University of Dayton Law Review

Volume 30 | Number 3 Article 1

5-1-2005

The Future of Same-Sex Marriage after Lawrence v. Texas and the Election of 2004

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THE FUTURE OF SAME-SEX MARRIAGE AFTER *LAWRENCE V. TEXAS*[1] AND THE ELECTION OF 2004

Jack B. Harrison[2]

The culture war will be over, and the world may soon become "as it was in the days of Noah."[3]

> This is the climactic moment in the battle to preserve the family, and future generations hang in the balance. This apocalyptic and pessimistic view of the institution of the family and its future will sound alarmist to many, but I think it will prove accurate unless — unless — God's people awaken and begin an even greater vigil of prayer for our nation. That's why we are urgently seeking the Lord's favor and asking Him to hear the petitions of His people and heal our land. As of this time, however, large segments of the church still appear to be unaware of the danger; its leaders are surprisingly silent about our peril (although we are tremendously thankful for the efforts of those who have spoken out on this issue). This reticence on behalf of Christians is deeply troubling. Marriage is a sacrament designed by God that serves as a metaphor for the relationship between Christ and His church. Tampering with His plan for the family is immoral and wrong. To violate the Lord's expressed will for humankind, especially in regard to behavior that He has prohibited, is to court disaster.[4]

"It was just crazy, man. And we were just looking at each other and said, 'Let's do something wild, crazy. Let's go get married, just for the hell of

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[1] 539 U.S. 558 (2003).

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[3] Dr. James Dobson, *Marriage Under Fire: Why We Must Win This Battle* (Multnomah Publishers Inc. 2004).

[4] *Id.*

it.'"[5]

I. The State of the World: Is the United States a Burgeoning Theocracy or Just What is All this Coded Language About "Wonder Working Power"?[6]

Given the conventional wisdom that continues to swirl around the outcome of the 2004 presidential election regarding the impact of "moral issues,"[7] particularly related to gay and lesbian issues and same-sex marriage, it appears that Rev. Dobson and the self-proclaimed forces of righteousness in the Republican party, have, for the time being, held back the floodwaters from the time of Noah. This is particularly true in those eleven states that added discriminatory provisions to their foundational governing documents. Yet, in the midst of this arrogantly crowing theocratic minority, let me, as one who remains firmly rooted in the historical experience of the Enlightenment, offer some cautionary observations and some predictions for the future:

Some observations:

- Despite the existence of state constitutional

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[5] Jack B. Harrison, *Britney's Fling: Taking Marriage Seriously*, 26 Natl. L.J. 21, 26 (2004) (quoting Britney Spears regarding her brief exercise of the right to heterosexual marriage that some claim must be protected from monogamous, committed gay and lesbian persons).

[6] In his 2003 State of the Union address, President Bush used this phrase from an old evangelical hymn, *There is Power in the Blood*, stating:

> For so many in our country—the homeless . . . the fatherless, the addicted—the need is great. Yet there is power, wonder-working power in the goodness and idealism and faith of the American people. . . . I urge you to pass both my faith-based initiative and the Citizen Service Act to encourage acts of compassion that can transform America, one heart and one soul at a time.

Writing about the use of this language on the webpage of the American Family Association, one of the leading conservative evangelical organizations in Washington, a few days after the speech, Gregory J. Rummo wrote the following:

> On Tuesday evening, the President was very clear about the need for true spiritual regeneration evidenced by his specific choice of words, ". . . there is power, wonder-working power," borrowed from the chorus of the hymn, "There Is Power in the Blood:"
>
> "There is power, power, wonder working power in the precious blood of the lamb."
>
> But those words will become hollow echoes as long as the obstructionists—the people who become apoplectic at the thought of God and government working in tandem—manage to block what is the only hope for the down-and-outs of society: Changed lives through the power of the Cross.

American Family Association, *Wonder Working Power*, http://www.afa.net/family/GetArticle.asp?id=77 (Feb. 12, 2003).

[7] *See e.g.* Alan Cooperman, *Liberal Christians Challenge "Values Vote,"* Wash. Post A7 (Nov. 10, 2004).

amendments defining marriage as between one man and one women − *although apparently not for life* − and the existence of Defense of Marriage Acts, within the last few weeks across America, Christian religious congregations celebrated the rite of Christian marriage for some same-sex couples, just as one did for my partner Paul and I a few years ago;

- Even after the election that occurred on November 2, 2004, valid legal constitutionally recognized same-sex marriages and civil unions occurred in America and nothing that occurred on November 2, 2004 changed that reality;
- Civil recognition of same-sex marriages and civil unions in Massachusetts, Vermont, and elsewhere have not interfered with the rights of religious bodies to refuse to perform such marriages any more than the Supreme Court's decision in *Loving v. Virginia*[8] in 1967 forced religious bodies to conduct interracial marriages. Those religious bodies who subscribe to the scriptural view of the trial judge in *Loving* that:

> Almighty God created the races white, black, yellow, [M]alay and red, and he placed them on separate continents. And, but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix,[9]

have never been required to conduct interracial marriages.

Some predictions:

- Even in the face of state and federal Defense of Marriage Acts and discriminatory constitutional amendments, within 10 years gay civil marriages and their civil union equivalent will be legally recognized in a patchwork of states across America, not unlike the patchwork of states that recognized interracial

[8] 388 U.S. 1 (1967).
[9] *Id.* at 3.

marriages in the mid twentieth century;[10]

- Within that same 10 year period, the sky will not fall, America will not collapse, and the Apocalypse will not occur – although Tim LeHaye will continue to make millions selling books about it[11] and Rev. Dobson and his Focus on the Family[12] operation will continue to

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[10] Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 Chi.-Kent L. Rev. 371 (1994); Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth Century America*, 83 J. Am. Hist. (1996). States which had anti-miscegenation laws in 1967 included: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Wallenstein, 70 Chi.-Kent L. Rev. at 436 n. 318.

[11] For those who might be unfamiliar with the work of Tim LeHaye, he is one of the authors of the best selling "Left Behind" series that depicts life and conflict during and after the "rapture" and the eschaton.

