NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 10
Issue 2 *VOLUME X SPRING 1993 PART Two*

Article 7

1993

SAME-SEX MARRIAGE

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NOTES

Same-Sex Marriage

"[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[1]

I. Introduction

According state recognition to opposite-sex marriages while denying the same recognition to same-sex[2] marriages denies same-sex couples equal protection of the laws and abridges the basic freedom of all persons to decide with whom to form their most enduring, intimate, and interdependent associations.[3] Despite prominent proclamations of equal protection and liberty in American law,[4] state and federal courts have rejected six same-sex marriage test cases

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[1] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (children cannot be required to salute the flag in public schools).

[2] The term "same-sex" marriages in this Note refers to all marriages that are not considered by the state to be opposite-sex marriages. *See* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (holding that a marriage of two persons of the same sex is not authorized by state statutes). The reasons for this definition become clear in the text, particularly *infra* note 37, discussing marriage cases involving transsexuals.

[3] *See* Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). "The freedom to choose our intimates and to govern our day-to-day relationships with them . . . is the foundation for the one responsibility among all others that most clearly defines our humanity." *Id.* at 692. "[T]he freedom of intimate association extends to homosexual associations as it does to heterosexual ones. All the values of intimate association are potentially involved in homosexual relationships; all have been impaired, in various ways, by government restrictions . . . ." *Id.* at 682.

[4] Indeed, the very first sentence of the Constitution asserts that securing "the Blessings of Liberty" is one of its essential purposes. U.S. CONST. pmbl. The Constitution further provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1. For state constitutional provisions, see *infra* note 179.

seeking to enforce these guarantees.[5] Courts have ruled essentially that same-sex couples cannot be allowed to marry because only opposite-couples can marry,[6] a circular argument that ignores the rich history of same-sex marriage.

This Note will review the history of same-sex marriage as well as recent and pending cases considering same-sex marriage. It will then establish why existing state constitutional rights require that same-sex marriages receive protection equal to that accorded opposite-sex marriages, and why the recognition of same-sex marriage in one state could lead to its recognition in all American states.

II. A Brief History of Same-Sex Marriage

A. Evolution of Marriage

"In order to trace marriage in its legal sense to its ultimate source, we must therefore try to find out the origin of the habit from which it sprang."[7]

One of the primary barriers that has stood in the way of accepting same-sex marriage cases in the United States has been the tendency of judges to focus only on their own understanding of marriage, which is drawn primarily from their own experience and

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[5] The cases are: Dean v. Barry, C.A. No. 90-13892 (D.C. Super. 1991); Baehr v. Lewin, 5. CC 91-1394 (Haw. Cir. Ct. Sept. 3, 1991); Adams v. Howerton, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); Singer v. Hara, 522 P.2d 1187 (Wash. App. Div. 1 1974); Jones v. Hallahan, 501 S.W.2d 589 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972). There have also been cases involving the dissolution of same-sex unions in which one partner claimed there had been a valid marriage and the other claimed there had not been. These cases tend to involve additional questions of fraud and substantial unfairness and are not entirely within the scope of this Note. *See, e.g.*, Anonymous v. Anonymous, 325 N.Y.S.2d 499 (Sup. Ct. 1971); *Homosexuals' Right To Marry: A Constitutional Test and a Legislative Solution*, 128 U. PENN. L. REV. 193, 194 (1979) [hereinafter *Homosexuals' Right to Marry*].

[6] *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (defining marriage as inherently and exclusively heterosexual).

[7] 1 EDWARD A. WESTERMARCK, THE HISTORY OF HUMAN MARRIAGE 28 (5th ed. 1922) [hereinafter WESTERMARCK].

from comparatively recent history.[8] Because same-sex marriage is less visible in contemporary American culture than it has been at other times in history, the judges tend to see the concept of same-sex marriage as something new and strange, rather than a fundamental tradition; they consequently conclude that same-sex marriage is an oxymoron, not a right.[9] To understand why this conclusion is mistaken, it is necessary to take a more comprehensive view of the history of marriage.

The history of marriage in a sense extends back even further than the existence of the human species. Seminal sociologist Edward Westermarck suggested that the institution of human marriage probably

> developed out of a primeval habit . . . of a man and a woman (or several women) to live together, to have sexual relations with one another, and to rear their offspring in common . . . . This habit was sanctioned by custom, and afterwards by law, and was thus transformed into a social institution.[10]

Similarly,

> it has been proposed that the origin of the habit lies in: the instinct to preserve the next generation and, therefore, the species; the instinct to care and provide for defenseless offspring; and the instinct to remain with a partner who has been the source of sexual

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[8] Apparently, no openly Gay judge has ever been asked to rule on the validity of same-sex marriage. *See Speaking for Ourselves, Draft Directory of Lesbian & Gay Elected Officials*, (National Gay and Lesbian Task Force, Washington, D.C.), Fall 1991, at 6 (listing all of the openly Gay judges appointed or elected in the United States, none matching any of the ruling judges in any same-sex marriage decision). *See also* THE ALYSON ALMANAC 23 (1989) (the first openly Gay judge in the United States was appointed in 1979 in California by then-Governor Jerry Brown, who also appointed the second, third, and fourth openly Gay judges in this country).

[9] *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 589, 590 (Ky. 1973) (holding there is no constitutional sanction or protection of the right of marriage between persons of the same sex).

[10] WESTERMARCK, *supra* note 7, at 27-28.

> pleasure even after the sexual relations have ceased. It was this habit which evolved into custom and which, in turn, resulted in the social institution of marriage.[11]

The instinct to form enduring interdependent associations is thus one of the factors that contributed to the evolution and survival of the human species. In this sense the roots of the institution of marriage presumably extend to the ancestors of the human species, as an integral part of life among all life forms that develop enduring, interdependent, and intimate relationships.[12]

B. Ancient Roots of Same-sex Marriage

It would be a mistake to believe, as some courts have ruled, that these relationships and families, the unions that later became institutionalized marriages and family structures, were exclusively heterosexual in nature.[13]

> The impression that infra-human mammals more or less confine themselves to heterosexual activities is a distortion of the fact which appears to have originated in a man-made philosophy, rather than in specific observations of mammalian behavior. Biologists and psychologists who have accepted the doctrine that the only natural function of sex is reproduction, have

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[11] Catherine M. Cullem, *Fundamental Interests and the Question of Same-Sex Marriage,* 15 TULSA L.J. 141, 146-47 (1979) (citations omitted).

[12] Indeed, Westermarck observed that marriage is "probably an inheritance from some pre-human ancestor," and that "similar habits are found among many other species of the animal kingdom." WESTERMARCK, *supra* note 7, at 28.

[13] At least two courts have asserted that marriage was created simultaneously with the Old Testament as, by definition, an institution uniquely involving one man and one woman. Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.") (quoting Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972)).

> simply ignored the existence of sexual activity which is not reproductive. They have assumed that heterosexual responses are a part of an animal's innate, "instinctive" equipment, and that all other types of sexual activity represent "perversions" of the "normal instincts." Such interpretations are, however, mystical.[14]

In fact, "sexual contacts between individuals of the same sex are known to occur in practically every species of mammal which has been extensively studied."[15] Contrary to the curious assertion contained in certain statutes that homosexual activity is "against nature,"[16] this activity is, and presumably has always been, a normal part of life for many species. Therefore, the natural evolutionary process of marriage, based on traditions of interdependent relationships, presumably included same-sex relationships from the beginning -- even before the arrival of the human species.

Certainly by the time of recorded marriage history, historians find an "ancient and powerful tradition of same-sex marriage."[17] Laws governing same-sex marriage apparently date at least as far back as the Hittites,[18] who ruled Asia Minor more than three thousand years ago.[19] Cicero, whose knowledge of Roman law under the Republic was "exhaustive,"[20] is quoted as considering same-sex marriage legally binding.[21] By the time the Roman Republic became the Roman Empire, "[a]mong the lower classes informal [same-sex unions] may have predominated, but marriages between males or

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[14] ALFRED KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 448 (1953).

[15] *Id.*

[16] *See* Post v. State, 715 P.2d 1105 (Okl. Crim. App.), *cert. denied*, 479 U.S. 890 (1986) (reversing conviction for "Crime Against Nature," a phrase that would seem to refer to polluting the environment but that in fact was applied to sex between two males).

[17] Telephone Interview with John Boswell, History Department Chair, Yale University (Nov. 12, 1991).

[18] JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 21 (1980) [hereinafter BOSWELL].

[19] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 573 (1989).

[20] BOSWELL, *supra* note 18, at 69.

