Brigham Young University Journal of Public Law

Volume 12
Issue 2
Law and the Politics of Marriage: Loving v. Virginia after thirty years

Article 6

5-1-1998

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Jay Alan Sekulow

John Tuskey

Sex and Sodomy and Apples and Oranges — Does the Constitution Require States to Grant a Right to Do the Impossible?

Jay Alan Sekulow*
John Tuskey**

I. INTRODUCTION

Until relatively recently, people could pretty much take for granted that when they talked about "marriage," they were talking about a relationship — a sexual union — between a man and a woman. State marriage laws uniformly have embodied that understanding. Because we as a society viewed marriage as a uniquely valuable form of human relationship, those laws gave special protection and benefits to couples entering that relationship.

In the last two or three decades, this understanding has come under increasing challenge, as agitation began to attempt to change state marriage laws to recognize same-sex relationships as marriages.[1] That movement has made, and continues to make, little headway in the state legislatures. As Lynn Wardle has noted, "[l]egislative rejection of same-sex marriages is unanimous in the United States."[2] Therefore, in a move remi-

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 The authors thank Shannon Demos Woodruff, Research Counsel at the ACLJ, for her help in the initial preparation of this article. We also thank Carolé Collier, staff counsel at the ACLJ, and the law clerks she supervises, for their editorial and research assistance.

1. See sources cited at note 9, *infra*.

2. Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 54. Wardle notes that there has been some success in efforts to legalize same-sex domestic partnerships. In 1994, "the California Legislature passed a domestic partnership bill that provided official registration of same-sex couples and provided limited marital rights and privileges relating to hospital visitation, wills and estates, and powers of attorney." *Id.* at 8. Governor Wilson vetoed the bill. *Id.* According to a list compiled by Carnegie-Mellon University and available on Carnegie-Mellon's Internet site, forty jurisdictions offer domestic partnership plans. Twelve of those jurisdictions offer "some form of registration . . . to non-employees." *See* <http://www.cs.cmu.edu/afs/cs/user/dtw/www/companies.htm/#municipalities>. To put this in perspective, forty jurisdictions represent "less than one-tenth of one percent of America's 83,000 state and municipal government

niscent of that made by abortion proponents who became impatient with the pace of legislative change to abortion laws in the 1960s and 1970s, same-sex marriage proponents have turned to the courts.

A. Background – Baehr v. Lewin

In 1993, the same-sex litigation effort hit paydirt in Hawaii. In *Baehr v. Lewin*,[3] the Hawaii Supreme Court became the first court in this country to hold, either under the federal or any state constitution, that a constitutional right could exist for same-sex couples (that is, couples made up of two men or two women, rather than one man and one woman) to receive marriage licenses from the state (and thereby receive state recognition of their relationship as a "marriage"). Specifically, the court in *Baehr* held that refusing to grant marriage licenses to same-sex couples constituted sex discrimination that the state must justify by showing that the refusal to issue licenses to same-sex couples was "narrowly drawn" to serve "compelling state interests."[4] The Hawaii Supreme Court remanded the case to the trial court to give the state an opportunity to make the required showing. The trial court held that none of the interests the state proffered was sufficiently "compelling" and enjoined the state from denying marriage licenses to same-sex couples;[5] and the case is pending again before the supreme court on the state's appeal.[6] The smart money is betting that if the Hawaii Supreme Court decides the state's appeal (which may not happen for reasons discussed below), the court will uphold the trial court's decision and require Hawaii to grant legal marriage status to those same-sex relationships whose participants seek that status.

Despite being the first decision by any American court to suggest that a state must treat same-sex relationships the same way that it treats marriages between men and women, the specific victory in *Baehr* for same-sex marriage proponents may be short lived (and *Baehr's* national influence less than meets the eye). The *Baehr* court premised its decision not on the United States Constitution but on a particularly distinctive equal protection

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jurisdictions." Wardle, *supra* note 2. Moreover, the benefits offered are generally limited. See Carnegie-Mellon's Internet site, noted above.

3. 852 P.2d 44 (Haw. 1993).

4. *Id.* at 67 (plurality opinion). Although only two (of five) justices originally joined in this opinion, a majority of the court later joined in an order adopting the plurality opinion's reasoning. *See id.* at 74-75 (order on Motion for Reconsideration or Clarification). Because the original plurality opinion now represents the view of a majority of the Hawaii Supreme Court, we will refer to the original plurality opinion as the court's opinion and the reasoning in that opinion as the court's reasoning.

5. Baehr v. Miike, No. 91-1394 (Haw. 1st Cir. Ct. Dec. 3, 1996). The court stayed its judgment pending review by the Hawaii Supreme Court. *See* Baehr v. Miike, No. 91-1394 (Haw. Cir. Ct. Dec. 12, 1996) (order granting state's Motion to Stay).

6. Baehr v. Miike, No. 91-1394 (Haw. Cir. Ct. Dec. 12, 1996) (order granting defendant State of Hawaii's Motion to Stay).

provision in the Hawaii Constitution.[7] A proposed amendment to the Hawaii Constitution will appear on the ballot in November 1998 that, if passed, effectively will overturn *Baehr* by expressly giving the Hawaii Legislature the power to reserve marriage status to couples of one man and one woman.[8] However, it appears unlikely that the Hawaii Supreme Court would issue its final decision before the November election. Indeed, it would be foolhardy for the court to decide the issue before the November election. Thus (assuming the amendment passes, which appears likely), Hawaii probably will not become the first state in this country to legally recognize same-sex relationships as marriages.[9]

But even if Hawaii never actually licenses same-sex marriages, *Baehr* demonstrates that it is at least possible for courts to find that same-sex couples are constitutionally entitled to have states recognize their relationships as marriages (and thus receive all the privileges and benefits attendant to marital status). This issue, which has percolated in the courts and the legal literature for over two decades,[10] is not going to go away simply because

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7. *See id.* at 6. Article I, Section 5, provides in relevant part that "[n]o person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry."

8. The proposed amendment provides simply that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples." H.R. No. 117, Haw. 19th Leg. § 2 (Haw. 1997).

9. Because the trial court has stayed its order enjoining Hawaii from denying marriage licenses to same-sex couples, the state is not now issuing licenses to same-sex couples. If Hawaii (or any other state) ultimately is required to recognize same-sex marriages, the question will arise whether the Full Faith and Credit Clause of the United States Constitution, Art. IV, § 1, would require other states to recognize Hawaii same-sex marriages. Anticipating this question after *Baehr*, Congress enacted the Defense of Marriage Act (DOMA), 28 U.S.C.A. §1738C (West Supp. 1997), which provides that states need not recognize such marriages entered into in other states. Constitutional issues surrounding DOMA include whether DOMA violates the Due Process Clause or the implied equal protection component of the Fifth Amendment, U.S. CONST. AM. V, cl. 3, and whether Congress has the authority under the Full Faith and Credit Clause to pass DOMA, *see id.*, ART. IV, § 1, cl. 2 ("And the Congress may by general laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof"). Of course, until a state actually does recognize same-sex marriage, DOMA's constitutionality is not an issue ripe for review in the courts. We will not comment on DOMA further, other than to say that 1) we believe DOMA is constitutional; and 2) the equal protection and due process arguments we canvas in this article would also arise in a case attacking DOMA.

10. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995). As for the legal literature on the topic of same-sex marriage, see the thorough compendium assembled in Wardle, *supra* note 2, at 96-101. As Wardle notes, the scholarly literature on same-sex marriage has weighed heavily in favor of finding a constitutional right to same-sex marriage. *Id.* While incredibly thorough, Wardle's compendium did fail to include a series of articles that appeared in the Georgetown Law Journal in 1995. *See* Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995); Robert P. George and Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995); Hadley Arkes, *Questions of Principle, Not Predictions: A Reply to Macedo*, 84 Geo. L.J. 321 (1995); and Steven Macedo, *Reply to Critics*, 84 GEO. L.J. 329 (1995). While these articles do not discuss legal and constitutional issues per se, they represent what we believe to be one of the most important (and best) discussions of the fundamental issues underlying those legal issues: What is marriage? What (if anything) is there about the nature of the committed sexual union between a man and a woman that justifies treating that union differently than any other intimate relationships

Hawaii voters overturn *Baehr* by constitutional amendment. Indeed, we expect the amendment, if passed, to be challenged on federal constitutional grounds; moreover, other states' refusals to license and recognize same-sex relationships as marriages have been challenged as well. So, despite *Baehr's* probable demise, same-sex "marriage" is an issue that is alive in the state courts and may very well reach the United States Supreme Court, as well.[11]

Arguments that the Constitution protects some right for same-sex couples to have their relationships recognized as marriage fall essentially into two categories: arguments that the Fourteenth Amendment's Due Process Clause protects the right of same-sex partners to marry in the legal sense; and arguments that not recognizing same-sex relationships as marriages violates the Equal Protection Clause by discriminating on the basis of sexual orientation or sex. Until recently, those arguments, in whatever form, would not have been taken seriously for a simple reason: a state does not have to allow anybody to do something that is impossible. As Gerard Bradley put it, "[w]hat most people have in mind when they talk about

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between two persons? We will discuss those issues in greater depth below.

11. Whether and when this happens will of course depend on strategic decisions by same-sex marriage proponents. Certainly, those proponents would like same-sex marriage now; but a proponent could well conclude that premature litigation and decision of the issue could have undesirable consequences from proponents' standpoint (not the least of which could be adverse precedent, or a string of adverse precedents). Thus, Cass Sunstein, who believes that prohibiting same-sex marriages constitutes unjust sex discrimination, nevertheless cautions *courts* to be careful before vindicating this principle because deciding the issue too soon could create a backlash harmful to the gay rights movement. Ultimate vindication of the principle, Sunstein believes, probably could be served better by a slower, more incremental approach which chips away little by little at the structures supporting the alleged unjust discrimination. *See* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L. J. 1, 23-28 (1994). Sunstein's approach treats the courts as essentially a political institution charged with making prudential judgments about how best to implement wise public policy (though we doubt he would put it quite that way). If refusing to recognize same-sex marriage violates the equal protection clause, and if a person injured by that violation sues for redress of that injury, it seems to us the court's proper function would be to decide that case without regard to the larger effects on the gay rights movement. In any event, while we do not share Sunstein's apparent view of the courts' proper function or his belief that recognizing only marriages between two-sex couples is unjust and unconstitutional, we think his analysis should give same-sex marriage proponents food for thought while plotting their litigation strategies. His analysis also should caution those who seek to uphold the traditional understanding of marriage to be alert for the ways in which same-sex marriage proponents might seek to bring about incremental change through the courts (for example, by seeking construction of terms such as "family" in state statutes to include same-sex partners). *See, e.g.*, Braschi v. Stahl Assoc. Co., 543 N.E.2d 49 (N.Y. 1989).

Be that as it may, strategically-directed frontal assaults on traditional marriage laws have continued, which have met with initial success. In Baker v. Vermont, No. 51009-97CnC, Vt. Super. Ct., Dec. 19, 1997, a Vermont trial court dismissed a suit claiming a constitutional right to recognition of same-sex unions as marriages. The case is currently on appeal to the Vermont Supreme Court. The trial court opinion in *Baker* is available at «http:\www..fitzhugh.com\-samesex.htm». But in Brause v. Bureau of Vital Statistics, No. 3AN-95-6562CI, 1998 WL 88743 (Alaska Super. Ct., Feb. 27, 1998), an Alaska trial court held that the Alaska Constitution recognizes a fundamental right to "choose one's life-partner and requires the state to demonstrate a compelling state interest for not recognizing same-sex unions as marriages.

marriage is, of course, the [committed] sexual union of a man and woman. That kind of marriage requires complementarity and consummation."[12] If this is what marriage (or, more precisely, the institution we have chosen to call marriage) really is, "same-sex marriage" is an oxymoron. Two men or two women cannot enter into a relationship that by definition consists of one man and one woman. No law can change this reality. This is the basis on which a number of courts before (and after) *Baehr* routinely rebuffed claims of a right to same-sex marriage.[13] And this, essentially, is what the State of Hawaii sensibly argued in *Baehr*:

> "[T]he fact that homosexual partners cannot form a state-licensed marriage is not the product of impermissible discrimination" . . . but rather "a function of their biologic inability as a couple to satisfy the definition of the status to which they aspire." . . . "[T]he right of persons of the same sex to marry one another does not exist because marriage . . . means a special relationship between a man and a woman."[14]

Unlike all other courts that had considered the question of same-sex marriage, the Hawaii Supreme Court in *Baehr* found this reasoning to be "circular and unpersuasive,"[15] an "exercise in tortured and conclusory sophistry."[16] Underlying this conclusion necessarily was a notion of marriage at odds with the definition of marriage as the committed sexual union of a man and a woman. Marriage, according to the *Baehr* court, is not necessarily an institution involving the sexual union of a man and a woman, but rather "a state-conferred legal partnership status, the existence of which gives rise to a multiplicity of rights and benefits reserved exclusively to that particular relation."[17] Sexual complementarity has nothing to do with this notion of marriage. Indeed, for the *Baehr* court, *sex* has nothing to do with marriage (either sex in the sense of a person's identity as a male or female, or sex in the sense of sexual intercourse or even other activities involving the stimulation of the sexual organs). Thus, " 'heterosexual' same-sex marriage is, in theory, not an oxymoron . . . . Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals."[18] To the *Baehr* court, marriage is "merely a [state-created] gateway to gov-

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12. Gerard V. Bradley, *Marriage Penalty*, NAT'L REV., Jan. 26, 1998, at 33.

13. See, *e.g.*, *Jones*, 501 S.W.2d at 589-90; Singer v. Hara 522 P.2d 1187 (Wash. App. 1974); Slayton v. Texas, 633 S.W.2d 934, 937 (Tex. App. 1982). Frances B. v. Mark B., 355 N.Y.S.2d 712, 713 (N.Y. Sup.Ct. 1974); Callender v. Corbett, No. 296666, at 3 (Ariz. Super. Ct. Apr. 13, 1994).

14. Baehr v. Lewin, 852 P.2d 44, 61 (Haw. 1993)(footnote ommitted).

15. *Id.*

16. *Id.* at 63.

17. *Id.* at 58.

18. *Id.* at 51 n.11.

ernment benefits."[19] So, if Billy and Bobby (or even Billy and his mother; nothing in *Baehr's* rationale would prevent this) wish to receive the benefits available to married couples and are willing to comply with the necessary procedures, the state should recognize them as just as married as the man and woman who wish to give their lives to each other and raise a family.

