹ and, at least as a general matter, the parents staying together will provide increased stability for the children, then the state has an interest in recognizing both same-sex and different-sex marriage.

Ironically, one infers from the *Morrison* opinion that the right to marry a same-sex partner would be more likely to be recognized if only same-sex couples would be less responsible when having children.¹²⁰ Consider a lesbian who approaches males whom she does not know and asks them to provide sperm to be used in artificial insemination. She does not want to raise the child with any of these strangers and, indeed, takes steps to assure everyone's anonymity so that the

¹¹⁶ See *id.* at 36 (Friedlander, J., concurring in result) (“Pursuant to this rationale, the State presumably could also prohibit sterile individuals or women past their child-bearing years from marrying.”).

¹¹⁷ See *supra* note 104 and accompanying text.

¹¹⁸ Charlene Quint Kalebic, *Children, The Unprotected Minority: A Call for the Reexamination of Children's Rights in Light of Stenberg v. Carhart*, 15 REGENT U. L. REV. 223, 232 (2002–2003) (discussing “the everyday challenges of raising children”).

¹¹⁹ See *Morrison*, 821 N.E.2d at 25.

¹²⁰ *But see In re Marriage Cases*, 183 P.3d 384, 432 (Cal. 2008), *superseded by* constitutional amendment as stated in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009):

None of the past cases discussing the right to marry - and identifying this right as one of the fundamental elements of personal autonomy and liberty protected by our Constitution - contains any suggestion that the constitutional right to marry is possessed only by individuals who are at risk of producing children accidentally, or implies that this constitutional right is not equally important for and guaranteed to responsible individuals who can be counted upon to take appropriate precautions in planning for parenthood.

donor cannot later assert parental rights.¹²¹ The *Morrison* rationale suggests that the state should recognize the right to marry a same-sex partner were this kind of scenario more prevalent, because the state would then be promoting her relationship with her female partner so that the child could be raised in a stable, responsible environment. But it would be absurd for Indiana to structure its right to marry jurisprudence to incentivize or reward irresponsible parenting. The kind of analysis offered by the *Morrison* court regarding the purpose of marriage undercuts individual interests, societal interests, and the integrity of the courts.

D. New York

The irresponsible procreation argument might seem so obviously specious that it should not be mentioned. Both planned and unplanned children benefit from stable environments in which the children can thrive, and the state should not arbitrarily restrict those couples receiving incentives to provide such environments. However, this very argument was cited with approval in *Hernandez v. Robles*¹²² by New York's highest court when analyzing the state's same-sex marriage ban. The court reasoned that the legislature could find that different-sex "relationships are all too often casual or temporary . . . [and] that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born."¹²³ Yet, it is presumably an important function of marriage to provide permanence for children even where the adults' relationship is not casual. Any number of factors including illness or loss of employment might put added stress on a relationship,¹²⁴ so the state should not limit its focus to only those in casual relationships.

The *Hernandez* court reasoned that the legislature "could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more."¹²⁵ Here, the court was addressing a situation not before the court, namely, if the legislature could recognize different-sex marriages or same-sex marriages *but not both*, which should be chosen? As Chief Judge Kaye pointed

¹²¹ Sonia Bychkov Green, *Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law*, 24 WIS. J. L. GENDER & SOC'Y 25, 33 (2009) (noting that a "donor's claim for parental rights . . . may depend on whether he is a known donor").

¹²² 855 N.E.2d 1 (N.Y. 2006).

¹²³ *Id.* at 7.

¹²⁴ See Beth M. Erickson, *Therapeutic Mediation: A Saner Way of Disputing*, 14 J. AM. ACAD. MATRIM. L. 233, 238 (1997) (discussing "life stressors such as relocation, illness, job loss, birth or death of a child, and other episodes that impinge on the couple from the outside").

¹²⁵ *Hernandez*, 855 N.E.2d at 7.

out in dissent, however, there was no need to choose; there were enough marriage licenses for everyone.¹²⁶

The *Hernandez* court accepted an argument that the *Goodridge* court rejected, namely, that the legislature might have reserved marriage for different-sex couples, believing that it was better for children to grow up with a father and a mother.¹²⁷ But this rationale simply does not make sense in this context.¹²⁸ New York, like Massachusetts, permits second-parent adoptions.¹²⁹ Precluding same-sex couples from marrying is not preventing same-sex couples from raising children; it is merely denying those families the benefits that marital status might have afforded. A same-sex marriage ban does not increase the number of children born into marriages; on the contrary, it increases the number of children being raised in a non-marital context.

