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Let me not to the marriage of true minds
Admit impediments.
—W. Shakespeare, Sonnet 116

Marriage is the legal recognition of human intimacy; it has endured throughout the ages. It has undergone a myriad of changes since the framing of the republic, and it has emerged, in modern times, as the basis for the family unit.[1] Marriage can protect and secure the values of community, autonomy, and sexual and emotional intimacy, for the individuals who choose to enter into it.[2] Many individuals prefer to raise children within the institution of marriage. Marriage, at times, has served to institutionalize and perpetuate gender bias in the legal system and in society.[3] It has also served to protect or shield abusers and wrong-doers from the reach of the law.[4] Traditionally, civil marriage has been viewed as a relationship involving a man and a woman.[5] Changing mores and attitudes, however, challenge that traditional understanding of marriage. These changes led the Massachusetts Supreme Court to hold in *Goodridge v. Department of Public Health* that Massachusetts could not deny

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1. *See generally, The Michigan Journal of Gender and Law Presents a Symposium: Marriage Law: Obsolete or Cutting Edge?*, 10 Mich. J. Gender & L. 21 (2003). This essay addresses only civil marriage, not marriage as defined or constructed by religious institutions.

2. Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 Colum. L. Rev. 75, 81–89 (2004) (describing marriage as an egalitarian liberal community).

3. *Id.* at 91–95. *See* Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 Stan. L. Rev. 225, 246-47 (1997). *See also* John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 Cardozo L. Rev. 1119, 1189 (1999).

4. *See* Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 Hastings L.J. 1465 (2003); Reva B. Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947 (2002). *But see* Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. Rev. 265, 303 (2000) (arguing that same-sex marriage would extend the protections now accorded domestic violence victims to same-sex couples).

5. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941,953 (2003).

"the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry."[6]

Goodridge was preceded by the United States Supreme Court's decision in *Lawrence v. Texas,*[7] which held that there is a realm of personal sexual intimacy and privacy protected from intrusion by the state such that the state may not criminalize adult consensual sexual intimacy and conduct within the home.[8] The *Lawrence* opinion appeared to recognize its relevance to the issue of same-sex marriage; language in the opinion indicates, however, that, for some justices, marriage may be sufficiently distinguished from sexual intimacy in the home to allow states to prohibit same-sex couples from participating in the institution of marriage.[9]

Our society has recognized that individual human beings are entitled to the protection of the law in the establishment of an enduring and recognized intimate sexual, mental, and emotional relationship that constitutes that individual's family.[10] *Lawrence* recognizes that the desire for and right to form an intimate relationship is not determined by one's sexual orientation.[11] Recognition of same-sex marriage requires no change to the substance of the marriage relationship; it merely requires that we shed the perspectives of entrenched gender roles for both men and women. Notwithstanding a constitutional command that government regulate human beings of both sexes as individuals and not on the basis of gender group norms or stereotypes,[12] the struggle to ensure

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6. *Id.* at 948.

7. 123 S. Ct. 2472 (2003).

8. *Id.* at 2478, 2484 ("It [the case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."), 2487–88 (O'Connor, J., concurring) ("That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations – the asserted state interest in this case – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.").

9. *Id.* at 2478, 2484.

10. *Id.* at 2478, 2484; Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 112 S. Ct. 2791 (1992); Michael M. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333 (1989); Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254 (1987); Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673 (1978); Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977); Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817 (1967); Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965); Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110 (1942); Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625 (1923).

11. 123 S. Ct. 2472.

12. United States v. Virginia, 518 U.S. 515, 116 S. Ct. 2264 (1996). *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 971-72 (2003) (Greaney, J.,

that individuals will not be penalized for exhibiting behavior, conduct, or attributes associated with a different gender continues to pose a substantial challenge to our society.

The Federal Constitution emerged in the twentieth century as the guarantor of basic human rights. It should not be used, as it was in 1791, to perpetuate tyranny and deny certain human beings the exercise of basic human rights.[13] Whether viewed as preservation of a basic human right to pursue happiness through marriage or to be free from societal animus because of one's sexual orientation, it is difficult to justify prohibitions against same-sex marriage. Same-sex marriages involve protected conduct, a highly valued institution and relationships that cause no harm or injury to individuals or society at large.[14]

I. OF CONSTITUTIONAL AMENDMENTS

The amendment process is a critical aspect of our constitutional framework. Its importance lies in providing a mechanism through which generations can continue to determine or test the legitimacy of our government, its protection of basic human rights and its continued viability for present times. Its importance also lies in providing a check to judicial review and the role that federal courts play in our constitutional scheme.[15] The amendment process is a response to concerns that our human rights and legal norms are determined by an entity that is not politically accountable, and that this entity, populated by persons immunized from direct political accountability, has the power to overrule and declare null and void actions of the two elected branches.