[12] Focus on the Family was founded by Dr. James C. Dobson, a California child psychologist, in 1977 "in response to Dr. James Dobson's increasing concern for the American family." Dr. James Dobson, http://www.family.org/welcome/bios/A0022947.cfm. (last accessed May 17, 2005). The mission of Focus on the Family is: "[t]o cooperate with the Holy Spirit in disseminating the Gospel of Jesus Christ to as many people as possible, and, specifically, to accomplish that objective by helping to preserve traditional values and the institution of the family. Focus on the Family defines its "Guiding Principles" as follows:

> Since Focus on the Family's primary reason for existence is to spread the Gospel of Jesus Christ through a practical outreach to homes, we have firm beliefs about both the Christian faith and the importance of the family. This ministry is therefore based upon five guiding philosophies that are apparent at every level throughout the organization. These "pillars" are drawn from the wisdom of the Bible and the Judeo-Christian ethic, rather than from the humanistic notions of today's theorists. In short, Focus on the Family is a reflection of what we believe to be the recommendations of the Creator Himself, who ordained the family and gave it His blessing.
>
> **We believe** that the ultimate purpose in living is to know and glorify God and to attain eternal life through Jesus Christ our Lord, beginning within our own families and then reaching out to a suffering humanity that does not know of His love and sacrifice.
>
> **We believe** that the institution of marriage was intended by God to be a permanent, lifelong relationship between a man and a woman, regardless of trials, sickness, financial reverses or emotional stresses that may ensue.
>
> **We believe** that children are a heritage from God and a blessing from His hand. We are therefore accountable to Him for raising, shaping and preparing them for a life of service to His Kingdom and to humanity.
>
> **We believe** that human life is of inestimable worth and significance in all its dimensions, including the unborn, the aged, the widowed, the mentally handicapped, the unattractive, the physically challenged and every other condition in which humanness is expressed from conception to the grave.
>
> **We believe** that God has ordained three basic institutions — the church, the family and the government — for the benefit of all humankind. The family exists to propagate the race and to provide a safe and secure haven in which to nurture, teach and love the younger generation. The church exists to minister to

make millions[13] preaching about its coming;

- The Constitution of the United States will not be amended to define marriage;[14]
- Marriage will continue to be devalued and demeaned as an institution by the millions of heterosexuals who disrespect their wedding vows and cast spouses aside like old suits;
- No family values conservative legislator or organization will propose amending the Constitution to defend marriage by defining marriage as between one man and one woman – for life – prohibiting all divorce and remarriage.

II. "Going To The Chapel": The Journey from *Loving* to *Bowers* to *Lawrence* to *Goodridge.*

So what is this debate all about then? On June 26, 2003, in *Lawrence v. Texas*,[15] the United States Supreme Court overruled its 1986 decision in *Bowers v. Hardwick*[16] and declared unconstitutional all state sodomy statutes.[17] The Court rejected majoritarian morality as a legitimate rational basis for the state's interference in the most intimate relationships of its citizens, stating that the two gay men who brought the suit, along with all other persons, "are entitled to respect for their private lives," and that the

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> individuals and families by sharing the love of God and the message of repentance and salvation through the blood of Jesus Christ. The government exists to maintain cultural equilibrium and to provide a framework for social order.

Family.org, *Our Guiding* Principles, http://www.family.org/welcome/aboutfof/a0000078.cfm (last accessed May 17, 2005).

[13] The budget for 2004 for Focus on the Family was approximately $110 million. http://www.family.org/welcome/financials/2004annualreport.pdf.

[14] President Bush recently stated when asked about the prospects for such an amendment in his second term that he did not intend to press the Congress to pass the Federal Marriage Amendment. As the President stated: "The point is, is that Senators have made it clear that so long as DOMA is deemed constitutional, nothing will happen. I'd take that admonition seriously." *Presidential Interview*, Wash. Post A16 (Jan. 16, 2005). This statement angered some religious conservative supporters of the President who were quick to remind him that they felt he owed his reelection to them and that as far as they were concerned, no issue was a graver matter of public concern than saving heterosexual marriage. *See* David D. Kirkpatrick & Sheryl Gay Solberg, *Backers of Gay Marriage Ban Use Social Security as a Cudgel*, N. Y. Times A17 (Jan. 25, 2005).

[15] 539 U.S. 558.

[16] 478 U.S. 186 (1986).

[17] *Lawrence* involved "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." 539 U.S. at 558.

"[s]tate cannot demean their existence or control their destiny by making their private sexual conduct a crime."[18] In dissent, Justice Scalia lashed out at the majority, accusing it of having "signed on to the so-called homosexual agenda."[19] Justice Scalia correctly noted that the Court's decision in *Lawrence* "dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."[20]

Within six months of the *Lawrence* decision, the Massachusetts Supreme Judicial Court, in *Goodridge v. Department of Public Health,* held that it was unconstitutional under the Massachusetts Constitution to deny same-sex couples the right to participate in civil marriage.[21] The court drew a line between "civil marriages" − those based upon a civil contract to which flow the civil rights, benefits and obligations offered by the state − and "religious marriage[s]" − those based upon some religious or ecclesial recognition of the relationship within some agreed upon belief system.[22] As described by the court:

> We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution. *See Commonwealth v. Munson*, 127 Mass. 459, 460-466 (1879) (noting that "[i]n Massachusetts, from very early times, the requisites of a valid marriage have been regulated by statutes of the Colony, Province, and Commonwealth," and surveying marriage statutes from 1639 through 1834). No religious ceremony has ever been required to validate a Massachusetts marriage. *Id*.
>
> In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State. *See DeMatteo v. DeMatteo*, 436 Mass. 18, 31, 762 N.E.2d 797 (2002) ("Marriage is not a mere contract between two parties but a legal status from which certain rights and obligations arise"); *Smith v. Smith*, 171 Mass. 404, 409, 50 N.E. 933 (1898) (on marriage, the parties "assume[] new relations to each other and to the State"). *See also French v. McAnarney*, 290 Mass. 544, 546, 195 N.E. 714 (1935). While only the parties can mutually assent to marriage, the

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[18] *Id.* at 567, 577-578.
[19] *Id.* at 602 (Scalia, J., dissenting).
[20] *Id.* at 604-605 (Scalia, J., dissenting).
[21] 798 N.E.2d 941, 1004-1005 (Mass. 2003).
[22] *Id.* at 953-958.

> terms of the marriage – who may marry and what obligations, benefits, and liabilities attach to civil marriage − are set by the Commonwealth. Conversely, while only the parties can agree to end the marriage (absent the death of one of them or a marriage void *ab initio*), the Commonwealth defines the exit terms. *See* G. L. C. 208.[23]

In *Goodridge*, the court dealt only with civil marriage, because, lest any of us forget, the First Amendment prohibits the state from involving itself directly in the religious construct underpinning religious marriage. The court redefined civil marriage in a constitutionally permissible way, holding, without qualification, that "[w]e construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others."[24]

Following this decision, religious conservatives assured everyone that this was yet another sign of the end times, unlike all other signs of the end times religious zealots have identified over the past 200 years of American history.[25] Underneath all of this rhetoric was a profound forgetfulness of our history when it comes to the invocation of God or the gods in support of morally repugnant exclusionary laws. Forgotten were the words of the trial judge in *Loving v. Virginia* who appealed to God and the Bible and some understanding of religious morality in upholding the Virginia statute prohibiting interracial marriage by writing:

> Almighty God created the races white, black, yellow, [M]alay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[26]

The simple fact is that when religion and sacred writings have been selectively used as support for exclusionary principles, we as a nation have always regretted it later and been the poorer for it.