E. Washington

The Washington Supreme Court offered reasoning that tracked the reasoning offered by the New York court:

[T]he legislature was entitled to believe that limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race, and *furthers the well-being of children by encouraging families where children are reared in homes headed by the children's biological parents*. Allowing same-sex couples to marry does not, in the legislature's view, further these purposes.¹³⁰

Yet, the court never explained how the legislature could hold these views. Washington also recognizes second-parent adoption,¹³¹ so the state obviously does not object to LGBT parenting. No argument was offered to suggest that limiting marriage to different-sex couples would somehow induce more couples to have children while married. Nor was any evidence presented somehow demonstrating that different-sex couples would be more likely to divorce were same-sex couples

¹²⁶ *Id.* at 30 (Kaye, C.J., dissenting).

¹²⁷ *Id.* at 7.

¹²⁸ See *supra* note 115 and accompanying text (discussing why Justice Cordy's *Goodridge* dissent was unpersuasive).

¹²⁹ See *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993).

¹³⁰ *Andersen v. King County*, 138 P.3d 963, 969 (Wash. 2006) (emphasis added).

¹³¹ *Id.* at 982 ("plaintiffs correctly say, same-sex couples can and do legally procreate through assisted reproduction and adoption"). See also Vanessa A. Lavelly, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 249–50 (2007) ("Courts in Massachusetts, New York, and Washington all allow same-sex couples to legally adopt children.").

allowed to marry.¹³² But without some kind of account suggesting how *restricting* marriage would promote marriage among different-sex couples or promote procreation within marriage, it is not rational to believe the same-sex marriage prohibition would promote these ends.

The Washington court is correct that permitting same-sex couples to marry would not *directly* promote the interests of those children *being raised by their biological parents*. But no one would seriously claim that legislatures are solely concerned with those members of the next generation being raised by both of their biological parents, given the huge number of children who do not fall into that narrow category, and permitting same-sex couples to marry would promote the interests of children more generally. Promoting the interests of children more generally indirectly promotes the interests of children being raised by their biological parents, because society benefits as a general matter when children benefit.¹³³ Any legislature ignoring those children not being raised by both of their biological parents is ignoring a large percentage of the state's children and cannot be thought to have the best interests of the state at heart.¹³⁴

The Washington Supreme Court noted that the legislature could have found that “encouraging marriage for opposite-sex couples who may have relationships that result in children is preferable to having children raised by unmarried parents.”¹³⁵ But those challenging the Washington ban were not questioning whether it was better for children to be raised by married parents; on the contrary, they were instead questioning whether the legislature could have found that it would be better for the children of same-sex parents to be raised by unmarried parents. If not, then the court should have examined whether the legislature could have found that the benefits of such a ban for the parents of children in families where the parents are of different sexes could plausibly be thought to outweigh the costs to the families where both of the adults were of the same sex. If same-sex marriage bans do not promote the interests of children raised by different-sex parents and positively undermine the interests of children raised by same-sex parents, then the legislature could not credibly have believed that the same-sex marriage ban somehow promoted the interests of children or society more generally.

¹³² Cf. Dale Carpenter, *A Traditionalist Case for Gay Marriage*, 50 S. TEX. L. REV. 93, 103 (2008) (“Eighteen years after recognizing same-sex relationships in Scandinavia, there are higher marriage rates for heterosexuals, lower divorce rates.”).

¹³³ Cf. Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of “Real” Workers*, 58 U. KAN. L. REV. 355, 398 (2010) (“raising children well benefits society”).

¹³⁴ Cf. Irene D. Johnson, *A Suggested Solution to the Problem of Intestate Succession in Nontraditional Family Arrangements: Taking the “Adoption” (and the Inequity) out of the Doctrine of “Equitable Adoption,”* 54 ST. LOUIS U. L. J. 271, 307 (2009) (“Often, especially in lower-income and minority communities, children are raised in family units that do not include their biological parents.”).

¹³⁵ *Andersen*, 138 P.3d at 982.