Amendments are, in most cases, not necessary to secure continued governmental legitimacy or to effectuate change.[16] Judicial review exercised in constitutional interpretation mirrors the common law in its flexibility and adaptation to change. The Court's development of constitutional norms on race discrimination,[17]

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concurring).

13. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

14. *See* John Garvey, *Men Only, in* Morality, Harm and the Law 123–33 (Gerald Dworkin ed., 1994).

15. Geoffrey R. Stone, et al., Constitutional Law 72–75 (4th ed. 2001).

16. *See* Theodore C. Sorensen, *Isaac Marks Memorial Lecture: The American Constitution: Basic Charter or First Draft?*, 40 Ariz. L. Rev. 709 (1998); David A. Strauss, *Commentary: The Irrelevance of Constitutional Amendments,* 114 Harv. L. Rev. 1457 (2001).

17. *See* Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S. Ct. 2097 (1995); Regents of the University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978); Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S. Ct. 686 (1954); Korematsu v.

reproductive rights,[18] the death penalty,[19] and civil or criminal detention of persons[20] are clear examples of this flexibility and ongoing dialogue between Congress, the Executive and the Court. The power of judicial review has proved itself remarkably apt at accommodating constitutional change and modification of legal norms.

Moreover, it is impossible to divorce the interaction of judicial review, legislative enactments and executive initiatives in reflecting change in American society. One example is the development of a constitutional norm on sex discrimination. Passage of Title VII of the Civil Rights Act of 1964,[21] prohibiting discrimination in employment on the basis of the sex, preceded the Supreme Court's own adoption of a constitutional norm prohibiting such discrimination unless it was substantially related to accomplish an important, exceedingly persuasive, governmental interest.[22]

Amendments that deprive individuals of human rights or affect their entitlement to individual rights are problematic. The essence of the Constitution was to establish the new republic as a government that would not trammel individual rights. In explaining and defending the constitutional framework, the framers of the Constitution consistently identified prevention of tyranny as the central aim of the drafters.[23] The inherent inconsistency in creating

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United States, 323 U.S. 214, 65 S. Ct. 193 (1944); Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138 (1896).

18. *Compare Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973) *with Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992) (narrowly construing the *Roe v. Wade* right).

19. *Compare Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002) (death sentence is cruel and unusual punishment in violation of the Eighth Amendment when imposed on the mentally retarded) *with Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934 (1989) (imposition of death sentence on mentally retarded held not to violate the Eighth Amendment's prohibition against cruel and unusual punishments).

20. *See* Demore v. Kim, 538 U.S. 510, 123 S. Ct. 1708 (2003); Zadvydas v. Davis, 533 U.S. 678, 121 S. Ct. 2491 (2001); Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072 (1997); United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095 (1987); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S. Ct. 625 (1953); Carlson v. Landon, 342 U.S. 524, 72 S. Ct. 525 (1952).

21. Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a) (2000). *See also* Equal Pay Act of 1963, 29 U.S.C. § 206 (d) (2000) *and* Title IX, Education Amendments of 1972, 20 U.S.C. § 1681 (2000).

22. Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451 (1976); United States v. Virginia, 518 U.S. 515, 116 S. Ct. 2264 (1996).

23. The Federalist Nos. 47, 51 (James Madison). *See* N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 82 n. 33, 102 S. Ct. 2858, 2877 n. 33 (1982); Buckley v. Valeo, 424 U.S. 1, 121, 96 S. Ct. 612, 683 (1976); Myers v. United States, 272 U.S. 52, 293, 47 S. Ct. 21 (1936) (Brandeis, J., dissenting); Crowell v. Benson, 285 U.S. 22, 56, 87, 52 S. Ct. 285, 294, 306 (Brandeis, J.)

a nation that would not tolerate tyranny at the hands of a national government, but would defer to such tyranny as condoned by state governments, was resolved in the aftermath of the Civil War with passage of the Thirteenth, Fourteenth and Fifteenth Amendments.[24]

The Reconstruction Amendments were adopted to rectify the compromise on race and slavery reflected in the original Constitution and to formally reject the Supreme Court's *Dred Scott v. Sanford* decision interpreting the Constitution to deprive Congress of power to grant citizenship to slaves. [25] Those Amendments make it clear that the amendment process itself is essential to the Constitution's continued legitimacy. This second revolution established that the Constitution ensured that individuals were not to be subject to tyrannical rule or to deprivations of basic human rights at the hands of the states. It was not until the latter half of the twentieth century, however, that the Reconstruction Amendments' promise, to secure basic human rights to all persons in the United States, was realized, however imperfectly.[26] The nation's discourse on just what those basic human rights are and should be continues today.