The United States Supreme Court recognized this fact in *Lawrence*, as it had in *Loving* when it declared unconstitutional all state laws prohibiting interracial marriage.[27] The Massachusetts Supreme Judicial Court also understood this fact in its decision in *Goodridge*, when it stated:

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[23] *Id.* at 954.
[24] *Id.* at 969.
[25] *See e.g.* Alex Heard, *Apocalypse Pretty Soon: Travels in End-Time America* (Norton, W.W. & Co. 1998); Paul Boyer, *When Time Shall Be No More: Prophecy Belief in Modern American Culture* (Harvard U. Press 1994).
[26] 388 U.S. at 3.
[27] *Lawrence*, 539 U.S. 558.

> Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations. The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. In reaching our conclusion we have given full deference to the arguments made by the Commonwealth. But it has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.[28]

The rejection of false principles deeply rooted in a misunderstanding or misrepresentation of religious and sacred writings is, however, always slow and painful. For example, a year after *Loving,* polls in America found that approximately 70 percent of Americans still believed interracial marriage was wrong and should be restricted.[29] In case any doubt exists, such a statistic shows the danger of using poll numbers as the moral barometer for civil rights in America.[30]

It is impossible for us to conceive of ourselves as morally autonomous human beings in America in 2004 without having the right and freedom to marry the person we love. It is not surprising then that marriage has long been seen as a fundamental right.[31] Certainly the fundamental nature of the right to marry is not rooted in child-bearing or procreation, in that the childless, the infertile and barren, the elderly are all provided the constitutionally protected right to marry. This right is not rooted in the

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[28] 798 N.E.2d at 948.

[29] In 1968, 72 percent of the American public opposed interracial marriage. In 1978, 54 percent of Americans continued to disapprove of interracial marriage and, by 1991, Americans finally approved by the slim majority of 48 percent to 42 percent. *See* Evan Gerstmann, *Same Sex Marriage and the Constitution* (Cambridge U. Press 2003).

[30] For example, in the 2004 election, the citizens of Alabama were given the opportunity to vote on an amendment to the Alabama Constitution that would have removed language in the Constitution mandating separate schools for "white and colored children" and making references to poll taxes that were used to disenfranchise black voters. The voters of Alabama rejected the amendment by approximately 2000 votes, so that today the Alabama Constitution still contains the unconstitutional requirement that Alabama have separate schools for "white and colored children." Manuel Roig-Franzia, *Vote Opens Old Racial Wounds in Alabama*, Wash. Post A1 (Nov. 28, 2004).

[31] *See e.g. Loving*, 388 U.S. 1; *Griswold v. Conn.*, 381 U.S. 479 (1965); *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

ability to anatomically perform certain sex acts, because for some, such acts are impossible because of injury and disability, while others simply choose to abstain from sex; yet none of these individuals are prohibited from marrying. The right to marry is not rooted in the maintenance of racial purity, because couples of widely differing races are now allowed to marry, although this was not the case for much of the history of our nation.[32] As the *Goodridge* court articulated it:

> The "marriage is procreation" argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like "Amendment 2" to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly "identifies persons by a single trait and then denies them protection across the board." *Romer v. Evans*, 517 U.S. 620, 633 (1996). In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.
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> The department's first stated rationale, equating marriage with unassisted heterosexual procreation, shades imperceptibly into its second: that confining marriage to opposite-sex couples ensures that children are raised in the "optimal" setting. Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy. "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Troxel v. Granville*, 530 U.S. 57, 63 (2000). Massachusetts has responded supportively to "the changing realities of the American family," *id*. at 64, and has moved vigorously to strengthen the modern family in its many variations. *See e.g.,* G.L. c. 209C (paternity

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[32] *Loving*, 388 U.S. 1; *see also Naim v. Naim* 87 S.E.2d 749 (Va. 1955), vacated and remanded, 350 U.S. 891 (1955) (per curiam), aff'd, 90 S.E.2d 849 (Va. 1956) (per curiam), appeal dismissed, 350 U.S. 985 (1956). Andrew D. Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes*, 42 Cornell. L.Q. 208, 212-14, 221 (1957) (arguing that the Equal Protection Clause governs the right to marry); Note, *Racial Intermarriage - A Constitutional Problem*, 11 Case W. Res. L. Rev. 93, 96 (1959) (discussing Naim as an example of litigation arising out of the idea that "the preservation of racial purity is a legitimate objective"); Note, *The Constitutionality of Miscegenation Statutes*, 1 How. L.J. 87, 92-93 (1955) (discussing why miscegenation statutes violate the Due Process Clause of the Fourteenth Amendment).

> statute); G.L. c. 119, § 39D (grandparent visitation statute); *Blixt v. Blixt*, 774 N.E.2d 1052 (2002), cert. denied, 537 U.S. 1189 (2003) (same); *E.N.O. v. L.M.M.*, 711 N.E.2d 886. 824, cert. denied, 528 U.S. 1005 (1999) (de facto parent); *Youmans v. Ramos*, 429 Mass. 774, 782 (1999) (same); and *Adoption of Tammy*, 416 Mass. 205 (1993) (coparent adoption). Moreover, we have repudiated the common-law power of the State to provide varying levels of protection to children based on the circumstances of birth. *See* G.L.C. 209C (paternity statute); *Powers v. Wilkinson*, 399 Mass. 650, 661 (1987) ("Ours is an era in which logic and compassion have impelled the law toward unburdening children from the stigma and the disadvantages heretofore attendant upon the status of illegitimacy"). The "best interests of the child" standard does not turn on a parent's sexual orientation or marital status. *See e.g.*, *Doe v. Doe*, 16 Mass.App.Ct. 499, 503 (1983) (parent's sexual orientation insufficient ground to deny custody of child in divorce action). *See also E.N.O. v. L.M.M.*, 711 N.E.2d at 829-830 (best interests of child determined by considering child's relationship with biological and de facto same-sex parents); *Silvia v. Silvia*, 9 Mass.App.Ct. 339, 341 & n. 3 (1980) (collecting support and custody statutes containing no gender distinction).[33]

In a decision following *Goodridge*, the Supreme Court of the State of New York for New York County[34] decided in *Hernandez v. Robles*,[35] that the New York State Constitution required that same-sex couples be able to obtain marriage licenses and enter into marriage.[36] The court found that marriage had long been recognized as a fundamental constitutional right by both New York state courts and federal courts that covered not only the right of entering into a marital relationship, but the right of choosing with whom one would enter that relationship.[37] The court then found that for the state to interfere with either prong of the fundamental right to marry, the state must offer a compelling reason and show that the

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[33] 798 N.E.2d at 962-63 (emphasis added).

[34] Strangely, the "Supreme Court" in New York's judicial system is actually the trial court, so this decision will no doubt be appealed to the New York appellate courts.

[35] *Hernandez v. Robles*, 2005 NY Slip Op 25057 (Sup. Ct. N.Y. Feb. 4, 2005). On March 14, 2005, the California Superior Court for the County of San Francisco in *Coordination Proceeding: Marriage Cases*, Judicial Council Coordination Proceeding No. 4365, found that a prohibition against same-sex marriage in California violated the equal protection guaranteed of the California Constitution. Like the New York court in *Hernandez*, the California court found that the reasons offered by the state for the prohibition failed both rational basis and strict scrutiny analysis.

