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Loving, Baehr, and the Right to Marry: On Legal Argumentation and Sophistical Rhetoric

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I. INTRODUCTION

Over thirty years ago, the United States Supreme Court held, in *Loving v. Virginia*,¹ that states were precluded from prohibiting an individual from marrying someone of a different race.² In *Baehr v. Lewin*,³ a plurality of the Supreme Court of Hawaii held that the Hawaii same-sex marriage ban implicated equal protection guarantees, remanding the case to give the state an opportunity to establish that it had a compelling interest in maintaining such a ban.⁴ Commentators have criticized *Baehr*, claiming that: 1) the plurality's reliance on *Loving* was misplaced because that case allegedly had no bearing on the issue before the court; and 2) the plurality's reasoning would suggest that the state was precluded from enacting any marital restrictions, for example, prohibitions on incestuous or polygamous marriages.⁵ Yet, a consideration of several cases in which interracial

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1. 388 U.S. 1 (1967).

2. *Id.* at 12.

3. 852 P.2d 44 (Haw. 1993), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

4. *Id.* at 68.

5. See, e.g., Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219 (1998); David Orgon Coolidge, *Playing the*

marriage bans have been challenged helps to illustrate why cases involving such challenges are much more relevant than commentators are willing to admit, and why a state's being required to recognize same-sex marriages would not entail that incestuous or polygamous marriages would also have to be recognized.

Part II of this article discusses some of the various respects in which *Loving* and *Baehr* are in fact analogous, commentators' claims to the contrary notwithstanding. Part III discusses the rhetorical claim that recognition of same-sex marriages would entail that no marital prohibitions are constitutionally permissible, concluding that this involves a misunderstanding of the relevant law and is only a repetition of the kinds of false claims that were made when theorists argued that interracial marriages should not be recognized. The cases involving interracial marriage are important to consider because they illustrate both how marital laws can invidiously discriminate to deny people their fundamental rights and how existing marital laws can be struck down without thereby establishing that no marital restrictions are constitutionally permissible.

II. THE *LOVING* ANALOGY

In *Loving v. Virginia*,⁶ the United States Supreme Court struck down Virginia's ban on interracial marriage because it violated the Fourteenth Amendment's Equal Protection and Due Process Clauses.⁷ Realizing that *Loving* might carry great "rhetorical punch" in the same-sex marriage debate, commentators discuss respects in which the statutory scheme in *Loving* was different from the statutory scheme in *Baehr*.⁸ Yet, many of the differences trumpeted by commentators are legally irrelevant, and those differences that are legally relevant are often misrepresented either in how or in why they are important. These exaggerations and misrepresentations only serve to underscore the strength of the *Loving* analogy. While there of course are differences between the *Loving* and *Baehr* cases, those differences are much less legally significant than commentators are willing to admit.

Loving Card: *Same-Sex Marriage and the Politics of Analogy*, 12 *BYU J. PUB. L.* 201 (1998).

6. 388 U.S. 1 (1967).

7. *Id.* at 12.

8. See Coolidge, *supra* note 5.

A. *Making Marriage a Crime*

Commentators rightly point out that *Loving* involved a criminal conviction, while *Baehr* did not.⁹ Thus, at issue in *Loving* was not only the refusal of the State of Virginia to recognize the marriage of Mildred Jeter and Richard Loving,¹⁰ but also the state's having convicted each of them of attempting to marry a partner of a different race.¹¹ In contrast, in *Baehr*, the plaintiffs had sought a declaration of the unconstitutionality of the Hawaii statute, but had neither been charged with nor convicted of having committed any crime.¹²

Surprisingly, commentators fail to explain why that difference is important and why it should have any role in determining whether *Loving* casts any light on the issues implicated in the same-sex marriage debate. Yet, to point to differences without explaining how or even whether they are important¹³ is to offer rhetoric rather than legal argument.¹⁴ Indeed, when the claim is that cases are *analogous* rather than identical, it is of course possible to identify differences between the cases and, thus, the essential part of the analysis is in explaining why the identified differences are legally significant.¹⁵ When this essential element is left undone, no headway can be

9. See *id.* at 219; see also Lynne Marie Kohm, *Liberty And Marriage—Baehr and Beyond: Due Process in 1998*, 12 *BYU J. PUB. L.* 253, 254 (1998) (pointing out that the Lovings had been convicted of a crime).

10. *Loving*, 388 U.S. at 4 (discussing the statutory scheme which “automatically voids all marriages between ‘a white person and a colored person’ without any judicial proceeding”) (citing VA. CODE ANN. § 20-57 (1960)).

11. See *id.* at 4 n.3.

12. *Baehr*, 852 P.2d at 48–49 (plaintiffs were seeking a declaration of unconstitutionality and an injunction prohibiting the future withholding of marriage licenses on that sole basis).

13. See Coolidge, *supra* note 5, at 220 (discussing “important differences between *Loving* and *Baehr*” without explaining how many of those differences are legally significant).

14. Ironically, some commentators fail to explain the legal significance of their points and, at the same time, claim that their *opponents* are failing to offer legal argumentation. See generally *id.* at 201–04 (stating that those advocating ‘same-sex marriage’ are not making a legal argument).

15. It is for this reason, among others, that much of the natural law debate about same-sex marriage is disappointing. Not only do theorists like Professors Finnis, George, Bradley, and others offer arguments which are internally inconsistent, but many of these commentators seem to ignore that these discussions have very little to do with the laws that states actually have enacted. See generally Mark Strasser, *Natural Law and Same-Sex Marriage*, 48 *DEPAUL L. REV.* 51 (1998); Mark Strasser, *Marital Acts, Morality, and the Right to Privacy*, 30 *N.M. L. REV.* (forthcoming 1999). Other commentators also do not seem to appreciate that the discussions of natural law should be made in light of existing laws and

made in determining whether one case casts light on how another case should be decided.

Consider what the argument focusing on the fact of criminal conviction in one case and not the other might look like and how it might be supported. Commentators might suggest that *the* fatal weakness in *Loving* was that Ms. Jeter and Mr. Loving had been charged with and convicted of having attempted to marry each other when the law had precluded their marrying. However, if this argument is to have import for the discussion at issue, these commentators must argue that the conviction was *the* fatal weakness rather than *a* fatal weakness. Otherwise, for example, the fact that Virginia unconstitutionally limited the right to marry and *in addition* unconstitutionally criminalized the attempt to marry someone of a different race would hardly undermine a claim that a different state's limitation on the right to marry was unconstitutional, even if that latter state did not, in addition, criminalize the attempt. Thus, those pointing out that *Loving* involved a conviction and *Baehr* did not, are implicitly suggesting that the fact of criminalization is somehow essential and that Virginia's laws may not have been held unconstitutional if only the state had not criminalized the attempt to marry. *Were* that an accurate description of the law, commentators might claim with plausibility that Hawaii's refusal to permit same-sex marriages was constitutionally permissible, given that the state did not also criminalize the attempt to marry. However, that is a misinterpretation of the relevant case law and thus cannot be used to support the constitutionality of same-sex marriage bans.

