Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy

INTRODUCTION

The freedom to marry is well-established as a vital personal right in this country.[1] The right to marry, however, has traditionally been denied to lesbian and gay couples because states have been reluctant to expand the definition of marriage beyond the union of a man and a woman.[2] While the regulation of marriage generally belongs to the states,[3] past Supreme Court decisions re-

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[1] *See, e.g.*, Turner v. Safley, 482 U.S. 78, 81, 82 (1987) (striking a law that limited prisoners' freedom to marry); Zablocki v. Redhail, 434 U.S. 374, 375, 382 (1978) (finding unconstitutional a state statute requiring parents under child support obligations to meet certain financial requirements before being permitted to marry); Loving v. Virginia, 388 U.S. 1, 2, 12 (1967) (invalidating a state statute prohibiting interracial marriage); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (describing the right to marry as "older than the Bill of Rights"); Skinner v. Oklahoma, 316 U.S. 535, 536-37, 541 (1942) (holding unconstitutional a state statute that provided for mandatory sterilization of certain felons on grounds that marriage and procreation are necessary for human survival); Maynard v. Hill, 125 U.S. 190, 205 (1888) (positing that marriage is "the most important relation in life").

[2] *See, e.g.*, Singer v. Hara, 522 P.2d 1187, 1188, 1197 (Wash. Ct. App. 1974) (validating a state's refusal to issue a marriage license to two men); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (upholding the denial of a marriage license to a same-sex couple); Burkett v. Zablocki, 54 F.R.D. 626, 626 (E.D. Wis. 1972) (dismissing an action by two females seeking an order to compel the county clerk to issue an application for a marriage license); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (upholding a state statute denying a marriage license to same-sex couples), *appeal dismissed*, 409 U.S. 810 (1972); *see also* Adams v. Howerton, 673 F.2d 1036, 1038 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982) (upholding a federal immigration law that excluded same-sex marriages for citizenship purposes).

[3] *See* Sosna v. Iowa, 419 U.S. 393, 404 (1975) (citations omitted) (noting that the state regulates the dissolution of the marital relationship); Pennoyer v. Neff, 95 U.S. 714, 734-35 (1877) (recognizing that the state has the "absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved"); John D. Ingram, *A Constitutional Critique Of Restrictions On The Right To Marry—Why Can't Fred Marry George—Or Mary And Alice At The Same Time?*, 10 J. CONTEMP. L. 33, 37 (1984) (noting that the state has the power to regulate marriage and define family relationships); *see also Maynard*, 125 U.S. at 205 (recognizing the legislature's ability to regulate many aspects of the marital relationship from its inception to dissolution). Specifically, Justice Field stated:

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

Id.

flect a willingness to protect the right to marry.[4] The United States Supreme Court, however, has never squarely addressed the legitimacy of same-sex marriage.[5] Given the changing structure of the American family[6] and the protections some states have extended to homosexual couples,[7] the Supreme Court will inevitably have to

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Some courts have gone so far as to view the state as an actual party to marriage. *See* Posner v. Posner, 233 So. 2d 381, 383 (Fla. 1970) (citations omitted) ("Since marriage is of vital interest to society and the state, it has frequently been said that in every divorce suit the state is a third party whose interests take precedence over the private interests of the spouses."); Fearon v. Treanor, 5 N.E.2d 815, 816 (N.Y. 1936), *appeal dismissed*, 301 U.S. 667, *and reh'g denied*, 302 U.S. 774 (1937) (citing Trammell v. Vaughan, 59 S.W. 79, 81 (Mo. 1900)) ("There are, in effect, three parties to every marriage, the man, the woman, and the state.").

[4] *See, e.g.*, *Turner*, 482 U.S. at 81 (preserving the right of prisoners to marry); *Zablocki*, 434 U.S. at 375, 382 (striking a state law requiring parents under court ordered child support obligations to meet certain financial obligations as a prerequisite to marriage); *Loving*, 388 U.S. at 12 (sanctioning the right of interracial couples to marry).

One commentator has noted an "array of Supreme Court decisions discovering and refining the constitutional right of marital privacy coexists uneasily with the states' traditional power to regulate marriage and divorce." Hannah Schwarzschild, *Same-Sex Marriage and Constitutional Privacy: Moral Threat and Legal Anomaly*, 4 BERKELEY WOMEN'S L.J. 94, 103 (1989). Another commentator, analyzing the respective interests of the federal and state governments in regulating marriage, has written: "Marriage is a highly regulated legal institution in which the state has traditionally asserted a wide range of legitimate interests. Any constitutional inhibition on state power would have to rebut this long historical tradition." David A. J. Richards, *Constitutional Legitimacy And Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 834 (1986).

[5] Mary P. Treuthart, *Adopting A More Realistic Definition of "Family"*, 26 GONZ. L. REV. 91, 107 (1991). Even more interestingly, the Court declined the opportunity to do so in *Baker v. Nelson*, in which it dismissed an appeal for lack of federal question. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

[6] *See* Martha Minow, *The Free Exercise of Families*, 1991 U. ILL. L. REV. 925, 930-32 (1991) (noting that the typical American family is no longer the traditional nuclear family; it has been subsumed by a range of alternatives, including single-parent families and cohabitating unmarried adults); *see also infra* notes 10-12 and accompanying text (discussing further the changing composite of the American family).

[7] *See, e.g.*, *In re* Guardianship of Kowalski, 478 N.W.2d 790, 791, 797 (Minn. Ct. App. 1991) (awarding a woman guardianship of her incapacitated lesbian partner on grounds that the couple constituted a "family of affinity"); State v. Hadinger, 573 N.E.2d 1191, 1193 (Ohio Ct. App. 1991) (holding that cohabitating same-sex partners are protected under Ohio's domestic violence statute); Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 50, 53-54 (N.Y. 1989) (determining that "family" as used in the rent-control laws included an unmarried lifetime gay partner); Bramlett v. Selman, 597 S.W.2d 80, 85 (Ark. 1980) (imposing a constructive trust upon property settled in one man's name for the benefit of his male partner); Weekes v. Gay, 256 S.E.2d 901, 902-03, 904 (Ga. 1979) (imposing an implied trust on the insurance proceeds of a house shared by a homosexual couple for the surviving partner who had supplied part of the purchase money after the house was destroyed by fire); *cf.* Donovan v. Workers' Compensation Appeals Bd., 187 Cal. Rptr. 869, 873-74 (Cal. Ct. App. 1982) (remanding to a review board to determine whether a homosexual partner of a deceased employee was a dependent covered by the Workers' Compensation Act); *see also infra* notes 206-16 and accompanying text (surveying cases protecting homosexual relationships).

consider the legality of same-sex marriage.[8]

Inextricably woven into the notion of marriage is the notion of family.[9] While states have continued to herald the virtues of the traditional heterosexual nuclear family,[10] this family composite, in practical reality, is now the exception to the rule.[11] Today, the typical family differs greatly from the traditional one in structure,[12] but not in purpose or function.[13] Current jurisprudence regarding

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But see In re Alison D. v. Virginia M., 572 N.E.2d 27, 28, 29 (N.Y. 1991) (holding that a lesbian non-biological parent did not have standing as a "parent" under a domestic relations law to seek visitation rights with a child she and her ex-partner shared).

8 *See generally* Ingram, *supra* note 3, at 39-44 (noting that the right to marry implicates equal protection, due process and First Amendment rights). Congress has primarily left the task of defining what constitutes an equal protection violation or a due process violation to the judiciary. Justice William J. Brennan, Jr., *Color-Blind Creed-Blind Status-Blind Sex-Blind*, HUMAN RIGHTS, Winter 1987, at 32. This Comment will analyze the right of same-sex couples to marry from a constitutional point of view. *See infra* notes 119-63 and accompanying text (analyzing same-sex marriage under the Equal Protection Clause) and *infra* notes 164-216 (analyzing same-sex marriage under the Due Process Clause).

9 *See* Treuthart, *supra* note 5, at 96-97 (recommending a re-evaluation of the basic assumptions upon which legal distinctions based on marriage and family status have been made).

10 *See* Libby Post, *The Question Of Family: Lesbians And Gay Men Reflecting A Redefined Society*, 19 FORDHAM URB. L.J. 747, 748 (1992) (defining the traditional family "as consisting of [a] mother, father, a couple of children and a pet").

11 *See* Barbara J. Cox, *Love Makes a Family—Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families*, 8 J. L. & POL. 5, 5 (1991) (noting that the past thirty years has seen a decrease in traditional families with a simultaneous increase in alternative families); Post, *supra* note 10, at 748 ("[T]he heterosexual two-parent, bread-winner father and homemaker-mother family is now the exception to the rule.").

As of 1991, the number of families in the United States fitting the traditional family structure had decreased to only twenty-two percent. Martha F. Riche, *The Future of the Family*, AM. DEMOGRAPHICS, Mar. 1991, at 44.

12 Alissa Friedman, Comment, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134, 135 (1988) (noting that today's family represents a diversity of alternatives to the traditional structure, including unmarried homosexual or heterosexual cohabitation, group living, and single parent families). The last decade has witnessed the surge of a gay baby boom. Jean L. Griffin, *The gay baby boom: Homosexual couples challenge traditions as they create new families*, CHI. TRIB., Sept. 3, 1992, at C1. It is estimated that about four million homosexuals are raising about eight to ten million children. *Id.* at C2. This estimate is based upon Alfred Kinsey's estimate that homosexuals comprise about ten percent of the population. *Id.* Further evidence of this baby boom lies in the fact that a New York organization of homosexual couples who have created their own families has 1,500 households on its mailing list. *Id.* at C1. Most of the members are women, but male membership is quickly growing. *Id.*

13 *See* Treuthart, *supra* note 5, at 92 (contending that nontraditional families are functionally equivalent to the traditional nuclear family because they promote the same values and interests). Certainly, family values such as commitment, loyalty, and intimacy are equally fostered by same-sex couples. Dwight J. Penas, *Bless The Tie That*

marriage and family, however, has failed to reflect this change.[14]

Part I of this Comment outlines the purposes and benefits of marriage, and the states' interest in regulating this most vital and personal right. Part II explores alternatives to marriage such as adoption, domestic partnership and contractual marriages. Part III analyzes the judicial history of same-sex marriage. Part IV explains why the equal protection clause is an inadequate mechanism through which to extend the right to marry to same-sex couples, and Part V dictates why the due process clause should afford these couples the same marital rights as heterosexual couples. Part VI concludes that only by recognizing the legitimacy of same-sex marriage will the homosexual population be protected under the Constitution.

I. MARRIAGE: THE INSTITUTION

Marriage is more than just a legal union of two people—marriage is an institution.[15] Marriage, broadly stated, is an integral ele-

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Binds: A Puritan-Covenant Case For Same-Sex Marriage, 8 LAW & INEQ. J. 533, 552-53 (1990).