The Washington court seemed to understand that the legislative classification was not closely tied to the desired ends. The court explained that the:

link between opposite-sex marriage and procreation is not defeated by the fact that the law allows opposite-sex marriage regardless of a couple's willingness or ability to procreate. The facts that all opposite-sex couples do not have children and that single-sex couples raise children and have children with third party assistance or through adoption do not mean that limiting marriage to opposite-sex couples lacks a rational basis. Such over- or under-inclusiveness does not defeat finding a rational basis.¹³⁶

But the questions at hand involve the work that the link between marriage and procreation is supposed to perform. Even if many different-sex, married couples cannot or do not choose to have children,¹³⁷ it is fair to suggest that many married couples do have children. It might indeed be rational for a legislature to encourage different-sex couples to marry in the belief that the adults, the children, and society itself would thereby benefit. Yet, a separate question is whether *these same benefits plus others* would be accrued were marriage open not only to different-sex couples but same-sex couples as well. The difficulty with the Washington statute was not merely that it was somewhat over- or under-inclusive, but that the state had adopted a policy that harmed the individuals it was claiming to help without providing any compensating benefits to anyone else.

F. New Jersey

In *Lewis v. Harris*¹³⁸ in which New Jersey's same sex marriage ban was challenged, the New Jersey Supreme Court recognized both that same-sex couples were forced to endure various "social indignities and economic difficulties" because of the inability to marry,¹³⁹ and that promoting procreation and optimal parenting could not credibly be used to justify restricting marriage to different-sex couples.¹⁴⁰ However, the court rejected that the right to marry a same-sex partner was a fundamental right¹⁴¹ in light of the *Glucksberg* Test.¹⁴² As Chief Justice Poritz pointed out in her concurrence and dissent, the court's conclusion was pre-determined by the way the question was framed. By asking whether the right to

¹³⁶ *Id.* at 983.

¹³⁷ Melissa B. Neely, *Indiana Proposed Defense of Marriage Amendment: What Will It Do and Why Is It Needed*, 41 IND. L. REV. 245, 268–69 (2008) ("[M]any marriages are childless; U.S. Census data for 2005 indicates that approximately 21% of married couples between fifteen and forty-four do not have children.").

¹³⁸ 908 A.2d 196(N.J. 2006).

¹³⁹ *See id.* at 202.

¹⁴⁰ *Id.* at 205–06.

¹⁴¹ *Id.* at 200.

¹⁴² *Id.* at 208.

marry a same-sex partner is deeply rooted in the nation's history, the court framed the question so narrowly that it could not help but answer in the negative.¹⁴³ But, framing the relevant question narrowly would also have resulted in others being denied the right to marry, such as the Lovings.¹⁴⁴ Had the question instead been “whether there is a fundamental right to marriage rooted in the traditions, history and conscience of our people, there is universal agreement that the answer is ‘yes.’”¹⁴⁵

Even if the New Jersey Constitution did not protect a fundamental right to marry a same-sex partner, a separate question was whether the state constitution precluded the state from refusing to accord same-sex couples the tangible rights and benefits associated with marriage.¹⁴⁶ The court found that the state's refusal violated state constitutional equal protection guarantees,¹⁴⁷ and held that the legislature either had to open up marriage to same-sex couples or had to create a separate civil union status.¹⁴⁸

The *Lewis* Court suggested that “families are strengthened by encouraging monogamous relationships, whether heterosexual or homosexual,”¹⁴⁹ and the court could not “discern any public need that would justify the legal disabilities that now afflict same-sex domestic partnerships.”¹⁵⁰ Yet, there is no reason to believe that same-sex couples in New Jersey have certain special needs that couples in other states do not have. On the contrary, all couples, whether or not raising children, stand to benefit from having the opportunity to marry. If, indeed, a particular kind of marriage would be harmful to society, then the state should offer some kind of plausible account of what the harm would be and how the prohibition prevents the harm. But without such a showing, it is difficult to understand how a state can justify harming LGBT families and society as a whole by denying same-sex couples the right to marry.

G. Maryland

In *Conaway v. Deane*,¹⁵¹ the Maryland Supreme Court analyzed the constitutionality of that state's same-sex marriage ban. The court's analysis, like that offered by the New Jersey Supreme Court,¹⁵² focused on whether the right to

¹⁴³ See *id.* at 228 (Poritz, C.J., concurring and dissenting).

¹⁴⁴ See *supra* note 21 and accompanying text.

¹⁴⁵ *Lewis*, 908 A.2d at 228 (Poritz, C.J. concurring and dissenting).

¹⁴⁶ *Id.* at 220.