It is possible to argue that amendments are, more than anything, a formal process, since their substance is subject to interpretation by the Supreme Court. An example of this phenomenon is the Court's treatment of section five of the Fourteenth Amendment as compared to its treatment of Congress' powers under the Commerce Clause.[27] But constitutional amendments have accomplished real substantive change in our society even if it was some time after their adoption that change was realized. Perhaps the most important role for the amendment process in American society today, thus, is that it stimulates continued debate and discourse on issues which are controversial and about which there is substantial dissent within the body politic. The wealth of amendments that have been introduced since the founding of the republic is testimony to the role of the constitutional amendment process in fostering and encouraging active

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(1932); Louis L. Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact,* 70 Harv. L. Rev. 953, 975 (1957); Edward L. Rubin, *Due Process and the Administrative State,* 72 Calif. L. Rev. 1044 (1984).

24. U.S. Const. amend. XIII, amend. XIV, amend. XV.

25. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

26. *See e.g.,* Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S. Ct. 686 (1954); United States v. Virginia, 518 U.S. 515, 116 S. Ct. 2264 (1996); Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965); Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620 (1996).

27. *Compare* the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), the *Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18 (1883), *United States v. Harris*, 106 U.S. 629, 1 S. Ct. 601 (1882), and *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740 (2000) *with NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615 (1937), *and Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82 (1942).

citizen participation in political, legal and governmental processes. Amendments have been proposed on child labor,[28] abortion,[29] the rights of crime victims,[30] school prayer,[31] flag burning,[32] the line-item veto,[33] a balanced budget,[34] and campaign reform.[35] None, including the Equal Rights Amendment, have been successful.[36] These efforts may be viewed as part of the ongoing national political and public debate on issues of public concern.

Most initiatives to amend the Constitution have failed in large part because of the absence of widespread support or consensus on the issues, or due to the flexibility of our other institutions. For example, the Supreme Court may often accommodate sufficient change to satisfy enough members of the body politic to thwart adoption of a constitutional amendment. This may explain, perhaps, the failure of the Equal Rights Amendment.[37] The process requires that a substantial majority of the population support the amendment before it becomes the law for all. The process provided in Article V begins when two-thirds of both Houses propose an amendment or the legislatures or conventions of two-thirds of the states call for a constitutional convention. Adoption requires ratification by three-fourths of the states. We are a large and very diverse nation; more so now than at the framing. We, unlike most other countries in the world, have embraced and thrived on that diversity.[38] To embrace and accept that diversity has required that we develop openness and tolerance of difference as a national value. It makes great practical sense to make our national constitutional amendment process

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28. Coleman v. Miller, 307 U.S. 433, 59 S. Ct. 972 (1939). *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law,* 99 Yale L.J. 453, 494 n. 8687 (1989).

29. 147 Cong. Rec. S686 (daily ed. Jan. 30, 2001).

30. The Victims' Bill of Rights, S.J. Res. 52 and H.J. Res. 174, 104th Cong. (Apr. 22, 1996) (introduced by Senators Jon Kyl (R-AZ) and Dianne Feinstein (D-CA) and Cong. Henry Hyde (R-IL)).

31. 143 Cong. Rec. E271 (daily ed. Feb. 13, 1997).

32. 147 Cong. Rec. H4043 (daily ed. Jul. 7, 2001).

33. 145 Cong. Rec. E265 (daily ed. Feb. 23, 1999).

34. 148 Cong. Rec. H2145 (daily ed. May 7, 2002); 147 Cong. Rec. S3704 (daily ed. April 6, 2001).

35. 147 Cong. Rec. S2853 (daily ed. Mar. 26, 2001).

36. 148 Cong. Rec. E2044 (daily ed. Nov. 14, 2002) (calling for passage of the ERA); H. Res. 26, 105th Cong. (Jan. 14, 1997). *See e.g.,* Allison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States,* 3 Wm. & Mary J. Women & L. 113 (1997) *and* Barbara Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 Yale L.J. 871 (1971).

37. *Id.*

38. Peter H. Schuck, *Diversity in America: Keeping Government at a Safe Distance* 3-15 (2003).

difficult to accomplish, and that it require overwhelming support by the body politic, in order for all, even dissenting minorities, to be bound by it.