14 Post, *supra* note 10, at 748-49. Specifically, alternative families are often refused the significant benefits automatically conferred upon legally recognized families. Note, *Looking For A Family Resemblance: The Limits Of The Functional Approach To The Legal Definition Of Family*, 104 HARV. L. REV. 1640, 1640 (1991) [hereinafter *Looking for a Family Resemblance*]. For a list of the benefits bestowed upon legally married couples, see *infra* note 20. *But see* United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 529, 532-33 (1973) (holding that the federal government could not constitutionally limit the benefits of food stamps to households of related individuals); Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 50, 53-54 (N.Y. 1989) (finding that the term "family" included an unmarried lifetime gay partner under an anti-eviction law).

15 ARLENE SKOLNICK, THE INTIMATE ENVIRONMENT: EXPLORING MARRIAGE AND THE FAMILY 194 (Little Brown & Co. 1973). In *Stevens v. United States*, the Court of Appeals for the Tenth Circuit articulated:

> Marriage is a consentient covenant. It is a contract in the sense that it is entered into by agreement of the parties. But it is more than a civil contract between them, subject to their will and pleasure in respect of effects, continuance, or dissolution. It is a domestic relation having to do with the morals and civilization of a people. It is an essential organization in every well organized society.

Stevens v. United States, 146 F.2d 120, 123 (10th Cir. 1944).

American family law, including marriage, evolved from English canon and common law. Adrienne K. Wilson, Note, *Same-Sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539, 541 (1991). The first formal marriage ceremonies were performed in the eighteenth century. *Id.* In early America, informal or common law marriages were commonplace because a clergy member or a civil officer was not always available to perform a formal marriage ceremony. *See generally* 52 AM. JUR. 2D *Marriage* § 45 (1970) (stating that common-law marriage developed in America because of the inconvenience in traveling to obtain a marriage license and the scarcity of individuals permitted to perform ceremonies). Common law marriages, however, are generally not

ment of cultural stabilization, necessary to establish and maintain social structure.[16] Specifically, the institution of marriage promotes community[17] and individual values,[18] and is viewed as essential to the maintenance of liberty and government.[19]

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recognized today. *Id.* at § 46. *See also* Watts v. Watts, 405 N.W.2d 303, 305-06, 309 (Wis. 1987) (holding that the statutes governing the division of property between married couples do not apply to unmarried persons living in a "marriage-like" relationship); Kinnison v. Kinnison, 627 P.2d 594, 595 (Wyo. 1981) (stating that Wyoming does not recognize common law marriages); Glasgo v. Glasgo, 410 N.E.2d 1325, 1327 (Ind. Ct. App. 1980) (citing IND. CODE § 31-1-6-1 (1992)) (noting Indiana's statutory prohibition of the doctrine of common law marriage); Hewitt v. Hewitt, 394 N.E.2d 1204, 1210 (Ill. 1979) (pointing out that common law marriages in Illinois had been abolished since 1905).

16 Schwarzschild, *supra* note 4, at 110. Schwarzschild expounded: "In Western society, certainly, marriage's historical ties both to religious authority and to systems of property relations have ensured it a role that reaches far beyond the 'private' sphere." *Id.*

Marriage breeds stability and reduces the social costs resulting from the breakdown of relations. Mark Strasser, *Family, Definitions, And The Constitution: On The Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981, 991 (1991). Gay and lesbian couples, like heterosexual couples, also promote these interests. *Id.*

17 *See* Bruce C. Hafen, *The Constitutional Status Of Marriage, Kinship, And Sexual Privacy - Balancing The Individual And Social Interests*, 81 MICH. L. REV. 463, 476 (1983) ("Through the commitments of marriage and kinship both children and parents experience the need for and the value of authority, responsibility, and duty in their most pristine forms."). Family bonds teach individuals "the attitudes and skills that sustain an open society." *Id.* at 472. Similarly, marriage fortifies society by providing a forum for potential happiness while breeding responsibility. Claudia A. Lewis, Note, *From This Day Forward: A Feminine Discourse on Homosexual Marriage*, 97 YALE L.J. 1783, 1799 (1988); *see also* Laws v. Griep, 332 N.W.2d 339, 341 (Iowa 1983) (stating that "[t]he policy favoring marriage is not rooted only community mores. It is also rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society").

18 *See* G. Sidney Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. DAYTON L. REV. 541, 542 n.8 (1985) [hereinafter Buchanan, *The Linchpin Issue*] (noting that the institution of marriage promotes many individual values, including generosity, fidelity, integrity, self-respect, and sustained joy). The Supreme Court has noted that the importance of family ties to both individuals and society is generated by the emotional attachments that develop from the intimacy of everyday life. Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 844 (1977) (citing Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972)). Individuals also benefit from marriage in that these relationships help "foster diversity and act as critical buffers between the individual and the power of the state." Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984) (citations omitted).

19 Schwarzschild, *supra* note 4, at 107. In *State v. Tutty*, a Georgia circuit court stated that "in this country, the home life of the people, their decency and their morality, are the bases of that vast social structure of liberty, and obedience to law, which excites the patriotic pride of our countrymen and the admiration of the world." State v. Tutty, 41 F. 753, 762 (1890). Similarly, almost a century later, the Supreme Court noted that "[t]he institution of marriage has played a critical role . . . in developing the decentralized structure of our democratic society." Lehr v. Robertson, 463 U.S. 248, 256-57 (1983).

The status of marriage automatically bestows a myriad of entitlements upon the married couple.[20] First, marriage serves as a vehicle through which couples gain social acceptance.[21] Second, marriage triggers state recognition and protection[22] of legal and economic benefits, such as inheritance and property rights as well as tax benefits.[23] These benefits evidence the value society places upon marriage and family,[24] and reflect the family's role as society's basic economic unit.[25] Insofar as these marital benefits are denied to same-sex couples, the law is a source of oppression.[26]

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20 *See* Treuthart, *supra* note 5, at 92 (noting that legally married couples are entitled to recovery for loss of consortium and lower insurance premiums); Wilson, *supra* note 15, at 540 (listing parenting and custody, health care for couples and their dependents, bereavement leave, inheritance and property rights, social security, and pensions as benefits of marriage). One of the most important benefits conferred upon married couples are tax benefits. *See* I.R.C. § 6013(a) (1992) (allowing married couples to file joint income taxes); I.R.C. § 2056 (1992) (providing a tax exemption for spouses inheriting from their mate's estate; no such exemption is available for unmarried partners).

Financial support upon separation is also accorded to married couples. Treuthart, *supra* note 5, at 92. Currently, however, there are no statutes or legal procedures that ensure fair treatment between same-sex partners upon separation. Rhonda R. Rivera, *Recent Developments In Sexual Preference Law*, 30 DRAKE L. REV. 311, 325 (1980-81) [hereinafter Rivera, *Recent Developments*].

Surviving spouses are also provided with veteran's benefits upon the death of a veteran spouse. 38 U.S.C. § 411 (1988); *see also* McConnell v. Nooner, 547 F.2d 54, 56 (8th Cir. 1976) (denying veterans benefits on the grounds that same-sex marriages were prohibited under Minnesota law).

21 *See* Wilson, *supra* note 15, at 543 (urging that marriage is especially vital for same-sex couples in search of social acceptance). It is dubious, however, whether the recognition of same-sex marriage would provide a vehicle for social change, because same-sex marriage is not uniformly championed among homosexuals. Ruth Colker, *Marriage*, 3 YALE J.L. & FEMINISM 321, 321 (1991). Opponents of same-sex marriage contend that legalization of same-sex marriage is no guarantee of social acceptance. *See* Nitya Duclos, *Some Complicating Thoughts On Same-Sex Marriage*, 1 LAW & SEXUALITY 31, 51-52 (1991) (contending that legalization of same-sex marriage will lead merely to toleration as opposed to respect). Professor Duclos further argued that if legal marital status were available to lesbian and gay couples, they would be under strong pressure to marry, because benefits would only be available on that basis. *Id.* at 50-51.

22 Lewis, *supra* note 17, at 1798. This recognition and protection promotes "a sense of belonging to the community through mutual public identification." *Id.*

23 *See supra* note 20 (listing marital benefits).

24 Friedman, *supra* note 12, at 155.

25 Treuthart, *supra* note 5, at 92. Professor Treuthart asserted that at least one reason economic benefits are conferred upon married persons is to encourage marriage because it promotes certain fundamental values which are beneficial to the persons involved and to society. *Id.* at 92-93.

26 *See* HAYDEN CURRY & DENIS CLIFFORD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES Ch.1, at 1:1 (6th ed. 1991) (asserting that sodomy laws and the specific exclusion of homosexuals from the military has "codified homophobia"). Examples of the oppression of homosexuals lie in sodomy laws, exclusion from military opportunities, and prohibitions against child custody. *Id.* Many states' refusal to permit same-

While states undoubtedly have a strong interest in regulating marriage,[27] the reasons proffered for denying this right to same-sex couples are unpersuasive.[28] The least prejudicial interest advanced by states for proscribing same-sex marriage is the encouragement of procreation.[29] Advocates maintain that this interest is justified because procreation is essential to the survival of the human race.[30]

This argument, however, fails for several reasons. First, the Supreme Court's privacy decisions, which grant individuals the right to contraception[31] and abortion,[32] question the legitimacy of

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sex marriage is also unduly oppressive because state interests are served equally well by both heterosexual and homosexual unions. Strasser, *supra* note 16, at 1015. For a discussion of the states' interest in marriage, see *supra* notes 15-19 and accompanying text.

Homosexuals are also oppressed in that they cannot sue in tort for certain actions. Penas, *supra* note 13, at 549. *See also* Elden v. Sheldon, 758 P.2d 582, 582, 588, 589-90 (Cal. 1988) (holding that an unmarried partner could not collect damages for negligent infliction of emotional distress or loss of consortium); Coon v. Joseph, 237 Cal. Rptr. 873, 874, 878 (Cal. Ct. App. 1987) (holding that an intimate homosexual relationship does not fall within the "close relationship" standard for negligent infliction of emotional distress); Rivera, *Recent Developments*, *supra* note 20, at 312 (insisting that the disparate treatment of legally recognized heterosexual unions and same-sex unions is a problem to be taken seriously).

27 *See supra* note 3 and accompanying text (discussing state regulation of marriage).

28 *See generally* Friedman, *supra* note 12, at 160-69 (scrutinizing and denouncing state interests advanced in support of denying homosexual couples marriage licenses); Wilson, *supra* note 15, at 544 (rejecting as antiquated justifications put forth for disallowing same-sex marriage).

29 *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (noting that the state has a basic interest in encouraging reproduction given that procreation is essential for the survival of the human race); Friedman, *supra* note 12, at 161 (arguing that legitimization of same-sex marriage would decrease incentive to enter a heterosexual union, which is more likely to result in offspring). Furthermore, courts have found procreation sufficient to prohibit same-sex couples from marrying. *See, e.g.*, Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (reasoning that homosexuals' inability to propagate the human race should preclude them from marrying).

30 Friedman, *supra* note 12, at 161. Advocates further maintain that even though homosexual couples do raise children, heterosexual unions are far more likely to result in procreation. *Id.* Moreover, recognition of a "homosexual union pairs individuals who are *capable* of natural procreation in a relationship *incapable* of natural procreation." *Id.*

31 *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 681, 700 (1977) (upholding the invalidation of a New York law prohibiting the sale or distribution of contraceptives to minors under age 16); Eisenstadt v. Baird, 405 U.S. 438, 440-42, 454-55 (1972) (finding unconstitutional a statute permitting distribution of contraceptives only to married people); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (determining that the right of married people to use contraceptives falls within the due process right to privacy).