To understand why, it is helpful to consider the arguments that may be offered to support the claim that *Loving's* fatal weakness involved the convictions. Commentators may claim to find implicit support for that interpretation when examining two cases involving Virginia's anti-miscegenation statutes. In *Naim v. Naim*,¹⁶ the Supreme Court refused to hear a challenge to Virginia's holding that an interracial marriage was void because, the Court suggested, the case was "devoid of a properly presented federal question."¹⁷ In *Naim*, no criminal charges had been filed and the only issue was whether the court below had erred when holding that the interracial marriage at issue was void.¹⁸ However, in *Loving*, where a

policies if indeed we are discussing whether the state should recognize same-sex marriage. See, e.g., Andrew Koppelman, *Forum: Sexual Morality and the Possibility of "Same-Sex Marriage" Is Marriage Inherently Heterosexual?*, 42 AM J. JURIS 51 (1997). Professor Koppelman spends remarkably little time discussing why these natural law arguments (regardless of their internal benefits and drawbacks) have anything to do with existing laws and policies. *Id.*

16. 350 U.S. 985 (1956).

17. *Id.* at 985.

18. *Id.*; see *Naim v. Naim*, 87 S.E.2d 749, 750 (Va. 1955).

conviction was at issue, the Court heard the case and invalidated the statutory scheme that had not been disturbed in *Naim*.¹⁹ It might be thought that the distinguishing feature of the two cases is that a criminal conviction was involved in one and not the other, and that it was this feature that mandated the result in *Loving*.

Support for such a view might be found in Justice Stewart's *Loving* concurrence where he emphasized that the Constitution prohibits making the *criminality* of an act depend upon the race of the actor.²⁰ Thus, were one *only* to consider the Court's claim in *Naim* that no federal question had been presented by the state's refusal to recognize an interracial marriage,²¹ the fact that there was a federal issue presented in *Loving*, and Justice Stewart's concurrence, one might conclude that the Lovings' having been convicted was legally significant. However, there are fatal weaknesses in such an interpretation, since it neither accounts for the *Loving* opinion itself nor for the Court's subsequent right to marry jurisprudence. Indeed, Justice Stewart's having only concurred in the judgment is a strong signal that the above interpretation simply misrepresents the propositions for which *Loving* stands.

Justice Stewart's *Loving* concurrence is better understood in light of his concurrence in *McLaughlin v. Florida*.²² At issue in *McLaughlin* was Florida's making interracial fornication and adultery a separate crime which was to be more severely punished than intra-racial fornication and adultery.²³ The Court struck down Florida's statutory scheme.²⁴ In his concurrence, Justice Stewart made clear that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor."²⁵

The State of Florida had argued that its criminal statute bolstered its anti-miscegenation statute, that its interracial marriage ban was "immune from attack under the Equal Protection Clause," and that the state's interracial cohabitation law was "ancillary to and serve[d] the same purpose as the miscegenation law itself."²⁶ Basically, the State of Florida argued that it prohibited interracial marriage, that the state's prohibition of such unions

19. *Loving*, 388 U.S. at 1.

20. *Id.* at 13 (Stewart, J., concurring) (citing *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964) (Stewart, J., concurring)).

21. The Court's actual claim had been that no federal question had properly been presented, perhaps leaving room for an eventual challenge, although that possibility will not be explored here.

22. 379 U.S. 184, 198 (1964) (Stewart, J., concurring).

23. *See id.* at 185 n.1 (specifying different crimes and penalties).

24. *Id.* at 196.

25. *Id.* at 198 (Stewart, J., concurring).

26. *Id.* at 195.

was clearly constitutional, and that the state's prohibiting non-marital interracial sexual relations served the same purposes as did the state's prohibiting such marriages.²⁷

The United States Supreme Court rejected Florida's argument, although in doing so, the Court neither said that states were precluded from prohibiting interracial marriage²⁸ nor that states were precluded from using criminal statutes to bolster their marriage laws.²⁹ The Court instead took a different tack, suggesting that the state's goals could be as well served by other existing laws.³⁰ The Court pointed out that other statutory provisions "which are neutral as to race express a general and strong state policy against promiscuous conduct, whether engaged in by those who are married, those who may marry or those who may not," and that the existing statutes, "if enforced, would reach illicit relations of any kind and in this way protect the integrity of the marriage laws of the State, including what is claimed to be a valid ban on interracial marriage."³¹ Thus, the Court suggested that Florida could serve its goals of deterring interracial marriages, assuming for the sake of argument that such a goal was legitimate,³² by enforcing its "neutral" statutes prohibiting non-marital relations *and* its marriage laws, making it impossible for interracial couples to have marital relations.³³ The *McLaughlin* Court struck down the statute at issue because the state had failed to establish that the statute was "a necessary adjunct to the State's ban on interracial marriage," given the existing laws which might have been used to deter the non-marital conduct.³⁴

The *McLaughlin* Court's ruling made it clear that Florida would be able to punish interracial couples who had married and then had sexual relations, since the state's anti-miscegenation law³⁵ would make the marriage null and of no legal effect, and the sexual relations might then be treated as either fornication or as lewd and lascivious behavior.³⁶ Further, on at least one

27. See *McLaughlin*, 379 U.S. at 195.

28. See *id.* at 196. The Court expressly refused to express "any views about the State's prohibition of interracial marriage." *Id.*

29. *Id.*

30. *Id.*

31. *McLaughlin*, 379 U.S. at 196.

32. See *id.* at 195 (noting hypothetically that "even if we posit the constitutionality of the ban against the marriage of a Negro and a white . . .").

33. *Id.*

34. *Id.* at 196.

35. Ch. 59, § 13, 1832 Fla. laws 374, 376, *repealed by*, ch. 69-195, § 1, 1969 Fla. Laws 770, 771.

36. See *McLaughlin*, 379 U.S. at 185 n.1 for a specification of the elements of each crime.

reading of *McLaughlin*, Florida could have adopted a different tack to achieve its goals without offending constitutional guarantees.