Even constitutional amendments may be revisited. The Eighteenth Amendment, which prohibited sale, manufacture and transportation of "intoxicating liquors," was adopted in 1919 and repealed less than fourteen years later in 1933 by the Twenty-First Amendment. The Eighteenth Amendment constitutionalized a norm that although perhaps of benefit to society as a whole restricted as a practical matter, an individual's autonomy and integrity. This type of constitutional norm is common in twentieth century constitutions; it is alien to the American Constitution, however, and contravenes the very essence of the constitutional framework.

The Supreme Court has plainly indicated that there is a constitutional limit to the discrimination and burdens American governments may place on those who are of a different sexual orientation from that of the majority,[39] and on the sexual and relational intimacy that consenting adults enjoy in the privacy of their homes. [40] Currently, thirty-six states prohibit same-sex marriage.[41] Other states, however, have recognized civil unions.[42] Some religions, faiths and churches have recognized or "blessed" same-sex marriages or unions. It seems unlikely, in this climate, that a constitutional amendment would succeed.

II. OF HUMAN RIGHTS AND SAME-SEX MARRIAGES

Marriage is an institution highly valued in American society.[43] That many individuals choose to establish intimate relationships or bear children outside marriage does not render marriage irrelevant, meaningless or valueless. For many individuals in our society civil marriage remains the preferred mechanism to establish intimacy and bear and raise children. Historically, marriage as an institution has served a number of different functions, including, but not limited to, providing beneficial conditions for the reproduction of the species.

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39. Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620 (1996).

40. Lawrence v. Texas, 123 S. Ct. 2472 (2003).

41. *See* Goodridge v. Department of Public Health, 798 N.E. 2d 941, 990, *citing* P. Greenberg, State Laws Affecting Lesbians and Gays, National Conference of State Legislatures Legisbriefs at 1 (April/May 2001) (reporting that, as of May, 2001, thirty-six States had enacted "defense of marriage" statutes).

42. *See e.g.*, An Act Relating to Civil Unions, 2000 Vermont Statutes No. 91 (Apr. 26, 2000).

43. I have explored marriage in a different context previously. *See* Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud,* 5 Geo. Mason L. Rev. 669, 710–17 (1997).

Traditionally, marriage has been regulated by state law.[44] State law focuses on the formalities of the marriage and leaves its substance to the parties.[45] Formal or statutory marriages generally require only that parties obtain a license prior to marriage; that parties be married by an authorized priest, rabbi or other religious, judicial or civil officer; and, in some states, that parties undergo testing for sexually transmitted diseases.[46] Only upon dissolution of the marriage, when disputes arise over children of the marriage and over what is owed by one party to another, does the law inquire as to the substance of the marriage relationship.[47] Persons who enter into a valid marriage under state law owe each other a duty of support enforceable in most states upon separation or divorce.[48] Moreover, even at this stage of the marriage the parties may resolve all their disputes without recourse to the court, except for the formality of obtaining the divorce decree and memorializing, through the court, whatever agreement has been achieved.

A number of benefits are available to persons who enter into a marriage relationship;[49] entitlement to those benefits does not depend on whether the parties observe or live within societal expectations of what the "ideal" American marriage is supposed to be. To an extent, the state's willingness to minimize regulation of the substance of marriage has been shaped by American constitutional law. The Supreme Court has recognized a core area of marital intimacy that is accorded constitutional protection from governmental intrusion.[50]

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44. *See* Haddock v. Haddock, 201 U.S. 562, 566, 265 S. Ct. 525, 526 (1906) (issues of fraud in contracting a marriage are solely matters of state cognizance).

45. Maynard v. Hill, 125 U.S. 190, 8 S. Ct. 723 (1888). *See* Lynn A. Baker, *Promulgating the Marriage Contract,* 23 U. Mich. J.L. Reform 217, 251–53. *But see* La. R. S. 9:272–275.1, 307–309 (2000) (establishing an alternative form of marriage available to couples in Louisiana on a voluntary basis but regulating marriage upon the desire of the individuals to end the marriage). *See* Katherine Shaw Spaht, *What's Become of Louisiana Covenant Marriage Through the Eyes of Social Scientists,* 47 Loy. L. Rev. 709 (2001). *But see* Jeanne Louise Carriere, *"It's Deja Vu All Over Again:" The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 Tul. L. Rev. 1701 (1998). Few couples have chosen to enter a covenant marriage.

46. *See* John De Witt Gregory, et al., Understanding Family Law 26–27 (2d ed. 1993).