[21] *Id.*

between females were legal and familiar among the upper classes."[22] Indeed, the history of the time suggests almost an inversion of modern conceptions of the relationship between homosexuality and heterosexuality:

> The biographer of Elagabalus maintains that after the emperor's marriage to an athlete from Smyrna, any male who wished to advance at the imperial court either had to have a husband or pretend that he did. Martial and Juvenal both mention public ceremonies involving the families, dowries, and legal niceties. Martial points out that . . . marriage took place under the same law which regulated marriage between men and women . . . . Nero married two men in succession, both in public ceremonies with the ritual appropriate to legal marriage.[23]

Same-sex marriages continued and were well-known in the Roman Empire until the mid-fourth century.[24] While the precise definition of marriage has varied from one community to another and from one era to the next,[25] there is a tradition of Christian same-sex marriage ceremonies celebrating unions that were considered marriages in the same sense in which opposite-sex couples married.[26] The tradition of same-sex marriage transcends thousands of years of human history. In a sense, same-sex marriages have existed longer than the human race itself, dating back to the first species to form enduring and intimate relationships.

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[22] *Id.* at 82.

[23] *Id.* (citations omitted).

[24] *Id.* at 123-24.

[25] WESTERMARCK, *supra* note 7, at 26.

[26] Telephone interview with John Boswell, History Department Chair, Yale University (Nov. 12, 1991).

C. Same-sex Marriage Today

At present, despite American assertions of liberty and equality, neither the Federal Government nor any American state recognizes same-sex marriage. Mayor David Dinkins of New York City recently signed an executive order permitting homosexual couples to register as unmarried "domestic partners."[27] The executive order allows those registered as domestic partners to have the same legal rights as married spouses in qualifying for apartments and visiting partners at hospitals and jails.[28] Although no jurisdiction now permits same-sex marriages, same-sex couples continue to wed even though they are denied the protection of the laws.

The Metropolitan Community Churches and the Unitarian Universalist Association of Congregations both perform same-sex "unions," and although Unitarians carefully point out that no two marriages are the same, same-sex unions can be called marriages and are considered equal to opposite-sex marriages.[29] Additionally, domestic partnership laws passed in some two dozen municipalities in the United States provide same-sex couples some, but not all, of the benefits accorded opposite-sex couples.[30]

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[27] Jonathan P. Hicks, *A Legal Threshold is Crossed by Gay Couples in New York*, N.Y. TIMES, Mar. 2, 1993, at A1.

[28] *Id.* at B3. Approximately two dozen other cities, counties, or states have established some form of recognition of domestic partnerships. *Id.*

[29] Telephone Interview with Rev. Darrel Burger, Unitarian Universalist Association of Congregations (Nov. 19, 1991). Rev. Burger pointed out that no two marriages are the same, but that same-sex marriages, usually called "holy unions" because of their lack of legal status, are considered equal to opposite-sex marriages. *Id.*

[30] These ordinances have also been passed in Canada, with Ottawa, Toronto, Vancouver, and the Yukon Territory passing legislation providing benefits to domestic partners. Kay Longcope, *Gay Couples Fight for Spousal Rights*, BOSTON GLOBE, Mar. 4, 1991, at 38.

Advocates within the Gay community have debated the relative merits of marriage and domestic partnership. *See* Paula Ettelbrick & Tom Stoddard, *Same-Sex Marriage and Domestic Partnership, A Conversation for Many Voices* (available from Lambda Legal Defense and Education Fund, New York, N.Y.). Domestic partnership may offer greater flexibility than marriage in allowing people to define their own relationships and to order their own lives, rather than submitting to a pre-ordained institutional structure. *See, e.g.*, Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992). One may also question whether the state should be

Moreover, contemporary American culture has begun to include a renaissance of Gay[31] parenting, described by one leading news weekly as the "gayby boom."[32] Estimates place the number of Gay parents, including parents whose children were born in the context of a prior heterosexual relationship and same-sex couples who have adopted or who have reproduced with the help of friends or artificial insemination, between three and five million.[33] According to a recent American Bar Association study, eight to ten million children are currently being raised in three million Gay households.[34]

One of the inevitable results of this renaissance has been to change the definition of family. "Family has become a fluid

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involved at all in sanctifying personal relationships like marriage or domestic partnership, and whether employers should provide extra compensation in the form of benefits to some employees but not others, based on the employees' personal relationships outside the workplace. Advocates of polygamous or plural marriage might argue that official recognition exclusively of two-party unions discriminates on the basis of religion. All of these policies blur the separation of personal, professional, and legal aspects of people's lives, in a sense inviting the corporation and the state into the bedroom by saying that the state and the company should value some people more highly than others based on their personal, and ordinarily private, relationships. *See, e.g.*, John C. Beattie, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415 (1991); Robert L. Eblin, Note, *Domestic Partnership Recognition in the Workplace: Equitable Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067 (1990). These questions, although important in their own right, are beyond the scope of this Note. This Note addresses the narrow and discrete problem of government discrimination against same-sex couples in the marriage laws, and argues that if government recognizes the marriages of opposite-sex couples, it must give equal protection to the marriages of same-sex couples.

[31] The term "Gay" in this Note refers to all members of the Gay community, including, but not limited to, Lesbians, Gay men, bisexual persons regardless of gender, and transsexuals who identify themselves as Gay.

[32] Eloise Salholz et al., *The Future of Gay America*, NEWSWEEK, Mar. 12, 1990, at 20. Although the current generation may be the first to have been given such a catchy name, Gay parenting is not a new phenomenon. *See* BOSWELL, *supra* note 18, at 285.

[33] Salholz, *supra* note 32, at 20. The article adds that "[a] number of organizations have sprung up to meet their social needs. San Francisco boasts the Lesbian and Gay Parenting Group, storytelling hours for tots at gay bookstores and Congregation Sha'ar Zahav, a largely gay synagogue with a Hebrew school for members' children." *Id. See also* Jean Seligman et al., *Variations on a Theme*, NEWSWEEK, Winter/Spring 1990, at 38 (citing an estimate by Roberta Achtenberg, executive director of the National Center for Lesbian Rights, that the number of Gay mothers and fathers exceeds two million).

[34] Craig Dean, *Legalize Gay Marriage*, N.Y. TIMES, Sept. 28, 1991, at 15.

concept,"[35] with census reports showing fewer than twenty-seven percent of American families conforming to the stereotypical model and more than 1.6 million same-sex couples living together.[36] Given the sheer number of same-sex couples, and the number of children being raised in Gay households, it is inevitable that courts will continue to hear from Gay families seeking equal protection of the laws for their relationships.

III. Recent Case Law

Despite six separate challenges to state and federal denial of equal protection for same-sex marriages, no American case has yet accorded same-sex marriages legal status equal to that granted to opposite-sex marriages.[37] In some cases, even marriage statutes that

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[35] Seligman, *supra* note 33, at 38 (quoting Arthur Leonard, Professor of Law, New York Law School).

[36] Seligman, *supra* note 33, at 38.

[37] Courts have reached different results concerning the validity of marriages involving transsexuals. In Corbett v. Corbett, 2 All E.R. 33 (P.D.A. 1970), an English court held that a person who completed gender reassignment surgery was nevertheless incapable of marrying a man because she was not "naturally capable of performing the essential role of a woman in marriage." *Id.* at 48. Describing the case as an "essentially pathetic, but almost incredible story," the court examined the surgical process in remarkably graphic detail. *Id.* at 37. The court observed that "the association of ideas connected with these words or phrases are [sic] so powerful that they tend to cloud clear thinking." *Id.* at 36. The court developed a five-part test to determine gender. *Id.* at 44. The court reasoned that because Mrs. Corbett had male chromosomes and had been born with male physiology, she was incapable of marrying a male and the marriage was void. *Id.* at 46-47, 51. The court decided that Mrs. Corbett was a man, but one wonders how the court would have ruled if she had tried to marry a woman.

Two New York cases reached the same result as *Corbett*, but with distinguishable fact patterns. In Anonymous v. Anonymous, 325 N.Y.S.2d 499 (Sup. Ct. 1971), a pre-operative transsexual represented herself as a female and married a male. The couple never lived together or had sexual relations. *Id.* at 500. Although the court did not find specifically that the wife in *Anonymous* had become a female, it expressly reserved the possibility that her sex had "been changed to female by operative procedures," and held simply that the marriage was void because both parties were male at the time of the ceremony. *Id.*

Similarly, in Frances B. v. Mark B., 355 N.Y.S.2d 712 (Sup. Ct. 1974), a transsexual represented himself as a male and married a female. *Id.* at 713. The wife

decided that she had been deceived and sued for annulment. *Id.* The court asserted that marriage exists "for the purpose of begetting offspring." *Id.* at 717. The court concluded that, because the husband did not have male sexual organs and the capacity to procreate as a male, the marriage was void. *Id.* at 712. Both *Anonymous* and *Frances B.* involved deception and were tried in a jurisdiction where marriages, whether heterosexual or homosexual, can be annulled if either party is found incapable of procreating with the other. N.Y. DOM. REL. LAW § 7(3) (McKinney 1988) ("A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto [i]s incapable of entering into the married state from physical cause"). The cases are therefore to be distinguished from cases that do not involve fraud or that take place in jurisdictions that do not place such a premium on procreation.

Exactly such a case arose in M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976). M.T. and J.T. met when M.T. was a pre-operative transsexual. *Id.* at 205. The couple moved in together and J.T. paid for M.T.'s gender reassignment surgery. *Id.* The couple subsequently married, had intercourse, and lived together as husband and wife. *Id.* After more than two years of marriage, J.T. left M.T. and ceased to support her. *Id.* After painstaking analysis of a substantial body of expert testimony concerning gender and gender identity, the court concluded that M.T. was female and that the marriage was valid. *Id.* at 207.