[36] *Id.* at 26.

[37] *Id*. at 13-14.

mechanism used is narrowly tailored to that interest.[38]

In *Hernandez*, New York offered two rationales for the prohibition against same-sex marriage: (1) "fostering the traditional institution of marriage" and (2) "avoiding the problems that might arise from a refusal by other jurisdictions to recognize the validity of same-sex marriages, even those which are valid where they are entered into."[39] In rejecting the first rationale, the court relied upon the Supreme Court's decision in *Lawrence* disapproving majoritarian morality as a compelling interest for interfering with constitutionally protected rights.[40] The court pointed out that the dissenters in *Lawrence* acknowledged that the phrase "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples."[41] The court further found that, beyond simply offering majoritarian moral disapproval of same-sex marriages, the State had completely failed to show how allowing same-sex couples to marry would diminish the "traditional institution of marriage."[42]

The court rejected the State's second rationale on the grounds that a state may not ignore its own state constitutional requirements simply because other states practice discrimination.[43] As the Court stated:

> At its root, defendant's second argument is that the State may excuse its own deprivation of plaintiffs' constitutional rights on the basis of discrimination countenanced by other States and the Federal government. But this simply cannot be a legitimate ground for denying a liberty interest as important as marriage. Indeed, if the California Supreme Court had been so constrained, it would never have struck down the bar on interracial marriage.[44]

In recognizing the fundamental right of same-sex couples to marry under the New York Constitution, the court summarized its holding as follows:

> As a society, we recognize that the decision of whether and whom to marry is life-transforming. It is a unique expression of a private bond and profound love between a couple, and a life dream shared by many in our culture. It is also society's most significant public proclamation of commitment to another person for life. With marriage

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[38] *Id*. at 14-17.
[39] *Id.* at 14.
[40] *Id*. at 15, (citing *Lawrence*, 539 U.S. at 583).
[41] *Hernandez*, 25057, slip op. at 15 (quoting *Lawrence*, 539 U.S. at 601 (Scalia, J., the Chief Justice, and Thomas, J. dissenting)) (emphasis in original).
[42] *Hernandez*, Index No. 10343/2004 at 14.
[43] *Id*. at 16-17.
[44] *Id*. at 16 (citing *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948)).

> comes not only legal and financial benefits, but also the supportive community of family and friends who witness and celebrate a couple's devotion to one another, at the time of their wedding, and through the anniversaries that follow. Simply put, marriage is viewed by society as the utmost expression of a couple's commitment and love. Plaintiffs may now seek this ultimate expression through a *civil* marriage.
>
> Rote reliance on historical exclusion as a justification improperly forecloses constitutional analysis and would have served to justify slavery, anti-miscegenation laws and segregation. There has been a steady evolution of the institution of marriage throughout history which belies the concept of a static traditional definition. Marriage, as it is understood today, is both a partnership of two loving equals who choose to commit themselves to each other and a State institution designed to promote stability for the couple and their children. The relationships of plaintiffs fit within this definition of marriage.[45]

Simply no argument other than animus toward gay and lesbian persons explains excluding gay and lesbian persons from the institution of marriage. This reality has become abundantly clear as same-sex couples have entered into constitutionally valid marriages in America since May 17, 2004, when the decision of the Supreme Judicial Court of Massachusetts went into effect, and no other person's marriage has been at all threatened, challenged, or weakened in any demonstrable manner.[46]

Over time, the Supreme Court has made clear its belief that marriage is one of the most significant and fundamental rights provided protection under the Constitution.[47] In his opinion in *Griswold v. Connecticut*, Justice Douglas characterized marriage as a "coming together for better or for worse, hopefully enduring, and intimate to the [point] of being sacred[,]" describing it as "an association that promotes a way of life . . . a harmony in living . . . [and] a bilateral loyalty."[48] In *Goodridge*, the court described marriage in the following terms:

> Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love

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[45] *Id*. at 25 (emphasis in original).
[46] Yvonne Abraham & Rick Klein, *Free to Marry; Historic Date Arrives for Same-Sex Couples in Massachusetts*, Boston Globe, May 17, 2004, at A1; Yvonne Abraham & Michael Paulson, *Wedding Day; First Gays Marry, Many Seek Licenses*, Boston Globe, May 18, 2004, at A1.
[47] *See e.g. Loving*, 388 U.S. 1; *Griswold v. Conn.*, 381 U.S. 479 (1965); *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978).
[48] 381 U.S. at 486.

> and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations.[49]

The issue in *Griswold* was whether the state of Connecticut could prevent married couples from using contraception.[50] In other words, the question before the Supreme Court was whether actions taken within the marital relationship to prevent procreation were deserving of protection under the rubric of the privacy or liberty interest inherent in the marriage bond.[51] The Court found that the state's interest in banning contraception for married persons, while perhaps encouraging procreation, was an impermissible interference in the intimate relationship of "bilateral loyalty" that created a marriage.[52] Thus, the Court in *Griswold* clearly found that marriage was not deserving of protection solely because it was the locus for procreation and the rearing of children.[53]

In *Turner v. Safley,*[54] where the Court was faced with a state policy that placed significant restrictions on the ability of inmates to marry, the Court stated the following:

- "[Marriages] are expressions of emotional support and public commitment . . . [which] are an important and significant aspect of the marital relationship."[55]
- "[M]any religions recognize marriage as having spiritual significance; . . . [therefore], the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication."[56]
- "[The]marital status often is a precondition of the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children

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[49] 798 N.E.2d at 948.
[50] 381 U.S. at 480.
[51] *Id.* at 485-486.
[52] *Id.*
[53] *Id.*
[54] 482 U.S. 78 (1987).
[55] *Id.* at 95-96.
[56] *Id.* at 96.

born out of wedlock)."[57]

The facets of marriage identified by the Court in *Turner* as important, including spiritual significance, are equally significant for same-sex couples as for different-sex couples. Yet, this does not mean that civil recognition of same-sex marriage would force religious bodies to perform sacramental or quasi-sacramental ceremonies of spiritual recognition for such relationships.

Today, it seems a forgotten piece of history that for years many religious bodies in America would not perform the religious rite of marriage for couples of different races, even in locations where such relationships were recognized under the civil law.[58] In fact, it should not be forgotten that one of the strongest religious supporters of President Bush in his 2000 primary battle against Senator John McCain was the President of Bob Jones University, an institution that, until 2000, categorically prohibited interracial dating on the grounds that any movement toward inclusiveness or unity in the world summons forth the Antichrist and the end times.[59] The Supreme Court's decision in *Loving*, while striking down

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[57] *Id.*

[58] For an interesting discussion of the history of marriage in America, *see* Nancy Cott, *Public Vows: A History of Marriage and the Nation* (2nd ed., Harvard U. Press 2000).