47. Baker, *supra* note 45, at 253–54.

48. Homer H. Clark, Jr., The Law of Domestic Relations in the United States §§ 6.1and 6.4 (2d ed. 1988).

49. Goodridge v. Department of Public Health, 798 N.E. 2d at 954-57 (describing the tangible and intangible benefits of marriage).

50. *See* Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 112 S. Ct. 2791 (1992) (striking down a state requirement that wives notify husbands prior to undergoing an abortion); Michael M. v. Gerald D., 491 U.S. 110, 109 S. Ct. 2333 (1989); Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254 (1987); Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673 (1978); Moore v. City of East Cleveland, 431

The recognition that the Due Process Clause of the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual ... to marry, establish a home and bring up children ..."[51] emerged in constitutional jurisprudence during the *Lochner* era.[52] In *Skinner v. Oklahoma*, the Supreme Court struck down a state statute that mandated sterilization of repeat offenders convicted of certain offenses.[53] The Court struck the statute down as inconsistent with the Equal Protection Clause of the Fourteenth Amendment because it discriminated against a particular group of offenders, indistinguishable from other groups, on the basis of what the Court called one of "the basic civil rights of man."[54] The Court went on to recognize that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[55]

More than twenty years later, in 1966, the Court struck down a state statute that prohibited the use of contraceptives.[56] The Court recognized a right by married couples to privacy in the conduct of their relationship.[57] This privacy right protected their right to use contraceptives. The Court referred to marriage as an institution predating the Bill of Rights.

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[58]

While *Skinner* connects the right to marry with the right to procreate, *Griswold v. Connecticut* implicitly recognizes that

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U.S. 494, 97 S. Ct. 1932 (1977); Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817 (1967) (state miscegenation statute held unconstitutional); Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965); Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110 (1942); Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625 (1923). *See also* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 487, 559 (1983).

51. Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626 (1923).
52. Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539 (1905).
53. Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110 (1942).
54. *Id.* at 541, 62 S. Ct. at 1113.
55. *Id.*, 62 S. Ct. at 1113.
56. Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965).
57. *Id.* at 485–86, 85 S. Ct. at 1682.
58. *Id.* at 486, 85 S. Ct. at 1682.

marriage involves an intimate sexual relationship between two adults that does not necessarily have procreation as its primary goal. The intimate sexual association may lead to procreation, but marriage itself exists without procreation.

Two years later, in *Loving v. Virginia,* the Court struck down a state statute that prohibited marriage between persons of the white race and persons of other races.[59] The Court's finding of unconstitutionality under the Equal Protection Clause of the Fourteenth Amendment rested on the racial classifications created by the state for the purpose of preserving the "purity" of the white race.[60] The Court also ruled that the ban on interracial marriages was unconstitutional under the Due Process Clause of the Fourteenth Amendment because "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[61] *Griswold* and *Loving* established that state regulation of marriage is limited by the Fourteenth Amendment.[62]

A decade later, *Zablocki v. Redhail*[63] reflected the Court's strongest articulation of the right to marry. The Court held that a state statute prohibiting persons with outstanding child support obligations from marrying without first obtaining a judicial determination that they had paid their outstanding child support violated the Equal Protection Clause of the Fourteenth Amendment.[64] The Court reasoned that the regulation substantially interfered with a person's right to marry. Those who could not pay the support obligations "are absolutely prevented from getting married."[65] Others may "be coerced into forgoing their right to marry. And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental."[66] Although "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed,"[67]

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59. 388 U.S. 1, 87 S. Ct. 1817 (1967).

60. *Id.* at 12, 87 S. Ct. at 1018.

61. *Id.*, 87 S. Ct. at 1018 ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

62. *Id.* at 7, 87 S. Ct. at 1015.

63. 434 U.S. 374, 98 S. Ct. 673 (1978).

64. *Id.* at 382, 98 S. Ct. at 679. *See* Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254 (1987) *and* Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977).

65. *Zablocki*, 434 U.S. at 387, 98 S. Ct. at 681.

66. *Id.*, 98 S. Ct. at 681.

67. *Id.*, 98 S. Ct. at 681.

conditioning an individual's marriage on satisfaction of any outstanding child support obligations imposed too great a burden on the right to marry.

All of these cases involved marriage between a woman and a man and they may be distinguished on this ground. Such a distinction however, ignores the substance of what a right to marry protects—the right to establish a family with another consenting adult.