It would be comforting to conclude that the *M.T.* opinion carried the day and was universally followed, but the case of *In re* Declaratory Relief for Ladrach, 513 N.E.2d 828 (Ohio P. Ct. 1987), renders such a conclusion impossible. In *Ladrach*, a male and a female transsexual were refused a marriage license because both parties were male on their birth certificates. *Id.* at 829. The court characterized *M.T.* as "liberal," and cited *Corbett* for the proposition that the determination of sex at birth, as indicated on the birth certificate, is final and cannot be changed absent a typographical error. *Id.* at 832. But the court did note that fifteen states do allow transsexuals to change the sex indication on their birth certificates, and stated: "It seems obvious to the court that if a state permits such a change of sex on the birth certificate of a post-operative transsexual, whether by statute or administrative ruling, then a marriage license, if requested, must issue to such a person provided all other statutory requirements are fulfilled." *Id.* at 830. The *Ladrach* decision thus seems to fall somewhere between *Corbett* and *M.T.*

In all these cases, the arguments focus on whether the spouses are of the same or opposite sex. As the differences between *Corbett* and *M.T.* illustrate, this question is not always answered the same way. Perhaps of more fundamental importance, the lengthy discussions of expert testimony illustrate the complexity of the issue and the fact that there is no unanimity as to what is meant by the terms "male" and "female," and that assigning persons to one category or the other is not always an exact task. Indeed, one expert in *M.T.* testified that "no person is 'absolutely' male or female." *M.T.*, 355 A.2d at 206. The multiplicity of indicia of gender can produce contradictory results, and suggest that there may be more than two possible answers to the question of what is a person's sex. *See* Anne Fausto-Sterling, *How Many Sexes are There?*, N.Y. TIMES, Mar. 12, 1993, at A29. If this view is correct, then the differences between "same-sex" and "opposite-sex" marriages may not be as clear as one might expect; indeed, the terms themselves may not always have any real meaning. Treating same-sex marriages equally to opposite-sex marriages would hopefully eliminate the need for courts to ask these

are gender-neutral and state no requirement that couples be opposite-sex have been judicially interpreted to prohibit same-sex marriages.[38] The cases have asserted several reasons, each of which is fatally flawed, for maintaining this unequal treatment.

A. Baker v. Nelson

The first suit by a same-sex couple seeking equal protection for their marriage was filed in Minnesota by Richard Baker and James McConnell, who had been denied a marriage license "on the sole ground that [they] were of the same sex, it being undisputed that there were otherwise no statutory impediments to a heterosexual marriage by either petitioner."[39] Although the Minnesota marriage laws did not contain any express requirement that couples be opposite-sex,[40] the court pointed out that some sections contained references to "husband and wife" and "bride and groom,"[41] and that dictionaries defined "marriage" as a union between persons of the opposite sex.[42] Noting that the Minnesota marriage statutes "date from territorial days,"[43] the court decided that same-sex marriages were outside the intent of the "original draftsmen"[44] of the marriage laws.

The court decided that because the marriage laws were not intended specifically to authorize same-sex marriages, such marriages were necessarily prohibited.[45] This form of reasoning directly contradicts the foundation principle that in a "free" society, anything

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questions, and thus, as a legal matter, could eliminate this problem in the marriage context.

[38] *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

[39] Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

[40] *Id.*

[41] *Id.* at 185-86.

[42] *Id.* at 186 n.1 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966) and BLACKS LAW DICTIONARY (4th ed. 1968)).

[43] *Id.* at 186.

[44] *Id.*

[45] *Baker*, 191 N.W.2d at 186.

not prohibited is permitted; it is only in "command" societies that the reverse is considered true, that anything not specifically permitted is prohibited.[46] Ordinarily, the fact that the statutes contained no prohibition against same-sex marriages would mean that those marriages are permitted, but the court decided that because there was no explicit authorization, same-sex marriages were prohibited.

The court's reason for this inversion of American thinking becomes clear in its consideration of the constitutional arguments in the case. The plaintiffs asserted that the state's refusal to recognize their marriage was a violation of the First, Eighth, Ninth, and Fourteenth Amendments to the Constitution.[47] The court dismissed the couple's argument that the state was interfering with their First Amendment rights of expression and association, as well as their Eighth Amendment argument that the denial of a marriage license imposed a cruel and unusual punishment.[48] Although the court declined to assert any reasons for dismissing these arguments, its

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[46] For an illustration of this distinction, see *On the Record*, TIME, Mar. 18, 1985, at 73 ("In Germany, under the law everything is prohibited except that which is permitted. In France, under the law everything is permitted except that which is prohibited. In the Soviet Union, everything is prohibited, including that which is permitted. And in Italy, under the law everything is permitted, especially that which is prohibited."). *See also* Don Wallace, Jr., *Address to the 33rd Annual Meeting of the Section of Antitrust Law of the America Bar Association*, 54 ANTITRUST L.J. 571, 571 (1985) ("There was a column written -- and he actually did this -- in the *Washington Post* by Lloyd Cutler while he was counsel to President Carter. He was trying to distinguish between the Anglo American, German, and French approach to the law. He said of the common law approach, that anything was allowed unless it were prohibited by law; the German approach was that everything is prohibited unless permitted by law; and the French approach is that everything is prohibited but anything can be arranged.") (emphasis omitted).

On the application of this distinction in the United States, see, e.g., David Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 381 (1987) ("[I]n our legal system, everything is permitted except that which is prohibited by proper legal action."). Exceptions to the general principle that everything not prohibited is permitted are urged in the area of protection from discrimination. *See, e.g.*, Douglass G. Boshkoff, *Private Parties and Bankruptcy-Based Discrimination*, 62 IND. L.J. 159, 181-82 (1987) (asserting that a statute prohibiting bankruptcy-based discrimination should be interpreted "in pursuit of sound bankruptcy policy.").

[47] *Baker*, 191 N.W.2d at 186 n.2.

[48] *Id.*

discussion of the other constitutional claims explains the disposition of the First and Eighth Amendment claims.[49] The court wrote:

> These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons . . . . The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children with a family, is as old as the book of Genesis.[50]

There are several problems with this argument. First, it ignores the tremendous history of same-sex marriages, both before and after the book of Genesis was written, and the current abundance of same-sex marriages that involve procreation[51] and the rearing of children with a family.[52] Second, it creates a rather unusual establishment clause problem. The justices evidently asserted their own religious view, contrary to theological and historical study, that marriage exists not as a legal arrangement but rather as an unchanging rite handed down with the Old Testament.[53] Third, it overlooks the vast imprecision of the correlation between marriage and procreation; that is, the huge numbers of married couples without children and unmarried couples, heterosexual and homosexual, with children.[54] Fourth, the argument is circular: it claims that the reason only opposite-sex couples can marry is because only opposite-sex couples can marry. Circular arguments, while internally irrefutable,

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[49] *Id.* The court did explain that it felt the Eighth Amendment claim was "without merit," but this assertion is a conclusion, not a reason. *Id.*

[50] *Id.* at 186.

[51] In the San Francisco area alone, at least 1000 children have been born to gay or lesbian couples from 1985 to 1990. Salholz, *supra* note 32, at 20.

[52] Salholz, *supra* note 32, at 20 (estimating that between three and five million Gay parents are raising children). While same-sex couples may have been less visible in 1972 than they are today, they were probably as numerous; even if Mr. Baker and Mr. McConnell had been the only same-sex couple in the world, it would not in itself justify depriving them of the equal protection of the laws, which is guaranteed to all persons. U.S. CONST. amend. XIV, § 1.

[53] *See* BOSWELL, *supra* note 18, at 26.

[54] *See* Seligman, *supra* note 33, at 38; Salholz, *supra* note 32, at 20.

are not a form of reasoning at all; they certainly cannot justify state interference with a right as fundamental as marriage.[55]

The court then used its assertion that a same-sex marriage is not a marriage to distinguish cases addressing the right of privacy and the right of equal protection in the marriage context.[56] In *Griswold v. Connecticut*,[57] the Supreme Court established the right of married couples to use contraception, and hence to engage in non-procreative sex.[58] By establishing this right, *Griswold* separated marriage from procreation; opposite-sex couples exercising their right to use effective contraception are no more able to procreate than same-sex couples. Additionally, Baker and McConnell pointed out that many opposite-sex couples cannot or do not procreate, but are nevertheless allowed to marry and to remain married.[59] Recognizing non-procreative opposite-sex marriages while refusing to recognize non-procreative same-sex marriages denies same-sex couples the equal protection of the *Griswold* decision. The Minnesota court nevertheless asserted that marriage, even when not procreative, could only be an opposite-sex relationship.[60] Indeed, the court appeared to have been so flustered by the very idea of a same-sex couple expecting the same rights as an opposite-sex couple that, in describing Justice Goldberg's famous *Griswold* concurrence,[61] the Justices

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[55] *See* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("the right to marry is of fundamental importance for all individuals.").