[59] In defending itself against challenges to its ban on interracial dating during the 2000 Presidential primary elections, Bob Jones University posted, in part, the following on its website under the title "The Truth About Bob Jones University:"

> Is there a Bible verse or passage that teaches against interracial marriage? No.
>
> Is there a Bible principle upon which the University's interracial dating stance is founded? Yes.
>
> - The one-world principle - every effort man has made, or will make, to bring the world together in unity plays into the hand of Antichrist. This first began at the Tower of Babel, and it will culminate at Armageddon when the Lord returns to establish His rule of peace and harmony for a thousand years.
>
> - Bob Jones University opposes one world, one church, one economy, one military, one race, and unisex. God made racial differences as He made sexual differences. Each race and each sex should be proud to be what God made it, and none should reproach the other.
>
> Does the University believe that those who choose interracial marriage do so out of rebellion against God?
>
> No. It does believe, however, that often the promoters of it do so out of antagonism toward God because they are often the same entities that promote homosexuality, abortion, and other forms of social radicalism.

http://www.beliefnet.com/story/12/story_1291_1.html (reprinted on Beliefnet with permission of Bob Jones University) (copy on file with the author).

Bob Jones University later dropped its ban on interracial dating.

all prohibitions on the civil recognition of interracial marriage, did nothing to alter the right of religious bodies to refuse to perform religious ceremonies bestowing the religious rite of marriage upon interracial couples.[60] The same would be true today for the civil recognition of same-sex marriages.

The simple fact is that today there are religious bodies that do perform sacramental and quasi-sacramental celebrations of religious marriage for same-sex couples, even where such marriages are not recognized under the civil law.[61] For example, Mt. Auburn Presbyterian Church in Cincinnati, Ohio, had a formal policy stating that the ritual joining together of either opposite-gender or same-gender couples would be called a "Christian marriage" until the congregation retreated in 2003 from its policy to include gay and lesbian persons rather than risk potential ecclesial disciplinary action. This policy, adopted unanimously numerous times by the governing body of the congregation stated:

> We hold that our policy of inclusion implies and requires equality in terms of consideration and entitlement in society, and that marriage between two persons, man and woman, or a man and a man, or woman and woman, is the same in the eyes of the Session of Mt. Auburn Presbyterian Church . . . . Therefore we resolve that Christian marriage services be held in our church for homosexual as well as heterosexual couples.[62]

Other individual congregations and denominations likewise have policies opening the celebration of religious or spiritual marriage to both opposite-gender and same-gender couples.[63]

The fact that some religious bodies already recognize religious marriages for same-sex couples does not mean that the civil authority must recognize such marriages. The Supreme Court in *Reynolds v. United*

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[60] U.S. Const. *amend.* I. *See also, State v. Barclay*, 238 Kan. 148 (1985) (upholding an ordained Baptist minister's right to be free from state coercion, including criminal prosecution, as a result of his refusal to perform interracial marriages because they violated his religious beliefs).

[61] Michael J. Kanotz, *For Better or for Worse: A Critical Analysis of Florida's Defense of Marriage Act*, 25 Fla. St. U. L. Rev. 439, 439 (1998).

[62] The Presbyterian Church (USA) by the Presbytery of Cincinnati v. Rev. A. Stephen Van Kuiken, Disciplinary Case 2003-1, Permanent Judicial Commission, Synod of the Covenant (April 30, 2004). In the interest of full disclosure, my partner, Paul Brownell, and I were married by Rev. Van Kuiken at Mt. Auburn Presbyterian Church on April 15, 2000 in a service of Christian marriage.

[63] Kanotz, *supra* note 61, at 439. Currently, both the Metropolitan Community Church and the Unitarian Universalist Association have denominational positions allowing same sex religious marriages to be performed within their congregations. *See http://www.mccchurch.org; http://www.uua.org.* Additionally, a number of individual United Church of Christ congregations allow same sex marriage ceremonies to occur within their congregations. A number of mainline Protestant congregations and Jewish synagogues in the United States also provide alternative rites to marriage for same sex couples, such as Holy Unions or Commitment Services.

States, decided this issue when the Court upheld the criminal conviction of a Mormon for practicing polygamy at a time when polygamous marriages were sanctioned within the Mormon faith. The Court rejected the argument that Congress' prohibition of polygamy violated the defendant's right to the free exercise of religion.[64]

In *Potter*, a more recent case, the United States Court of Appeals for the Tenth Circuit focused on whether or not the state had a compelling interest in prohibiting polygamous marriages that were at the heart of the appellant's religious belief.[65] A city police officer in *Potter* claimed that his termination for practicing polygamy violated his right to the free exercise of his religion under the First Amendment.[66] In upholding the lower court's grant of summary judgment in favor of the state, the Tenth Circuit did not simply say that *Reynolds* was dispositive or that marriage was simply between one man and one woman — end of story.[67] Rather, the court conducted a relatively thorough analysis to determine whether the state actually had an articulated compelling interest for infringing upon a religious practice that was, in fact, recognized as a core religious practice by the religious body to which the police officer belonged.[68] The court concluded that the state had a compelling interest in prohibiting polygamous marriages to preserve monogamy, which was shown by "a vast and convoluted network of other laws clearly establishing its compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage."[69]

Leaving aside the circularity of the court's reasoning in *Potter*, the importance of this case when read in light of the Supreme Court's analysis in *Lawrence*, is its requirement that the state show a compelling interest in prohibiting civil recognition of marriages recognized as valid spiritual marriages by religious bodies through their own sacramental and quasi-sacramental ceremonies. The requirement that the state must show a compelling interest is as true for those states that seek to prohibit same-sex civil marriages that are recognized by the religious bodies to which the couple belongs as it was in the case of the state's efforts to prohibit the polygamous marriages at issue in *Potter*.[70]

Moreover, what of sexual activity itself? Is there something in the sexual consummation of a marriage itself that elevates a marital relationship

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[64] 98 U.S. 145 (1878).
[65] *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985).
[66] *Id.* at 1066-1067.
[67] *Id.* at 1066-1070.
[68] *Id.* at 1068-1070.
[69] *Id.* at 1070 (quoting *Potter v. Murray City*, 585 F. Supp. 1126, 1138 (D. Utah 1984)).
[70] *See* discussions of *Goodridge, supra* n. 21; *Hernandez, supra* n. 41.

to a position requiring constitutional protection? In *Turner*, the Court in determining whether inmates had a constitutionally protected right to marry pointed out that "*most* inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated."[71] Yet, while the Court found that the sexual consummation of the marriage was of some constitutional significance in that *most* inmate marriages have an expectation of consummation, it did not hold that such a physical consummation was necessary for all marital relationships to be deserving of constitutional protection.[72]

While the Court has held repeatedly that the marital relationship is fundamental and deserving of protection, it has also repeatedly held that the constitutional import of the relationship is not solely rooted in the procreative or the sexual nature of the relationship.[73] In fact, under the Supreme Court's marriage jurisprudence, the infertile, the barren, those physically incapable of sex, those physically incapable of bearing children, and those who simply decide to remain childless all have a fundamental right to marry that is provided constitutional protection.[74] So if the constitutional protection recognized by the Court is not about sexual consummation and is not about bearing children and if, as the Court held in *Lawrence*, it cannot be about majoritarian morality,[75] then what remains as a legitimate constitutional basis for a prohibition against same-sex marriage? What reasons will be seen as compelling enough?