Recognizing the right to marry as a basic and fundamental human right has not prevented substantial governmental interference or regulation of that right. In no other context is this as clear as in marriages between United States citizens and nationals from other countries. Our constitutional understanding of the right to marry has tolerated the government's power to prohibit an alien spouse from residing in the United States with her or his United States citizen spouse without the government having to specify the reasons for the prohibition and without the government according the United States citizen spouse procedural due process rights.[68] Moreover, American immigration law requires substantial interference with the privacy and intimacy of married couples seeking to establish residence in the United States if one of the spouses is a foreign national.[69]

Immigration cases posed the same-sex marriage issue as early as the 1980's.[70] While immigration into the United States is limited, immigration laws exempt spouses of United States citizens from any numerical immigration limits.[71] Immigration laws also grant preference to spouses of immigrants. Thus, marriage is one way in which persons may immigrate to the United States. In *Adams v. Howerton,*[72] a United States citizen filed a petition for his spouse to be admitted to the United States as an immigrant on the basis of a same-sex marriage. The marriage had been celebrated in Boulder, Colorado.[73] Immigration authorities denied the petition. The denial of the marital immigration benefit to same-sex couples was affirmed by federal courts, in part, on the reasoning that federal authority over who enters the United States is plenary. Moreover, the United States Court of Appeals for the Ninth Circuit reasoned that Congress had not intended to include same-sex couples within the marriage

68. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 70 S. Ct. 309 (1950). See also Justice Frankfurter's dissenting opinion, 338 U.S. 537, 547, 70 S. Ct. 309, 315, ("Although five minutes of cross-examination could enable the soldier-husband to dissipate seemingly convincing information affecting the security danger of his wife, that opportunity need not be accorded.") and Justice Jackson's dissent, 338 U.S. 537, 550, 70 S. Ct. 309,316.

69. *See* Medina, *supra* note 43, at 696–717.

70. *See* Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982).

71. 8 U.S.C. § 1151 (a) and (b) (2003).

72. 673 F.2d 1036.

73. *Id.* at 1038.

benefit.[74] At the time, immigration statutes excluded homosexuals from qualifying as immigrants.[75] Federal courts also have taken the view that denying entry to a spouse does not burden the right to marry, because the individuals are not denied the opportunity to enter into the marriage or to live together; they simply may not live together in the United States.[76]

Notwithstanding the immigration cases, the Court's cases on the right to marry, *Loving* and *Zablocki,* in particular, recognize that the institution of marriage, albeit a legal institution formally created by the state, shields a core fundamental right or interest secured under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment with which states may not interfere. Marriage laws that prohibit individuals from entering into the institution of marriage with other individuals of the same sex operate the severest burden on the right of marriage, for those individuals who would contemplate marriage only with individuals of their same sex. If the state provides an alternative institution, such as a civil union, and accords persons who enter into civil unions the same protections and benefits accorded under civil marriage, it is possible to argue that the burden on the right to marry is minimal.[77] But the question of stigma and the ugly specter of separate but equal rear their heads. The echoes of and parallels to interracial marriages in *Loving* is uncomfortably apt.[78]

III. ANIMUS OR REASONABLE REGULATION?

Our national dialogue on same-sex marriage reflects one of humanity's basic and inherent weaknesses—our inability to effectively communicate.[79] There is a difference in perspective

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74. *Id.* at 1040 ("The term 'marriage' ordinarily contemplates a relationship between a man and a woman." (citing Webster's Third New Int'l Dictionary and Black's Law Dictionary)).

75. *See* Robert J. Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration,* 29 Harv. C.R.-C.L. L. Rev. 439 (1994).

76. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 70 S. Ct. 309 (1950). *See also* Azizi v. Thornburgh, 908 F.2d 1130 (2nd Cir. 1990); Escobar v. INS, 896 F.2d 564 (D.C. Cir. 1990); Noel v. Chapman, 508 F.2nd 1023 (2nd Cir. 1975); Barmo v. Reno, 899 F. Supp. 1375 (E.D. Pa. 1995).

77. *But see* Terry S. Kogan, *Competing Approaches to Same-Sex Versus Opposite-Sex, Unmarried Couples in Domestic Partnership Laws and Ordinances,* 2001 BYU L. Rev. 1023 (2001).

78. Lawrence v. Texas, 123 S. Ct. 2472, 2482. *See also id.* at 2486 (O'Connor, J., concurring) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause . . . to justify a law that discriminates among groups of persons.").