32 *See, e.g.*, Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 58, 70, 74-75 (1976) (barring states from giving parents or spouse absolute veto power over a woman's decision to abort); Roe v. Wade, 410 U.S. 113, 153 (1973) (finding that the

the states' interest in increasing the population.[33] Second, states do not deny marital rights to heterosexual couples unable or unwilling to procreate.[34] Third, lesbian and gay couples can and do raise their own families.[35]

Protection of the traditional family has also been enumerated as a reason to prohibit same-sex marriage.[36] Proponents of same-

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right to privacy gives a woman the constitutional right to decide whether to terminate her pregnancy). For an excellent discussion of developments in the undeniably controversial area of abortion, see Mary Edwards & Brian D. Lee, Note, *A Regulation Requiring A Woman to Notify Her Husband Before Receiving An Abortion Is Impermissible Because It Unduly Burdens The Woman's Abortion Right*, 23 SETON HALL L. REV. 255, 322 (1992) (calling for specific guidelines to clarify how far a woman's right to abort extends).

[33] Friedman, *supra* note 12, at 161. Friedman additionally warned that the real threat to the human race is overpopulation not underpopulation. *Id.*

[34] Wilson, *supra* note 15, at 544. Childless same-sex couples and childless heterosexual couples are "similarly situated" in that they are both unable or unwilling to procreate. Leo Sullivan, *Same Sex Marriage and the Constitution*, 6 U.C. DAVIS L. REV. 275, 280 (1973). The Equal Protection Clause requires that similarly situated people be treated alike; thus states cannot reasonably prohibit same-sex couples from marrying based upon an inability to procreate. *Id.* at 278, 280.

[35] Post, *supra* note 10, at 756. Gay and lesbian couples have used adoption and artificial insemination as a means to have children of their own. *Id.*; *see also* Note, *Developments In The Law, The Constitution And The Family*, 93 HARV. L. REV. 1156, 1285 (1980) [hereinafter *Developments in the Law*] (maintaining that the fundamentals of childraising are the same for both homosexual and heterosexual parents); Note, *Joint Adoption: A Queer Adoption*, 15 VT. L. REV. 197, 199, 204-18 (1990) (arguing for joint adoption by homosexual couples).

The most controversial means by which a gay or lesbian can become a parent is adoption. Jeffrey S. Loomis, Comment, *An Alternative Placement for Children in Adoption Law: Allowing Homosexuals The Right to Adopt*, 18 OHIO N.U. L. REV. 631, 632-64 (1992) (surveying the law governing adoption of minors by homosexuals). The case law governing adoption by homosexuals is scant, with at least two courts coming out different ways on the issue. *Compare In re* Appeal in Pima Cty. Juvenile Action B-10489, 727 P.2d 830, 835 (Ariz. Ct. App. 1986) (affirming a trial court certification of a homosexual as unacceptable to adopt a child) *with In re* Adoption of Charles B., 552 N.E.2d 884, 885, 886, 890 (Ohio 1990) (upholding trial court's placement of a child with a homosexual).

[36] *See* Buchanan, *The Linchpin Issue*, *supra* note 18, at 565-70 (discussing the importance of heterosexual marriage in promoting certain individual and community values, such as allegiance to family life, conventional marriage, and childbearing). The author contended:

> The majority, therefore, may reasonably believe that legal recognition of same-sex marriage would destroy the exclusiveness of the present position held by opposite-sex marriage in the eyes of society and, by so doing, would impair the ability of opposite-sex marriage to advance the individual and community values that it has traditionally promoted.

Id. at 567.

One commentator has also observed that "[t]he law accords legal benefits to the married and legal disabilities to the unmarried for its own moral health and ultimate survival . . . ." Peter J. Riga, *The Supreme Court's View Of Marriage And The Family: Tradition or Transition?*, 18 J. FAM. L. 301, 310 (1980). For example, the protection and

sex marriage argue that states are overly concerned with maintaining the traditional family composite; the key to a stable society, however, is the promotion of family values.[37] Similar to heterosexual pairs, homosexual couples further traditional marriage and family values such as commitment, loyalty, and intimacy.[38]

II. ALTERNATIVES TO MARRIAGE

Legal alternatives to marriage are available to gay and lesbian couples. These alternatives include adult adoption,[39] domestic partnership,[40] and contract drafting.[41] These devices, however, are limited in that they merely provide a means through which to establish property rights.[42] More specifically, none grant same-sex couples a recognized legal status similar, let alone equal, to that of marriage, nor uniformly define homosexual unions.[43] These alter-

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promotion of the traditional family has guided the Supreme Court in reviewing laws dealing with illegitimacy. *See, e.g.*, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 167 n.3, 168 (1972) (acknowledging the inferior status of illegitimate children in recovering their parent's Workmen's Compensation benefits because of the importance of the state's interest in promoting the traditional family); Labine v. Vincent, 401 U.S. 532, 533, 539-40 (1971) (upholding a Louisiana intestate succession scheme which prevented illegitimate children from sharing equally with legitimate children in their father's estate). Whether such protection is appropriate today is precisely the issue addressed in this Comment. See *infra* note 37 and accompanying text for a discussion of how the virtues of the traditional family have been used as a justification for prohibiting same-sex marriage.

[37] *See generally* Penas, *supra* note 13, at 552-53. Opponents of same-sex marriage claim that legalization would debilitate the values associated with heterosexual marriage and traditional family life. *Id.* at 552. That same-sex marriage furthers the same values and interests as heterosexual marriage, such as commitment and loyalty, illustrates the illogic of this argument. *Id.* at 552-53.

[38] *Id.* at 552-53; Friedman, *supra* note 12, at 169 (stressing that since homosexual and heterosexual couples promote the same family values, it does not make sense to maintain that family values are protected by precluding homosexual marriage). Friedman contends that "[t]he notion of a lesbian or gay *family* is novel and foreign to the majority." *Id.* Homosexual relationships last because they parallel many of the "interpersonal arrangements" seen in heterosexual relationships. C.A. TRIPP, THE HOMOSEXUAL MATRIX 159 (McGraw-Hill 1975). For example, the division of leadership and decision-making in homosexual relationships generally parallels that in heterosexual unions. *Id.* at 162.

[39] *See infra* notes 45-53 and accompanying text (discussing adult adoption as an alternative to marriage).

[40] *See infra* notes 54-61 and accompanying text (discussing domestic partnership).

[41] *See infra* notes 62-71 and accompanying text (surveying the contract alternative to marriage).

[42] Lisa R. Zimmer, Note, *Family, Marriage, And The Same-Sex Couple*, 12 CARDOZO L. REV. 681, 688 (1990). *See also* ROBERTA ACHTENBERG & BARBARA J. GILCHRIST, SEXUAL ORIENTATION AND THE LAW § 1.05(2)(a) (Clark, Boardman & Callaghan 1992) (stating that adoption "suggests itself as a technique for insuring that the lover of a lesbian or gay testator inherits the testator's property").

[43] Zimmer, *supra* note 42, at 688.

natives, given their limited scope, therefore, do not adequately rectify the inherent unfairness of preventing same-sex couples from enjoying the legal benefits of marriage.[44]

A. *Adult Adoption*

Gay and lesbian couples have used adult adoption to legalize their unions.[45] Adoption is the legal process in which a person acquires parental rights and responsibilities with respect to another person. Adoption results in an irrevocable legal union between the adopter and the adoptee and is usually characterized as a parent-child relationship.[46] In a same-sex marriage, homosexual individuals adopt their mates to create a legal status that permits them to overcome obstacles relating to inheritance and housing, and to create a legally protected family unit.[47] Notably, although only New York has repeatedly addressed the quasi-marital aspect of adult adoptions, the results have been inconsistent.[48]

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[44] *See id.* at 688-97 (surveying alternatives to marriage and ultimately rejecting them on the grounds that they emphasize the differences rather than the similarities between homosexual and heterosexual couples).

[45] Peter N. Fowler, Comment, *Adult Adoptions: A "New" Legal Tool For Lesbians And Gay Men*, 14 GOLDEN GATE U. L. REV. 667, 668 (1984). Some statutes have expressly authorized adult adoption. *See, e.g.*, ARK. CODE ANN. § 9-9-203 (Michie 1991) ("Any individual may be adopted."); N.J. STAT. ANN. §§ 2A:22-1 to -3 (West 1987) (expressly permitting adult adoption); N.Y. DOM. REL. LAW § 110 (Consol. 1979 & Supp. 1991) ("An adult unmarried person . . . may adopt another person."); N.D. CENT. CODE § 14-15-02 (1991) ("Any individual may be adopted."). In New Jersey, however, adoption is probably not a reasonable alternative for same-sex couples because the adopter must be ten years older than the adoptee. *See* N.J. STAT. ANN. § 2A:22-2 (West 1987). Only Nebraska prohibits adult adoption. *See* Appeal of Ritchie, 53 N.W.2d 753, 754, 755 (Neb. 1952) (denying adult adoption based on Nebraska's statutory scheme which only expressly authorized the adoption of minors).

[46] Fowler, *supra* note 45, at 668-69. *See also* N.Y. DOM. REL. LAW § 110 (Consol. 1979 and Supp. 1991) ("Adoption is the legal proceeding whereby a person takes another person into the relation of child . . . .").

[47] ACHTENBERG & GILCHRIST, *supra* note 42, at § 1.05(2)(a)-(g). Often, the participants to adult adoption express their desire to legally formalize their personal commitment to each other. *See, e.g., In re* Adult Anonymous II, 88 A.D.2d 30, 32 (N.Y. App. Div. 1982) (acknowledging that the couple desired to display openly their commitment to each other); *In re* Adoption of Adult Anonymous, 435 N.Y.S.2d 527, 528 (Fam. Ct. 1981) (noting that the couple "wished to establish a more permanent legal bond").

Adoption may also permit the couple to acquire employment and insurance benefits. ACHTENBERG & GILCHRIST, *supra* note 42, at § 1.05(2)(d)-(e). Adoption may evidence a close relationship when a lesbian or gay partner is designated a beneficiary in a life insurance policy. *Id.*; *see also* Fowler, *supra* note 45, at 679-88 (enumerating motives underlying adult adoption: inheritance, recognition of "next-of-kin" relationships, housing restrictions, insurance and employment benefits, immigration, and the creation of a family unit).

[48] *Compare* 333 E. 53rd St. Assocs. v. Mann, 121 A.D.2d 289, 292 (N.Y. App. Div.