Suppose that Florida had feared that its existing punishments of fornication and adultery were not sufficiently severe to deter individuals from having interracial sexual relations. Presumably, this was at least one of the reasons that the state had made such relations a separate crime subject to a more severe penalty. Suppose further that the state had expanded the range of possible punishments for committing fornication or adultery to include the possible penalties that might have been imposed under the statute criminalizing interracial relations at issue in *McLaughlin*.³⁷ By taking the above steps, the state would have been able to impose the same penalties as it did under the statutory scheme found unconstitutional in *McLaughlin* and, according to one formulation of Justice Stewart's view, might nonetheless not have violated the Constitution.

Bracketing Justice Stewart's comments for a moment, the statutory scheme described above would have been much more difficult to challenge than the one at issue in *McLaughlin*, since this amended scheme would not have involved facial discrimination. Certainly, if under that modified scheme the only individuals charged with and convicted of these crimes were married to someone of another race, then the Court *might* have held that equal protection guarantees had been violated because the law had been "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights."³⁸

However, because the imposition of particular penalties might seem so fact-dependent and because many types of couples might be convicted of such crimes, it would be harder to establish that there had been selective prosecution if the state was less blatant with respect to its prosecution choices. Even if, for example, it could be established that interracial couples were receiving more severe penalties than were intra-racial couples for having committed adultery or fornication, the Court might turn a blind eye to such evidence.³⁹ In any event, Justice Stewart's articulated worry that the criminality of the act cannot depend upon the race of the actor would not be at issue in this modified statutory scheme, since adultery, fornication, and lewd and lascivious behavior would all be prohibited regardless of the races of the parties. If his sole constitutional worry was that the criminal statute explicitly incorporated race, then the same invidious results might have been achieved more subtly without implicating his constitutional concerns.

37. *See id.* (discussing the penalties).

38. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

39. *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987) (stating "[t]hus, if we accepted *McCleskey's* claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty") (footnote omitted).

It is, of course, not suggested that Florida should have adopted the above scheme but merely that Justice Stewart's stated objection would be easy for a state to avoid, while both preventing interracial marriage and punishing those who attempted to contract such marriages. Yet, the *Loving* opinion precluded far more than did Justice Stewart's concurrence. Not only does the opinion preclude a state's explicitly criminalizing the attempt to marry someone of a different race, but it also precludes a state's barring interracial couples from marrying.⁴⁰ Thus, while both *McLaughlin* and *Loving* struck down criminal statutes,⁴¹ *Loving* did far more than that, since it also invalidated the laws barring interracial marriage then existing in several states.⁴²

The *Loving* Court offered two bases upon which the Virginia anti-miscegenation law would have been struck down even had there not in addition been statutes criminalizing the attempt to marry someone of a different race.⁴³ The Court wrote that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," suggesting that the state's denial of the Lovings' right to marry violated due process guarantees⁴⁴ and that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."⁴⁵

Arguably, the proper interpretation of *Loving* can only be established upon an examination of subsequent decisions concerning the right to marry generally or, perhaps, the *Loving* decision specifically. Yet, the subsequent case law also establishes that *Loving* was about more than merely preventing states from criminalizing the attempt to marry a partner of a different race, since in subsequent case law *Loving* stands for the proposition that "the right to marry is of fundamental importance."⁴⁶ Thus, while it is true that *Loving* involved criminal convictions and *Baehr* did not, and it is of course true that a year's imprisonment is not to be treated lightly,⁴⁷ it is simply wrong to

40. See *Loving*, 388 U.S. at 1.

41. See Robert A. Destro, Symposium, *Law & the Politics of Marriage: Loving v. Virginia After 30 Years*, Introduction, 47 CATH. U. L. REV. 1207, 1213 (1998) (pointing out that both cases involved criminal statutes).

42. See *id.* at 1207-08 (suggesting that several states had anti-miscegenation laws).

43. *Loving*, 388 U.S. at 12.

44. *Id.* (stating that "[t]hese statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment").

45. *Id.*

46. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting that "the 'liberty' specially protected by the Due Process Clause includes the right to marry") (citing *Loving v. Virginia*, 388 U.S. 1 (1967)); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (stating that "[t]he leading decision of this Court on the right to marry is *Loving v. Virginia*").

47. The Lovings were sentenced to one year in jail. *Loving*, 388 U.S. at 3. The

suggest that the fatal weakness of the Virginia statutory framework was that criminal penalties were involved. If Virginia had merely refused to recognize the Lovings' relationship,⁴⁸ the state's law would still have been unconstitutional.⁴⁹ Thus, while it is true that criminal penalties were at issue in *Loving* but not in *Baehr*, that has nothing to do with whether *Loving* is instructive with respect to how *Baehr* should be decided.

Ironically, had the difficulty presented by *Loving* been that there is something wrong with using criminal statutes to buttress the marriage laws, this would have had implications for other state statutes. Consider state statutes that preclude marriages between individuals closely related by blood and that also criminalize the violation of those incest statutes.⁵⁰ Were states precluded from passing criminal laws to bolster their marriage statutes, then it would seem that those laws would be unconstitutional. The point here, of course, is neither that incest and anti-miscegenation laws are analogous⁵¹ nor that the Constitution precludes states from using criminal statutes to bolster their marriage laws, but merely that a blanket rule suggesting that criminal laws could not be used to bolster such laws would have wider implications than originally thought.

sentences were suspended for a period of 25 years on the condition that they leave the state and not return together during that time. *Id.*

48. See Kohm, *supra* note 9, at 256–57 (suggesting that an important distinction was that in *Loving*, state proceedings were instituted against the couple, whereas in *Baehr*, the state had merely refused to “sanction certain relationships”); see also Coolidge, *supra* note 5, at 219 (distinguishing between *Loving* and *Baehr* by suggesting that in Hawaii “the marriage law is positive, not prohibitory”). Professor Coolidge implies that nothing was amiss in the Hawaii case because “[i]n Hawaii, no one was charged with a felony; the State simply sent them a polite letter and returned their marriage applications.” Coolidge, *supra* note 5, at 219.