[56] *Baker*, 191 N.W.2d at 187.

[57] 381 U.S. 479 (1965).

[58] *Id.* at 485.

[59] *Baker*, 191 N.W.2d at 187. Couples, regardless of sex, cannot procreate after a certain age. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 772 (4th ed. 1990) ("modern verifiable medical records show no births to women over 60, and births to women over 50 are statistically insignificant."); THE GUINNESS BOOK OF WORLD RECORDS 15 (27th ed. 1989) ("The oldest recorded mother of whom there is satisfactory verification [gave birth] when her age was 57 years 129 days."); Telephone Interview with Dr. Albert E. Levin, M.D. (Apr. 1991) (it is exceptional for women in their fifties to be able to have children). Nevertheless, the elderly are not prohibited from marrying nor are their marriages terminated once the function of raising children in a family is completed or no longer possible. Clearly, society has recognized that there is more to marriage than the simplification endorsed by the Minnesota court.

[60] *Baker*, 191 N.W.2d at 187.

[61] Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

specifically stated that Goldberg had "stopped short" of implying that the Ninth Amendment was applicable against the states.[62] This was done despite the fact that Justice Goldberg's main point was that he would have applied a Ninth Amendment right to the states via the Fourteenth Amendment to invalidate the Connecticut law.[63]

The court also distinguished *Loving v. Virginia*,[64] in which the Supreme Court struck down a Virginia anti-miscegenation statute because it interfered with a "basic civil right" by creating a restriction based on "invidious racial discrimination."[65] The Minnesota Supreme court reasoned that the *Loving* decision hinged "solely on the grounds of its patent racial discrimination."[66] Having distinguished *Loving*, however, the court did not assert any reason why a restriction based on sex would be acceptable, relying solely on its assumption that marriage is exclusively an opposite-sex institution.[67]

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[62] *Baker*, 191 N.W.2d at 187 n.3. The Minnesota court stated: "He [Goldberg] stopped short, however, of an implication that the Ninth Amendment was made applicable against the states by the Fourteenth Amendment." *Id.* To be fair, Justice Goldberg's concurrence by its terms does support the limited statement that he was not applying the Ninth Amendment in its entirety to the states via the Fourteenth Amendment. *Griswold*, 381 U.S. at 492. The concurrence does, however, use the Ninth Amendment as a basis for asserting personal rights not enumerated in the first eight amendments, and in that context does apply it to the states via the Fourteenth Amendment. *Id.* at 499. Justice Goldberg's concluding paragraph is as follows:

> In sum, I believe that the right of privacy in the marital relation is fundamental and basic - a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States. I agree with the court that petitioners' convictions must therefore be reversed.

Id. Justice Goldberg's concurrence thus located a right of marital privacy in the Ninth Amendment, and applied that right against the state of Connecticut through the Fourteenth Amendment. The *Baker* opinion, however, completely ignores the substance of Goldberg's concurrence, relying on its statement that the Ninth Amendment is not entirely to be applied to the states. *Baker*, 191 N.W.2d at 187.

[63] *Griswold*, 381 U.S. at 499.

[64] 388 U.S. 1 (1967).

[65] *Id.* at 12.

[66] *Baker*, 191 N.W.2d at 187.

[67] *Id.*

Not surprisingly, the court held that Baker and McConnell had no right to a marriage license.[68] Baker and McConnell petitioned the United States Supreme Court for review, but their appeal was dismissed "for want of a substantial federal question."[69]

B. Jones v. Hallahan

In *Jones v. Hallahan*,[70] a Lesbian couple in Kentucky filed for recognition of their marriage by the state after their request for a marriage license was denied.[71] They appealed to the Kentucky courts, arguing that the denial of the marriage license deprived them of the right to marry, the right of association, and the right to free exercise of religion.[72] The couple did not, however, persuade the court.[73]

Kentucky marriage laws did not specifically prohibit same-sex marriage, but some sections did contain references to "the male and female of the species."[74] The situation in *Jones* was thus analogous to that in *Baker*, and the court used essentially the same reasoning to arrive at the same conclusion. Quoting reference books that defined marriage as an opposite-sex union,[75] the court held:

> Marriage was a custom long before the state commenced to issue licenses for that purpose. . . . In all cases, however, marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary. . . . [A]ppellants are prevented from

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[68] *Id.* at 186.

[69] Baker v. Nelson, 409 U.S. 810, 810 (1972).

[70] 501 S.W.2d 588 (Ky. Ct. App. 1973).

[71] *Id.* at 589.

[72] *Id.*

[73] *Id.* at 590.

[74] *Id.* at 589 n.1 (citing KY. REV. STAT. ANN. § 402.020(5) (Michie 1968) & KY. REV. STAT. ANN. § 402.210 (Michie 1968)).

[75] *Jones*, 501 S.W.2d at 589.

> marrying . . . by their own incapability of entering into a marriage as that term is defined.[76]

The court refused to order the issuance of a marriage license to the couple because "[a] license to enter into a status or a relationship which the parties are incapable of achieving is a nullity."[77]

Having decided that same-sex marriage was by definition impossible, the court dismissed, almost gratuitously, the federal constitutional claims in the case.[78] Instead of discussing the right to marry or the right of association, the court cited *Baker* as precedent[79] and asserted that "no constitutional issue is involved."[80] The court then dismissed the claim of the right to free exercise of religion, saying only that "[t]he claim of religious freedom cannot be extended to make the professed doctrines superior to the law of the land and in effect to permit every citizen to become a law unto himself."[81] With similar brevity, the court dismissed the Eighth Amendment argument with the sentence: "We do not consider the refusal to issue the license a punishment."[82] The court effectively explained the cursory nature of its consideration of the constitutional claims in its conclusion -- "the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage."[83]

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[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at 589-90. The court also cited Anonymous v. Anonymous, 425 N.Y.S.2d 499 (Sup. Ct. 1971), a case involving a marriage between a man and a person whom he thought to be female but who was at the time a pre-operative transsexual. Because of the role of deception, the case is not really on point; the defendant basically defaulted and the issue of whether two people of the same sex have a right to marry was not litigated. The case is discussed *supra* note 37.

[80] *Jones*, 501 S.W.2d at 590.

[81] *Id.*

[82] *Id.*

[83] *Id.*

C. Singer v. Hara

On September 20, 1971, John Singer and Paul Barwick applied for a marriage license in King County, Washington.[84] The request for a marriage license was denied.[85] Singer and Barwick challenged the refusal, saying it improperly denied them the right to marry under the marriage statutes,[86] thus contravening the Equal Rights Amendment to the Washington State Constitution,[87] and the Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.[88]

Beginning with the issue of whether same-sex marriages were prohibited by the Washington marriage statutes, the court stated, "it is apparent from a plain reading of our marriage statutes that the legislature has not authorized same-sex marriages."[89] To support this conclusion, the court pointed out that one section of the statutes contained a reference to "the female"[90] and a 1970 amendment to the section referred to "the male" and "the female."[91] The court decided that the existence of these references meant that the legislature did not intend to authorize same-sex marriages, and that therefore same-sex marriages were not permitted.[92] The Washington court did not explicitly say, as the *Baker* court had, that the lack of specific authorization was equivalent to prohibition, but its ruling had the same effect: Singer and Barwick were denied their right to marry.[93]

The court next considered the implications of the Equal Rights Amendment ("ERA"), which provides in relevant part: "Equality of rights and responsibility under the law shall not be denied or abridged

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[84] Singer v. Hara, 522 P.2d 1187, 1188 (Wash. App. Div. 1974).

[85] *Id.* The license was denied by King County Auditor Lloyd Hara, who thus became the named defendant in the ensuing court case. *Id.*

[86] *Id.* (citing WASH. REV. CODE § 26.04.010 (1970)).

[87] *Id.* (citing WASH. CONST. art. 31, § 1).

[88] *Id.* at 1189.

[89] *Id.*

[90] *Singer*, 522 P.2d at 1189 n.2 (citing WASH. REV. CODE § 2604.010 (1970)).

[91] *Id.* at 1189.

[92] *Id.*

[93] *Id.* at 1197.

on account of sex."[94] The court noted that the legislative history of the ERA included indications that there was a belief that the Amendment would legalize same-sex marriages, but pointed out that this belief was sometimes stated by opponents of the Amendment and that some supporters of the ERA stated disagreement.[95] The court said that it did not believe the people intended to offer same-sex couples the protection of the state's marriage laws, and that to interpret the ERA to grant equal protection to same-sex marriages would "subvert the purpose for which the ERA was enacted by expanding its scope."[96] The court concluded that the original intent and "a common-sense reading"[97] of the ERA indicated that "to be entitled to relief under the ERA, appellants must make a showing that they are somehow being treated differently by the government than they would be if they were females."[98] The judges did not mention the fact that the appellants would have been treated differently if *one* of them had been female.