Even if same-sex adult adoption was accepted uniformly by the courts, it would remain an inadequate option for obtaining legal familial status because adoption defines the relationship as parent-child, rather than marital, and does not sufficiently define the accompanying rights.[49] Highlighting this inadequacy is the fact that couples who use adoption as a means of creating a legal relationship cannot forego a will and rely on intestacy laws for property inheritance purposes.[50] Similarly, adult adoption does not assure

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1986) (holding that adult adoption is permitted for inheritance purposes) *and Adult Anonymous II*, 88 A.D.2d at 31 (stating that "adoption of an adult by an adult is permissible so long as the parties' purpose is neither insincere nor fraudulent") *and Adoption of Adult Anonymous*, 435 N.Y.S.2d at 531 (proclaiming that adult adoption between two consenting adults will be permitted when the purpose of the adoption is for legitimate legal and economic reasons) *with In re* Adoption of Robert Paul P., 471 N.E.2d 424, 427 (N.Y. 1984) (rejecting adoption as a way to formalize intimate adult relationships).

In *Robert Paul P.*, New York's highest court rejected adoption as a mechanism to formalize what the court characterized as a nonfilial relationship. *Id.* The decision focused on traditional parent-child roles, not on the resulting family status. *Id.* According to the court, "where the relationship between the adult parties is utterly incompatible with the creation of a parent-child relationship between them, the adoption process is certainly not the proper vehicle by which to formalize their partnership in the eyes of the law." *Id.* The court asserted that it should be the legislature's decision as to whether unmarried sexual partners should be able to adopt one another for the purpose of legalizing their relationship. *Id.*

In *Mann*, however, the New York Supreme Court Appellate Division circumvented the highest court's ruling. *Mann*, 121 A.D.2d at 292. In *Mann*, the plaintiff sought a declaratory judgment that the defendant's apartment was exempt from rent control following the death of the defendant's co-tenant. *Id.* at 289. The defendant was living with the co-tenant when the apartment became rent-controlled and continued to live there "as a nonpurchasing rent-controlled tenant." *Id.* at 290. The defendant argued that because she had been adopted by the co-tenant, she was entitled to succeed in the tenancy under New York law. *Id.* (citing New York City Rent and Eviction Regulations § 56(d)). Relying on the established rule that adults may be adopted for inheritance purposes, the *Mann* court held that adult adoptions are permitted where economic concerns are a primary motivation for the adoption. *Id.*. The court reasoned, therefore, that the underlying personal motivations such as protecting one's rights in a shared apartment were acceptable purposes for adoption. *Id.*

Similarly, the decision in *Braschi v. Stahl Assocs. Co.* indicates a retreat from the reasoning set forth in *Robert Paul P.* Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 53 (N.Y. 1989). In *Braschi*, New York's highest court asserted that adoption is improper only where "none of the incidents of a filial relationship is evidenced or even remotely intended . . . ." *Id.* Moreover, the court held that a same-sex couple can form a family within the meaning of rent control laws. *Id.* at 54-55.

[49] *See* Zimmer, *supra* note 42, at 691. Zimmer asserted that further legal tools were needed to define the rights given to individuals of adult adoption. *Id.*

[50] ACHTENBERG & GILCHRIST, *supra* note 42, at § 1.05(2)(a). Adoption merely removes standing to contest the will from the testator's blood relatives. *Id.*; *see also* Sol Lovas, *When Is A Family Not A Family? Inheritance And The Taxation Of Inheritance Within The Non-Traditional Family*, 24 IDAHO L. REV. 353, 354-67 (1988) (surveying inheritance problems within the non-traditional family). Because inheritance laws regarding

employment benefits because most benefits are available only to the worker's minor children.[51] Most significantly, adult adoption is an inadequate marriage alternative because of its irrevocability.[52] Without a viable and clearcut dissolution device similar to divorce, courts may be even more reluctant to endorse adult adoption.[53]

B. Domestic Partnership

Domestic partnership is a legal status conferred upon non-traditional couples by municipal governments as an alternative to marriage.[54] This alternative primarily provides the private sector with a means to extend employment benefits to same-sex couples.[55]

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adult adoption differ from jurisdiction to jurisdiction, the law's effectiveness will vary. *Id.* at 373. The prevailing view, however, is that same-sex couples have no inheritance rights without beneficiary designation or a valid will. *Id.* at 393-94.

[51] ACHTENBERG & GILCHRIST, *supra* note 42, at § 1.05(2)(e).

[52] *Id.* at § 1.05(4). *But see* CAL. CIVIL CODE § 227(p)(6) (West 1992) (allowing an adopted adult to file a petition for termination of the adoptive relationship after written notification is provided to the adoptive parent).

[53] Zimmer, *supra* note 42, at 692. Furthermore, couples separating after adoption face a precarious legal position due to the lack of a specific property designation scheme. *Id.* Courts, therefore, could only deal with designation of property rights if they are provided with prearranged individualized contracts. *Id.*

[54] Wilson, *supra* note 15, at 539 & n.2. Domestic partnership has been generally defined as two people who are committed to each other and have decided to share their lives in an intimate familial relationship. Jean Seligmann, *Variations on a Theme, The Twenty First Century Family*, NEWSWEEK, Winter/Spring 1990, at 38. Partners must register with their municipality, a process that usually entails filing an affidavit declaring the creation of the partnership and paying a nominal fee. Treuthart, *supra* note 5, at 101-02.

In 1907, Denmark was the first country worldwide to establish partnership registration for same-sex couples. Marianne H. Pedersen, *Denmark: Homosexual Marriages And New Rules Regarding Separation And Divorce*, 30 U. LOUISVILLE J. FAM. L. 289, 289 (1991). Denmark's legislation differs from other laws in that Denmark extends legal benefits that more closely parallel marriage. *Id.* at 290. Registered partners, however, still cannot jointly adopt children or obtain custody of a child. *Id.*; *see also* Michael L. Closen & Carol R. Heise, *HIV-AIDS and the Non-Traditional Family: The Argument for State and Federal Judicial Recognition of Danish Same-Sex Marriages*, 16 NOVA L. REV. 809, 815-16, 824-45 (1992) (arguing for United States courts to follow Denmark's recognition of same-sex marriages because such recognition would serve the best health interests of United States citizens).

United States municipalities that have enacted domestic partnership ordinances include Los Angeles, Berkeley, West Hollywood, and Laguna Beach, California; New York City and Ithaca, New York; Seattle, Washington; Madison, Wisconsin; and Takoma Park, Maryland. Wilson, *supra* note 15, at 539 n.2.

[55] *Id.* at 540; *see also* Zimmer, *supra* note 42, at 692 (describing domestic partnership legislation as an employer response to the demands of unmarried employees). Cities that have extended domestic partnership benefit ordinances to city employees and their partners include:

> Seattle, WA (March 1990—health benefits, August 1989—sick leave/bereavement leave); Takoma Park, MD (November 1988—sick leave/be-

Although domestic partnership is a commendable step towards recognizing the needs of same-sex couples,[56] it is still an ineffective alternative for combatting the unequal treatment afforded to married heterosexual couples and committed homosexual couples.[57] Specifically, domestic partnership does not grant partners the legal benefits of marriage.[58] Unlike marriage partners, most prospective domestic partners are required to live together for a period of time prior to the acquisition of domestic partnership status.[59] Moreover, while a heterosexual couple has the option of choosing between marriage and domestic partnership, the same-sex couple does not even have marriage and its accompanying benefits as an option.[60] Thus, the pivotal issue is equal choice.[61]

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reavement leave); Madison, WI (August 1988—sick leave/bereavement leave); Los Angeles, CA (March 1988—sick leave/bereavement leave); Santa Cruz, CA (May 1986—sick leave/bereavement leave and health benefits); West Hollywood, CA (February 1985—parenting leave/sick leave/bereavement leave, August 1988—dental and vision benefits, December 1988—medical coverage through self-insurance mechanism).

Treuthart, *supra* note 5, at 102 n.32. Recently, a New York City hospital, Montefiore Medical Center, decided to provide health benefits to homosexual employees and their partners if the employee could prove his or her living arrangements resembled that of married couples. James Barron, *Bronx Hospital Gives Gay Couples Spouse Benefits*, N.Y. TIMES, Mar. 27, 1991, at A1, col. 2. Unlike marriage, domestic partnership does not provide tax benefits, inheritance rights, dissolution procedures, or constitutional protection. Zimmer, *supra* note 42, at 694. Significantly, state legislatures do not recognize domestic partnership benefits. *Id.* It is left to employers' discretion as to whether they choose to provide their employees with equal benefits under an enacted domestic partnership ordinance. *Id.*

56 Arguably, entitlements conferred through domestic partnership show that homosexual unions are becoming more accepted in society. Closen & Hiese, *supra* note 54, at 841.

57 Zimmer, *supra* note 42, at 693-94. Zimmer pointed out the lack of uniformity in protecting domestic partnership offers as compared to the established framework of protection marriage conveys. *Id.*; *see also* Raoul Felder, *No Cheers for Domestic Partnerships*, N.Y. POST, Apr. 26, 1993, at 21 (describing domestic partnership as a "cruel hoax" because it offers homosexuals little substantive protection and further ostracizes them from the heterosexual population).

58 Wilson, *supra* note 15, at 540. Domestic partnership is a limited victory because it is not universally available, and provides only limited protection in the areas in which it is available. Cox, *supra* note 11, at 64. In addition, it is susceptible to voter repeal efforts. *Id.*

59 *Zimmer*, *supra* note 42, at 693. For example, in Berkeley, California, couples must live together for six months before they qualify for registration. Milt Freudenheim, *Rising Worry on 'Partner' Benefits*, N.Y. TIMES, Aug. 16, 1989, at D5. Similarly, New York City workers are extended benefits only if they register their relationship, cohabitate for at least one year, and maintain a "close and committed" relationship. Walter Isaacson, *Should Gays Have Marriage Rights?*, TIME, Nov. 20, 1989, at 101-02.

60 *See* Zimmer, *supra* note 42, at 694 (declaring that "[l]imited regulation of this sort is simply not enough").

61 *Id.*

C. Contract

Same-sex couples have also used the contract as a vehicle to obtain certain entitlements automatically granted to married couples, such as property distribution after separation or death.[62] In the landmark decision *Marvin v. Marvin*,[63] the California Supreme Court provided unmarried cohabitants with the right to agree contractually on their chosen form of property distribution.[64] Although *Marvin* involved a heterosexual couple, the court's neutral treatment of cohabitation can be read broadly to include same-sex couples.[65]

One advantage of the contract alternative is that properly executed contracts conforming to state law requirements provide same-sex cohabitators with property rights.[66] Moreover, carefully drafted documents can furnish the parties with rights in the event of dissolution.[67]

A major disadvantage to the contract alternative is that same-sex couples cannot refer to their sexual relationship in the document.[68] Unfortunately, some courts have found a sexual relation-

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62 Kristin Bullock, Comment, *Applying* Marvin v. Marvin *to Same-Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute*, 25 U.C. DAVIS L. REV. 1029, 1030-31 (1992). Bullock concluded that codification of contract principles with regard to cohabitation contracts would best meet the needs of homosexual couples who wish to establish property rights. *Id.* at 1054.

Some members of the homosexual community view automatic property rights as one of the primary reasons to fight for legal recognition of same-sex marriage. *See* CURRY & CLIFFORD, *supra* note 26, at 2:2 (observing that courts have begun to uphold property agreements between homosexual couples). Without the right to marry, a contract is essentially the only way to provide judicial redress to the separating same-sex couple because their relationship is not legally recognized. Zimmer, *supra* note 42, at 695. Dissolution of marriage, of course, provides property designation guidelines, *i.e.*, whether the jurisdiction subscribes to equitable distribution or community property theories. *Id.*

63 557 P.2d 106 (Cal. 1976).