49. Ironically, Professor Kohm recognizes that *Loving* is about the right to marry rather than about the right to have state proceedings instituted against one when one does marry. See Kohm, *supra* note 9, at 254 (noting that the *Loving* Court held that “liberty and freedom to marry is indeed a fundamental right”). She nonetheless distinguishes between *Baehr* and *Loving* by discussing whether proceedings had been instituted against the couple. *See id.*

50. See, e.g., ALA. CODE § 13A-13-3(a), (c) (1975) (specifying the family members whom individuals cannot marry and the kind of felony that would be committed for attempting to contract such a marriage); ARK. CODE ANN. § 9-11-106 (a), (b) (Michie 1987) (specifying which marriages would violate the incest prohibition and specifying the criminal penalty for attempting to contract such a marriage); MO. ANN. STAT. § 568.020 (West 1999) (specifying the marriages that would violate incest prohibition and the type of felony involved in the attempt to contract that marriage).

51. For a discussion of the historical claim that they were analogous, see *infra* notes 125–28 and accompanying text.

B. *On Using the Courts to Vindicate Rights*

Some commentators imply that there is something illicit in using the courts to vindicate one's right to marry, suggesting that those who want the right to marry a same-sex partner should try to convince their legislators that the marriage laws should be changed rather than thwart the democratic process by making use of the courts.⁵² Thus, these commentators imply that would-be married same-sex couples who are currently unable to convince the legislature of the wisdom of recognizing same-sex marriage should simply keep trying until they ultimately are successful or, perhaps, until they are no longer interested in marrying.⁵³ These commentators fail to mention that the same argument might be offered in *all* of the cases challenging marital regulations and is no more correct in this context than it was in those.

Ironically, those who claim that *Loving* and *Baehr* are so different fail to mention that this is a respect in which the cases may be thought to be analogous. Thus, it could be argued that the Lovings were trying to circumvent the democratic process by using the courts to have their marriage validated. Indeed, one of the arguments offered by the State of Virginia was that the "Court should defer to the wisdom of the state legislature."⁵⁴ The United States Supreme Court wisely rejected the invitation to do so, notwithstanding the view offered by the Supreme Court of Virginia that striking down an anti-miscegenation law "would be judicial legislation in the

52. See Coolidge, *supra* note 5, at 235 (complaining that same-sex marriage proponents want "to use *Loving* to remove the current debate about marriage from the democratic process"); Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 739-40 (1998) (implying that there is something illicit in having the courts recognize same-sex marriage because they are not "politically accountable to the people"); and Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 5 (1996) ("[c]onstitutionalizing same-sex marriage raises serious concerns about the delicate balance of federalism, about judicial overreaching, and about principles of representative government, in addition to concerns about the revolutionary effects of same-sex marriage"). Cf. Anita K. Blair, *Constitutional Equal Protection, Strict Scrutiny, and the Politics of Marriage Law*, 47 CATH. U. L. REV. 1231, 1239 (1998) (complaining that if the Hawaii Supreme Court were to uphold the trial court's having found that the state same-sex marriage ban was unconstitutional on state constitutional grounds, the court might thereby "foreclose an important public debate").

53. Cf. Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 57 (1996) (suggesting that such marriages should not be recognized because a majority of Americans have not been persuaded that such unions should be legalized).

54. *Loving*, 388 U.S. at 8.

rawest sense of that term.”⁵⁵ The Court further rejected the view that the arguments against such marriage bans “are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate.”⁵⁶

The United States Supreme Court decided that it was appropriate for the judiciary to examine the statutory scheme at issue in *Loving*, given the fundamental nature of the interest at stake.⁵⁷ The Court made clear that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women].”⁵⁸ Furthermore, this freedom was simply too important to be withheld until the legislature could be convinced to change the anti-miscegenation law.⁵⁹

*Zablocki v. Redhail*⁶⁰ involved a challenge to a Wisconsin statute precluding noncustodial parents from marrying under certain conditions.⁶¹ One infers that these commentators would suggest that Mr. Redhail should not have tried to vindicate his right to marry his pregnant fiancée through the courts, but instead should simply have spoken to the members of the legislature.⁶² After all, to make use of the courts to establish one’s right to marry is to suggest that “citizens [are] too dangerous to be trusted with . . . judgments about the common good.”⁶³

At least one of the difficulties with these commentators’ position is that it undervalues the importance of the right at issue. As the *Loving* Court suggested, challenges to marriage regulations should not be viewed as if they were cases involving mere economic regulation in which “the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures.”⁶⁴ The *Loving* Court described marriage as involving a “fundamental

55. *Loving v. Virginia*, 147 S.E.2d 78, 82 (Va. 1966).

56. *Id.*

57. *See Loving*, 388 U.S. at 12 (stating “[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law”).

58. *Id.*

59. *Id.*

60. 434 U.S. 374 (1978).

61. *Id.* at 374–75.

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

63. Coolidge, *supra* note 5, at 236.

64. *Loving*, 388 U.S. at 9.

freedom”⁶⁵ and, as the *Zablocki* Court subsequently made clear, “the right to marry is of fundamental importance for all individuals.”⁶⁶ Were individuals precluded from making use of the courts to vindicate their marriage rights, one of the checks built into our legal system would be destroyed, namely, making sure that when a statutory classification “interfere[s] directly and substantially with the right to marry,”⁶⁷ the classification will not be upheld “unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”⁶⁸

It is, at the very least, surprising and disappointing that commentators would suggest that it is somehow hypocritical to vindicate one’s right to equal treatment through the courts.⁶⁹ In a country in which the electorate of one state recently tried to amend their state constitution to include a provision adversely affecting lesbians, gays, and bisexuals “not to further a proper legislative end but to make them unequal to everyone else,”⁷⁰ it is nothing short of amazing that commentators would nonetheless suggest that members of that group who make use of the courts to protect their rights are somehow doing something hypocritical and inappropriate.

C. *Classifications Based on Race and Sex*

Commentators make a variety of disingenuous arguments when comparing *Loving* and *Baehr*.⁷¹ Nonetheless, it is not argued here that there are no important differences between the two cases. On the contrary, differences do exist, although they tend to be represented by commentators in a way that obscures rather than clarifies the issues. For example, *Loving* involves a classification based on race,⁷² whereas *Baehr* involves a classification based on sex.⁷³ That difference is not necessarily important—in some states, sex-based classifications are subjected to the same degree of

65. *Id.* at 12.

66. *Zablocki*, 434 U.S. at 384.

67. *Id.* at 386–87.

68. *Id.* at 388.

69. See Coolidge, *supra* note 5, at 236 (noting “[t]he plaintiffs claim that their goal is to be treated as equal citizens, yet their attorneys want to withdraw the resolution of the question from their fellow citizens”).