B. Implications of Baehr

Baehr illustrates the radical nature of the movement to require states to confer marriage status on same-sex relationships. That movement is nothing less than an attempt to change the long-held public understanding of the true nature of marriage as the committed sexual union of a man and a woman and the understanding that this union is uniquely valuable and worthy of encouragement and protection. The debate over same-sex marriage, then, and the issues that debate raises, are as much ontological as legal: What is marriage? Is there something qualitatively different about the committed sexual union of a man and a woman we historically have called "marriage" that justifies treating that union differently than any other close (or even intimate) relationships between persons? Or, is what we historically have called "marriage" just another relationship, no more or less worthy of encouragement and protection than any other relationship?

This is not just idle philosophical speculation bereft of practical import. Any sound strategy for defending a state's right to refuse to recognize same-sex relationships as marriages must consider this: a judge who cannot see any meaningful distinction between committed same-sex relationships and what we historically have called marriage likely will find a right to same-sex marriage. Legal reasoning will probably follow philosophical inclination. Although we believe the arguments for any right to same-sex marriage do not fare well under existing legal precedent, there is probably sufficient precedent to provide legal cover for a right to same-sex marriage. Inconvenient precedent can always be ignored, distinguished, or if necessary, overruled.

Moreover, those who oppose in the courts the movement to require states to recognize same-sex marriages cannot forget that legal arguments in litigation are a part of (and only a part of) the broader cultural debate[20]

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19. Bradley, *Marriage Penalty, supra* note 10, at 34. We agree with Bradley's assessment that the *Baehr* court has not just "hazardously expanded the definition of marriage but has abolished marriage, legally speaking. What the Hawaii Supreme Court is setting up is better described as a 'household' than as a marriage." *Id.*

20. Our characterization of the dispute over marriage's meaning as a "debate" rather than as a "fight" or "struggle" or "war" is deliberate. No matter how wrong we think their cause is, same-sex marriage proponents are not our enemies; they are our fellow citizens, worthy of full respect and

over the meaning of marriage. Those legal arguments help to shape that debate. For instance, arguments based on federalism, separation-of-powers, and the courts' proper role in a representative republic will and ought to play a large part in legal arguments concerning the alleged constitutional right to same-sex marriage. If the people of the states want to change the centuries-old understanding of marriage as the committed sexual relationship of a man and a woman and embody any new understanding in law, they may do that through their elected representatives after fully debating and considering the ramifications. Courts have no business preempting that consideration (as happened in the abortion cases) by foisting their own new understanding of "marriage" on the people of the states.

But arguments such as this, while powerful, are insufficient if divorced from any persuasive articulation of the nature of what we call marriage. As we have noted above, a judge who cannot see any meaningful distinction (or at least a sound basis for meaningful distinction) between same-sex relationships and marriage between a man and a woman is likely to find a right to same-sex marriage. Moreover, focusing legal arguments solely on government power may well send the wrong message in the broader cultural conversation. If "marriage" is merely a government construct and its definition just a matter of government power, perhaps the courts cannot change that definition; but why can't legislatures do so? And if the meaning of "marriage" is *only* a matter of government power to define which relationships do and do not count as marriages, perhaps legislatures *should* change that definition. If nothing meaningful really does distinguish traditional marriage from same-sex "marriage", it seems arbitrary to deny marital status to same-sex couples.

In the following pages, we will explore the distinction between same-sex "marriage" and marriage as traditionally understood as the committed sexual union of man and woman, and that understanding's relation to the various legal arguments for a right to same-sex marriage. That traditional understanding is sound, and helps provide a sound basis for courts to reject arguments for any constitutional right to same-sex marriage. If we are to embody a new understanding of the value of different relationships in our law, we should make that decision consciously as a society rather than have that decision forced upon us by robed masters in the courts.

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consideration. As Christians ourselves, we (the authors) must take the position that we must not only defeat same-sex marriage proponents, but that we must love and respect them enough to convince them of their error. That may not be possible, but it is essential to attempt. In any event, hatred, rancor, and self-righteousness have no proper place in the debate about marriage. Arguments so tinged are not only ineffective; they are morally wrong. Besides, we all have plenty of sins of our own to be concerned with. That should not prevent us from pointing out and opposing error when we find it (it is sophistry to label as hatred the vigorous but charitable advocacy of what one believes to be the truth), but it ought to keep us humble and respectful when pointing out that error.

II. WHAT MARRIAGE IS, AND WHY THAT MATTERS LEGALLY

The traditional notion of heterosexual monogamous marriage as a uniquely valuable form of interpersonal communion worthy of special recognition, benefits, and protection is based on the complementarity of the two sexes. Simply put, the (practically) "unanimous, international, and multicultural" perception has been that "a man and woman united in marriage 'constitute a unit that is more complete, more comprehensive, more whole, more balanced, more complementary, and more liberating than any relationship of two persons of the same sex can ever be.' "[21]

Lynn Wardle has expressed the traditional perception in more detail:

> The marriage license, certificate, or legal status does not make the heterosexual marital relationship unique, nor does the marriage label make committed heterosexual relations valuable. Instead, because the relations themselves are uniquely valuable they are given the preferred status and label of marriage.
>
> The heterosexual dimension of [marriage] is at the very core of what makes marriage a unique union and is the reason why marriage is so valuable to individuals and to society. The concept of marriage is founded on the fact that the union of two persons of different [sexes] creates a relationship of unique potential strength and inimitable potential value to society. The essence of marriage is the integration of a universe of [sexual] differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity. In the same way that "separate but equal" was a false premise and that racial segregation is *not* equivalent to racial integration, same-sex marriage is not equivalent to heterosexual marriage.
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> Thus, the definition of marriage as [a male-female] union is not merely a matter of arbitrary definition or semantic word play; it is fundamental to the concept and nature of marriage itself.[22]

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21. Richard F. Duncan, *Wigstock and Kulturkampf: Supreme Court Storytelling, the Culture War, and* Romer v. Evans, 72 NOTRE DAME L. REV. 345, 357-358 (1997) (quoting Lynn D. Wardle). As Duncan notes, "no country . . . *in the world* recognizes homosexual [relationships] as marriages." *Id.* at 357.

22. Wardle, *supra* note 2, at 38-39 (footnotes omitted). We have taken the liberty of replacing Wardle's references to "gender" in the original with the word "sex" or a derivative. That might seem overly picky, but the point is important: "sex", not "gender," is the proper word to describe the fact of human persons' existence as male or female. The primary definition of the noun "gender" is grammatical: "a set of two or more categories . . . that determine agreement with or the selection of modifiers, referents, or grammatical forms." THE AMERICAN HERITAGE DICTIONARY 552 (2d College ed. 1991). "Sex", on the other hand, is an ontological term defined in pertinent part as

A. Marriage, Procreation and the Complementarity of Reproductive Functioning

Why is this so? It is not simply because marriage serves the valuable purpose of procreation because only a man and woman can unite sexually to create new human life. After all, one may reasonably ask why we allow sterile couples to marry if procreation is all that distinguishes marriage from same-sex relationships.[23] A sterile heterosexual couple's genital sexual intercourse[24] is not more "fruitful" (in the sense of being capable of generating offspring) than a same-sex couple's act of sodomy.