64 *Id.* at 116. The court qualified this right, however, by precluding the use of sexual services as consideration for such a contract. *Id.*

65 *See* Bullock, *supra* note 62, at 1044 (positing that the court's neutral language applies equally to all adult cohabitants who wish to provide for property distribution through the use of a contract). The *Marvin* court refused to impose an outdated moral standard on the couple. *Marvin*, 557 P.2d at 122. The *Marvin* court recognized that "adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights." *Id.* at 116.

66 *See* Zimmer, *supra* note 42, at 696 (noting that AIDS has increased the need for an effective legal tool for estate planning purposes).

67 *Id.* Zimmer opined that the contract provides the only alternative for the separating same-sex couple because both equitable distribution and community property designations are available only to couples who were legally married. *Id.* at 695-96.

68 Rhonda R. Rivera, *Queer Law: Sexual Orientation In The Mid-Eighties—Part II*, 11

ship to comprise part of the consideration, and have used this bond as a basis to refuse enforcement of the contract.[69] Other jurisdictions permit severance of the sexual service promises from the contract and enforce the remaining legal promises.[70] Perhaps the largest drawback to this alternative is that it does not create a legally recognized status for same-sex couples.[71]

D. Why These Alternatives Fail

Although same-sex couples can and have used adult adoption, domestic partnership, and contracts to receive certain benefits, these options fail as adequate alternatives.[72] In particular, these alternatives fail to resolve the inherent unfairness resulting from the fact that while a plethora of economic and emotional benefits are automatically conferred upon married couples, same-sex couples are forced to fight for a fraction of these rights.[73] In other words, none provide same-sex couples with an alternative that parallels marriage. Clearly, the only remedy to the problem is recognition of same-sex marriage or establishment of a nontraditional equivalent.[74]

III. MARRIAGE AND THE COURTS

While the Supreme Court has proclaimed that the freedom to marry is among a person's basic civil rights,[75] state courts have not

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U. DAYTON L. REV. 275, 375 (1986) (citing Jones v. Daly, 176 Cal. Rptr. 130 (1981)). Denying the sexual aspect of the same-sex couple's relationship, however, essentially delegitimizes it. Zimmer, *supra* note 42, at 697.

69 ACHTENBERG & GILCHRIST, *supra* note 42, at § 2.04[1]. States which unequivocally find that a sexual relationship invalidates a contract are Arizona, Arkansas, Illinois, Georgia, and Tennessee. *Id.*

70 *Id.* For instance, the *Marvin* court recognized the applicability of this contract principle to cohabitation agreements. *Marvin*, 557 P.2d at 114. Specifically, the court refused to render cohabitation contracts invalid if they involved sexual relationships. *Id.* at 114-15. The court determined that to do so would result in an unworkable standard because cohabitating couples are usually sexually involved. *Id.* at 114.

71 Zimmer, *supra* note 42, at 697.

72 *Id.*

73 *See id.* at 688, 697 (stressing that the alternatives not only result in nonuniformity with regards to the definition of the same-sex couple but also fail to define adequately the rights and responsibilities of the partners).

74 *See id.* at 697 ("Only through marriage can same-sex couples achieve the psychological harmony of emotional commitment coupled with legal protection.") Even legalization of same-sex marriage, however, will not resolve all the problems of alternative families at least with regard to parenthood issues. Cox, *supra* note 11, at 65. For example, the law offers limited protection to stepparents, which would affect homosexual couples who chose to marry if same-sex marriage was permitted. *Id.* at 65-66.

75 Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

endorsed this philosophy with regard to same-sex marriage.[76] Instead, state courts have restrictively defined marriage as an opposite-sex union, and have been reluctant to stray from this definition.[77]

The issue of whether same-sex couples have the right to marry remained unaddressed until 1971,[78] when the Minnesota Supreme Court decided *Baker v. Nelson*.[79] In *Baker*, two men challenged, on statutory and constitutional grounds, Minnesota's refusal to issue them a marriage license.[80] The court quickly dismissed the statu-

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[76] *See, e.g.*, Singer v. Hara, 522 P.2d 1187, 1188, 1197 (Wash. Ct. App. 1974) (upholding the state's refusal to issue a marriage license to two men); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (upholding the denial of a marriage license to a same-sex couple); Burkett v. Zablocki, 54 F.R.D. 626 (E.D. Wis. 1972) (dismissing action by two females seeking an order to compel the county clerk to issue application for marriage license); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (upholding a state statute denying a marriage license to two men); *see also* Adams v. Howerton, 673 F.2d 1036, 1038 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982) (refusing to recognize a same-sex marriage for federal immigration law purposes).

Singer, *Jones*, and *Baker* all emphasize that marriage is a same-sex union by definition. Schwarzschild, *supra* note 4, at 113 & nn.117-18. Underlying each decision's reliance on dictionary and encyclopedia definitions is basically an "is and always has been" rationale. *Id.* at 113. This rationale originated in *Anonymous v. Anonymous*. *Id.* & n.113; Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (Special Term 1971). The *Anonymous* court quashed a marriage involving a transsexual, reasoning that the requisite partners to a marriage are a man and a woman. *Id.* at 499, 501. The court asserted that "[m]arriage *is and always has been* a contract between a man and a woman." *Id.* at 500 (emphasis added); *see also In re* Ladrach, 513 N.E.2d 828, 832 (Ohio Prob. 1987) (invalidating a marriage between a male and a postoperative transsexual female). *But cf.* M.T. v. J.T., 355 A.2d 204, 211 (N.J. App. Div. 1976) (holding that a valid marriage can occur between a male and a male-to-female postoperative transsexual).

The first battles for legal recognition of same-sex marriage paralleled the growth of the lesbian and gay rights movement in the 1970s. Friedman, *supra* note 12, at 137. Alissa Friedman maintains that "[t]he early same-sex marriage cases are better viewed as political efforts to raise the consciousness of the American public than as realistic efforts to effect social change through litigation." *Id.*

The battle for homosexual rights in the United States can be traced back to the 1920s. DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 458 (The University of Chicago Press 1988). The 1968 Stonewall riot, in which patrons of a New York City gay bar fought against police who had raided the bar, commenced the modern homosexual rights movement. *Id.* For a detailed account of the modern gay movement, see *id.* at 455-81.

[77] Schwarzschild, *supra* note 4, at 113. Only a few jurisdictions have expressly declared that marriage is restricted to a man and a woman. *See* FLA. STAT. ANN. § 741.04 (West 1986) (mandating that no marriage license shall be issued "unless one party is a male and the other party is a female"); MD. FAM LAW CODE ANN. § 2-201 (1991) ("Only a marriage between a man and a woman is valid in this state.").

[78] Schwarzschild, *supra* note 4, at 113-14.

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

[80] *Id.* at 185-86. Baker and McConnell based their claim on the lack of an express

tory claim, defining marriage as a "union between persons of the opposite sex."[81] In so holding, the court noted the state's strong interest in encouraging procreation.[82]

The *Baker* court also rejected the couple's equal protection and due process claims.[83] The court reasoned that the unconstitutionality of anti-miscegenation statutes was not parallel to prohibitions against same-sex marriage.[84] According to the court, anti-miscegenation statutes were precluded solely because they are ra-

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prohibition of homosexual marriage in the Minnesota statutes. *Id.* at 185. The couple contended that the right to marry is a fundamental right, irrespective of the gender of either party, and that refusing to recognize same-sex marriage is irrational and invidiously discriminatory. *Id.* at 186.

81 *Id.* at 185-86. The court cited two dictionaries to support its interpretation of the statute. *Id.* at 186 n.1 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1384 (1966); BLACK'S LAW DICTIONARY 1123 (4th ed. 1957)). The court first referenced Webster's Third New International Dictionary, which defined marriage as "the state of being united to a person of the opposite sex as husband or wife." *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1384 (1966)). Similarly, the court looked to Black's Law Dictionary that defined marriage as "the civil status . . . of one man and one woman united in law for life . . . ." *Id.* (quoting BLACK'S LAW DICTIONARY 1123 (4th ed. 1957)).

82 *Id.* at 186. The court glibly distinguished the privacy right upheld in *Griswold v. Connecticut*, stressing that the privacy right existed because the state had authorized the marriage. *Baker*, 191 N.W.2d at 186 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)). At issue in *Griswold* was a state statute making it a criminal act for any person to use contraceptives. *Griswold*, 381 U.S. at 480. In *Griswold*, defendant-appellants, the director and medical director of the local Planned Parenthood, were convicted of giving married persons advice regarding the use of contraceptives. *Id.* In striking the statute, the Court found that several of the Bill of Rights guarantee to protect a "zone of privacy". *Id.* at 482-85. The Court concluded that the right of married persons to use contraceptives fall within this zone. *Id.* at 485. The Court was particularly persuaded by the privacy implications of proof in prosecutions, admonishing that "[t]he very idea [of allowing police to search the marital bedroom for signs of contraceptive use was] repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 485-86. Thus, *Griswold* is considered a landmark case for recognizing the right of privacy—a new constitutional right. *See* Lackland H. Bloom, Jr., *The Legacy of* Griswold, 16 OHIO N.U. L. REV. 511, 512 (1989) (analyzing the constitutional, doctrinal, and perceptional ramifications of *Griswold* after twenty-five years); G. Sidney Buchanan, *The Right of Privacy: Past, Present, and Future*, 16 OHIO N.U. L. REV. 403, 404 (1989) [hereinafter Buchanan, *The Right of Privacy*] (examining the *Griswold* precedent and the extension of the right to privacy in the twenty-five years since *Griswold*).

83 *Baker*, 191 N.W.2d at 186, 187. Specifically the couple argued that opposite-sex couples who were unwilling or unable to procreate were not similarly denied the right to marry. *Id.* at 187. The *Baker* court rejected the equal protection claim, however, on the grounds that a state's classification of persons permitted to marry was constitutional because the Fourteenth Amendment did not demand "abstract symmetry." *Id.* (footnote omitted).

84 *Id.* The court discussed *Loving v. Virginia*, in which a state statute prohibited interracial marriages. *Id.* at 187 (citing Loving v. Virginia, 388 U.S. 1, 2 (1967)). Holding that this racial classification violated equal protection, the *Loving* Court rejected the state's contention that the statute did not invidiously discriminate because it punished both white and black participants equally. *Loving*, 388 U.S. at 8, 11.

cially discriminatory.[85] The majority insisted that a clear distinction existed between a marital restriction based on race and one based on sex.[86]

Shortly after *Baker*, this view of marriage, as limited to a man and woman, was followed by the Kentucky Court of Appeals, then the state's highest court, in *Jones v. Hallahan*.[87] In rejecting the claims of two women seeking a marriage license,[88] the court applied a more restrictive definition of marriage than the *Baker* court.[89] After quoting extensively from dictionaries and an encyclopedia,[90] the *Jones* court concluded simply that marriage has traditionally been viewed as an opposite-sex union.[91] The court failed to address the couple's constitutional claims,[92] because it had already determined that the couple's proposed union was not a marriage.[93]

In *Singer v. Hara*,[94] the Washington Court of Appeals did not stray from the pattern set by *Baker* and *Jones*.[95] The court promulgated that a marital union presumably consisted only of a man and a woman.[96] As in *Jones*, the court ignored federal and state consti-

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85 *Baker*, 191 N.W.2d at 187.