Singer and Barwick cited to *Loving v. Virginia* and noted that the *Loving* court changed the basic definition of marriage by requiring the state of Virginia to recognize interracial marriages.[99] The plaintiffs reasoned that because the *Loving* court had changed the definition of marriage through the Fourteenth Amendment, the Washington court was required to do the same with the ERA so that same-sex marriages were included.[100] The court distinguished *Loving* by noting that *Loving* had merely prohibited racial restrictions on marriage and had not changed "the basic definition of marriage as the legal union of one man and one woman."[101]

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[94] *Id.*

[95] *Id.* at 1190 n.5.

[96] *Singer*, 522 P.2d at 1194.

[97] *Id.*

[98] *Id.* at 1190 n.5.

[99] *Id.* at 1191. Singer and Barwick also cited a California case, Perez v. Lippold, 198 P.2d 17 (Cal. 1948), with essentially the same holding. *Id.*

[100] *Singer*, 522 P.2d at 1192 n.8.

[101] *Id.*

The court argued that the definition of marriage excluded same-sex marriage.[102] The court's argument is best summarized by the following statement:

> [A]ppellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.[103]

This statement is both contradictory and circular: first, it says that the reason Singer and Barwick are being denied equal protection of the laws is not because of their sex, but because of their sex; second, it says that the reason same-sex couples cannot marry is because same-sex couples cannot marry.

The court then implicitly conceded that Singer and Barwick were being discriminated against on account of sex but relied on the circular definition argument to say that this discrimination was not invidious and was therefore permissible:

> laws which differentiate between the sexes are permissible so long as they are based upon the unique physical characteristics of a particular sex . . . the

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[102] *Id.* at 1192 (citing Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) and Jones v. Hallahan, 501 S.W.2d 589 (Ky. 1973)).

[103] *Id.* In addition to repeating this argument several times, the court apparently tried to reinforce it with additional arguments such as the assertion that it was "so obvious as not to require recitation." *Id.* The court, having advanced only contradictory and circular arguments, satisfied itself by observing that "it is clear that all marriages have one 'husband' and one 'wife.' In the relationship proposed by appellants, there is no 'wife' and therefore there can be no marriage." *Id.* at 1192 n.7. The court did have precedents on which to rely, but to paraphrase a historic criticism of the common law, it is difficult to think of a worse reason to perpetuate an injustice than that it was done in the past. *See* Justice Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

> state's refusal to grant a license allowing the appellants to marry one another is . . . based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though some couples who produce children are not married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination "on account of sex."[104]

The court thus generously attributed to the legislature a basis that it considered rational for restricting marriage to same-sex couples. Dismissing the imprecision of its basis for the restriction as inapplicable only in "exceptional situations,"[105] the court skirted the issue raised by the *Griswold* decision.[106] Moreover, the court conveniently overlooked the fact that no couple past a certain age offers the possibility of the birth of children by their union, and yet the state does not attempt to dissolve the marriages of senior citizens or even to prevent senior citizens from marrying. Indeed, such a restriction would almost certainly be considered an impermissible, and unconscionable, denial of the right to marry. But while this marriage restriction would be unconscionable when applied to other groups of people who are unable to procreate in the way that some opposite-sex couples can, the court felt the restriction was perfectly acceptable when applied to Gay people like Singer and Barwick.

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[104] *Singer*, 522 P.2d at 1195.

[105] *Id.*

[106] *Id.* at 1197.

The court then analyzed the federal equal protection issues in the same manner. Deciding that no suspect classifications were involved, the court applied a rational relationship standard of review.[107] The court repeated that Singer and Barwick "were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself."[108] While acknowledging that other cultures "may have fostered differing definitions of marriage,"[109] the court asserted that its definition of marriage was "deeply rooted in our society,"[110] and quoted *Baker* for the proposition that its definition was "as old as the book of Genesis."[111] The court added that "subject to constitutional limitations, the state has absolute dominion over the legal institution of marriage,"[112] which appears to contradict its assertion that marriage is an inflexible institution handed down with the Old Testament.

Finally, the court asserted that the restriction permitting only opposite-sex marriages, despite its imprecision, was "clearly related to the public interest in affording a favorable environment for the growth of children."[113] Having reached this conclusion with reference to the equal protection claim, the court decided it was "unnecessary"[114] to discuss the claims under the due process clause,

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[107] *Id.* at 1196.

[108] *Id.*

[109] *Id.*

[110] *Singer*, 522 P.2d at 1197.

[111] *Id.*

[112] *Id.*

[113] *Id.* The court did not advance any reason for its belief that children would develop unfavorably if same-sex marriages were recognized, or that the survival of opposite-sex marriages depended on the non-recognition of same-sex marriages. Moreover, the correlation between marriage and children has become increasingly imprecise since *Singer* was decided in 1974. *See* Seligman, *supra* note 33, at 38 (discussing how the definition of "family" has evolved from "[a] group of people related by blood, marriage or adoption" to "[a] group of people who love and care for each other."). As the imprecision pushes the correlation into the domain of pure fiction, it will be interesting to see whether courts continue to rely on it in rationalizing their failure to accord same-sex couples the equal protection of the marriage laws.

[114] *Singer*, 522 P.2d at 1195 n.11.

the Ninth Amendment, and the Eighth Amendment,[115] and held that Singer and Barwick were prohibited from receiving a marriage license.[116]

D. Adams v. Howerton

Following *Singer v. Hara,* same-sex couples gave up looking to the courts for equal protection of the laws until Richard Adams and Anthony Sullivan decided it was time to try again. Anthony Sullivan, who was an Australian citizen, and Richard Adams, an American, had been together for some time when Sullivan's visa to remain in the United States expired.[117] Like many couples in this situation, Richard and Anthony explored their immigration options and decided that the best solution was to marry. They obtained a marriage license from the county clerk in Boulder, Colorado, and were married by a minister.[118] "Adams then petitioned the INS [Immigration and Naturalization Service] for classification of Sullivan as an immediate relative of an American citizen, based upon Sullivan's alleged status as Adam's spouse."[119] The INS denied the petition, and Adams and Sullivan filed suit in federal court. Both the district court and circuit court affirmed the INS decision, and the Supreme Court denied certiorari.[120]

The circuit court opinion began with a careful exercise in statutory interpretation. The court said that the applicable statutes[121] provided preferential admissions for close family members, including spouses of United States citizens, but that the statutes did not provide

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[115] *Id.* The court did pause long enough to mention its opinion that the Eighth Amendment claim was "without merit." *Id.*

[116] *Id.* at 1197.

[117] Adams v. Howerton, 673 F.2d 1036, 1038 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982).

[118] *Id.*

[119] *Id.*

[120] Adams v. Howerton, 458 U.S. 1111 (1982).

[121] *Adams*, 673 F.2d at 1038 (citing § 201(a) and § 201(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1151 (1965)).

a specific definition of the term "spouse."[122] The court then turned to relevant case law and found that:

> a two-step analysis is necessary to determine whether a marriage will be recognized for immigration purposes. The first is whether the marriage is valid under state law. The second is whether that state-approved marriage qualifies under the Act.[123]

The two-step analysis meant that even a marriage that was valid under state law might not qualify as a marriage for immigration purposes.[124]

The court began with the first step which was to determine the validity of the marriage under state law.[125] While Adams and Sullivan asserted their belief that the marriage was valid, and while they had obtained a license and been duly married by a minister, the court noted an informal, unpublished opinion from the Attorney General of Colorado to a state legislator which stated that the same-sex marriage had no legal effect in Colorado.[126] The court also referred to a Colorado statute which neither permitted nor prohibited same-sex marriages.[127] The court concluded this stage of its analysis by saying that it was not clear whether Colorado law would recognize same-sex marriage.[128] Although the court rejected Adams' and Sullivan's claim because of their failure to meet the second prong of the two-step analysis, the fact that the court avoided finding that their

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[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at 1039. Presumably as an alternative argument, Anthony and Richard asserted that, even if their marriage was not valid, they were putative spouses because they had a good faith belief in the validity of their marriage. The court doubted the merits of the argument, however, stating that they "could not have been without doubts concerning the validity of their marriage," and that, in any case, putative marriage provisions "were enacted not to confer validity on the marriage of a putative spouse, but rather to protect property rights and insure support for children when the invalidity of such a marriage is discovered." *Id.*

[126] *Id.* at 1038-39.

[127] *Adams*, 673 F.2d at 1039 (citing COLO. REV. STAT. § 14-2-104 (1973)).

[128] *Id.*

marriage was legally invalid under state law, a proposition for which the court could have found ample precedent in *Baker*, *Jones*, and *Singer*, is interesting. The fact that the court acknowledged that same-sex marriage might be valid under state law may imply at least some symbolic progress had been made in the field of same-sex marriage between 1974 and 1983.