One could respond to this by saying that we know that, in general, acts of genital sexual intercourse between a male and a female are the acts that *can* result in the reproduction of offspring. We also do not know (generally) which heterosexual couples are fertile or not. It would be an incredible intrusion into a couple's legitimate privacy to require that couple to submit to fertility testing or otherwise prove their fertility before recognizing their union as a marriage.[25]

Given the Supreme Court's decision in *Griswold v. Connecticut,*[26] in which the Court employed similar reasoning concerning legitimate privacy interests to strike down a Connecticut statute prohibiting married couples from using contraceptives, this may well be a sufficient *legal* response to the objection concerning sterile couples.[27] However, the traditional view is not that sterile marriages are something that we merely recognize as marriages (though they really are not) because it is too intrusive to ferret out

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follows:

> 1. a. The property or quality by which organisms are classified according to their reproductive functions. b. Either of two divisions, designated male and female, of this classification. 2. Males or females collectively. 3. The condition or character of being male or female: the physiological, functional, and psychological differences that distinguish the male and the female.

Moreover, the term "gender" has been commandeered for use in signifying that real sexual differences are mere social constructs. Because (as we show below) the unique value of heterosexual marriage depends on the reality of complimentary sexual functioning, it is important to be precise and not to cede the definitional and rhetorical high ground to those who deny the reality of those differences. Therefore, those who defend the traditional understanding of heterosexual marriage should be careful to refer to sex as "sex", not as gender.

23. This is the primary point raised by Macedo, *supra* note 10 at 278-81, when questioning the conclusion that male-female genital intercourse really is qualitatively different than sodomy (whether between couples of the same or different sexes).

24. By "genital sexual intercourse," we mean "coition", which is defined as "physical union of male and female genitalia. . . leading to ejaculation of semen from the penis into the female reproductive tract." WEBSTER'S NEW COLLEGIATE DICTIONARY 218 (1977).

25. *See infra*, text accompanying notes 83-87, where we develop this argument further in relation to the objection that American law allows married couples to contracept, abort, and engage in sodomy, all of which seem (and indeed are) contrary to the understanding of marriage we will set forth.

26. 381 U.S. 479 (1965).

27. *See infra* text accompanying notes 85-87.

infertility. Rather, the traditional view always has been that unions between sterile heterosexual couples, even knowingly entered, are no less marriages than unions between fertile couples.[28] Thus, for instance, while the law generally has considered failure and inability to consummate a marriage by genital sexual intercourse to constitute grounds for annulment, the law has not considered infertility a bar to marriage or a ground for annulment.[29]

The heterosexual sterile couple cannot reproduce, but the spouses can perform acts of genital sexual intercourse. Their union is still properly considered a marriage. So the unique nature of marriage must transcend the fact that marriage serves the very valuable end of procreation. Marriage is not properly seen merely as a means to any end but as an end in itself.

As Wardle's observation implies, the uniqueness of marriage is related to the complementarity of the two sexes. When a man and a woman unite sexually in marriage, they create a union that cannot exist in any other relationship. Unlike any other form of human relationship, "marriage is an irreducible form of *interpersonal communion* grounded in the *complementarity of reproductive functioning*, even where reproduction for this or that couple is impossible."[30]

What is it about the "complementarity of reproductive functioning that separates heterosexual marriage from other relationships (and marital sexual intercourse from nonmarital intercourse or other orgasmic acts performed on each other by partners, whether of the opposite or same sex)? A number of modern natural law theorists (most notably Germain Grisez, John Finnis, Robert George, and Gerard Bradley) have been working out a convincing answer to this question.[31] This answer, while consistent with classical Christian (or at least Catholic) teaching on marriage, is philosophical, not theological, and makes no appeals to religious authority. As Finnis notes, this answer has roots in the writings of ancient pre-Christian

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28. Even St. Augustine, who seems to have seen marriage between fertile couples as a good *because* those marriages serve the good of procreation and rearing of offspring, held this view. Saint Augustine, *De bono coniugalia (The good of marriage)* (9.9), in ST. AUGUSTINE, TREATISES ON MARRIAGE AND OTHER SUBJECTS 21-22 (Charles T. Wilcox, et al, trans. 1955). Augustine wrote, "it is a good to marry . . . since it is good to be the mother of a family." *Id.* But in an earlier portion of the same treatise, Augustine identified another good of marriage, the "natural companionship between the two sexes." *Id.* (3.3), at 12. This natural companionship led Augustine to see that the marriage of sterile (elderly) couples was indeed marriage. *Id.*

29. *See* George & Bradley, *supra* note 10, at 307-09 & nn.23-27.

30. Gerard V. Bradley, *Pluralistic Perfectionism: A Review Essay of* Making Men Moral, 71 NOTRE DAME L. REV. 671, 695 (1996) (emphasis added).

31. *See* 2 Germain Grisez, The Way of the Lord Jesus, *Living a Christian Life* 555-74, 633-80 (1993); John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049, 1055-69 (1994); George & Bradley, *supra* note 10.

philosophers and first century non-Christian philosophers such as Plato, Aristotle, Plutarch, and Musonius Rufus.[32]

It is not necessary for our purpose to sketch all the details of this natural law explanation of marriage as grounded in reproductive complementarity.[33] A brief sketch of the major points of the explanation will suffice to show the qualitative difference between the committed sexual union of man and woman (marriage) and other human relationships. We begin with the premise that marriage is a free and complete giving of the two spouses to each other.[34] When two people freely consent to give themselves to each other, they create an intercommunion of their whole persons — mind, spirit, and body. This insight is reflected, as Finnis notes, in Plutarch's observation in the early second century that the union of husband and wife creates an "integral amalgamation" of their two lives.[35]

This "integral amalgamation" or, "two-in-one-flesh" communion is actualized and experienced by the couple when they perform genital intercourse. In other words, genital intercourse literally makes two people one in a way that no other act can. How is this so? No man or woman can reproduce by him or herself; only the mated pair can perform the *single* function of reproduction. Grisez explains:

> Though a male and a female are complete individuals with respect to other functions — for example, nutrition, sensation and locomotion — with respect to reproduction they are only potential parts of a mated pair, which is the complete organism capable of reproducing sexually. Even if the mated pair is sterile, intercourse, provided it is the reproductive behavior characteristic of the species, makes the copulating male and female one organism.[36]

Since human persons are unities of mind, soul, and body, their bodies — the biological reality of the human being — are part of, and not merely instruments of, their whole persons. When a husband and wife unite bio-

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32. *See* Finnis, *supra* note 31, at 1062-63.

33. For a much fuller treatment, see the sources cited *supra* note 30.

34. *See* George & Bradley, *supra* note 10, at 312 ("Marriage is a 'reflexive' good; it includes the free choices of the party's consent").

35. Finnis, *supra* note 31, at 1064 n.9 & 1065 (quoting Plutarch, Erotikos 769 F; Coniugalia Praecepta 142 F). Plutarch's observation foreshadows the insight of Pope John Paul II, who has referred to marriage as "a great project: *fusing* your persons to the point of becoming one flesh." Quoting John Paul II, Address to Young Married Couples at Taranto (October 1989), *quoted in* Finnis, *supra* note 29, at 1065 n.43. However, this is not a uniquely Catholic (or even more generally Christian) insight; as Finnis notes, Plutarch's writing on this subject was "certainly free from Judeo-Christian influence." *Id.* at 1062.