86 *Id.* The court, however, did not elaborate further as to why there is such a "clear distinction." *See id.* Interestingly, the United States Supreme Court dismissed an appeal "for want of a substantial federal question." Baker v. Nelson, 409 U.S. 810, 810 (1972). This failure to address such a question is perhaps indicative of deference accorded to the states with regard to marriage laws. *See supra* note 3 (discussing regulation of marriage by the states).

87 501 S.W.2d 588 (Ky. Ct. App. 1973).

88 *Id.* at 589.

89 *See id.* at 589-90 (stating that marriage has always been viewed as an opposite-sex union and that no constitutional concerns applied). *See infra* notes 90-93 and accompanying text (discussing the *Jones* court's rejection of same-sex marriage).

90 *Jones*, 501 S.W.2d at 589. Specifically, the court cited Webster's New International Dictionary, Second Edition which defined marriage as "being united to a person or persons of the opposite sex . . . ." *Id.* (citation omitted). The court then cited Century Dictionary and Encyclopedia, which defined marriage as "[t]he legal union of a man with a woman for life." *Id.* (citation omitted). Finally, the court cited to Black's Law Dictionary which defined marriage as "[t]he civil status . . . of one man and one woman united in law for life." *Id.* (quoting BLACK'S LAW DICTIONARY 1123 (4th ed. 1957)).

91 *Id.*

92 *Id.* at 590 (maintaining that "[w]e find no constitutional sanction or protection of the right of marriage between persons of the same sex").

93 *Id.* Indeed, the court blamed the couple's failure to obtain a license on their own incapability to enter into a marriage as it was defined. *Id.* at 589.

94 522 P.2d 1187 (Wash. Ct. App. 1974).

95 *See id.* at 1191. *See supra* notes 79-93 (analyzing *Baker* and *Jones*).

96 *Singer*, 522 P.2d at 1191. The court added that it was not necessary to resort to dictionary definitions to support this presumption. *Id.* at 1191 n.6. The court contended that an opposite-sex requirement is justified based on the "unique physical characteristics" of men and women. *Id.* at 1195. The court reasoned that a primary

tutional claims in reviewing the legality of a same-sex marriage.[97]

In *Adams v. Howerton*,[98] the United States Court of Appeals for the Ninth Circuit reviewed whether a same-sex marriage was valid for purposes of obtaining United States citizenship.[99] The court held that Congress could not have intended that same-sex marriage would satisfy immigration law requirements.[100] The court further found no constitutional infirmity in the preferential treatment of heterosexual marriages.[101]

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purpose of marriage is procreation; therefore, the state is justified in prohibiting same-sex marriage because those unions do not result in offspring. *Id.* The court apparently was not aware that same-sex couples are bearing their own children, albeit with the help of technology. *See* Friedman, *supra* note 12, at 158-59 (noting that same-sex couples do have families through artificial insemination and sperm bank services).

97 *Singer*, 522 P.2d at 1197. The plaintiffs, Singer and Barwick, made a simple, yet compelling argument under the Washington Equal Rights Amendment (ERA). Friedman, *supra* note 12, at 140. The Washington ERA required that equal rights not be infringed upon or denied on account of sex. *Singer*, 522 P.2d at 1190. The couple argued that "to permit a man to marry a woman but at the same time to deny him the right to marry another man is to construct an unconstitutional classification 'on account of sex' ". *Id.* The court, however, rejected this argument on the grounds that the voters did not intend to extend same-sex couples the right to marry when ratifying the ERA. *Id.* at 1193-94. The court assumed that the voters only intended to remedy discrimination "between women and men on account of sex." *Id.* at 1194.

In addition, Singer and Barwick contended that the opposite-sex requirement for marriage constituted a classification based upon sex that was "inherently suspect," therefore triggering strict scrutiny analysis. *Id.* at 1195 (citation omitted). The court conceded that Washington's highest court had held that a sex-based classification was inherently suspect. *Id.* at 1196 (citation omitted). The court dismissed this claim, however, on the grounds than in its ERA analysis it had already determined that "[a]ppellants were not denied a marriage license because of their sex; rather they were denied a marriage license because of the nature of marriage itself." *Id.*

98 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982). Adams, an American male citizen, and Sullivan, an Australian male citizen, obtained a marriage license in Boulder, Colorado, and went through a marriage ceremony. *Id.* at 1038; Adams v. Howerton, 486 F. Supp. 1119, 1120 (C.D. Cal. 1980). Adams then petitioned the Immigration and Naturalization Service to reclassify Sullivan as an immediate relative. *Adams*, 673 F.2d at 1038.

99 *Id.* at 1040. Presumably, Sullivan wanted to obtain an immigrant visa to avoid deportation. Friedman, *supra* note 12, at 142.

Initially, the district court addressed whether the marriage was valid under Colorado law. *Adams*, 486 F. Supp. at 1122. In so doing, the court deferred to the definition of marriage in Black's Law Dictionary and the reasoning of *Singer* to find that a same-sex union cannot be a valid marriage. *Id.* at 1122-23.

100 *Adams*, 673 F.2d at 1041.

101 *Id.* at 1042. Relying on the deference traditionally accorded to Congress's judgment regarding immigration, the court observed on the constitutional issues that "in this area of the law, Congress has almost plenary power and may enact statutes which, if applied to citizens, would be constitutional." *Id.* The court decided, therefore, that the opposite sex requirement for purposes of immigration laws need only pass rational basis scrutiny. *Id.* The Ninth Circuit reasoned that Congress rationally decided that "preferential status is not warranted for the spouses of homosexual marriages[ ]

In 1991, the legitimacy of homosexual marriage was addressed again in *Dean v. District of Columbia*.[102] Essentially following from the reasoning set forth in earlier cases, the *Dean* court denied the plaintiffs a marriage license on the grounds that the relationship did not fit within the traditional definition of marriage.[103] The court posited that certain provisions of the law indicated the legislature's recognition that procreation was an integral part of marriage.[104] The *Dean* court explained that the plaintiffs were not

. . . because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores." *Id.* at 1042-43.

[102] No. 90-13892 (D.C. Super. Ct. Dec. 30, 1991). Craig Dean and Patrick Gill, the plaintiffs, filed this suit after the clerk of the District of Columbia refused to issue them a marriage license. *Id.* at 1.

[103] *Id.* at 26 (quoting Singer v. Hara, 522 P.2d 1187, 1196 (Wash. Ct. App. 1974)). Upon concluding that no genuine issue of material fact existed, the court granted summary judgment in favor of the defendants. *Id.* The court first considered whether the legislature intended to authorize same-sex marriage when it enacted the Marriage and Divorce Act in 1977. *Id.* at 1. The plaintiffs contended that the District of Columbia was required to issue them a marriage license under the "gender-neutral" language of the Marriage and Divorce Act. *Id.* After examining the local ordinance regulating marriage, the court concluded that the gender-specific language of the law did not permit same-sex marriage. *Id.* at 7-9. The court considered not only the wording of the Act, but also the "gender distinctive" provisions in the history of the District of Columbia's marriage provisions. *Id.* at 8-9 (citations omitted). Specifically, the court pointed to D.C. CODE § 30-318 that read "husband and wife shall be competent witnesses . . .", and D.C. CODE, § 30-201, which read, in relevant part: "This section (relating to property rights) shall not be . . . deemed to affect the law relating to . . . ownership of property held by the husband and wife as tenants by the entireties . . ." *Id.* at 9. The court was especially persuaded by the annulment provision of D.C. LAW 1-107, which read, in relevant part: "Marriage contracts may be annulled . . . where either party was matrimonially incapacitated at the time of the marriage and has continued to be so incapacitated . . . ." *Id.* at 11-12. The *Dean* court noted that this bigamy provision was relevant only when an individual married another while "having a *husband* or *wife* from a prior, undissolved marriage." *Id.* at 12.

Moreover, the court interpreted matrimonial incapacity to mean an inability to consummate the marriage through sexual intercourse. *Id.* The court maintained that oral sex and anal sex could not have been the types of intercourse contemplated by the legislature, based on the fact that both oral and anal sex constitute criminal sodomy violations. *Id.* at 13. The court reasoned that without participating in sodomy, it is questionable whether a same-sex marriage could ever be "consummated." *Id.*

According to the commonly understood meaning of the words, the court further reasoned that construction of the statute required a finding that marriage is defined as a union between a man and a woman. *Id.* at 13-14 (quotation omitted). Again, the court relied on common definitions of marriage. *Id.* at 14 (citations omitted). The court concluded its definitional analysis of the historical meaning of marriage with a list of Biblical scriptures containing references to a man and his wife. *Id.* at 18-20 (quoting *Genesis* 2:18, 22-25; *Deuteronomy* 24:1-5; *Matthew* 19:3-6; *Ephesians* 5:22, 25, 33).

[104] *Id.* at 10. As evidence, the court specifically pointed to the District of Columbia's consanguinity prohibitions. *Id.* at 9-10 (citation omitted). These prohibitions, the court maintained, indicated the legislative recognition that the encouragement of

denied a marriage license because of their "sexual orientation," but rather because the "nature of marriage itself" requires the participating parties to be of the opposite sex.[105]

Most recently, Hawaii's highest court took the first step towards legalizing same-sex marriage in *Baehr v. Lewin*.[106] Although refusing to declare same-sex marriage a fundamental constitutional right,[107] the *Baehr* court held that barring such marriages might violate the Hawaii Constitution's prohibition against sex discrimination.[108] Remanding the case, the *Baehr* court articulated that the state had to prove that the present statutory prohibitions against same-sex marriage furthered a compelling state interest and were narrowly tailored for minimal infringement of constitutional rights.[109]

The common thread running throughout the cases which re-

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procreation is one of the purposes of marriage. *Id.* at 10. In line with *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972), and *Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974), the court emphasized the procreational aspect of marriage. *Id.* at 11. The court also addressed the argument that heterosexual couples unwilling or unable to procreate should similarly be denied marriage licenses, but quickly and superficially dismissed it on the grounds that procreation is essential to the survival of the human race. *Id.*

105 *Id.* at 25-26 (quoting *Singer*, 522 P.2d at 1196). The court determined that any change in the definition should come from the legislature rather than the court. *Id.* at 26.

106 No. 15689, 1993 Haw. LEXIS 26, at *12, *33 (May 5, 1993). Three homosexual couples, who asserted that prohibitions on homosexual marriage violated their rights of privacy and equal protection, filed a suit seeking injunctive and declaratory relief. *Id.* at *14-15, *22-23.

107 *Id.* at *41-42.