The court stated that it would decide this case "solely upon . . . the second step in [its] two-step test which required a statutory analysis of section 201(6) of the Immigration Act."[129] To discover the intent of Congress, the court looked to the statute and noted that its definition of spouse specifically excluded some marriages that might be valid under state law, indicating that it did not intend all valid marriages to qualify for immigration purposes.[130] The court also noted that the construction of statutes by the agencies charged with their enforcement is ordinarily entitled to "substantial deference,"[131] and that the INS had determined that Adams' and Sullivan's marriage was outside its construction of the statute.[132] The court referred to the plain meaning rule of statutory construction and cited dictionaries for the proposition that marriage "ordinarily contemplates a relationship between a man and a woman."[133] The court also observed that other sections of the Immigration Act "clearly express an intent to exclude homosexuals" and inferred that it was "unlikely" that Congress intended to give preferential treatment to homosexual spouses while simultaneously mandating their exclusion.[134] The court concluded that Congress intended to give preferential treatment only to the spouses of heterosexual marriages.[135]

In deciding whether this discrimination in favor of heterosexual marriages was constitutionally permissible, the court asserted that Congress has "almost plenary power to admit or exclude

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[129] *Id.*

[130] *Id.*

[131] *Id.* at 1040.

[132] *Id.*

[133] *Adams*, 673 F.2d at 1040 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1384 (1971) and BLACK'S LAW DICTIONARY 876 (5th ed. 1979)).

[134] *Id.*

[135] *Id.* at 1041.

aliens"[136] and to make rules that would be unacceptable if applied to citizens.[137] The court concluded that "the decisions of Congress are subject to only limited review."[138] The court stated that immigration laws will be upheld "where there is a rational basis for Congress's exercise of its power, whether articulated or not."[139] The court then searched for rational bases on which Congress might have relied, suggesting as possibilities that "homosexual marriages never produce offspring . . . are not recognized in most, if in any, of the states, or . . . violate traditional and often prevailing societal mores."[140] Without choosing one of these reasons in particular, the court concluded that Congress had acted rationally and therefore within its constitutional authority.[141]

The main flaw in the court's analysis is its excessive deference to Congressional power over immigration. Congress does not have the power to suspend Fifth and Fourteenth Amendment guarantees of equal protection -- even in immigration. If Anthony and Richard had been an opposite-sex couple, their marriage would have been recognized by the INS. Their marriage was not recognized because they were a same-sex couple, and they were denied the equal protection of the laws.

E. Baehr v. Lewin

In the first case to complete the trial level in the 1990s, three same-sex couples applied for marriage licenses in Hawaii and were turned down.[142] They filed suit claiming that the denial of marriage licenses violated their rights to privacy, equal protection, and due process of law under the Hawaii state constitution.[143] The trial court

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[136] *Id.*

[137] *Id.* at 1042.

[138] *Id.* at 1041.

[139] *Adams*, 673 F.2d at 1042.

[140] *Id.* at 1043.

[141] *Id.*

[142] Baehr v. Lewin, No. 5. CC 91-1394, slip op. at 1-3 (Haw. Cir. Ct. Sept. 3, 1991).

[143] *Id.* at 2.

ruled that the plaintiffs were not entitled to marry, and the case is currently on appeal.[144]

The trial court began by saying that whether sexual orientation is protected by the Hawaii right to privacy was an open question, not previously addressed by Hawaii case law,[145] but that Hawaii citizens "can and should expect . . . unfettered freedom to control their personal and intimate affairs and to select their lifestyle even if it includes a preference for same sex partners."[146] Then, apparently in defense of the state's invasion of the privacy of marriage by requiring persons who wish to marry to choose spouses of the opposite sex, the court stated, "citizens cannot expect government's policies to support their lifestyle or personal choices as opposed to those of another class of people."[147] That the court would make this argument in defense of the statute is remarkable, because it is precisely the *plaintiffs'* argument: the government's policies restricting marriage to opposite-sex couples have supported a heterosexual lifestyle or personal choice as opposed to that of another class of people, specifically Gay people, including the plaintiffs. It is refreshing to see that the court endorsed the argument, but it is extremely confusing to see that the court misapplied it so completely.

Continuing in this vein, the court went on to say that the legislature's decision to restrict marriage to heterosexual couples "does not infringe upon a person's individuality or lifestyle decisions."[148] Next, the court cited *Baker* for the proposition that "[b]ecause homosexual marriage has never been considered to be a fundamental right under any known state constitution or the United States Constitution, the provisions of HRS Section 572-1, do not violate Article I Section 6 of the Hawaii State Constitution."[149]

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[144] *Hawaii Trial Court Dismisses Gay Marriage Case; D.C. Court Hears Oral Argument*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), Oct. 1991, at 65, 66.

[145] *Baehr*, No. 5. CC 91-1394, slip op. at 2.

[146] *Id.* at 3.

[147] *Id.*

[148] *Id.* The court's assertion is clearly false, however, because prohibiting same-sex couples from marrying obviously infringes on the "lifestyle decisions" available to them.

[149] *Id.*

Getting away from the privacy issue, the court moved to the equal protection and due process issues.

> A law, such as HRS Section 572-1, which classifies people into those who can and cannot be legally married may be subject to strict judicial scrutiny under Article I Section 5 of Hawaii State Constitution if it infringes upon a fundamental right or creates a suspect classification. Otherwise, a law which classifies is measured by the "rational basis" test.[150]

The court referred back to its decision, based on *Baker,* that there was no fundamental right to same-sex marriage under the Hawaii State Constitution.[151] By doing so, the court essentially assumed its own conclusion; the court should have asked whether there is a fundamental right *to marry*, and then asked whether same-sex couples were being denied equal access to that right. By framing the question as whether there is a special fundamental right to *same-sex* marriage, the court confused its equal protection analysis and its due process analysis.[152]

The court next turned to the issue of suspect classification. The court noted that under Hawaii law "a group must have been subject to purposeful, unequal treatment *or* have been relegated to a position of political powerlessness in order to be considered a

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[150] *Id.* at 3-4.

[151] *Baehr*, No. 5. CC 91-1394, slip op. at 4.

[152] For an explanation of this distinction in the federal context, see Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988). Professor Sunstein points out that due process analysis and equal protection analysis look at history in opposite ways: due process looks at history to see what rights are deeply rooted and fundamental, while equal protection looks to see what groups have suffered discrimination. *Id.* at 1163. The difference becomes critical in cases like Bowers v. Hardwick, 478 U.S. 186 (1986), which held that the due process clause does not protect homosexual sodomy. The *Hardwick* court based its decision on the long history of prohibitions of homosexual sodomy. *Id.* at 192-94. But it is precisely that history of persecution that militates in favor of heightened scrutiny of laws disfavoring homosexuals. Ironically, *Hardwick* is therefore one of the strongest federal cases *supporting* recognition of sexual orientation as a suspect classification and Gay people as a protected class in equal protection law.

'suspect class' for the purposes of constitutional analysis."[153] In effect, because the court stated that the legislature had decided to restrict the right to marry to heterosexual couples,[154] the court conceded that homosexual couples who wish to marry have been subjected to purposeful unequal treatment.

The court circumvented the state issue of the requirements of suspect classification by delving into federal law. The court stated that "[n]o federal or state case has ever determined that homosexuals constitute a 'suspect class,'"[155] despite the fact that the Federal District Court in Kansas had made exactly that determination in *Jantz v. Muci*[156] more than three months earlier.

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[153] *Baehr*, No. 5. CC 91-1394, slip op. at 4 (emphasis added).

[154] *Id.* at 3.

[155] *Id.* at 4 (citing High Tech Gays v. Defense Inc. Sec. Clearance Off., 895 F.2d 563 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987)).

[156] 759 F. Supp. 1543 (D. Kan. 1991). Contrary to the court's implication that sexual orientation classifications could not possibly be considered suspect, at least two federal courts have held that sexual orientation does constitute a suspect classification calling for strict scrutiny review. *See, e.g.*, Watkins v. United States Army, 837 F.2d 1428 (9th Cir. 1988) (*Watkins I*), *superseded and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 384 (1990) (*Watkins II*); Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991), *rev'd and remanded on other grounds*, 976 F.2d 623 (10th Cir. 1992).

In *Watkins I*, the Ninth Circuit held that homosexuals constitute a suspect class and that the Army could not discharge an openly Gay Sergeant solely because of his homosexuality. *Watkins*, 837 F.2d at 1451. *Watkins I* was superseded by *Watkins II*, which affirmed the reinstatement order but withdrew the suspect classification determination, holding instead that the Army was estopped from discharging Watkins for homosexuality because it had previously allowed him to reenlist despite knowing that he was homosexual. *Watkins*, 875 F.2d at 708-09, 711.

In *Jantz v. Muci*, the District Court held that a school principal impermissibly discriminated against a teacher on the basis of homosexuality (in this case perceived homosexuality as the plaintiff maintained that he was not in fact homosexual), which the court held to be a suspect classification. *Jantz*, 759 F. Supp. at 1552. The Tenth Circuit reversed and remanded, holding that the principal could not be held liable because, regardless of whether homosexuals or perceived homosexuals constituted a suspect class, the question was not clearly resolved at the time of the principal's action and he could not reasonably be expected to know he was acting unconstitutionally. *Jantz*, 976 F.2d at 630. At the time *Baehr v. Lewin* was decided, the district court opinion in *Jantz* had been issued but had not yet been reversed.