Since *Lawrence* found that traditional majoritarian moral rationales for classifying persons based on sexual orientation did not even pass muster under rational basis review, then unless some new arguments are found, the Court will ultimately be forced to hold, correctly I think, that the only reason for excluding gay and lesbian persons from the fundamental right of marriage is unlawful discriminatory animus. Obviously Justice Scalia read *Lawrence* in just this manner, as is made clear in his dissent in that case:

> At the end of its opinion — after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case "does not involve whether the government must give formal recognition to any

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[71] *Turner*, 482 U.S. at 96 (emphasis added).
[72] *Id.*; *see generally* Mark Strasser, *The Right to Marry: Making the Case Go Forward: Interpretations of Loving in Lawrence, Baker, and Goodridge: On Equal Protection and the Tiers of Scrutiny*, 13 Widener L.J. 859 (2004).
[73] *See e.g. Griswold, Turner, Loving,* and discussion *supra* n. 31.
[74] *Id. See also Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (stating "what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the Constitution[?'] Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry." (citations omitted)).
[75] 539 U.S. at 577-78.

> relationship that homosexual persons seek to enter." Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education," and then declares that "persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct[;] and if, as the Court coos (casting aside all pretense of neutrality), "when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring" what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "the liberty protected by the Constitution"? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.[76]

Such recognition of the constitutional legitimacy of same-sex marriage will obviously not happen anytime soon. However, it will happen when there is already a patchwork of states that recognize same-sex civil marriages or their equivalent and when, as is already beginning to happen, religious bodies exist that recognize the religious, sacramental, or spiritual nature of a same-sex marriage under their own theological rubric — factors that will inevitably come to pass over the next decade.

It is not that the state has no role to play in the regulation of marriage, although one must question how spiritual and civil recognition of marriage became so intertwined and inseparable in the United States.[77] As the Supreme Court stated in *Zablocki v. Redhail,* state regulation is limited to those "reasonable regulations that do not significantly interfere with

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[76] *Id*. at 604-605 (Scalia, J., dissenting) (citations omitted).
[77] *See generally* Cott, *supra* n. 58.

decisions to enter into the marital relationship."[78] More intrusive or limiting restrictions on the right to marry may be adopted by the state only if they are "supported by sufficiently important state interests and [are] closely tailored to effectuate only those interests."[79]

It is important to briefly look at what compelling interests remain which a state might legitimately seek to assert to support either a state Defense of Marriage Act or a constitutional amendment banning same-sex marriage that could pass constitutional muster after *Lawrence*. What we see when we look at the Supreme Court's marriage jurisprudence over time is that the Court has found that the constitutionally protected interests are focused, at times, solely on the protected interests of the partners to the relationship themselves.[80]

At other times the Court's focus regarding marriage has been on the family unit as a whole, with some particular focus upon the interests of children who may live within that family construct.[81] For example, in *Zablocki v. Redhail*, the Court stated:

> It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships . . . [since] it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.[82]

What can clearly be seen here, as in all of the Court's marriage jurisprudence, is that the Court sees the fundamental right to marry as having a separate existence alongside the fundamental rights to procreation, childbirth, child rearing, or family relationships. The right to marry does not exist solely to realize the rights to procreation, childbirth, child rearing, or family relationships. In fact, the Court has held that a constitutionally protected right to sexual activity or to child rearing exists outside the sphere of marriage.[83]

The Court has previously articulated its understanding that the "composition of families varies greatly from household to household[,]" and that the "demographic changes of the past century make it difficult to speak of an average American family."[84] In fact, when the Court discusses

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[78] 434 U.S. at 386.
[79] *Id.* at 388.
[80] *See supra* nn. 47-64 and adjoining text.
[81] *See infra* nn. 80-84 and adjoining text*; see also Troxel v. Granville*, 530 U.S. 57 (2000).
[82] 434 U.S. at 386.
[83] *See Lawrence*, 539 U.S. at 558; *Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).
[84] *Troxel*, 530 U.S. at 63.

a fundamental interest in childrearing, it must assume all of the various ways in which persons become parents and create a parent/child relationship. No one could argue using existing Supreme Court analysis that a child who is being raised by her biological mother and the mother's lesbian partner who has legally adopted her, does not have a constitutionally protected interest in the parent/child relationship. Likewise, no one could legitimately argue that the two legal parents of this child do not have a constitutionally protected interest in child rearing or in the family relationship. Rather, a legally recognized parent/child relationship by its very existence implicates a fundamental interest that is provided constitutional protection and which can be interfered with only for some compelling state interest.[85]

If the constitutional fundamental right to marry has already been recognized, what further demographic changes must courts incorporate in their analysis to include persons of the same gender? The reality on the ground — one which is not likely to change — is that gay and lesbian persons are raising children in legally recognized family units.[86] Gay and lesbian individuals and couples have adopted some of those children, some have been biologically conceived through artificial insemination and surrogacy, and some were the product of a previously existing marriage. There is little doubt that these gay and lesbian persons and their children have a right to privacy and liberty with respect to matters of family life under the Court's prior decisions.[87] Therefore, it makes "little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[88]

Even assuming that the state has an interest in the procreation and rearing of children, what exactly is the scope of that interest and is it

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[85] *Id.* at 66.

[86] *See generally* Evan Wolfson, *Why Marriage Matters : America, Equality, and Gay People's Right to Marry* (Simon & Schuster 2004). *But see Lofton v. Sec. of Dept. of Children and Family Serv.*, 358 F.3d 804 (11th Cir. 2004), in which a three judge panel of the 11th Circuit upheld Florida's ban on adoption by gay and lesbian individuals. The full 11th Circuit Court of Appeals voted 6-6 on whether or not to rehear the case *en banc*. The result of this tie vote was that the case was not reheard. The tying vote was cast by Judge William Pryor who had been added to the court in a recess appointment by President George W. Bush after he was filibustered by Democrats on the Senate Judiciary Committee and denied an open vote. Subsequently, the Supreme Court refused to hear an appeal of the case. *Lofton v. Sec. of Dept. of Children and Family Serv.*, 125 S. Ct. 869 (2005). Currently, Florida is the only state that explicitly bans adoption by unmarried gay, lesbian, and bisexual individuals, although New Hampshire and Utah also prohibit adoptions by any unmarried person. Several states, including California, Connecticut, Illinois, Massachusetts, New Jersey, New Mexico, New York, Oregon, Vermont, and the District of Columbia, allow same-sex couples to jointly petition to adopt. *See* Human Rights Campaign Foundation, http://www.hrc.org/Content/NavigationMenu/Family/Get_Informed1/Laws_Legal_Resources/State_Laws.htm (last accessed May 17, 2005).