¹⁴⁷ *Id.* at 220–21.

¹⁴⁸ *Id.* at 224 (“the Legislature must either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision”).

¹⁴⁹ *Id.* at 218.

¹⁵⁰ *Id.*

¹⁵¹ 932 A.2d 571 (Md. 2007).

¹⁵² See *supra* note 146 and accompanying text.

marry a same-sex partner was deeply rooted in the state's history and traditions,¹⁵³ notwithstanding that none of the right to marry cases were predicated on a preexisting history or tradition of recognizing the particular marriage at issue. The *Conaway* court claimed that almost all of the federal right to marry cases were focused on producing children. Yet, *Loving* was not, since the Court nowhere mentions children and seemed determined to shift the focus away from the children that might be produced through the union of the parties.¹⁵⁴ Further, as the Maryland court recognized, *Turner* did not focus on procreation.¹⁵⁵ Even *Zablocki*, which involved a man who wanted to marry his pregnant fiancé, did not focus on producing children in particular but, instead, focused on a number of aspects of families including the production and raising of children.¹⁵⁶

¹⁵³ *Conaway*, 932 A.2d at 618. Thus, there was no history and tradition in Virginia of having a right to marry someone of another race. *See Loving*, 388 U.S. at 6 (“Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period.”). There was no history and tradition in Missouri of incarcerated individuals being permitted to marry, on the contrary, there was a history of refusing to permit the marriages of female inmates. *See Turner*, 482 U.S. at 99 (“the Missouri prison system operated on the basis of excessive paternalism in that the proposed marriages of all female inmates were scrutinized carefully even before adoption of the current regulation”). Further, in a related case issued after *Loving*, the Court in *Butler v. Wilson*, 415 U.S. 953 (1974) had summarily affirmed *Johnson v. Rockefeller*, 365 F.Supp. 377 (C.D. N.Y. 1973) in which a federal district court had upheld New York’s prohibition on prisoners with life sentences from marrying. Moreover, no history of refusing inmates the right to marry, especially when it was claimed that prison security might thereby be threatened. *See Turner*, 482 U.S. at 97 (“Petitioners have identified both security and rehabilitation concerns in support of the marriage prohibition. The security concern emphasized by petitioners is that “love triangles” might lead to violent confrontations between inmates.”). And there was no history and tradition in Wisconsin of permitting individuals to marry even when they had already had children not in their custody whom they could not support. The Wisconsin statute, WIS. STATE ANN. § 245.10, was based on previous statutes going back almost twenty years. *See WEST WIS. STAT. ANN.* 845 (2009), suggesting that the statute was derived from L.1959 c. 595 § 17. *See also In re Ferguson’s Estate*, 130 N.W.2d 300, 302 (Wis. 1964):

This section was originally created by ch. 595, sec. 17, Laws of 1959, to become effective January 1, 1960. In its then form it provided no license to marry should be issued when it appeared that either applicant had a minor of a previous marriage not in his custody and which he was under obligation to support by court order or judgment without the written permission of a judge of a court having divorce jurisdiction in the county in which the license was applied for.

130 N.W.2d 300, 302 (Wis. 1964).

¹⁵⁴ *See supra* notes 40–44 and accompanying text (discussing the *Loving* Court shifting the focus away from the children that might be born of interracial marriages).

¹⁵⁵ *Conaway*, 932 A.2d at 621.

¹⁵⁶ *See supra* notes 48–53 and accompanying text (noting *Zablocki*’s focus on various family matters).

The perceived focus on children in the federal marriage cases allegedly convinced the Maryland court that the relevant issue was the “‘inextricable link’ between marriage and procreation,”¹⁵⁷ notwithstanding that some different-sex couples are neither willing nor able to have children and that some same-sex couples are having and raising children.¹⁵⁸ The court recognized that its analysis might seem dated, given the changing demographics of the American family.¹⁵⁹ Yet, given these changing demographics which include the increasing number of married couples choosing not to have children¹⁶⁰ and the increasing number of children raised by same-sex parents,¹⁶¹ one might well wonder how to spell out this inextricable connection discussed by the court. For example, insofar as the link involves the recognition that marriage provides a setting in which children might thrive, then one would have expected the court to have held that the connection between marriage and the next generation provided the basis for striking down, rather than upholding, the Maryland law.