79. *See e.g.,* Marriage and Same-Sex Unions: A Debate (Lynn D. Wardle, et

among speakers, and the difference appears too vast to transcend.[80] Commentators look at the same evidence and come away with different conclusions.[81]

Several possible avenues of addressing human rights and same-sex marriage present themselves. One is to allow the issue to benefit from federalism, and allow each state to decide for itself whether or not to define marriage so as not to exclude gay and lesbian couples.[82] This is the current posture and one that may be left in place even if the issue reaches the Supreme Court, should the Court find that neither due process nor equal protection prevent the states from banning same-sex marriage. Proponents of the benefits of federalism should favor this approach as it would appear to be consistent with all of the articulated benefits of a federalist model.[83] Other avenues involve adoption of a national norm, either through adoption of a constitutional amendment, or a Supreme Court ruling. The substance of such a national norm, of course, is precisely the question our society faces today. For the reasons articulated in this essay, it seems unlikely that a constitutional amendment either prohibiting or authorizing same-sex marriages would be adopted. Whether the United States Supreme Court would interpret the federal constitution to prevent states from banning same-sex marriage, because such a ban rests on animus towards homosexuals and lesbians and impermissibly burdens the exercise of their basic human rights remains to be seen.

Justice O'Connor notes, in her concurring opinion in *Lawrence,* that "other reasons exist to promote the *institution* of marriage

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al., eds., 2003); Mark Strasser, On Same-Sex Marriage, Civil Unions, and the Rule of Law: Constitutional Interpretations at the Crossroads (2002).

80. Justice Scalia describes this as a war between cultures. Romer v. Evans, 517 U.S. 620, 652, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting).

81. *See e.g.,* Maggie Gallagher, *A Reality Waiting to Happen: A Response to Evan Wolfson* and *Normal Marriage: Two Views, in* Marriage and Same-Sex Unions 10–24 (Lynn D. Wardle, et al., eds., 2003); Evan Woolfson, *All Together Now* and *Enough Marriage to Share: A Response to Maggie Gallagher, in* Marriage and Same-Sex Unions 3–9, 25–32 (Lynn D. Wardle, et al., eds., 2003).

82. Louisiana, for example, changed its statutory definition of marriage in 1987 to exclude same-sex marriage by defining marriage as "the legal relationship between a man and a woman that is created by civil contract." La. Civ. Code art. 86. 1987 La. Acts, No. 886, § 1 (effective Jan. 1, 1988). In 1999, Louisiana further provided that "marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage." La. Civ. Code art. 3520 (amended by 1999 La. Acts, No. 890). The Louisiana legislature is presently considering adding a constitutional amendment to further prohibit same-sex marriage.

83. *See* Stone, *supra* note 15, at 139–43.

beyond mere moral disapproval of an excluded group."[84] Justice O'Connor does not identify those reasons; nor does she explain how same-sex marriage is inconsistent with promoting the institution of marriage. In the view of some commentators, recognition of same-sex marriage would serve many of the interests that state legislatures seek to vitiate through the institution of marriage.[85] Equal protection doctrine would require some relationship between the asserted interest and the stated goal, and the presence of animus or bias towards the group affected by the restriction, would require, as Justice O'Connor recognizes in *Lawrence*, an actual relationship between the stated goal and the prohibition. The *Goodridge* opinions identify interests that states are likely to assert to justify a ban on same-sex marriage.

As the majority opinion in *Goodridge* recognizes:

> Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the [state] identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data.[86]

More particularly, states may assert an interest in the following: "(1) providing a 'favorable setting for procreation;' (2) ensuring the optimal setting for child rearing . . . define[d] as 'a two-parent family with one parent of each sex;' and (3) preserving scarce State and private financial resources."[87]

As the *Goodridge* court reasoned, and one *Goodridge* dissent acknowledged, today "heterosexual intercourse, procreation, and childcare are not necessarily conjoined."[88] Assisted reproduction technologies and adoption have for some time provided an alternative to sexual intercourse for reproductive purposes. Moreover, persons who cannot procreate are not prohibited from marrying. If the state does not prohibit marriage to persons who cannot procreate, it is difficult to see how it may justify a prohibition on same-sex marriages on that basis—except because of animus or bias towards homosexual and lesbian individuals.

The second interest is directly linked to the first in that both rest on the premise that only a family unit made up of a man and a

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84. Lawrence v. Texas, 123 S. Ct. 2472, 2488 (O'Connor, J., concurring).

85. Mark Strasser, *The State Interests in Recognizing Same-Sex Marriage, in* Marriage and Same-Sex Unions 33–42 (Lynn D. Wardle, et al., eds., 2003).

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

87. *Id.* at 961.