108 *Id.* at *79. The court first pointed out that the Hawaii Constitution provided broader protection than the United States Constitution. *Id.* at *51 (citation omitted). Specifically, the Hawaii Constitution provides in relevant part that "no person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry." *Id.* (quoting HAW. CONST. art. I, § 5). Conversely, the United States Constitution simply forbade the denial of equal protection. *Id.* (quoting U.S. CONST. amend XIV).

The court then declared sex as a "suspect category" for equal protection purposes under Hawaii's constitution, and that classifications based on sex would be presumed unconstitutional. *Id.* at *79. Accordingly, the court held that any such classifications could stand only if they passed "strict scrutiny" analysis by showing that the classification was based upon a compelling state interest, and was narrowly tailored to achieve that interest. *Id.*

109 *Id.* at *83-84 (citations omitted). Gay advocates are viewing this decision as a major breakthrough because it is the first case to consider seriously homosexual marriage. Jeffrey Schmalz, *In Hawaii, Step Toward Legalized Gay Marriage*, N.Y. TIMES, May 7, 1993, at A14 [hereinafter Schmalz, *In Hawaii*]. If upon remand, Hawaii decides to legalize gay marriage, the decision would have nationwide ramifications because all states recognize marriages performed in other states. *Id.*

fuse to legalize same-sex marriage is that marriage, by definition, is restricted to opposite-sex couples.[110] Each decision has relied upon the traditional conception of marriage and family, supported by the common dictionary definition.[111] The states' consistent reliance upon the traditional definition of marriage is misplaced because a definition, as part of the substantive law that incorporates it,[112] is subject to constitutional scrutiny and revision.[113]

Reliance upon this standard definition has led to the disparate treatment of homosexual couples.[114] The more a particular inequality infringes upon an important relationship, such as marriage, the greater the necessity for the courts to examine the relevant laws, and invalidate those that are unconstitutional or no longer serve their intended purpose.[115] The judiciary must expand and redefine the concept of marriage[116] in accordance with its fundamental values and function.[117] Overall, the case law governing

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110 *See* Schwarzschild, *supra* note 4, at 117 (pointing out that the cases which refuse to recognize same-sex marriage "share a common logic as well as a common blind spot" in that the decisions were based upon common dictionary definitions). While the cases discussed here have all dealt with statutory marriage, the issue of common law same-sex marriage has not gone unaddressed. *See* De Santo v. Barnsley, 476 A.2d 952, 955 (Pa. Super. Ct. 1984) (refusing to recognize a same-sex common law marriage based on Pennsylvania's statutory prohibitions against same-sex marriage).

111 Schwarzschild, *supra* note 4, at 117.

112 Friedman, *supra* note 12, at 151. This reasoning is unsound because nonlegal definitions change as the nature of the thing they are defining changes—definitions are not just changed by legislatures. Strasser, *supra* note 16, at 987. Furthermore, the definition of marriage is no longer confined to the union of a man and a woman. *Id.* Marriage is commonly found in daily conversation, newspapers, magazines, and journals and often refers to same-sex unions, even if the reference is not to a *legal* marriage. *Id.*

113 Friedman, *supra* note 12, at 151; *see also* Strasser, *supra* note 16, at 986 (calling for courts and theorists to recognize that definitions either incorporated or created by statutes are subject to constitutional limitations).

114 *See Looking for a Family Resemblance*, *supra* note 14, at 1640 (recognizing that alternative families are often refused the significant benefits automatically bestowed upon legally recognized families). For a list of the benefits conferred upon legally married couples, see *supra* note 20.

115 Lewis, *supra* note 17, at 1797.

116 *See* Closen & Heise, *supra* note 54, at 823 (arguing that as society becomes more accepting of homosexuality and of the severity of the AIDS epidemic, adjudication must begin to recognize same-sex marriage as a result of the changing times); Lewis, *supra* note 17, at 1797-98 (calling for the Court to redefine rights as the need arises).

117 *Id.* One commentator has posited that Puritan ideology, as one of the fundamental roots of American law, argues strongly for legal recognition of same-sex marriage. Penas, *supra* note 13, at 537-38. Puritan ideology is based on a divine-human covenant under which God promised to protect the human race, while humans were expected to care for one another. *Id.* at 541-42. According to covenant theology, human life is basically communal. *Id.* at 543. It should not be surprising, then, that Puritans stressed the *partnership* of marriage as: "mutual help, affection, and respect."

marriage is grounded upon historic and outdated notions.[118]

IV. SAME-SEX MARRIAGE: AN EQUAL PROTECTION ANALYSIS

The Equal Protection Clause of the Fourteenth Amendment[119] is used to invalidate legislation that infringes upon certain

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Id. at 544. Additionally, Puritan covenant relationships emphasized a person's freedom to choose whom to marry. *Id.*

But cf. Looking for a Family Resemblance, *supra* note 14, at 1641, 1652-59 (exposing limitations of the functional approach, which legitimizes non-nuclear relationships, and proposing open registration systems for individuals in alternative relationships to formalize their relationships).

118 *See, e.g.*, Ingram, *supra* note 3, at 55 (noting that modern prohibitions against same-sex marriage "rely heavily on ancient dogma and religious teachings"). For instance, in *Baker v. Nelson*, the Minnesota Supreme Court reasoned:

> The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. . . . This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend.

Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (citation omitted).

As one commentator pointed out, the *Baker* court's reliance upon "commonsense," and marriage as an "historic institution . . . deeply founded," is strange in light of *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down a statute based on equally "deeply founded" principles. Schwarzschild, *supra* note 4, at 114-15 (citations omitted). *See generally* Strasser, *supra* note 16, at 981 (maintaining that the states' refusal to recognize same-sex marriage closely parallels the states' former refusal to permit interracial marriage in that such refusal deprives homosexuals of a fundamental right).

119 The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The right to equal protection is a deeply rooted concept in Anglo-American jurisprudence. Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 507 (1985). Equal protection is based on the notion of *quid pro quo*, in which the citizen gives allegiance to the sovereign in exchange for its protection. *Id.* The Equal Protection Clause of the Fourteenth Amendment governs state and local government classifications. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.1, at 568-69 (4th ed. 1991). The Equal Protection Clause, therefore, regulates governmental classifications that afford different benefits and burdens to individuals under the law, and theoretically guarantees that all persons will be treated similarly. *Id.* at 568. Equal protection analysis determines whether a particular classification is properly drawn. *Id.* at § 14.2, at 570. If a federal government classification contravenes the equal protection guarantee, a due process violation of the Fifth Amendment occurs. *Id.* at § 14.1, at 569.

Because the exact nature and scope of the rights guaranteed by the clause are unclear, however, it is questionable whether equal protection guarantees actually exist. Melanie E. Meyers, Note, *Impermissible Purposes And The Equal Protection Clause*, 86 COL. L. REV. 1184, 1184 (1986). Meyers noted that the Supreme Court's equal protection decisions had been described as "incoherent, 'rudderless,' unprincipled, and ultimately 'astonishing.' " *Id.* at 1184 (citations omitted). As an alternative approach, Meyers argued for an impermissible purpose analysis of governmental classifications as a way of achieving more consistent treatment of the equal protection doctrine. *Id.* at 1209; *see also* Paul M. Bator, *Equality As A Constitutional Value*, 9 HARV. J.L. & PUB.

individual rights.[120] The Equal Protection Clause prohibits arbitrary classification of all persons similarly situated with respect to a statute's purpose.[121] Under the Equal Protection Clause, a legislative classification will be subjected to strict scrutiny analysis if a fundamental right or a suspect class is involved.[122] Strict scrutiny review imposes a heavy burden of proof upon the state because the government must establish that the statute is narrowly tailored to promote a compelling state interest.[123] Thus, strict scrutiny essen-

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POL'Y 21, 21 (1986) ("[T]he legal commentary . . . [on the Equal Protection Clause] seems tedious or incoherent or both. . . . [T]he many cases on the subject do not in any systematic or deep way confront the problematical quality of equality as a constitutional value."); Robert A. Destro, *Equality, Social Welfare And Equal Protection*, 9 HARV. J.L. & PUB. POL'Y 51, 60 (1986) (maintaining that "the government, [and] especially the courts, routinely confuse equal protection and social welfare concerns"); William Kristol, *Equal Protection Doctrine: Foundations In Mud*, 9 HARV. J.L. & PUB. POL'Y 35, 39 (1986) (arguing that the current concept of equal protection "is incoherent and unsustainable and needs to be rethought").

120 Wilson, *supra* note 15, at 548-49.

121 Reed v. Reed, 404 U.S. 71, 76 (1971) (citing Royster v. Guano Co., 253 U.S. 412, 415 (1920)). In other words, equal protection guarantees are triggered when a law classifies groups of individuals for different burdens or benefits. NOWAK & ROTUNDA, *supra* note 119, at § 14.2, at 571.

One possible equal protection argument is that men are denied equal protection of the laws when they are not allowed to marry men, and similarly that women are denied the same protection when they are not allowed to marry women. Friedman, *supra* note 12, at 145. In *Baker v. Nelson*, the plaintiffs made this argument by analogizing their case to *Loving v. Virginia*, in which the Court held that Virginia's anti-miscegenation statute violated equal protection, even though the right to marry a person of a different race was denied equally to blacks and whites. *Id.* at 144-45 (citing Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971); Loving v. Virginia, 388 U.S. 1, 8 (1967)). Specifically, the *Baker* plaintiffs argued that the marital opposite-sex requirement is irrational and invidiously discriminatory on the basis of sex. *Baker*, 191 N.W.2d at 186. The *Baker* court declared, however, that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Id.* at 187. For a discussion of *Baker v. Nelson*, see *supra* notes 79-86 and accompanying text.

This analogy to *Loving* seems more persuasive today in light of the developments in the law over the past two decades. Friedman, *supra* note 12, at 145. Specifically, the Supreme Court now employs a new approach to classifications based on sex. *Id.*; *see, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (articulating that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"). The opposite sex marriage requirement classifies according to sex in the same fashion that the anti-miscegenation statutes classified according to race. *Friedman*, *supra* note 12, at 145. That same-sex marriage is denied equally to males and females does not immunize the restriction from constitutional attack. *Id.*

122 Comment, *Homosexual's Right To Marry: A Constitutional Test And A Legislative Solution*, 128 U. PA. L. REV. 193, 199-200 (1979) [hereinafter *Homosexual's Right to Marry*].

123 *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 374, 376 (1971) (holding that states cannot deny welfare benefits to aliens because states' fiscal interests in preserving limited resources for its citizens is not compelling); Shapiro v. Thompson, 394 U.S. 618, 622, 629-31, 638 (1969) (invalidating the denial of welfare benefits to resi-

tially presumes the unconstitutionality of a challenged classification.[124]

Although the Equal Protection Clause, on its face, would appear to be a useful weapon to fight marital discrimination against homosexual couples, the opposite is true.[125] The right to marry has been declared fundamental only towards heterosexuals,[126] and homosexuals have not been declared a suspect class.[127]

A. *Are Homosexuals A Suspect Class For Equal Protection Purposes?*

The Supreme Court has thus far accorded suspect status to classifications based upon race,[128] alienage,[129] and national ances-

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dents who had not resided in the jurisdiction for at least a year on grounds that the right to travel was fundamental); *Loving*, 388 U.S. at 11 (stating that distinctions drawn according to race require strict scrutiny).