Further, the court recognized the recent passage of a law prohibiting employment discrimination based on sexual orientation,[157] and concluded that "there is no evidence that homosexuals and the homosexual legislative agenda have failed to gain legislative scrutiny."[158] The court's analysis on this point represents a dangerous distortion of equal protection analysis. By using the Hawaii civil rights law as a reason not to review discrimination based on sexual orientation with heightened scrutiny, the court implies that the passage of civil rights laws undermines the constitutional safeguards of protected classes.[159] If this were true, then the passage of the Civil Rights Act of 1964 would militate against using strict scrutiny to review classifications based on race. Fortunately, this distortion appears unique to the *Baehr v. Lewin* court.

Without explaining its relevance to suspect classification under Hawaii law, the court next addressed the issue of immutability.[160] Citing research by a single researcher working for a clinic related to the Roman Catholic Church, which has recently taken explicit political stands against any acceptance of homosexuality,[161] the court decided that homosexuality had not been proven to be an immutable characteristic.[162] The court also cited a Ninth Circuit decision stating

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[157] *Baehr*, No. 5. CC 91-1394, slip op. at 5.

[158] *Id.*

[159] *Id.* at 3-4.

[160] *Id.* at 5.

[161] *See, e.g.*, Roberto Suro, *Vatican Reproaches Homosexuals with a Pointed Allusion to AIDS*, N.Y. TIMES, Oct. 31, 1986, at A18 (the Vatican issued a letter, approved by Pope John Paul II, to all Roman Catholic bishops stating "homosexuality may seriously threaten the lives and well-being of a large number of people."); Loren Jenkins, *Vatican Adamant on Gays; Letter to Bishops Charges Groups try to "Mislead" Pastors*, WASH. POST, Oct. 31, 1986, at A1 (Vatican document entitled "Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons" stated "special concern and pastoral attention should be directed toward those who have this condition [homosexuality], lest they be led to believe that living out this orientation in homosexual activity is a morally acceptable option. It is not."); *Vatican Targets U.S. in Blast at Homosexuality*, CHI. TRIB., Oct. 31, 1986, at 1 (Vatican statement "urged greater vigilance in opposing the 'deceitful propaganda' of pro-homosexual groups in church and society.").

[162] *Baehr*, No. 5. CC 91-1394, slip op. at 5 (referring to research by Joseph Nicolosi, Ph.D. of the Thomas Aquinas Psychological Clinic in Encino, California).

homosexuality is not immutable,[163] but rather "behavioral and hence . . . fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes."[164] The court concluded that the plaintiffs had failed to show that homosexuals constitute a suspect class for Hawaii equal protection and due process purposes, and therefore reviewed the marriage restriction under the rational relationship test.[165]

Applying the rational relationship test, the court decided that the refusal to recognize same-sex marriage "is obviously designed to promote the general welfare interests of the community by sanctioning traditional man-woman family units and procreation. Clearly, these legislative goals has [sic] been achieved by the legal classification set forth in the statute."[166] This assertion implies that the reason people enter "traditional man-woman family units" and procreate is because same-sex marriages are not recognized, and that what brides and grooms really want is to marry others of their own sex -- if only the law allowed. Without explaining a basis for this belief, the court concluded that same-sex couples did not have a right to marry in Hawaii.[167]

F. Dean v. Barry

Perhaps the most incredible refusal to recognize a same-sex marriage took place in the nation's capital, a jurisdiction with gender-neutral marriage laws and a human rights law specifically prohibiting discrimination on the basis of sex or sexual orientation.[168] In *Dean v. Barry*,[169] Judge Shellie Bowers held that despite the explicit ban on

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[163] High Tech Gays v. Defense Inc. Sec. Clearance Off., 895 F.2d 563 (9th Cir. 1990).

[164] *Baehr*, No. 5. CC 91-1394, slip op. at 5-6. For consideration of whether gender is an immutable characteristic, see *supra* note 37.

[165] *Baehr*, No. 5. CC 91-1394, slip op. at 6.

[166] *Id.*

[167] *Id.*

[168] *See* D.C. CODE ANN. §§ 30-101, 30-103 (1981); D.C. CODE ANN. § 1-2512 (1981).

[169] C.A. No. 90-13892 (D.C. Super. Ct. Dec. 3, 1991).

discrimination based on sex or sexual orientation, the plaintiffs were not entitled to a marriage license.[170]

Judge Bowers asserted that the City Council did not intend to authorize Gay marriages, as the Council failed to adopt an amendment that would have done so explicitly.[171] Judge Bowers pointed out that words in a statute should be given the meaning commonly attributed to them.[172] As to the District's Human Rights Law, Judge Bowers stated that its legislative history did not include specific mention of same-sex marriage, which he claimed it would have done if the Council had intended to authorize same-sex marriage, and thus concluded that marriage was not within the scope of the Human Rights Law.[173] Reiterating the circular argument that same-sex couples cannot marry because same-sex couples cannot marry, Judge Bowers stated that the plaintiffs were prevented from marrying because of the definition of marriage and not by any unlawful discrimination.[174] Judge Bowers also observed that all past attempts to obtain a license for a same-sex marriage in American appellate courts have been denied.[175]

Responding to the extensive historical evidence that the plaintiffs presented to prove that the concept of marriage historically included same-sex marriage, the court nevertheless insisted that same-sex marriage was "unthinkable and, by definition, impossible."[176]

> [The plaintiffs did not prove that] the Church officially recognized these 'unions' as marriages, notwithstanding the acts of individual clergymen . . . [or that] the state ever recognized them. . . . [Further], one of the most important characteristics of

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[170] *D.C. Court Rebuffs Dean/Gill Marriage Suit*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), Feb. 1992, at 9-10. The plaintiffs, represented at trial by Professor William Eskridge, Jr., of Georgetown University Law Center, plan to appeal. *Id.* at 9.

[171] *Id.*

[172] *Id.*

[173] *Id.* at 10.

[174] *Id.*

[175] *Id.* at 9.

[176] *D.C. Court Rebuffs Dean/Gill Marriage Suit*, LESBIAN/GAY L. NOTES (Lesbian & Gay Law Ass'n of Greater N.Y., New York, N.Y.), Feb. 1992, at 9.

> fundamental moral principles is that they are immutable . . . . The Ten Commandments are as relevant today as they were at Mount Sinai, and their observance or non-observance no less consequential. Thus, if homosexual marriage were anathema to Christian religious dogma and morally repugnant, it would still be so, regardless of the number of clergy willing to participate in such a ceremony or the number of centuries over which they did so.[177]

Given the court's reliance on what it called the immutable moral principles that make same-sex marriage unthinkable and impossible, one wonders whether any legislation, indeed even an amendment to the Constitution, would be sufficient to establish same-sex marriage in Judge Bowers' court.

Two of the existing decisions, *Baehr v. Lewin* and *Dean v. Barry*, are currently being appealed. *Dean v. Barry*, a District of Columbia case, is subject to a federal climate that appeared discouraging when the case was filed but that may improve during the presidency of Bill Clinton. *Baehr v. Lewin*, in Hawaii, seemed more promising until the judge who wrote the lower court opinion was elevated to the Hawaii Supreme Court. Nevertheless, hope remains that the plaintiffs in at least one of the existing cases will prevail.

IV. Other States

"All we say to America is be true to what you said on paper."[178]

As each failed attempt to win legal recognition of same-sex marriage adds to the growing weight of unfavorable precedent, the case law becomes increasingly discouraging. Nevertheless, despite the expanding number of jurisdictions in which these cases have been tried, there remain a number of states whose constitutions express strong support for individual and religious freedom and whose courts

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[177] *Id.* at 10.

[178] Martin Luther King, Jr., Address in Memphis, Tenn. (Apr. 3, 1968).

have not yet been asked to decide a same-sex marriage case.[179]