70. See *Romer v. Evans*, 517 U.S. 620, 635 (1996).

71. See, e.g., *supra* notes 9–51 and accompanying text (discussing the importance of whether a conviction is at issue, given that *Loving* precludes anti-miscegenation statutes even if there are no criminal statutes to bolster that law); *supra* notes 52–70 and accompanying text (discussing the claim that same-sex couples circumvent the political process when the same claim might have been made in *Loving* and other cases).

72. *Loving*, 388 U.S. at 2.

73. *Baehr*, 852 P.2d at 49.

scrutiny as are race-based classifications because of state constitutional protections.⁷⁴ However, the *United States Constitution* imposes a lower level of scrutiny on statutes incorporating sex-based classifications than it does on statutes incorporating race-based classifications. Thus, a statute incorporating the former might pass constitutional muster, even if an analogous statute incorporating the latter would not.⁷⁵ However, even the above difference is often characterized in a misleading, if not simply inaccurate, way.

Consider the claim that same-sex marriage bans classify on the basis of sex because the sexes of the respective parties is what precludes them from marrying—a man may marry a woman, but not a man; and a woman may marry a man, but not a woman.⁷⁶ A separate question is whether the state interest in classifying on the basis of sex is sufficiently important for such a classification to withstand constitutional scrutiny. Thus, it is one thing to say that a statute *classifies* on the basis of sex and a different one to say that a statute *invidiously discriminates* on the basis of sex, but it should not be difficult to understand how a statute which says that a marriage may only be between a man and a woman⁷⁷ at the very least does the former.

Nonetheless, some commentators reject that contention. For example, Professor Duncan suggests that “[d]ual-gender marriage laws do not classify on the basis of gender,” since they “merely define marriage as a relationship between one man and one woman and apply the same neutral rules to both men and women.”⁷⁸ He suggests that “[p]roperly understood, the same-sex marriage issue is about an eminently reasonable distinction drawn on the basis of sexual orientation.”⁷⁹

74. See *id.* at 67 (holding that the state constitution requires that sex-based classifications, like race-based classifications, be subjected to strict scrutiny).

75. See Kohm, *supra* note 9, at 260–61 (stating “[t]he central problem in making the *Loving* analogy to same-sex marriage petitions is that race is afforded the strictest scrutiny for constitutional protection, while gender or sex is not and has never been afforded the strictest scrutiny under the federal constitution”); see also Wardle, *supra* note 53, at 83 (“[i]n terms of the history, purpose, and application of the Fourteenth Amendment, race and gender are not fungible categories because race triggers the strictest standard of judicial scrutiny, whereas gender discrimination invokes an intermediate, albeit heightened, standard of judicial review”).

76. See Baehr, 852 P.2d at 60; see also Wardle, *supra* note 53, at 83 (describing the argument that “since conventional marriage laws allow a man, for example, to marry a woman but not a man, they discriminate on the basis of sex in violation of the Equal Protection Clause”). Professor Wardle does not subscribe to that argument. See Wardle, *supra* note 53, at 83 (describing the argument as “flawed”).

77. See HAW. REV. STAT. § 572-1 (Supp. 1998).

78. Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 *BYU J. PUB. L.* 239, 243 (1998).

79. *Id.*

Professor Duncan's view seems to conflate the two questions that the *Baehr* plurality was keeping separate: 1) whether the classification was sex-based; and 2) whether the sex-based classification was legitimate.⁸⁰ Surprisingly, he realizes that the classification focuses on whether the parties who wish to marry are of the same-sex—dual-gender laws are at issue.⁸¹ However, because the classification is allegedly reasonable, the nature of the classification itself somehow changes from being sex-based to being orientation-based instead.⁸² Yet, whether a classification is sex-based rather than orientation-based has nothing to do with whether the classification is wise or even constitutional, and thus the implicit suggestion that the reasonableness of the classification determines its *nature* is simply mistaken.

Suppose that two heterosexuals wished to marry because they wished to secure particular government benefits that they might not otherwise be able to secure.⁸³ The question for Professor Duncan would be whether these individuals could marry. If not, for example, because the statute expressly states that only a man may marry a woman and only a woman may marry a man, then it seems clear that the statute is sex rather than orientation-based. Further, if that couple could marry, notwithstanding the explicit textual requirement that they be of different sexes, then a different problem would be presented—a statute allegedly “fair on its face and impartial in appearance,”⁸⁴ because it would “prohibit same sex marriages on the part of professed or nonprofessed heterosexuals, homosexuals, bisexuals, or asexuals,”⁸⁵ would nonetheless have been “applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights.”⁸⁶

Consider a different example. Suppose that a gay man and a lesbian wished to marry each other, perhaps as a way of securing government benefits. The dual-gender law would not preclude their marrying, notwithstanding their having the ‘wrong’ sexual orientation and

80. *Baehr*, 852 P.2d at 67 (pointing out that the dissent has misunderstood the opinion, since the plurality has merely said that the statute involves a sex-based classification and is remanding the case for a determination of whether that classification is invidious).

81. See Duncan, *supra* note 78.

82. See *id.*

83. See Sondrea Joy King, Note, *Ya'll Can't Do That Here: Will Texas Recognize Same-Sex Marriages Validly Contracted in Other States?*, 2 TEX. WESLEYAN L. REV. 515, 551 (1996) (posing a hypothetical of two heterosexual women who wish to marry for economic benefits).

84. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

85. *Baehr*, 852 P.2d at 71 (Heen, J., dissenting).

86. See *Yick Wo*, 118 U.S. at 373–74.

notwithstanding the allegedly “eminently reasonable distinction drawn on the basis of sexual orientation.”⁸⁷

Two issues should not be conflated: 1) the nature of the classification; and 2) the purpose behind the statute. The purpose behind the adoption of a sex-based classification may be to disadvantage individuals with a particular sexual orientation. In that event, the constitutional issue requiring analysis would be whether it is acceptable to employ a sex-based classification to achieve the allegedly important goal of, for example, establishing or reinforcing the societal view that heterosexuals are superior to lesbians, gays, and bisexuals.⁸⁸ While many would argue that this is exactly the sort of societal goal that *Romer* suggests is illegitimate,⁸⁹ Professor Duncan seems to disagree.⁹⁰

To determine whether the sex-based classification implicated in dual-gender statutes promotes sufficiently important goals, the asserted state interests must be subjected to judicial scrutiny. However, as the Supreme Court made clear in *United States v. Virginia*,⁹¹ “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”⁹² Thus, even though heightened scrutiny is not as stringent as strict scrutiny, it should not be thought that it involves a standard that is easy to meet.