88. *Id.* at 995 (Cordy, J., dissenting).

woman should raise children.[89] The state's interest in protecting children, however, is not furthered by prohibiting same-sex couples from marrying. Homosexuals and heterosexuals alike bear and raise children in the United States today. A prohibition against same-sex marriage serves not to protect children of same-sex couples, but to increase their risk. Prohibition of same-sex marriage conveys state approval of discrimination and animus towards same-sex couples; this discrimination and animus is directed not just at the adults in the relationship, but is visited as well upon the children. Moreover, there is little evidence to establish that children do better in families with opposite-sex parents. Little research has been done to date, to establish that opposite-sex parents are any more or less effective than same-sex parents at child-rearing; the research that has been done is inconclusive.[90] But it is perhaps in the area of child rearing that the arguments against allowing same-sex marriage are based on harm. The expert and statistical evidence is inconclusive because either too little research has been conducted into same-sex families, the research that has been done has focused on families that have gone through a divorce, or because the research is disputed.

It is unlikely that scientific research will ever settle the question of what the best family setting for all children may be. Like most institutions, the family is a dynamic organism constituted of individuals who all have varying personalities, needs, wants and who are in a constant state of change and development. Families are not static, just as people are not static. What may work best with one child, may not work with another.

Children are not harmed by same-sex marriage. Children are harmed by lack of access to health care, lack of a living wage, lack of access to a good or even adequate education, lack of access to adequate shelter and food, and a safe and secure environment. Children are better off with non-abusive homosexual parents than with abusive heterosexual parents. Indeed, it is difficult for some to understand why children would be affected at all by their parent's sexuality, *except* for the animus that society directs at persons of the minority sexuality. Moreover, it is difficult to evaluate the claims about parenting in the context of a debate that purports to be, at one level, about morality. If children of same-sex couples are harmed, it will be difficult to establish that the harm is not the result of societal animus directed at their parents, but a result of the same-sex parenting itself. This harm is suffered not just by children of same-

89. *Id.* State court decisions restricting parental rights when one of the parents is homosexual or lesbian rely on this view of marriage and parenting. *See* Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004).

90. *See supra* note 81.

sex parents, whether they are couples or not, but by children who are themselves homosexual or lesbian.

The third interest identified, to conserve economic resources, is inapposite. Basically, a state asserting this interest is arguing that it should be able to discriminate against homosexual couples to conserve resources. But it is difficult to see how the state would be conserving public and private resources by discriminating against homosexuals. Those same costs will be incurred, since the individuals involved, whether adults, parents, or children, will incur the same medical, educational and employment costs outside of marriage as well as within the marriage. Marriage, as the *Goodridge* court noted, is one way in which states ensure that the costs of caring for individuals and children are provided for. Same-sex marriage furthers this interest; it does not hinder it.

IV. CONCLUSION

Ultimately, it is hard to argue that opposition to same-sex marriage is not about animus or moral disapprobation of lesbian and gay individuals and couples. It is unlikely that allowing same-sex couples to marry will materially affect the vast number of heterosexual marriages that are celebrated in this country. Moreover, recognizing same-sex marriage furthers values of community, autonomy, equality, stability, and intimacy. There appears to be no reason to discriminate against same-sex couples other than because traditionally marriage has been a heterosexual institution. But the traditional view of homosexuals and lesbians reflects substantial tolerance for rabid animus, expressed through legal norms and sometimes, through violent acts, towards gay and lesbian individuals and the sexual conduct that is at the heart of their status.[91] If the only reason to discriminate against same-sex couples with regards to marriage is because of animus towards them, it is hard to see how such discrimination or distinctions could survive either equal protection or due process scrutiny.

Nothing about the institution of marriage is peculiarly heterosexual—not caring for children, not privacy or intimacy, not support. Prohibiting persons who are homosexual or lesbian from enjoying the legal celebration of their marital union, and from enjoying the "[t]angible and intangible benefits" which flow from

91. Lawrence v. Texas, 123 S. Ct. 2472 (2003); Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620 (1996); *Goodridge*, 798 N.E.2d 941. *See* stats on violence directed at gays. *See* William B. Rubenstein, *The Real Story of U.S. Hate Crime Statistics: An Empirical Analysis*, 78 Tul. L. Rev. 1213, 1230-33 (analyzing statistical data to establish that "gay people are about two and one-half times more likely to report a hate-based attack on their selves than are members of other minority groups").

marriage, furthers no legitimate state goal and burdens one of the most basic of human rights—the right to establish and enjoy an intimate relationship—a family—with another adult.