[87] *See supra* nn. 79-85 and adjoining text.

[88] *Zablocki*, 434 U.S. at 386.

necessarily furthered by prohibiting gay and lesbian persons from civil marriage? One should be able to assume that the state's interest in this area is to ensure that children are protected and are being raised in environments in which they can flourish. If that is so, then what is the evidence that supports the privileging of heterosexual coupling over homosexual coupling as a locus for rearing children.

Even Justice Scalia has recognized that the procreation argument is unpersuasive, noting that it could not be used to justify prohibiting same-sex marriage given that "the sterile and the elderly are allowed to marry."[89] However, it is not merely that those who do not and will not have children are allowed to marry, but, more importantly, that by prohibiting the civil recognition of same-sex marriages, the state is precluding individuals from marrying who are currently having and raising children within the state's borders. If the role that married couples play in providing a setting in which the next generation might flourish is one of the reasons that marriage is a fundamental interest, then this is a reason for same-sex marriage, not against it.

No doubt there are those who will argue that same-sex marriages are not constitutionally protected. They argue that the right to marry a person of the same-sex is not implicit in the concept of ordered liberty or deeply rooted in the history and tradition of our country.[90] Such an assertion was equally true, however, of interracial marriages, marriages involving indigents, or prison marriages. Yet, the Court when faced with these situations ultimately concluded that despite the fact that such marriages were not implicit in the concept of ordered liberty or deeply rooted in the history and tradition of our country, these marriages were protected by the Constitution.[91]

It would seem, therefore, that asking whether certain marital relationships were envisioned by the Founders, implicit in the concept of ordered liberty or deeply rooted in the history and tradition of our country is not dispositive of the question of constitutional protection.[92] Such an analysis cannot incorporate or account for those marriages and other interests that the Court has found to be protected under the constitutional right of privacy without such a textual or historical basis.[93] In *Lawrence*, the Court suggested, lest we all needed to be reminded, that the constitutional standard was not static and that as "the Constitution endures, persons in every generation can invoke its principles in their own search for

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[89] *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting).
[90] *Bowers*, 478 U.S. at 191-192. *See also* Mark Strasser, *Lawrence, Same-Sex Marriage and the Constitution: What is Protected and Why?*, 38 New. Eng. L. Rev. 667, 676 (2004).
[91] *See* discussion of *Loving, Zablocki,* and *Turner, supra* n. 47.
[92] *Strasser*, *supra* n. 72, at 676.
[93] *Id.*

greater freedom'"[94]

III. The Miscegenation Analogy: Evolving Theological and Constitutional Understanding and Analysis

While the analog between the debate over interracial marriage and same-sex marriage is certainly not perfect, those who oppose same-sex marriage by employing the identical religious rhetoric as employed by their forbearers in opposing interracial marriage are, in the light of such history, suspect.

For example, in 1911, almost 50 years after the end of the Civil War, following the marriage of Jack Johnson, a black man who happened to be heavyweight champion of the world, to Lucille Cameron, a white woman — two Christian ministers recommended that Johnson be lynched and Governor John Dix of New York declared that "[the] Johnson wedding . . . is a blot on our civilization. Such desecration of the marriage tie should never be allowed."[95] Rep. Seaborn Roddenberry of Georgia introduced a constitutional amendment to define marriage so as to ban all interracial marriages, stating:

> Intermarriage between whites and blacks is repulsive and averse to every sentiment of pure American spirit. It is abhorrent and repugnant. It is subversive to social peace. It is destructive of moral supremacy, and ultimately this slavery to black beasts will bring the nation to a fatal conflict.[96]

Roddenberry asserted that his amendment was necessary to defend traditional marriage because "no more voracious parasite ever sucked at the heart of pure society, innocent girlhood, or Caucasian motherhood than the one which welcomes and recognizes the sacred ties of wedlock between Africa and America."[97] In 1913, many states saw the introduction of laws against interracial marriage; these laws already existed in some 25 states.[98] This natural order or natural law argument will sound awfully familiar to those who have listened to the proponents of the Federal Marriage Amendment and other state constitutional amendments, which articulate the various reasons why they believe that the civil recognition of same-sex marriage will somehow harm their heterosexual marriages. But in the case of some of those conservative religious types in opposition, I am not sure

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[94] *Lawrence*, 539 U.S. at 579.
[95] Denise C. Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 Akron L. Rev. 529, 548 (1999) (citing Al-Tony Gilmore, *Jack Johnson and White Women: The National Impact, 1912-1913*, 58 J. of Negro Hist. 18, 23 (1973)).
[96] Al-Tony Gilmore, *Bad Nigger! The National Impact of Jack Johnson* 108 (1975).
[97] 62d Cong. Rec. 504 (Dec. 11, 1912).
[98] Morgan, *supra* n. 95, at 549-551.

which of their many marriages they are seeking to have defended.

So that there will be no misunderstanding, I am not saying that the experience of a white woman seeking to marry a black man in 1910 is identical to the experience of a gay couple seeking to marry today. I am simply pointing out that the appeal to some theocratic understanding of natural law that defined marriage as between persons of the same race was as heartily believed in America by many for centuries, as is the natural law argument regarding same-sex marriage today. Yet, who will raise their hand today to argue with Rep. Roddenberry or the trial judge in *Loving* that the separation of the races and prohibitions against interracial marriage are a creation of God begun with Adam and Eve and carried forward until corrupted by humanity? As bigoted as that argument sounds to us today — 100 years from now the same rhetoric regarding same-sex marriage likely will sound equally bigoted.

It was only in 1967, 100 years after the Civil War, that the Supreme Court declared laws prohibiting interracial marriage unconstitutional based not just on the racially discriminatory animus contained in such laws, but also because the Court had historically recognized that marriage was a fundamental right protected by the Constitution.[99] As the Court wrote in *Loving*:

> These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. 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. Marriage is "one of the basic civil rights of man."[100]

In the later case of *Zablocki v. Redhail*, Justice Marshall made it clear that *Loving* rested on concepts of both racial equality and an independent constitutional right to marry, writing, "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance to all individuals."[101]

IV. Conclusion: When Did the Constitution Become a Mechanism for the Imposition of a Majoritarian Moral and Theological Worldview?

Civil marriage is a civil contract from which flow certain rights, benefits, and obligations that should not be denied to America's gay citizens, while religious marriage will always be a decision of individual

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[99] *Loving*, 388 U.S. 1.
[100] *Id.* at 12.
[101] *Zablocki*, 434 U.S. at 384.

religious bodies. Recognition of same-sex civil marriages will never result in any religious organization being forced by the state to conduct gay marriages against its religious belief, and basing a call for amending the Constitution on such a prediction is simply dishonest.