Commentators deny that the sex-based classification implicated in same-sex marriage bans involves an invidious distinction.⁹³ After all, the

87. Duncan, *supra* note 78, at 243.

88. *See id.* at 239–40. (discussing the “radical and dangerous agenda” which seeks to “reflect the alleged equal goodness of homosexuality and heterosexuality”).

89. *See* Matthew Coles, *The Meaning of Romer v. Evans*, 48 HASTINGS L.J. 1343, 1361 (1997) (noting “[t]o the Court, sexual orientation discrimination is the moral (if not the legal) equivalent of race and sex discrimination”); Joseph S. Jackson, *Persons of Equal Worth: Romer v. Evans and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 454 (1997) (stating that “[i]n striking down Colorado’s Amendment 2 for seeking to impose second-class status on gays and lesbians, the Supreme Court illuminated the core of equal protection: government must respect the principle that all persons have equal intrinsic worth”).

90. *See* Duncan, *supra* note 78, at 246 (claiming that *Romer* did not “hold that laws that make distinctions on the basis of sexual orientation or relationships are tainted by animus or dislike for a politically unpopular group,” and that Amendment 2 was unconstitutional “only because no legitimate state interest came close to fitting the Amendment’s nearly infinite path of disadvantage”).

91. 518 U.S. 515 (1996).

92. *Id.* at 531 (citations omitted).

93. *See* Coolidge, *supra* note 5, at 208 (suggesting that the distinction is not invidious); *see also* Wardle, *supra* note 53, at 62 (arguing that “laws permitting only heterosexual marriage could survive strict judicial scrutiny”).

statutes treat men and women in precisely the same way,⁹⁴ since each is precluded from marrying someone of the same sex.⁹⁵ Yet, that alone will not suffice to establish the permissibility of the statute, since the Court has already made clear that “[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities,”⁹⁶ and, in fact, the Court rejected the analogous argument in *Loving*.⁹⁷ Thus, the State of Virginia argued that while its anti-miscegenation statutes employed racial classifications, the “reliance on racial classifications, [did] not constitute an invidious discrimination based upon race” because they applied equally to whites and blacks.⁹⁸ Because the classification (allegedly) was not invidious, the state claimed that “the question of constitutionality . . . [was] whether there was any rational basis for a state to treat interracial marriages differently from other marriages.”⁹⁹ However, the Court rejected “the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations.”¹⁰⁰

One way to understand the difference between the views expressed by the Court and the State of Virginia in *Loving* helps illuminate one of the points of disagreement between the plurality and the dissent in *Baehr*. Basically, the State of Virginia had argued that because the classification was not invidious, the Court should defer to the legislature.¹⁰¹ The Court rejected that analysis because of the type of classification at issue.¹⁰²

Consider the disagreement between the plurality and the dissent in *Baehr*. The *Baehr* plurality determined that the statute incorporated a sex-based classification and then remanded the case for a determination of whether the classification was invidious.¹⁰³ Judge Heen, in dissent, decided

94. Blair, *supra* note 52, at 1238 (arguing that “[s]ex discrimination simply does not enter into Hawaii’s marriage law: women and men are treated precisely the same”).

95. See Jay Alan Sekulow & John Tuskey, *Sex and Sodomy and Apples and Oranges—Does the Constitution Require States to Grant a Right to Do the Impossible?* 12 *BYU J. PUB. L.* 309, 323 (1998) (stating that “[t]he obvious rejoinder to this argument is that state marriage laws treat men and women alike: Billy may no more marry Bobby than Sue may marry Linda. Thus, these laws discriminate against neither men nor women.”).

96. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

97. Allison Moore, *Loving’s Legacy: The Other Antidiscrimination Principles*, 34 *HARV. C.R.-C.L. L. REV.* 163, 163 (1999) (noting that “*Loving* involved a law that was in fact neutral as between black and white persons who married interracially—punishing them equally for miscegenation”).

98. *Loving*, 388 U.S. at 8.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. See *Baehr*, 852 P.2d at 68.

that the classification was not invidious and thus saw no reason to remand the case for an examination of the state's asserted interests.¹⁰⁴ Judge Heen was determining whether heightened scrutiny was appropriate in light of whether he believed the classification invidious instead of imposing heightened scrutiny to determine whether an invidious distinction had been made.¹⁰⁵ Yet, as the *Baehr* plurality recognized, the relevant jurisprudence requires that when a statute incorporates a sex-based classification, the court should impose heightened scrutiny to determine whether that classification is invidious.¹⁰⁶ The court should not decide whether the classification is invidious, and then decide what level of scrutiny to impose.¹⁰⁷

Certainly, Judge Heen is not the first to claim that same-sex marriage bans do not violate equal protection guarantees.¹⁰⁸ Of course, the same might be said of the view expressed by the Supreme Court of Virginia regarding whether interracial marriage bans violated equal protection guarantees.¹⁰⁹ For example, about eighty years before *Loving* was decided, the Supreme Court of Alabama addressed whether the Equal Protection Clause precluded states from prohibiting interracial marriages.¹¹⁰ The court considered the state's anti-miscegenation statute, which read:

If any white person and any negro, or the descendant of any negro to the third generation inclusive, though one ancestor of each generation was a white person, intermarry, or live in adultery or fornication, with each other, each of them must, on conviction, be imprisoned in the penitentiary, or sentenced to hard labor for the county for not less than two, nor more than seven years.¹¹¹

The court wrote:

What the law declares to be a punishable offense, is, marriage between a white person and a negro. And it no more tolerates it in one of the parties than the other--in a white person than in a negro or mulatto; and each of them is punishable for the offense prohibited, in precisely the same manner and to the same extent.

104. *Id.* at 70.

105. *Id.*

106. *Id.*

107. *Id.*

108. *See, e.g., Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (finding no equal protection violation).

109. *Loving*, 388 U.S. at 1.

110. *See Green v. State*, 58 Ala. 190 (1877).

111. *Id.* at 191.