36. Germain Grisez, The Christian Family as Fulfillment of Sacramental Marriage, Paper Delivered to the Society of Christian Ethics Annual Conference (Sept. 9, 1995), at 6, *quoted in* George & Bradley, *supra* note 10, at 311-12.

logically by acts of genital intercourse, therefore, they unite personally. Thus, by acts of genital intercourse, a husband and wife experience and actualize their marriage as the complete giving of themselves to one another; they truly do experience union in mind, spirit, *and* body.[37] Genital intercourse renews the self-giving and interpersonal communion that constitute marriage. Again, Finnis notes how Plutarch captured this insight in the early second century:

> In the case of lawful wives, physical union is the beginning of friendship, a sharing, as it were, in great mysteries. [The] pleasure is short [or unimportant: *mikron*] but the respect and kindness and mutual affection and loyalty that daily spring from it [conjugal sex] . . . proves that Solon was a very experienced legislator of marriage laws. He provided that a man should consort with his wife not less than three times a month — not for the pleasure, surely, but as cities renew their mutual agreements from time to time, just so he must have wished this to be a renewal of marriage.[38]

Again at this point, one might point to our friends the sterile couple to raise an objection: if actual reproduction is impossible, how can the sterile couple's genital intercourse be "*reproductive* behavior"? Intercourse by a sterile couple, one might say, is no more behavior "suitable for generation"[39] than pointing an unloaded gun at someone and pulling the trigger is "behavior suitable for murder."[40] If so, then the sterile couple's marriage is a sham, or genital intercourse does not have the unitive significance that we (along with Grisez, Finnis, George, Bradley, and most who adhere to the traditional view of marriage) believe it has. Marriage as a "one-flesh union" is, at best, a metaphor.

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37. *See* Finnis, *supra* note 31, at 1066; George & Bradley, *supra* note 10, at 311 n.32 ("males and females [] who unite genitally in marital acts really do unite biologically (and, because — as Finnis has observed . . . — the biological reality of human beings is part of their personal reality, they unite personally)").

38. Finnis, *supra* note 31, at 1063-64 n.37 (quoting Plutarch, Erotikos 769). None of this is to say, of course, that marital intercourse ought not be pleasurable, or that spouses ought not desire their intercourse to be pleasurable. The point is that the pleasure is secondary; the significance of marital intercourse is that it renews the couple's marriage by making them physically — and therefore, personally — one.

39. Finnis, *supra* note 31, at 1066 n.46 ("Biological union between humans is the inseminatory union of male genital organ with female genital organ; in most circumstances it does not result in generation, but it is the behavior that unites biologically because it is the behavior which, as behavior, is suitable for generation").

40. Macedo, *supra* note 10, at 280 poses this analogy. See generally *id.* at 278-80 for a more extended discussion.

We believe the murder analogy fails. All reproduction is, as George and Bradley note, a "complex biological function."[41] This function entails two aspects: a behavioral aspect (that is, penile penetration of the vagina and ejaculation of semen into the reproductive tract) and a non-behavioral aspect (for example, the presence of sperm in the semen, the presence of an ovum, and the sperm's ability to reach and penetrate the ovum). When a sterile couple engages in genital intercourse that results in ejaculation of semen into the reproductive tract, that couple is performing the behavior necessary for reproduction even if nonbehavioral factors prevent the generation of new life.

Compare the murder analogy. One could characterize committing murder with a gun as a "complex function" and break that function down into behavioral and non-behavioral aspects. Among the behavioral aspects are aiming the gun and pulling the trigger, but also (first and foremost) *loading the gun*. Suppose a person aims and fires, but forgot to load. That person has omitted an essential part of the *behavior* necessary (suitable) for murder. But suppose that same person loads, aims, and fires, but, much to his chagrin, the firing mechanism malfunctions (or the victim is wearing a bullet-proof vest). That person would be performing behavior suitable for murder; something other than his behavior has thwarted his efforts. The sterile couple is like the person who fired the malfunctioning gun: nothing *they have done* has thwarted the full completion of the reproductive process (that is, the generation of new life). It is not as if a man and a woman fail or forget to "load" sperm in the man's semen or ova into the woman's reproductive tract.[42] Thus, George and Bradley correctly state that a sterile couple's "intercourse constitutes reproductive functioning, even if the process of which it is a part is, due to nonbehavioral factors, incomplete. This is why we easily recognize the mating of animals we know to be sterile as mating, and not as failed attempts to mate."[43]

Therefore, Grisez's point still holds. Because the mated pair is the only organism capable of reproduction, a married couple performing genital intercourse — the only behavior suitable for reproduction — literally

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41. George & Bradley, *supra* note 10, at 312.

42. The couple using contraception, on the other hand, may be said to be in the position of the person who has failed to load his gun (or, has deliberately unloaded his gun). If so, it would seem to follow that contracepted sex may well not constitute the behavior suitable for reproduction required to make the couple truly one. Thoughtful scholars have disagreed about whether contraception vitiates the unitive (and therefore marital) quality of spousal genital intercourse. *See id.* at 310 n.30. Even if contraception does vitiate the marital quality of these acts, the legal significance of that conclusion is another matter. We discuss this question *infra* at text accompanying notes 83-87.

43. *Id.* at 312-13 (footnote omitted). George and Bradley offer other reasons to defend this conclusion. *See id.* We find these reasons persuasive, but we need not discuss them.

do become "one flesh" and experience and actualize their marriage commitment, even if they are unable to generate new life by that act.

No other act, including sodomy, has this unitive significance. This includes sodomy between spouses.[44] Only genital intercourse is the type of reproductive behavior that literally makes the man and the woman one "complete organism capable of reproducing sexually." Unlike reproduction, merely inducing orgasm is a biological function that does not require a mated pair. A person can quite easily induce an orgasm by masturbating. That the person chooses to involve another person in inducing his orgasm (for example, by an act of sodomy) may make the couple feel closer emotionally, or give them pleasure; it does not however make them one functioning biological unit. It does not *literally* unify them.

As George and Bradley note, this explanation of marriage as rooted in the complementarity of reproductive functioning makes sense of the traditional (though perhaps not universal) legal requirement that consummation by genital intercourse is an essential element of marriage and that failure to consummate is a ground for annulment.[45] We believe that this explanation, if correct, also provides a sound basis for rejecting the legal arguments for a right to same-sex marriage. The Constitution does not "require 'things which are different in fact . . . to be treated in law as though they were the same.' "[46] The institution our society commonly has called marriage — the committed sexual union of a man and a woman — is qualitatively different than same-sex relationships. Married couples are capable of truly becoming "two-in-one flesh"; same-sex couples, no matter how much they may desire to, are incapable of doing so. Same-sex couples simply cannot perform the act of genital intercourse that allows them to actualize and experience true one-flesh union.

B. The Loving *Analogy*

Arguments that the Constitution requires states to recognize same-sex marriage simply deny the difference between marriage and other relationships, and in effect deny the significance of reproductive complementarity for the union between man and woman. Take, for instance, arguments that refusing to recognize same-sex marriages discriminates on the basis of sex.

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44. This is an important point. The argument we have been sketching does *not* single out homosexual acts for special opprobrium. Nonmarital sex acts by anybody, even spouses, lack the ability to actualize marriage. This includes extramarital intercourse, which cannot actualize the personal communion of marriage because there is no personal communion to actualize. This has been reflected in the traditional legal requirement that sodomy, no matter how pleasurable or expressive of care, affection, etc., does not consummate marriage. *See* George & Bradley, *supra* note 10, at 308.