It may well be that the Maryland court was not really convinced by the inextricable link to procreation argument but instead was simply following the example that the U.S. Supreme Court had allegedly set. The *Conaway* court noted that *Lawrence* had not expressly recognized a fundamental right to engage in same-sex relations and hypothesized that the Court had not “intended to confer such status on the public recognition of an implicitly similar relationship.”¹⁶² Yet, the Maryland court failed to mention that the *Lawrence* Court had supported its holding by discussing many of the important recent right to privacy cases including *Griswold v. Connecticut*,¹⁶³ in which the Court recognized the right of married individuals to have access to contraception; *Eisenstadt v. Baird*,¹⁶⁴ in which the Court recognized the right of unmarried individuals to have access to contraception; *Roe v. Wade*,¹⁶⁵ in which the Court recognized a right to be free from unwarranted government interference in one’s attempt to secure an abortion; *Carey v. Population Services*,¹⁶⁶ in which the Court struck down certain limitations on the sale and distribution of contraceptives to minors; and *Planned Parenthood*

¹⁵⁷ *Conaway*, 932 A.2d at 631.

¹⁵⁸ *Id.* at 631.

¹⁵⁹ *Id.* at 632.

¹⁶⁰ See, e.g., Keith Lawrence, *Middle America Slipping Away*, MESSENGER-INQUIRER, Nov. 22, 2009, available at 2009 WLNR 23550550 (discussing a demographer’s prediction that in the next census “married couples with no children will be the prevalent household”).

¹⁶¹ See Sally Jacobs, *What Can Social Science Add to the Gay Marriage Debate? Not Much So Far*, BOSTON GLOBE, Mar. 9, 2004, at C1 (discussing the children of gay and lesbian parents—who number between 6 and 14 million in the United States, according to various studies).

¹⁶² *Conaway*, 932 A.2d at 626.

¹⁶³ 381 U.S. 479 (1965).

¹⁶⁴ 405 U.S. 438 (1972).

¹⁶⁵ 410 U.S. 113 (1973).

¹⁶⁶ 431 U.S. 678 (1977).

of *Southeastern Pennsylvania v. Casey*,¹⁶⁷ in which the Court “confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education.”¹⁶⁸ If all of these cases involved rights falling within the right to privacy but adult, consensual relations did not, then one might rightly ask, “Why are those cases being cited as support for protecting an interest that does not fall within the right to privacy?”

The *Lawrence* Court neither expressly designated the right to have non-marital relations with a same-sex partner as a fundamental right nor expressly designated such relations as implicating a mere liberty interest subject to rational basis review. Instead, the Court noted that the sodomy statute “furthers no legitimate interest which can justify its intrusion into the personal and private life of the individual.”¹⁶⁹

The language here is important to examine. The Court refrains from saying that the state has *no* legitimate interest at all in regulating non-marital conduct, but instead suggests that the state has no legitimate interest that *justifies* the intrusion. The Court’s description is compatible with a reading suggesting that adult, consensual, intimate relations implicate more than a mere liberty interest.

Consider the statute at issue in *Zablocki*, where Wisconsin was trying to restrict the marriage rights of indigent noncustodial parents. The state had a legitimate interest at stake, namely, protecting the public fisc. The difficulty was that Wisconsin’s legitimate interest could not justify the limitation on Redhail’s personal life. It would have been quite accurate to say that Wisconsin did not have a legitimate interest that justified the burden imposed, notwithstanding Wisconsin’s clearly legitimate interest in conserving scarce resources. Basically, Wisconsin’s legitimate interests in *Zablocki* were not “sufficiently important” to justify the prohibition.¹⁷⁰

Ironically, even if *Lawrence* is read as protecting a mere liberty interest, the decision nonetheless supports same-sex marriage being constitutionally protected.¹⁷¹ The *Lawrence* Court suggested that the Constitution precludes states from criminalizing voluntary, adult, consensual sexual relations.¹⁷² What justification could be offered for such a statute? Arguably, by criminalizing such relations, the state is providing couples with an incentive to marry, where their voluntary sexual relations would be legal. Promoting marriage is considered a

¹⁶⁷ 505 U.S. 833 (1992).

¹⁶⁸ *Lawrence*, 539 U.S. at 573–74.

¹⁶⁹ *Id.* at 579.

¹⁷⁰ *See Zablocki*, 434 U.S. at 388.

¹⁷¹ *See Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”).