There is no discrimination made in favor of the white person, either in the capacity to enter into such a relation, or in the penalty.¹¹²

Basically, the court suggested that because both whites and blacks were prohibited from intermarrying and because whites and blacks would be subjected to the same penalties for violating the statute at issue, there was no equal protection violation.¹¹³

It is not as if such reasoning would only have been offered in the 1800s. The Supreme Court of Virginia manifested its approval of such reasoning in *Naim v. Naim* in 1955.¹¹⁴ *Pace v. Alabama*¹¹⁵ was cited in *Naim* with approval.¹¹⁶ The *Pace* Court had denied that equal protection guarantees were violated by a statute punishing interracial fornication or adultery more severely than intra-racial fornication, suggesting, “[w]hatever discrimination is made in the punishment prescribed . . . is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.”¹¹⁷

The Supreme Court of Virginia expressed its approval of its own *Naim* decision in *Loving v. Virginia*,¹¹⁸ expressly stating that it could “find no sound judicial reason . . . to depart from [its] holding in the *Naim* case.”¹¹⁹ Further, notwithstanding the United States Supreme Court’s claim in *McLaughlin* that the “narrow view of the Equal Protection Clause [articulated in *Pace*] was soon swept away,”¹²⁰ the Court refused to hear a case in 1954 in which Alabama’s anti-miscegenation statute was at issue and in which the court specifically cited *Pace* to support its upholding the statute.¹²¹

112. *Id.* at 192.

113. *See id.* at 197 (stating that “[n]o amendment to the Constitution, nor any enactment thereby authorized, is in any degree infringed by the enforcement of the section of the Code, under which the appellant in this cause was convicted and sentenced”); *see also* *State v. Gibson*, 36 Ind. 389, 405 (Ind. 1871) (noting that “[i]t is quite clear to us, that neither the fourteenth amendment nor the civil rights bill has impaired or abrogated the laws of this State on the subject of marriage of whites and negroes”).

114. 87 S.E.2d 749 (Va. 1955), *vacated*, 350 U.S. 891 (1955), *on remand* 90 S.E.2d 849 (Va. 1956) (adhering to previous decision in 87 S.E.2d 749 (Va. 1955) (lacking a properly presented federal question)).

115. 106 U.S. 583 (1883), *overruled by* *McLaughlin v. Florida*, 379 U.S. 184 (1964).

116. *Naim*, 87 S.E.2d at 754.

117. *Pace*, 106 U.S. at 585.

118. 147 S.E.2d 78 (Va. 1966).

119. *Id.* at 82.

120. *McLaughlin*, 379 U.S. at 190.

121. *See* *Jackson v. State*, 72 So. 2d 114, 115 (Ala. Crim. App. 1954), *cert. denied*, 348 U.S. 888 (1954).

The Supreme Court of Virginia was probably as surprised by the *Loving* Court's holding that the anti-miscegenation statute at issue involved invidious discrimination, as were a variety of commentators by the *Baehr* plurality's holding that Hawaii's same-sex marriage ban implicated equal protection guarantees and hence *might* be invidious.¹²² Nonetheless, commentators distinguish between *Loving* and *Baehr* by claiming that the former obviously was invidious and the latter obviously is not. It was not obvious at the time how *Loving* would be decided and, more importantly for purposes here, at best premature to have decided the question in *Baehr* before the state's interests had even been articulated. The point here of course is not that *Loving* was wrongly decided, but that the whole point of the remand in *Baehr* was to find out whether in fact the distinction was invidious.¹²³ To conclude that the Hawaii statute was constitutional, without even examining whether Hawaii could identify important legitimate interests is simply to ignore the applicable test. It simply will not do merely to *assert* that such laws are permissible or, perhaps, that such legitimate state interests exist or that the statutes are sufficiently closely tailored, since that kind of analysis is merely rhetoric and the antithesis of legal argument.¹²⁴

III. INCEST AND POLYGAMY

Some commentators suggest that if the Constitution precludes states from enacting same-sex marriage bans, then the Constitution precludes states from prohibiting any marital unions including incestuous or polygamous ones. However, this involves a misunderstanding both of why the state might be precluded from enacting same-sex marriage bans and of what arguments might be made to justify particular marital restrictions.

A. *The Slippery Slope Argument*

A variety of commentators seem to believe that if the Constitution requires the recognition of same-sex marriages, then it requires the

122. The plurality remanded the case to give the state an opportunity to demonstrate that the ban "furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights." See *Baehr*, 852 P.2d at 68.

123. See Coolidge, *supra* note 5, at 208 (discussing with approval Judge Heen's *Baehr* dissent in which Judge Heen suggested that the Virginia law was based on invidious racial discrimination and the Hawaii law was not based upon invidious sex discrimination).

124. For an extensive analysis of some of the legal issues surrounding same-sex marriage, see MARK STRASSER, *LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION* (1997) and MARK STRASSER, *THE CHALLENGE OF SAME-SEX MARRIAGE: FEDERALIST PRINCIPLES AND CONSTITUTIONAL PROTECTIONS* (1999).

recognition of all marriages.¹²⁵ Yet, such a claim involves a variety of misconceptions, as becomes apparent when one considers how the argument has been used in the past.

It should not be surprising that slippery slope concerns were articulated when the issue was whether interracial marriages should be recognized. The Supreme Court of Tennessee suggested that if interracial marriages validly celebrated in other states were recognized by Tennessee, “we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited”¹²⁶ and, further, that the “Turk or Mohammedan, with his numerous wives [could] establish his harem at the doors of the capitol, and we [would be] without remedy.”¹²⁷ Thus, the court apparently believed that the recognition of interracial marriages would dictate that incestuous or polygamous marriages would also have to be recognized.¹²⁸

Worries of the Supreme Court of Tennessee notwithstanding, the Constitution’s requiring the recognition of interracial marriages does not imply that all marriages must be recognized and, in fact, has not led to the abolition of all marital restrictions. The questions at hand whenever a marital regulation is challenged are simply whether there are sufficiently important state interests promoted by banning the union at issue and whether the statute is sufficiently tailored to promote those interests. Where no important state interests are implicated or the statute at issue is not sufficiently tailored to promote important interests, the marital prohibition will not pass constitutional muster. Where the interests are sufficiently important and the statute sufficiently tailored, the Constitution will not stand in the way, even if the Constitution does provide a bar with respect to other marital classifications.

125. See Coombs, *supra* note 5, at 231 (describing the claim offered by others that recognition of same-sex marriage “sends us down a slippery slope that would also protect incest or polygamy”); Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 *FORDHAM L. REV.* 1241, 1249 (1998) (discussing the “familiar invocation of the slippery slope: recognizing same-sex marriage would open the door to the recognition of all manner of relationships, including incest, polygamy, and bestiality”).