45. *See id.*

46. Michael M. v. Superior Court, 450 U.S. 464, 469 (1981).

These arguments rely on an analogy to *Loving v. Virginia*.[47] In *Loving*, the Supreme Court struck down a Virginia statutory scheme that prevented whites and blacks from marrying each other. Notably, Virginia law prohibited interracial marriage involving only whites: while blacks and other races were free to intermarry, whites could marry only whites.[48] This, coupled with the overt racial classification in the statute and the clear history of the statute's purpose to protect white "racial integrity,"[49] led the Court to conclude "that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy,"[50] and struck down the statute as an unconstitutional racial classification.[51]

Same-sex marriage proponents make two arguments based on *Loving*. First, Loving, a white man could have married a white woman, but he could not marry Jeter, a black woman. Likewise, Billy may marry Sue, but Billy may not marry Bob. Therefore just as the Virginia law in *Loving* discriminated because of race, state-laws refusing to recognize same-sex relationships as marriages discriminate because of sex.[52]

The obvious rejoinder to this argument is that state marriage laws treat men and women alike: Billy may no more marry Bobby than Sue may marry Linda. Thus, these laws discriminate against neither men nor women. However, Virginia made a similar argument in *Loving*: "[B]ecause its miscegenation statutes punish equally both the White and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classification, do not constitute an invidious discrimination based upon race."[53] Yet, the Court rejected this argument.[54] Therefore, the argument goes, it must follow that just as miscegenation discriminates because of race, marriage laws discriminate because of sex.[55]

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47. 388 U.S. 1 (1966). In Sunstein's words, *Loving* is "the most aptly titled case in the entire history of American law." Sunstein, *supra* note 11, at 17. Although we agree with little else in Sunstein's article, we must admit that this observation is right on the mark!

48. *See* 288 U.S. at 11 & n.11 (Virginia prohibits only interracial marriages involving white persons; "while Virginia prohibits whites from marrying any nonwhite . . . Negroes, Orientals, and any other racial class may intermarry without statutory interference").

49. A significant part of that history came from the Virginia Supreme Court. In Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955), the court upheld the miscegenation statute, finding that Virginia could legitimately "preserve the racial integrity of its citizens" and prevent "the corruption of blood," "a mongrel race of citizens," and the "obliteration of racial pride." The Supreme Court understandably found those statements to be "obviously an endorsement of the doctrine of White Supremacy." 388 U.S. at 7.

50. 388 U.S. at 11 (footnote omitted).

51. *Id.* at 12.

52. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208 (1994). This is essentially the argument the Hawaii Supreme Court accepted in *Baehr*. *See* 852 P.2d at 67-68.

53. 388 U.S. at 8.

54. *Id.* at 8-10.

55. *See Baehr*, 852 P.2d at 67-68.

This argument strips *Loving's* conclusion from its context. Unlike state marriage laws that treat women and men alike, the Virginia miscegenation statute treated whites and blacks differently. In Virginia, Mr. Loving, a white man, could only marry a white woman; and Ms. Jeter, a black woman could marry any man *but* a white man.[56] The Virginia statute did not treat the races equally; it more strictly limited white persons' marriage options. This legal disadvantage to whites existed to serve a regime designed specifically to segregate whites and blacks and preserve the "integrity" of the white race in the interest of "White Supremacy". Given this context, it is not surprising that Cass Sunstein, (who believes that marriage laws discriminate because of sex), nevertheless has concluded that the "Billy can marry Sue but not Bobby" analogy to *Loving*, "[u]nder current law gets nowhere . . . . There is no sex discrimination because women and men are treated exactly the same."[57]

Sunstein himself believes that state marriage laws discriminate against women because just as the miscegenation ban in *Loving* was the product of a desire to maintain White Supremacy, state marriage laws are "a product of a desire to maintain a system of gender hierarchy, a system that same-sex marriage tends to undermine by complicating traditional and still-influential ideas about the 'natural difference' between men and women."[58] Sunstein argues that state marriage laws that refuse to recognize same-sex relationships as marriages "have much the same connection to gender caste as bans on racial intermarriage have on racial caste"[59] because "miscegenation laws attempt to keep blacks and whites apart, while bans on same-sex relations attempt to keep men and women together."[60] Thus,

> [S]ame-sex marriages are banned because of what they do to — because of how they unsettle — gender categories. Perhaps same-sex marriages are banned because they complicate traditional gender thinking, showing that the division of human beings into two simple kinds is part of sex-role stereotyping, however true it is that women and men are "different".[61]

Thus, like the ban on interracial marriage, "the ban on same-sex marriages may well be doomed by a constitutionally illegitimate purpose. The ban

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56. *Loving*, 388 U.S. at 11 & n.11.
57. Sunstein, *supra* note 11, at 18-19.
58. *Id.* at 16.
59. *Id.*
60. *Id.* at 20, n.65.
61. *Id.* at 20-21.

has everything to do with constitutionally unacceptable stereotypes about the appropriate roles of men and women."[62]

This argument is interesting, but it has several problems, not the least of which (for the tactical purposes of same-sex marriage proponents) is its veiled insult to women. What Sunstein is telling women, in effect, is that by marrying under present conditions (that is, at a time when the law would not recognize her choice to "marry" a woman as a real marriage) they are helping to prop up a social structure that forces them to remain second-class citizens. Apparently, the woman who falls in love with and desires to marry a man (exercising what she thinks is her own free will) and believes that marital union is truly a good that will contribute to her well-being and flourishing, is too dull-witted to realize that by propping up the patriarchy she is acting contrary to her own best interests. To be fair, Sunstein also thinks that we are all — women and men — victims of the sexual caste.[63] So, perhaps not only women who marry are too dull-witted to understand how they are hurting themselves — we all are!

Moreover, Sunstein's theory boils down to an empirical claim that marriage, as we know it, harms women. That will be a hard, perhaps impossible, claim to prove. Given that most women seem to have missed this connection, it would not be surprising to find that "[j]udges may find it difficult to understand how denying two gay men the right to marry is driven by an ideology that oppresses straight women.' "[64]

For our purposes, however, the biggest problem with Sunstein's argument is that it can succeed only if — indeed, makes sense only if — what we consider to be important sexual differences are nothing but sex-role stereotypes imposed by the culture. It may be true that some of what we consider to be "natural" differences between the sexes really are learned behavior and ought not justify legal distinctions between the sexes.[65] (This itself is an empirical claim that may be difficult to prove, as Sunstein himself admits.[66]) But if what we said earlier about marriage as one-flesh un-

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62. *Id.* at 21.

63. *See id.* at 22-23 ("The legal and social taboo on homosexuality" including the refusal to recognize same-sex relationships as marriages, "might well be damaging to both men and women, heterosexual and homosexual alike, though of course in very different ways and to quite different degrees").

64. Craig M. Bradley, *The Right Not to Endorse Gay Rights: A Reply to Sunstein*, 70 IND. L.J. 29, 33 n.27, (quoting William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1509-10 (1993)).