¹⁷² *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (“*Lawrence* was a substantive due process decision that recognized a right in all adults, regardless of sexual orientation, to engage in certain intimate conduct.”).

legitimate state interest, and it seems reasonable to believe that some might be induced to marry were voluntary non-marital relations criminalized. Basically, the *Lawrence* Court suggested that the state's legitimate interest in promoting marriage is not sufficiently important to justify criminalizing non-marital relations.

Here is at least one of the difficulties posed by *Lawrence* for those opposing same-sex marriage. Suppose that the decision is read as only implicating rational basis scrutiny. If that is so, then it must be claimed that the state promoting marriage by criminalizing consensual, non-marital relations either is not a legitimate goal or, perhaps, the state's chosen method is not rationally related to the promotion of that goal. But consider, instead, how excluding same-sex couples from marriage is supposed to promote marriage. It does not seem credible to claim that different-sex couples are less likely to get, or remain, married because same-sex couples are also allowed to marry.¹⁷³ But if promoting different-sex marriage is the goal, and it is more credible to believe that different-sex marriage would be promoted by criminalizing non-marital relations than by maintaining a same-sex marriage ban, then *Lawrence* counsels that same-sex marriage bans are constitutionally infirm even using the rational basis test.

Suppose, instead, that adult, voluntary, non-marital relations (including such relations between same-sex partners) fall within the right to privacy and thus trigger close scrutiny. Then, presumably, the same would be said for marriage (even between same-sex partners), which would also mean that the state will have great difficulty justifying its ban.¹⁷⁴

One of the noteworthy omissions in the *Lawrence* Court's recounting of the privacy cases involved its utter refusal to discuss the marriage cases—*Loving*, *Zablocki*, and *Turner*—when discussing privacy rights.¹⁷⁵ Further, same-sex marriage opponents might point out that the *Lawrence* Court made quite clear that it was not discussing same-sex marriage.¹⁷⁶ Yet, the claim here is not that *Lawrence* held that same-sex marriage must be recognized, but that its reasoning supports that conclusion.¹⁷⁷ That the *Lawrence* Court refused to address the constitutionality of same-sex marriage bans does not establish their

¹⁷³ Nicholas Bala, *The Debates about Same-Sex Marriage in Canada and the United States: Controversy over the Evolution of a Fundamental Social Institution*, 20 *BYU J. PUB. L.* 195, 215 (2006) (“recognizing same-sex unions will not be likely to deter any heterosexual person from marrying or having children”).

¹⁷⁴ See, e.g., *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 480 (Conn. 2008) (“It is only because the state has not advanced a sufficiently persuasive justification for denying same sex couples the right to marry that the traditional definition of marriage necessarily must be expanded to include such couples.”).

¹⁷⁵ *Lawrence*, 539 U.S. at 573–74.

¹⁷⁶ See *id.* at 578 (“The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).

¹⁷⁷ See *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”).

constitutionality. On the contrary, past experience indicates that the Court's refusal to address same-sex marriage might cut the other way.

In *McLaughlin v. Florida*,¹⁷⁸ the Court struck down Florida's imposing a more severe penalty on interracial compared to intra-racial non-marital relations.¹⁷⁹ The state had claimed that the statute promoted the state's anti-miscegenation law.¹⁸⁰ The Court rejected that argument but expressly declined to reach "the question of the validity of the State's prohibition against interracial marriage."¹⁸¹ Three years later, the *Loving* Court struck down anti-miscegenation laws.

The same-sex marriage opponent will not save his position by noting that *Lawrence* involved a criminal statute. *McLaughlin* involved a criminal statute and although *Loving* involved both criminal and civil statutes,¹⁸² there was no suggestion in *Loving* that the case would have been decided differently had Virginia merely refused to recognize the validity of the Loving's marriage. On the contrary, the *Loving* Court made it quite clear that Virginia's attempt to ban interracial marriages could not stand, at least in part, because the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women]."¹⁸³

H. California

In *In re Marriage Cases*,¹⁸⁴ the California Supreme court addressed a relatively narrow question, namely, whether the state violated state constitutional guarantees by reserving marriage for different-sex couples and offering same-sex couples virtually all of the benefits of marriage through domestic partnerships.¹⁸⁵ Yet, opening up marriage to same-sex couples would not deprive different-sex couples of any benefits,¹⁸⁶ and the state's vital interests in promoting marriage for the sake of the next generation would be served rather than undermined by permitting same-sex couples to have access to that institution.¹⁸⁷ The right to marry has never been understood to be limited to those who can procreate through their union,¹⁸⁸ and the court noted the irony in justifying restrictions on marriage by appealing to the possibility of accidental procreation, as if it made sense to burden

¹⁷⁸ 379 U.S. 184 (1964).