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[179] While many state constitutions contain very positive language about equal rights, some make specific exceptions in the area of marriage. *See* ALA. CONST. art. I, § 1 ("That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."), ALA. CONST. art. IV, § 102 ("The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro."); ARIZ. CONST. art. II, § 2 ("All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty . . . and of pursuing their own happiness."), ARIZ. CONST. art. II, § 3 ("The equality of all persons before the law is recognized, and shall ever remain inviolate . . . ."), ARIZ. CONST. art. II, § 18 ("The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens."); CAL. CONST. art. I, § 7(a) ("A person may not be . . . denied equal protection of the laws . . . ."), CAL. CONST. art. I, § 7(b) ("A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."), CAL. CONST. art. XX, § 7 ("No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect."); COLO. CONST. art. II, § 29 ("Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex."); CONN. CONST. art. I, § 1 ("All men . . . are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."), CONN. CONST. art. I, § 20 ("No person shall be denied the equal protection of the law nor be subjected to . . . discrimination in the exercise or enjoyment of his or her civil or political rights because of . . . sex . . . ."), CONN. CONST. art. VII ("No preference shall be given by law to any religious society or denomination in the state. Each shall have and enjoy the same and equal powers, rights, and privileges . . . ."); FLA. CONST. art. I, § 2 ("All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness . . . . No person shall be deprived of any right because of . . . religion . . . ."); GA. CONST. art. I, § I ("No person shall be denied the equal protection of the laws."); IDAHO CONST. art. I, § 1 ("All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty . . . [and] pursuing happiness . . . ."); ILL. CONST. art. I, § 2 ("No person shall be . . . denied the equal protection of the laws."), ILL. CONST. art. I, § 18 ("The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."); IND. CONST. art. I, § 1 ("[A]ll people are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness . . . ."), IND. CONST. art. I, § 23 ("The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."); IOWA CONST. art. I, § 1 ("All men are, by nature, free and equal, and have certain inalienable rights – among which are those of enjoying and defending life and liberty . . . and pursuing and obtaining safety and happiness."), IOWA CONST. art. I, § 6 ("All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or

immunities, which, upon the same terms shall not equally belong to all citizens."); KAN. CONST. Bill of Rights, § 1 ("All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."); LA. CONST. art. I, § 3 ("No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations."); MASS. CONST. art. I ("All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties . . . in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex . . . ."), MASS. CONST. art. III ("[A]ll religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law."); ME. CONST. art. I, § 1 ("All people are born equally free and independent, and have certain natural, inherent and inalienable rights, among which are those of enjoying and defending life and liberty . . . and of pursuing and obtaining safety and happiness."), ME. CONST. art. I, § 3 ("[A]ll persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law . . . ."), ME. CONST. art. I, § 6-A ("No person shall be . . . denied the equal protection of the laws, nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof."); MD. CONST. art. XXXVI ("[A]ll persons are equally entitled to protection in their religious liberty . . . ."), MD. CONST. art. XLVI ("Equality of rights under the law shall not be abridged or denied because of sex."); MICH. CONST. art. I, § 2 ("No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion."); MO. CONST. art. I, § 2 ("[A]ll persons have a natural right to life, liberty, the pursuit of happiness . . . all persons are created equal and are entitled to equal rights and opportunity under the law . . . ."); NEV. CONST. art I, § 1 ("All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty . . . and pursuing and obtaining safety and happiness."); N.Y. CONST. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of . . . religion, be subjected to any discrimination in his civil rights . . . by the state or any agency or subdivision of the state."); N.C. CONST. art. I, § 1 ("[A]ll persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty . . . and the pursuit of happiness."), N.C. CONST. art. I, § 19 ("No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of . . . religion . . . ."); OHIO CONST. art. I, § 2 ("All political power is inherent in the people. Government is instituted for their equal protection and benefit . . . ."); OKLA. CONST. art. I, § 2 ("Perfect toleration of religious sentiment shall be secured . . . . Polygamous or plural marriages are forever prohibited."); PA. CONST. art. I, § 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are

Somewhere among the many states with constitutions that explicitly protect rights to equal protection, freedom of religion, liberty, and privacy, it is possible that a court will be found that will enforce those lofty guarantees and provide all its citizens equal access to the marriage institution.

Moreover, if one state recognizes same-sex marriage, then the precedents in other states against same-sex marriage will be seriously

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those of enjoying and defending life and liberty . . . and of pursuing their own happiness."), PA. CONST. art. I, § 28 ("Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."); R.I. CONST. art. I, § 2 ("No person shall be . . . denied equal protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state."); S.D. CONST. art. VI, § 1 ("All men are born equally free and independent, and have certain inherent rights, among which are those of enjoying and defending life and liberty . . . and the pursuit of happiness."), S.D. CONST. art. VI, § 18, ("No law shall be passed granting to any citizen, class of citizens . . . privileges or immunities which upon the same terms shall not equally belong to all citizens . . . ."), S.D. CONST. art. VI, § 26 ("All political power is inherent in the people, and all free government is founded on their authority, and is instituted for their equal protection and benefit . . . ."); TEX. CONST. art. I, § 3 ("All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."), TEX. CONST. art. I, § 3a ("Equality under the law shall not be denied or abridged because of sex . . . . This amendment is self-operative."), TEX. CONST. art. I, § 6 ("no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship."); UTAH CONST. art. I, § 2 ("All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit . . . ."), UTAH CONST. art. III, ("Perfect toleration of religious sentiment is guaranteed. . . . [B]ut polygamous or plural marriages are forever prohibited."), UTAH CONST. art. IV, § 1 ("Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges."); VA. CONST. art. I, § 1 ("[A]ll men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty . . . and pursuing and obtaining happiness . . . ."), VA. CONST. art. I, § 16 ("[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience. . . . [T]he General Assembly shall not . . . confer any peculiar privileges or advantages on any sect or denomination . . . ."); WYO. CONST. art. I, § 2 ("In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal."), WYO. CONST. art. VI, § 1 ("Both male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges.").

undermined, as they rest on the false assumption that same-sex marriage is impossible. Establishing same-sex marriage in even one American state would expose the falsehood of the other states' circular argument against same-sex marriage. As a result, the success of a same-sex marriage appeal in one state would be very likely to lead to success in other states as well. Even without additional litigation, the recognition of same-sex marriage by one state could give legal validity to same-sex marriages in every state if the first state allows out-of-state citizens to marry under its laws. As one court has noted: "It is the generally accepted rule that a marriage valid where the ceremony is performed is valid everywhere. There are, however, exceptions to that rule . . . ."[180] Unless states make a special exception to avoid recognizing the validity of same-sex marriage, the establishment in one state of valid same-sex marriage procedures that do not require in-state residence would extend legal validity to same-sex marriage in every state.

Conceivably, the recognition of same-sex marriage in one state could result in a successful United States Supreme Court decision, as the equal protection claim of citizens in other states would be made more obvious. Such a decision would, of course, bind every state, and would have the advantage of addressing federal discrimination as well.

V. Conclusion

Existing statutes and case law deny equal protection of marriage laws to same-sex couples.[181] Same-sex couples with children often must take special precautions to protect their family relationships; where these precautions are incomplete, and where the law fails to extend protection to private agreements, the children of

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[180] Catalano v. Catalano, 170 A.2d 726 (Conn. 1961) (refusing to recognize the validity of an incestuous marriage made valid in Italy).

[181] The denial of equal protection of marriage laws can also affect couples who may be considered opposite-sex in some jurisdictions but not in others. See *supra* note 37 for a discussion of the validity of marriages involving transsexuals and the complications involved in defining gender in opposite terms.

families headed by same-sex couples may suffer.[182] This inequity continues despite state and federal constitutional provisions expressly guaranteeing equal protection of the laws to all persons,[183] and despite numerous challenges by same-sex couples seeking to enforce these guarantees.[184]

Judicial responses that same-sex couples cannot marry because marriage is inherently an opposite-sex institution are both factually wrong and logically circular; these rationalizations do not support continuing discrimination against same-sex couples. Claims that restriction of marriage to opposite-sex couples is rationally related to a legitimate state purpose of maximizing reproduction are similarly refuted by the existence of large numbers of same-sex couples raising children and opposite-sex couples without children.

Efforts to secure same-sex couples equal protection of the marriage laws are likely to continue until they prevail. As litigation of the issue enters its third unsuccessful decade,[185] legislative initiatives are appearing.[186] Given the importance of marriage as an institution in contemporary society, the validity of same-sex marriage is crucial to any consistent understanding of equal protection of the

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[182] *See, e.g.*, Alison D. v. Virginia M., 572 N.E.2d 27, 30 (N.Y. 1991) (Kaye, J., dissenting) ("the impact of today's decision falls hardest on the children of those relationships, limiting their opportunity to maintain bonds that may be crucial to their development."). *See also* Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783, 1795 (1988) (discussing how in the absence of a legally sanctioned relationship, the children of homosexual couples are without legal protection should the relationship dissolve). *But see* Loftin v. Flournoy, No. 569630-7 (Cal. Super. Ct. Jan. 2, 1985) (granting standard visitation rights to lesbian co-parent despite lack of biological connection to child).

[183] *See, e.g.*, U.S. CONST. amend. XIV, § 1 (guaranteeing equal protection of the laws); N.M. CONST. art. 2, § 18 (same); N.M. CONST. art. 4, § 26 (same); WASH. CONST. art. 1, § 12 (same).

[184] *See, e.g.*, Adams v. Howerton, 673 F.2d 1036, 1038 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982). Note also that the Fourteenth Amendment gives Congress the power to enforce its provisions. U.S. CONST. amend. XIV, § 5.

[185] The history of litigation in this area does include one successful case. *See* M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. 1976) (upholding the validity of a marriage between a male and a person who had been born male but who completed gender reassignment surgery). For a discussion of *M.T. v. J.T.*, see *supra* note 37.

[186] *See* Jonathan P. Hicks, *A Legal Threshold is Crossed by Gay Couples in New York*, N.Y. TIMES, Mar. 2, 1993, at A1; Kay Longcope, *Gay Couples Fight for Spousal Rights*, BOSTON GLOBE, Mar. 4, 1991, at 38.

laws and the freedom all persons should be able to expect in making decisions about their own lives.

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