65. Sunstein is surely correct when he notes that not even all real differences justify different legal and social treatment. *See* Sunstein, *supra* note 11, at 14-15. Thus, for instance the fact that blacks and whites are different in skin color should have no bearing on how the law treats blacks and whites. And the fact that men generally are larger and stronger than women should have no bearing on whether women can be lawyers or CPA's. While we agree with Sunstein concerning this principle, we believe that he simply glosses over and ignores the significance of reproductive complementarity and its conclusive importance to the question of marriage.

66. *See id.* at 15-16.

ion is true, then the difference that matters for marriage — the reproductive complementarity of men and women — is conclusive for excluding same-sex relationships from the universe of marriage. Committed sexual union between a man and a woman is different in kind from any other relationship, for only in that union can two distinct individuals literally become one. Same-sex couples, as a matter of biological fact, cannot engage in the only behavior that can consummate and actualize the marriage union by literally making the two into one.

Thus, any analogy to *Loving* breaks down. Richard Loving was a man. Mildred Jeter was a woman. Presumably, they were capable of consummating their marriage. Skin color has absolutely nothing to do with this ability (despite the trial judge's quaint comments that "Almighty God" decreed that whites not marry blacks)[67]. Thus, it was invidious discrimination to prevent them from marrying. Billy and Bobby, on the other hand, cannot consummate their "marriage." Therefore, it is not invidious discrimination to refuse to call their relationship a "marriage," no matter how much they wish it to be one.

C. Due Process and a Fundamental Right to Same-Sex Marriage

Arguments for a due process "right" to same-sex marriage also must assume that marriage is something other than the sexual union between a man and a woman. The Supreme Court has stated that the right to marry is a "fundamental" right;[68] therefore a state generally must justify laws that prohibit marriage by showing that those laws serve a compelling state interest.[69] However, same-sex marriage proponents should get little mileage from these cases, since the Court historically has tied the fundamental right to marriage to activities associated with procreating and raising children.[70] In fact, the Supreme Court in *Bowers v. Hardwick*[71] dismissed the argument that the Constitution protects a fundamental right to perform homosexual sodomy with the curt comment that "no connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[72]

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67. *See* 388 U.S. at 3.

68. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942); *Loving*, 388 U.S. at 12; Zablocki v. Redhail, 434 U.S. 374 (1978).

69. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 10.1.2 (1997).

70. *See, e.g., Zablocki*, 434 U.S. at 386 ("[I]t 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. . . . [I]f appellee's's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.") (citations and footnote omitted).

71. 478 U.S. 186 (1986)

72. *Id.* at 191. *See* Wardle, *supra* note 2, at 35.

Another line of Supreme Court cases may, however, provide a better avenue of attack. In his dissent in *Bowers*, Justice Blackmun suggested that the reason the Court has protected the right to marry and enter into sexual and family relationships is not so much because those rights contribute to the general welfare, but because the choice to enter into those relationships is central to a person's dignity and autonomy.[73] This is consistent with the Court's statement in *Eisenstadt v. Baird*[74] that "the marital couple is not an independent entity with a mind and heart of its own, but *an association of two individuals*."[75] *Eisenstadt* foreshadowed Justice Blackmun's suggestion in his *Bowers* dissent that we protect marriage to protect the choice of the spouses to enter into marriage and therefore the autonomy of those two persons. This, in turn, suggests that the value of marriage lies not in anything unique about that institution, but in the choice of two people to live together in a life of sexual intimacy.

This reasoning came to full flower in the famous "mystery passage" in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[76] in which the Court stated:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Our precedents "have respected the private realm of family life which the state cannot enter." These matters, *involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.*[77]

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73. 478 U.S. at 204-05. For a penetrating (and critical) analysis of Justice Blackmun's *Bowers* dissent, see Gerard V. Bradley, *Remaking the Constitution: A Critical Reexamination of the* Bowers v. Hardwick *Dissent*, 25 WAKE FOREST L. REV. 501 (1990).

74. 405 U.S. 438 (1972).

75. *Id.* at 453 (emphasis added).

76. 505 U.S. 833 (1992).

77. *Id.* at 851 (Joint opinion of O'Connor, Kennedy, and Souter, Jj.)(citations omitted)(emphasis added).

If "marriage" is merely an association of two individuals, valuable primarily because of the choice of two people to enter into that relationship, and if liberty really is the right to make intimate and personal choices that define one's own concept of meaning and existence, it would seem to follow that two men have the right to marry each other. After all, two men's decision to enter into a committed intimate relationship seems (at least on the surface) to be as personal and intimate as the choice of a man and a woman to marry.

If we take *Casey* at its word, what the Court really has created is a constitutional right to define one's own moral universe. If one's own moral universe includes the notion that men really can marry men, then *Casey* appears to say that the due process clause protects choices based on that notion.[78] In fact, it is hard to think of any principled limit to the right *Casey* potentially created.

Despite this, it is doubtful that a due process argument based on *Eisenstadt* and *Casey* is likely to succeed. First, the specter of *Bowers v. Hardwick*[79] still looms large. *Casey*, though perhaps doctrinally inconsistent with *Bowers* (given that *Casey* essentially adopted the reasoning of the *Bowers* dissent) did not purport to overrule *Bowers*.

Second, a majority of the Court indicated last term in *Glucksberg v. Washington*,[80] that it was not willing to extend *Casey's* reasoning (and the Court's own privacy/liberty jurisprudence) much further than it already has extended. *Glucksberg* rejected the argument that a mentally competent, terminally-ill patient has a fundamental right to have a physician's assistance in committing suicide.[81] One might suppose that the decision whether and how to end one's life is one of the more "personal and intimate" decisions a person might make concerning his own "concept of existence." But the majority in *Glucksberg* interpreted (perhaps somewhat disingenuously) *Casey's* mystery passage as merely describing "in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as . . . protected by the Fourteenth Amendment."[82] Moreover, the Court placed great emphasis on the "consistent and almost universal tradition that has long rejected the asserted right [to as-

78. For a critical, philosophically informed critique of *Casey's* mystery passage and the Supreme Court's privacy jurisprudence in general, see David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975 (1992). Smolin characterizes the *Casey* view of liberty as "a cheerful interpretation of Sartre's existentialism." *Id.* at 981.

79. 478 U.S. 186 (1986).

80. 117 S.Ct. 2258 (1997).

81. *See id.* at 2271.

82. *Id.* at 2271 (footnote omitted). This interpretation of *Casey* might strike one as somewhat fanciful. If the *Casey* joint opinion merely was describing other specific constitutionally protected activities, the joint opinion's authors used rather strange language to make that point.

sisted suicide]."[83] A similarly consistent and almost universal tradition has long rejected the notion that same-sex relationships are marriages.[84]

Again, however, note how the argument for recognizing same-sex marriages depends on dismissing the biological reality that separates the committed sexual union of man and woman from same-sex relationships. The due process argument hinges on the notion that marriage is not really a one-flesh union consummated and actualized by acts of genital intercourse which literally do unite the couple as a single organism. Instead, marriage is just the association of two individuals that is valuable because it reflects the choice of its participants to associate with each other. To accept what we have argued as the reality of marriage is necessarily to reject the due process argument for recognizing same-sex relationships as marriages.