¹⁷⁹ *Id.*

¹⁸⁰ *See id.* at 195.

¹⁸¹ *Id.*

¹⁸² *See* *Loving v. Virginia*, 388 U.S. 1, 4 n.3 (1967) (quoting the statute making interracial marriages void. *See also id.* at 4 (quoting the criminal statute pertaining to interracial marriages)).

¹⁸³ *Id.* at 12.

¹⁸⁴ 183 P.3d 384 (Cal. 2008), *superseded by* *Cal. Constitutional Amendment as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

¹⁸⁵ *See id.* at 397–98.

¹⁸⁶ *Id.* at 401.

¹⁸⁷ *See id.* at 423.

¹⁸⁸ *Id.* at 431.

individuals for being responsible when making decisions about when to have and raise a child.¹⁸⁹

The California court's points are of course applicable in a jurisdiction not offering the option of domestic partnership. Indeed, they are all the more telling in such a jurisdiction, because the denial of marriage recognition would be imposing an even greater burden on the LGBT community, and that denial still would not have afforded different-sex couples and their families or society any benefits.

I. Connecticut

The Connecticut Supreme Court addressed an issue similar to the one faced by the California court—the question addressed in *Kerrigan v. Commissioner of Public Health*¹⁹⁰ was whether the state's creating a separate status of civil unions for same-sex couples violated state constitutional guarantees.¹⁹¹ The state's recognition that sexual orientation does not affect one's ability to parent played an important role in the court's analysis.¹⁹² Basically, the state could not offer sufficient justification for its restriction of marriage,¹⁹³ notwithstanding the state's affording the tangible benefits of marriage to couples who had entered into civil unions.¹⁹⁴

In his *Kerrigan* dissent, Justice Borden worried that to “change the law of marriage by expanding it to include same-sex couples is to change the institution that the law reflects.”¹⁹⁵ But it is not clear how the institution is changed by this expansion, just as it is not clear how the institution was changed by its expansion to include interracial couples. While some couples are permitted to marry who could not have married previously, that does not establish that the institution itself has changed.

Rather, as the *Goodridge* court wrote:

Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits.¹⁹⁶

This understanding of marriage is not at all changed by affording same-sex couples access to the institution. Indeed, different-sex marriage has not been destroyed in

¹⁸⁹ *Id.*

¹⁹⁰ 957 A.2d 407 (Conn. 2008).

¹⁹¹ *Id.* at 414–15.

¹⁹² *Id.* at 435 (“It is highly significant, moreover, that it is the public policy of this state that sexual orientation bears no relation to an individual's ability to raise children.”).

¹⁹³ *Id.* at 480.

¹⁹⁴ *Id.* at 417–18.

¹⁹⁵ *Id.* at 503 (Borden, J., dissenting).

¹⁹⁶ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

Massachusetts now that same-sex couples are also allowed to marry,¹⁹⁷ and there is no reason to think that there would be adverse effects on the institution of marriage in any other state in which same-sex couples were accorded access to that institution.

J. Iowa

The most recent state supreme court decision examining the right to marry was issued by the Iowa Supreme Court in *Varnum v. Brien*.¹⁹⁸ The court noted that the societal benefits that accrue when different-sex couples are permitted to marry would also accrue were same-sex couples permitted to marry, e.g., the benefits that are thereby provided the children that the married same-sex couples might be raising.¹⁹⁹ Indeed, the state's same-sex marriage ban neither promoted the interests of children raised by same-sex parents nor the interests of children raised by different-sex parents, and so could not be justified using a child's best interests rationale.²⁰⁰ Further, the court gave short shrift to the claims that restricting marriage would somehow promote more procreation or more stability among different-sex couples.²⁰¹ The Iowa Supreme Court rejected that the state had offered an adequate justification for its restrictions on marriage.