126. See *State v. Bell*, 66 *Tenn.* 9, 11 (1872).

127. *Id.*

128. Different issues are implicated when the question is whether to recognize a marriage validly celebrated elsewhere rather than whether to allow the celebration of the marriage locally. See generally Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles’ Refusing to Recognize Same-Sex Marriages*, 66 *U. CIN. L. REV.* 339 (1998). However, that is not relevant for the point being made here.

B. *Equal Protection*

It is especially ironic that the specter of incestuous and polygamous unions has been raised in light of the *Baehr* decision. The *Baehr* plurality *denied* that the same-sex marriage ban implicated substantive due process guarantees.¹²⁹ According to the *Baehr* plurality, the reason that same-sex marriage bans should receive heightened scrutiny is that they involve sex-based classifications.¹³⁰ If the recognition of same-sex marriages is to challenge marital restrictions of incestuous or polygamous relationships, then it must be established how the recognition that same-sex marriage bans classify on the basis of gender somehow establishes (or at least makes more likely) a similar claim about incest or polygamy regulations. Of course, even if such a case could be made, that would merely imply that the state's reasons for prohibiting polygamous or incestuous marriages would have to be examined with heightened scrutiny.¹³¹

It might be thought that polygamy restrictions implicate equal protection guarantees on the basis of religion and, thus, should be subjected to strict scrutiny.¹³² Whether the Constitution requires the recognition of same-sex marriages on equal protection grounds would hardly affect either whether strict scrutiny would be imposed when polygamy restrictions were at issue, or whether such restrictions would be struck down were such scrutiny imposed.¹³³

Arguably, the recognition of same-sex marriages would affect whether polygamous or incestuous unions will be permitted because the latter are no more offensive than the former and, thus, if the former must be recognized then the latter must be as well. However, even were that an accurate description of public opinion, more would have to be asserted, namely, that there should be a new criterion for whether marriages should be recognized—the offensiveness criterion. It would not matter what legitimate state interests were supported by a particular regulation or how closely

129. See *Baehr*, 852 P.2d at 57 (stating that “[a]ccordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise”).

130. See *id.* at 67.

131. For a discussion of why polygamous marriages should not be recognized, see Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997).

132. See Keith Jaasma, *The Religious Freedom Restoration Act: Responding to Smith; Reconsidering Reynolds*, 16 WHITTIER L. REV. 211, 257 (1995) (suggesting that restriction of religiously motivated polygamy should be subjected to strict scrutiny).

133. See, e.g., *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) (suggesting that the state has a compelling interest in maintaining its ban on polygamy), *cert. denied*, 474 U.S. 849 (1985).

tailored the relevant law was. The only question would be how offensive that union was to the general populace, perhaps as determined by a Gallup Poll. Yet, if this purports to represent current law or even what the law should be, "the statement carries its own refutation."¹³⁴ This is a *constitutional* democracy in which the will or tastes of the majority are subject to limitations imposed by the United States Constitution.

The offensiveness criterion has been suggested in the past. When justifying the refusal to recognize an interracial marriage, the Supreme Court of Tennessee described certain incestuous and polygamous relationships and then suggested that "none of these are more revolting, more to be avoided, or more unnatural than the case before us [an interracial marriage]."¹³⁵ That court's analysis should sound a cautionary note, since the recognition or adoption of an offensiveness criterion would mean that a whole host of potential marital unions might be at risk, those involving individuals of different races, religions, or generations might all be found too offensive (according to the tastes of some) to be permitted.¹³⁶ The right to marry is simply too important to be left to the whims of the general populace.

IV. CONCLUSION

Some commentators suggest that *Loving* and *Baehr* are not analogous. However, the differences they cite are often irrelevant and, even when relevant, are often misrepresented in importance or implication. Certainly, bans of interracial and same-sex marriages can be differentiated. The important question is whether those distinctions are relevant to the issues at hand and a surprising number of commentators seem to believe that such a basic element of the analysis need not be offered when same-sex marriage is at issue.

The history of this country's treatment of interracial marriage bans has many important lessons, including how equal protection guarantees can be distorted beyond recognition and how permitting states to enact marriage regulations without having to articulate the interests thereby served can lead to the perpetuation of invidious distinctions. Many of the arguments currently offered in an attempt to establish that same-sex marriages should not be recognized echo the kinds of fallacious arguments that were used in attempts to prevent the recognition of interracial marriages. Those

134. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 443 (1934).

135. *Bell*, 66 Tenn. at 11.

136. A separate issue is whether marriages that were already contracted could be invalidated. That involves a separate question which is beyond the scope of the current discussion. For a discussion of that issue, see generally Mark Strasser, *Constitutional Limitations and Baehr Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Injustice*, 29 RUTGERS L.J. 271 (1998).

arguments were rightly rejected as invalid decades ago and they have not somehow acquired validity over the intervening years.¹³⁷

The constitutionality of same-sex marriage bans can only be determined once states assert their reasons for enacting such statutes. One of the benefits of subjecting these statutes to even heightened scrutiny is that the state is forced to articulate the interests allegedly thereby served, and both the importance of the interests and the methods for attaining them are then subjected to examination. The Court has made clear that when sex-based classifications are at issue, the “justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.”¹³⁸ Further, those justifications “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females,”¹³⁹ and the differences between men and women must not be cause for “denigration of the members of either sex or for artificial constraints on [their] opportunit[ies].”¹⁴⁰

If a justification is to be genuine rather than merely hypothesized, one would expect that the asserted state interest in preventing same-sex partners from marrying would also play a role in preventing others from marrying. If a state interest asserted in cases involving same-sex couples, for example, the alleged importance of the parties’ being able to procreate through their union,¹⁴¹ plays no role in other marital regulations, then one has reason to believe that the interest asserted is not a genuine interest of the state. Of course, an interest can be genuine but nonetheless impermissible because not legitimate. If, for example, the real reason for same-sex marriage bans is to impose a stigma on lesbians, gays, and bisexuals, then the statute may well be closely tailored to promote an illegitimate end, but is nonetheless unconstitutional. If the reasons offered for same-sex marriage bans are invented rather than genuine or are genuine but illegitimate, the Equal Protection Clause will not allow these marital restrictions to stand. If the arguments against same-sex marriage currently put forward are the best that can be offered, then there is reason to believe that same-sex marriage bans should be found unconstitutional and to hope that such marital unions will soon be recognized.

137. *Id.*

138. *See Virginia*, 518 U.S. at 533.

139. *Id.*

140. *Id.*

141. For such an argument, see generally John Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049 (1994).