D. Is It Arbitrary to Allow Non-Marital Acts by Married Heterosexuals, But Not Recognize Gay Marriage?

It is, however, possible to accept all we have said about marriage, yet still maintain that present-day marriage laws should recognize same-sex relationships (and grant them the benefits that go along with recognition). A person could accept that the reproductive complementarity of man and woman really does make their union unique and that acts of sexual intercourse between spouses (behavior of the reproductive type) really do make them one flesh in a way no other acts can. The response to this would be, in effect, so what? That's not the kind of union your marriage laws actually protect. The law allows couples to thwart reproduction by using contraception; the law even allows them to kill their offspring after they are conceived. The law does nothing to prevent married couples from performing the same kind of acts (sodomy, mutual masturbation) that you hold are unable to unite same-sex couples. In short, you reserve the full cornucopia of orgasmic delights to opposite-sex couples, and recognize and protect relationships that same-sex couples are as capable of entering into as opposite-sex couples. This is arbitrary and unjust.

For those who take the view of marriage we have presented, this argument has (and should have) considerable force. It does *seem* arbitrary, as Steven Macedo put it, to impose restrictions on "a . . . minority . . . that the majority is unwilling to impose on itself."[85] Those who decry homosexual

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83. *Id.* at 2269; *See generally id.* at 2262-67 (discussing the history of suicide and assisted suicide prohibitions); 2267-69 (discussing the importance of history and tradition in substantive due process analysis).

84. Although, to be sure, the supposed right to have an abortion has no better historical or legal pedigree than the right to commit suicide or to marry someone of the same-sex.

85. Macedo, *supra* note 10, at 277.

activity also should decry the unfortunate frequency of other nonmarital acts in our society.

Yet, we believe this argument is not sufficient to require recognizing same-sex relationships as marriages. The differential legal treatment referred to is not arbitrary. Men and women are capable of entering and actualizing the one-flesh union that is marriage. Same-sex couples are not. True, the law generally allows spouses to commit acts like sodomy. But the fact that the law does not inquire into the sexual or contraceptive practices (assuming that contraception vitiates the marital nature of intercourse) of married couples is a prudential decision reflecting the judgment that marriage needs a certain amount of privacy to prosper. Intruding into married couples' sexual practices may well damage this privacy and thus ultimately cause more harm to a marriage (and the institution of marriage) than the good that might result from deterring contraception or sodomy.[86]

In fact, this was the very reasoning the Supreme Court used in *Griswold v. Connecticut*[87] to strike down Connecticut's law that prohibited married couples from using contraceptives. The Court waxed philosophic about the nature of marriage as a "noble" institution, "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[88] Marriage, in the Court's view, required an appropriate zone of privacy to flourish and prosper; Connecticut's law, in the Court's view, violated that zone. As the Court noted, *Griswold*

> concerns a law which, in forbidding the *use* of contraceptives . . . seeks to achieve its goals by means having a maximum destructive impact upon [the marital] relationship . . . . Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.[89]

In *Griswold,* the Court no doubt exceeded its power; it was clearly legislating. But (assuming for now the Court had the power to legislate), the Court's conclusion was reasonable. It is hard to deny a real legislature the power to reach essentially the same conclusion concerning how far to intrude into a married couple's sexual practices. Therefore, the fact that the law does not prohibit married partners from performing nonmarital acts

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86. *See* George & Bradley, *supra* note 10, at 319-20.

87. 381 U.S. 479 (1965).

88. *Id.* at 486.

89. *Id.* at 485-86. For further discussion of this interpretation of *Griswold,* see Gerard V. Bradley, *Life's Dominion: A Review Essay,* 69 NOTRE DAME L. REV. 329, 351-53 (1993).

should not provide a sufficient basis to require states to recognize same-sex relationships as marriages.

V. CONCLUSION — THE STAKES OF THE DEBATE

Perhaps the law does not now require recognizing same-sex relationships as marriages. Perhaps there is a real difference between the committed sexual union of a man and woman, and other relationships. But so what if we choose to call same-sex relationships marriages? How does that harm anybody? Isn't this just a matter of semantics? No. As legal philosopher Joseph Raz has noted regarding monogamy,

> [s]upporting valuable forms of life is a social rather than an individual matter. Monogamy, assuming that it is the only morally valuable form of marriage, cannot be practiced by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal institutions.[90]

Robert George understands Raz to be arguing "that without this social recognition and support, the (uniquely valuable) option of monogamous marriage will be practically unavailable for large numbers of people in a given society," since "[a] framework of expectations and understandings that will profoundly affect individual members of a society and their relationships with one another will be shaped decisively by a society's commitment (or lack of commitment) to the ideal of monogamous marriage."[91] In other words, the surrounding culture, including that culture's legal norms, helps to shape people's understanding of what are or are not truly valuable forms of life and relationships.

As with monogamy, so with marriage generally. Raz has noted that such changes as same-sex marriage and homosexual families "will not be confined to adding new options to the familiar heterosexual monogamous family. They will change the character of that family. If these changes take root in our culture then the familiar marriage relations will disappear."[92]

Why is this so? Why not call committed same-sex relationships marriages? After all, those who believe in marriage as uniquely the sexual union of man and woman will still be free to marry in that sense, and to regard their relationships as unique, special, and superior. How does recog-

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90. JOSEPH RAZ, THE MORALITY OF FREEDOM 162 (1986).

91. ROBERT P. GEORGE, MAKING MEN MORAL 165 (1993).

92. RAZ, *supra* note 18 (quoted in Gerard V. Bradley, *Pluralistic Perfectionism: A Review of* Making Men Moral, 71 NOTRE DAME L. REV. 671, 695 (1996)). Bradley notes that Raz "ventured no moral evaluation of the prospect" that homosexual families would become accepted in our law and culture. *See* 71 NOTRE DAME L. REV. at 695.

nizing same-sex marriage deprive them of that choice or harm those people in any other way?

Gerard Bradley offers a trenchant response to this objection:

> Why not just call or treat gay relationships as "marriage" in scare quotes or with an asterisk? Because for a time straight and gay marriage might co-exist in the law and in popular consciousness as somehow superior and inferior forms. But they will not for long. Sooner rather than later, persons will wonder, superior and inferior versions of what? The ranking presumes a common metric or a genre embracing both species. If the genre is the traditional one, gay partnerships are not inferior versions of it at all, but morally indistinguishable from what the tradition has always considered an affront against marriage: cohabitation. If marriage and gay partnership are variations on a single theme, some new ideal of domestic partnership has replaced marriage, one which has conclusively cut off our understanding of marriage as, in some decisive way, a community grounded in the complementarity of reproductive functioning.[93]

Thus, as George notes, "the presence or absence of a culture's commitment to, and support for, a social form such as monogamous marriage will profoundly shape the options that people will typically understand themselves to have — and the choices that they will actually make — in morally important areas of their lives."[94]

By giving special status, benefits, and protection to heterosexual monogamous marriage, we as a society demonstrate our commitment to that institution as a uniquely valuable form of human interaction and communion (both for those married and for society as a whole). To give the same status, benefits, and protection to relationships that do not share the characteristics that make heterosexual monogamous marriage uniquely valuable – that is to call something "marriage" that is not really marriage – will at best blur the message that marriage is uniquely valuable, and probably over time cut off our understanding of marriage as uniquely valuable. If we as a society wish to do that, we should do it consciously after full debate and not by dictate of five platonic guardians who have been convinced by lawyers that sexual intercourse and sodomy – apples and oranges – really are the same thing.

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93. Bradley, *supra* note 21, at 695-96.
94. GEORGE, *supra* note 91, at 166. *See also* George & Bradley, *supra* note 10, at 307.