To state the obvious, we live in a constitutional representative republic, not a democracy. What that means for this discussion is that it simply does not matter that a majority of people may oppose same-sex marriage today, any more than it mattered that in polls taken one year before or one year after *Loving* declared a constitutional right to interracial marriage, 70 percent of Americans opposed interracial marriage — a larger majority than those who today oppose same-sex marriages.[102] The purpose of our constitutional system is not to insure majority rule, as some would have it, but to insure that the rights of the minority are protected against the tyranny of that majority.[103]

Having said that, we are still left with the question of whether the Constitution requires the recognition of same-sex marriages. This may be the wrong question, because in reality when one looks at the attitudes of young people toward their gay and lesbian friends and their attitudes toward gay marriages, one knows that the inexorable move toward the recognition of these relationships is inevitable — which is of course why the theocrats among us are so obsessed with amending the Constitution now.

What is clear is that those seeking to amend the Constitution through the Federal Marriage Amendment, including the current President of the United States, believe and fear the following:

1. The Full Faith and Credit clause of the Constitution may well require constitutionally valid marriages that occur in Massachusetts or elsewhere to be recognized in other states; and,

2. Federal and state Defense of Marriage Acts, as well as state constitutional amendments, may well be stricken as violative of substantive due process and equal protection, based on the Court's reasoning in *Lawrence*.

What is also clear, based on *Lawrence*, is that individual states that wish to prohibit valid same-sex marriages from being recognized will need more than majoritarian morality and child bearing and rearing as bases for the public policy exclusion of same-sex marriages. For example, if a state

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[102] *Supra* n. 29.

[103] *See* John Stuart Mill, *On Liberty*, in The Basic Writings of John Stuart Mill: On Liberty, the Subjection of Women and Utilitarianism (Modern Library 2002); Alexis de Tocqueville, Democracy in America 235-49 (Univ. of Chicago 2000); The Federalist No. 51 (James Madison).

argues that heterosexual marriages must be protected for the purpose of protecting the locus for the rearing of children, then it better first ask itself whether its agencies and its courts are placing the most needy and vulnerable children under its care with gay families for foster care and adoption. If so, then any court in America will see through the breathtaking intellectual dishonesty at work in an argument claiming that a state's compelling interest for prohibiting same-sex marriage is to insure that its children are reared in a stable heterosexual marital context, while at the same time, the state is placing children in the households of same-sex couples. During the oral argument in *Lawrence*, discriminatory animus was rife in the Supreme Court chamber. The attorney for the state argued that Texans' traditional moral abhorrence for homosexuality and the need to protect children were adequate bases for criminalizing same-sex sexual intimacy. The attorney could not answer the simple question of whether the state of Texas was placing children for foster care and adoption with the very persons that the state was arguing were morally abhorrent.[104] The answer to that question is that, of course, the state of Texas, like many other states, is placing a significant percentage of its most needy children in gay and lesbian households for both foster care and adoption.[105]

In *Lawrence*, the Court resurrected its substantive due process jurisprudence by finding that the right of homosexual intimacy could not be criminalized solely on the grounds of majoritarian morality or discriminatory animus.[106] Such analysis clearly applies to the right of marriage, a right that the Court long ago deemed fundamental and deserving of constitutional protection. As Justice Douglas wrote about marriage in *Griswold*:

> We deal with a right of privacy older than the Bill of Rights – older than our political parties. . . . Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred.[107]

Despite the results of the 2004 election regarding state constitutional amendments prohibiting same-sex marriage, polls consistently show that a majority of Americans support the civil recognition of same-sex couples.[108]

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[104] Hrg. Transcr. *Lawrence v. Texas* 35 (Mar. 26, 2003).
[105] Molly Cooper, Note, *GAY AND LESBIAN FAMILIES IN THE 21ST CENTURY: What Makes a Family?: Addressing the Issue of Gay and Lesbian Adoption*, 42 Fam. Ct. Rev. 178, 180-81 (2004).
[106] 539 U.S. at 577-578.
[107] *Griswold*, 381 U.S. at 486.
[108] *See, e.g.* CBS/New York Times Poll, Nov. 18-21, 2004, as reported in http://www.pollingreport.com/civil.htm, finding that 53% of Americans believed that the relationships of same-sex couples should be legally recognized either through civil marriage (21%) or through civil unions (32%). Less than a majority (44%) believed there should be no legal recognition of same-sex relationships. The same poll was remarkably consistent throughout 2004, as can be seen in the following summary:

While a split exists within this majority as to whether such recognition should be centered upon the concept of civil marriage or some other nomenclature, such as civil unions, what is clear is that the trajectory on this issue is moving toward greater civil recognition of same-sex couples. As the Rev. Dr. Martin Luther King Jr. said on a number of occasions, "[t]he arc of history is long, but it bends toward justice."[109]

CBS News/New York Times Poll. Feb. 24-28, 2005. Nationwide.

"Which comes closest to your view? Gay couples should be allowed to legally marry. OR, Gay couples should be allowed to form civil unions but not legally marry. OR, There should be no legal recognition of a gay couple's relationship." Form A (N=559 adults)

	Legal Marriage	**Civil Unions**	**No Legal Recognition**	**Unsure**
	%	%	%	%
ALL	23	34	41	2
Republicans	8	37	54	1
Democrats	29	35	34	2
Independents	30	29	37	4
Trend:				
11/18-21/04	21	32	44	3
7/11-15/04	28	31	38	3
5/20-23/04	28	29	40	3
3/10-14/04	22	33	40	5

"Which comes closest to your view? Same sex couples should be allowed to legally marry. OR, Same sex couples should be allowed to form civil unions but not legally marry. OR, There should be no legal recognition of a same sex couple's relationship." Form B (N=552 adults)

	Legal Marriage	**Civil Unions**	**No Legal Recognition**	**Unsure**
	%	%	%	%
2/24-28/05	25	28	42	5

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http://www.pollingreport.com/civil.htm.

[109] On August 16, 1967 in Atlanta, Georgia, Martin Luther King, Jr. delivered the annual report at the 11th Convention of the Southern Christian Leadership Conference. The title of his speech that day was "Where Do We Go From Here?". He ended the speech with the following:

> Let us realize that the arc of the moral universe is long, but it bends toward justice. Let us realize that William Cullen Bryant is right: "Truth, crushed to earth, will rise again." Let us go out realizing that the Bible is right: "Be not deceived. God is not mocked. (Oh yeah) Whatsoever a man soweth (Yes), that (Yes) shall he also reap." This is our hope for the future, and with this faith we will be able to sing in some not too distant tomorrow, with a cosmic past tense, "We have overcome! (Yes) We have overcome! Deep in my heart, I did believe (Yes) we would overcome."

The parentheticals shown here are the vocal responses from those in attendance. The full speech may be found at www.stanford.edu/group/King/publications © The Estate of Martin Luther King, Jr.