While the Iowa Supreme Court struck down the state's same-sex marriage ban using heightened scrutiny,²⁰² the court's analysis suggests that the ban should not have withstood rational basis scrutiny. For example, when examining the claim that parenting by different-sex couples is optimal for children, the court noted the abundance of evidence suggesting that children are doing equally well whether with same-sex or different-sex parents.²⁰³ After noting that some commentators nonetheless sincerely claim that children do better with different-sex parents,²⁰⁴ the court noted that such opinions "were largely unsupported by reliable scientific studies."²⁰⁵

Yet, even if reliable scientific studies were to support such a contention, that would not justify restricting marriage to different-sex couples. As the court pointed

¹⁹⁷ See Harold P. Southerland, "Love for Sale"—*Sex and the Second American Revolution*, 15 DUKE J. GENDER L. & POL'Y 49, 76 (2008) ("Those who oppose gay and lesbian marriage cannot seem to realize that these unions are in a real sense 'traditional' in a way that many of today's heterosexual marriages are not, and that they may actually be more consonant with the family values the opponents claim to espouse.").

¹⁹⁸ 763 N.W.2d 862 (Iowa 2009).

¹⁹⁹ See *id.* at 883.

²⁰⁰ *Id.* at 900.

²⁰¹ See *id.* at 901–02.

²⁰² See *id.* at 896.

²⁰³ *Id.* at 899 ("Plaintiffs presented an abundance of evidence and research, confirmed by our independent research, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents.").

²⁰⁴ *Id.*

²⁰⁵ *Id.*

out, same-sex couples already were raising children and would continue to do so,²⁰⁶ and thus restricting marriage would not further the state's alleged goals. Restricting marriage would only affect children if "people in same-sex relationships [would] choose not to raise children without the benefit of marriage"²⁰⁷ and if children would be "adopted by dual-gender couples who would have been adopted by same-sex couples but for the same-sex civil marriage ban."²⁰⁸ But there was no reason to think that a same-sex marriage ban would produce such results. Indeed, the court might have added a further point. Children adopted by members of the LGBT community tend to be either a partner's child or a hard-to-place child.²⁰⁹ If same-sex couples are indeed being deterred from adopting because of their inability to marry, then this may well mean that a child who might otherwise have been placed will now simply not be accorded the benefits of permanent placement in a loving home. Arguably, no state that is seriously interested in providing permanency and stability for its children should want such an outcome.

IV. CONCLUSION

The right to marry has already been recognized as falling within the right to privacy—the only question confronting those courts analyzing whether same-sex marriage is constitutionally protected is whether the right to marry includes the right to marry a same-sex partner. The analyses offered are often remarkably disappointing. The Court has never suggested that marriage rights are somehow tied to the ability and willingness to have children through the parties' union. Further, it is implausible to think that any court would ever assert such a tie in any context other than in an attempt to justify a same-sex marriage ban.

Traditionally, the right to marry has been given greater protection than the right to engage in adult consensual relations outside of marriage, at least in part, because the right to marry has been associated with a variety of family functions including having and raising children, even though it is of course true that non-marital relations can also result in the production of children. Yet, if non-marital (including same-sex) relations are constitutionally protected, it is difficult to see why same-sex marriage should not also be protected, especially because permitting states to regulate non-marital relations would more plausibly promote marriage than would restricting access to marriage to different-sex couples.

Courts upholding same-sex marriage bans have deferred to the legislature's alleged judgment that marriage restrictions would promote marriage among different-sex couples or advance the interests of their children when no plausible connection could be made between the restriction and the goals to be promoted.

²⁰⁶ *Id.* at 901.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. U. L. REV. 341, 394 (2006) ("[G]ays and lesbians overwhelmingly adopt either hard to place foster children or their partners' biological children.").

Yet, the very goals articulated by these courts were themselves illuminating, because the courts implicitly assumed that *same-sex couples and their children did not have interests that should be weighed in the balance*. That very focus makes clear that members of LGBT community are being treated as non-persons in these analyses, which alone makes such laws constitutionally suspect.

If it could be shown that opening up marriage to same-sex couples would impose significant costs on different-sex couples, then a more difficult cost-benefit analysis would have to be performed, which included justifications for imposing burdens on one group to benefit another. But maintaining such restrictions when they do not benefit anyone, and instead harm both the families of those precluded from marrying and society as a whole, is simply unconscionable, and courts upholding such bans are, in the words of the Connecticut Supreme Court, guilty of ignoring their own responsibility.²¹⁰

²¹⁰ Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 480-81 (“Contrary to the suggestion of the defendants, therefore, we do not exceed our authority by mandating equal treatment for gay persons; in fact, any other action would be an abdication of our responsibility.”).