124 *Homosexual's Right to Marry*, *supra* note 122, at 200. On the other hand, if neither a fundamental right or a suspect class is involved, a challenged law will generally be upheld so long as the law is rationally related to a legitimate state interest. *Id.*; *see, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 424, 440-42 (1982) (holding that a state employment statute requiring a fact-finding conference within 120 days of filing the complaint was not a rational way of achieving the state objective of expediting disputes); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 177-79 (1980) (stating generally that so long as a plausible reason exists for Congress's enactment of the classification scheme for distributing retirement benefits, the equal protection guarantee was satisfied); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312, 314-16 (1976) (upholding a state statute that required police officers to retire at age fifty because it was rationally related to the state's goal of ensuring physically fit policemen); Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 222-23, 224-25 (1949) (holding that the state's goal of stamping out funeral insurance was legitimate). In practice, application of the rational basis test virtually assures a finding of constitutionality. Wilson, *supra* note 15, at 549. This result can be explained, at least in part, by the deference accorded state legislatures. *See, e.g.*, *Daniel*, 336 U.S. at 224 (reminding that the Court will not deem legislation illegitimate simply because the Court believes that the objective behind state legislation is unwise); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 82 (1911) (invalidating a law only if the classification is purely arbitrary).

125 Lewis, *supra* note 17, at 1785.

126 *See, e.g.*, *Loving*, 388 U.S. at 11 (declaring that only racial classifications with regard to marriage are prohibited); *Zablocki v. Redhail*, 434 U.S. 374, 378-79, 383-84 (examining a statutory scheme as applied to a heterosexual couple).

127 *See Homosexual's Right to Marry*, *supra* note 122, at 202 (stating that the Supreme Court has declared only race, alienage, and nationality to be suspect classes). If marriage were deemed to be a fundamental right, strict scrutiny would also be triggered. *See infra* notes 172, 183, and accompanying text (discussing application of strict scrutiny review to the right to marry).

In *Singer v. Hara*, a couple unsuccessfully attempted to invoke strict scrutiny in determining whether a state's marriage laws violated an individual's fundamental rights. Singer v. Hara, 542 P.2d 1187, 1195-97 (Wash. Ct. App. 1974). For an additional discussion of *Singer*, see *supra* notes 94-97 and accompanying text.

128 *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 431, 433-34 (1984) (holding invalid a state court order that transferred custody of a child to the father on grounds that the

try,[130] but not yet to homosexuality.[131] While the Court has not determined whether this list is exhaustive,[132] race is the characteristic that most clearly constitutes suspect status.[133] For other classes to qualify as suspect, they must resemble to some undefined degree the suspectness of race.[134] Because the characteristics that constitute suspectness are limited, homosexuals face a formidable barrier in gaining suspect status recognition.[135]

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child's mother had married a black man, which would result in the child's social stigmatization); *Loving*, 388 U.S. at 11 (reminding that distinctions drawn according to race demand the "most rigid scrutiny"); McLaughlin v. Florida, 379 U.S. 184, 186, 193, 196 (1964) (invalidating a statute prohibiting blacks from cohabitating with white members of the opposite sex); Anderson v. Martin, 375 U.S. 399, 401-02 (1964) (invalidating a law requiring a candidate's race to appear on an election ballot); Brown v. Board of Ed., 347 U.S. 483, 495 (1954) (explicitly rejecting the separate but equal doctrine in public education); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that the federal government could not be permitted to operate racially-segregated schools any more than could the states).

129 *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding that states cannot deny welfare benefits to aliens); Oyama v. California, 332 U.S. 633, 635-36, 640 (1948) (holding that a California law, which forbade aliens from owing agricultural land, violated the equal protection rights of an American minor citizen of Japanese heritage).

130 *See, e.g.*, Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (finding that discrimination against any racial group triggers strict scrutiny, even if the group has never been the subject of widespread discrimination); Hernandez v. Texas, 347 U.S. 475, 479-80 (1954) (holding that discrimination against Mexican-Americans would be scrutinized in the same way that discrimination against blacks would have been because the Mexican-Americans were also a group "distinct from 'whites' "); Korematsu v. United States, 323 U.S. 214, 215-16, 219-20 (1944) (upholding internment of Japanese-Americans under strict scrutiny where such exclusion is necessary for the protection of citizens in times of war).

131 *See Homosexual's Right to Marry*, *supra* note 122, at 202 (pointing out that the Supreme Court has only granted suspect class status to classifications based upon race, alienage, and national ancestry).

132 *See* Wilson, *supra* note 15, at 551 (observing that poverty has been viewed as suspect, and that the Supreme Court has not precluded additions to the list of suspect groups).

133 Note, *The Constitutional Status Of Sexual Orientation: Homosexuality As A Suspect Classification*, 98 HARV. L. REV. 1285, 1297-98 (1985) [hereinafter *Constitutional Status Of Sexual Orientation*].

134 *Id.* at 1298; *see also* Ellen Chaitin & V. Roy Lefcourt, *Is Gay Suspect?*, 8 LINCOLN L. REV. 24, 37 (1973) (describing race as the "first and foremost suspect class").

135 *See Homosexual's Right to Marry*, *supra* note 122, at 203, 206 (positing that homosexuals do not exhibit suspect characteristics to the same extent as established suspect classes; specifically, "homosexuality is not as visible or as immutable as the characteristics of the traditional suspect classes"). The Supreme Court denied the opportunity to decide whether a heightened standard of review should be applied to legislative classifications based upon sexual orientation in *Rowland v. Mad River Local School District.* Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 451-52 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985). The Ninth Circuit Court of Appeals, however, has declared homosexuals a suspect class. Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988), *cert. denied*, 498 U.S. 957 (1990).

While no explicit or coherent theory of what constitutes suspectness exists,[136] homosexuals, as a class, exhibit at least some, if not all, of the characteristics commonly associated with suspect status.[137] These characteristics include immutability, derogatory stereotyping, historical discrimination, and political disadvantage.[138]

Immutability implies that an individual does not intentionally possess a given trait, and that the trait could not be easily changed.[139] Recent studies suggest that homosexuality is an immutable characteristic determined at birth.[140] Were homosexuality proven to be an immutable trait, gays and lesbians could not be placed at a disadvantage because it is unfair to impose legal burdens upon—or award legal benefits to—an individual based upon an immutable attribute.[141]

Hostility and prejudice toward homosexuality is widespread,[142] dating as far back as the thirteenth century.[143] Indeed, in the United States, derogatory stereotyping of homosexuals is common.[144] Homosexuals have been perceived as being promiscuous, psychologically maladjusted, untrustworthy, and perverted.[145]

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136 Wilson, *supra* note 15, at 552.

137 *Homosexual's Right to Marry*, *supra* note 122, at 203.

138 Wilson, *supra* note 15, at 552.

139 *Constitutional Status Of Sexual Orientation*, *supra* note 133, at 1302. One commentator has contended that immutability is important because:

> [I]t would be pointless to try to deter membership in the immutable group, or because individual group members cannot be blamed for their status, or because immutability heightens the sense of stigma associated with membership, since no one would choose to be a member if she did not have to be one.

Id. at 1302-03; *see also*, Wilson, *supra* note 15, at 552-53 ("The origins and mutability of one's sexual orientation are unclear. What is clear is that homosexuality is a status and not merely a chosen activity.").

140 *See, e.g.*, Marcia Barinaga, *Is Homosexuality Biological?*, SCI., Aug. 30, 1991, at 956 (according to one study, the brain region that governs sexual behavior in homosexual men has an anatomical form typical of women rather than that found in heterosexual men); Bruce Bower, *Genetic clues to female sexuality*, SCI. NEWS, Aug. 22, 1992, at 117 (pointing out that studies have shown a strong genetic influence on both male and female homosexuality); Lewis, *supra* note 17, at 1799 ("The overwhelming psychiatric evidence demonstrates . . . that homosexuality is not a matter of simple election but rather a deep-seated psycho-social phenomenon established in early childhood years."). *See generally* LEONARD BARNETT, HOMOSEXUALITY: TIME TO TELL THE TRUTH 45-51 (The Camelot Press Ltd. 1975) (outlining briefly several theories regarding the causes of homosexuality).

141 Wilson, *supra* note 15, at 552.

142 *Id.* at 554.

143 Scott Turner, Comment, Braschi v. Stahl Assocs. Co.: *In Praise of Family*, 25 NEW ENG. L. REV. 1295, 1321-22 (1991).

144 CURRY & CLIFFORD, *supra* note 26, at FOREWORD.

145 *Id.* Said one businessman, "homosexuality is not a civil right. It's an aberration." Jeffrey Schmalz, *Gay Politics Goes Mainstream*, N.Y. TIMES MAG., Oct. 11, 1992, at 20

Discrimination against homosexuals is also pervasive in American society.[146] Currently, it is particularly visible in the military setting.[147] Similarly, the judiciary has also discriminated against

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[hereinafter Schmalz, *Gay Politics*]. Much of homosexuals' emotional disturbance can be attributed to the persecution and condemnation they suffer in our society. Albert Ellis, *The Happy Humanist: Are Gays and Lesbians Emotionally Disturbed?*, THE HUMANIST, Sept./Oct. 1992, at 33. Most experts agree that there is no correlation between emotional disturbance and homosexuality, as is evidenced by the fact that the American Psychiatric Association has removed homosexuality from its list of mental disorders. *Id.*

146 *Constitutional Status Of Sexual Orientation*, *supra* note 133, at 1285-86. Recently, the Wisconsin Court of Appeals affirmed the denial of a lesbian's application for family health insurance coverage for her lesbian companion because the two were not married. Phillips v. Wisconsin Personnel Comm'n, 482 N.W.2d 121, 123, 129 (Wis. Ct. App. 1992). The court reasoned that the plaintiff was not discriminated against on the basis of her sexual orientation because the bar against coverage for unmarried couples applied equally to heterosexual and homosexual employees. *Id.* at 123.

Another example of the non-uniform treatment lesbians and gay men must tolerate is newspaper managements' refusal to list surviving mates in lesbian and gay obituaries. Post, *supra* note 10, at 750-51. Post provides a compelling illustration:

> Imagine two couples. One heterosexual. One lesbian or gay. Both have a terminally ill partner. The healthy partner cares for the ill partner in a thousand large and small ways and grieves at the inevitable loss of the partner to death.
>
> For both couples, the newspaper obituary chronicles the life, civic involvements, church affiliation and other activities and interests of the deceased partner. For the heterosexual couple, the surviving spouse is listed. For the lesbian or gay couple, the surviving partner is not.

Id.

The causes of discrimination against homosexuals is generally beyond the scope of this Comment. Nonetheless, homophobia is at least partly responsible for producing discrimination. Wilson, *supra* note 15, at 555. The growing trend of hate crimes motivated by the sexual orientation of the victim reflects the pervasiveness of homophobia in this country. *See* Jeff Peters, *When Fear Turns to Hate and Hate to Violence*, 18 HUMAN RIGHTS 22, 22 (1991) (assessing that homosexual murders, shootings, verbal insults, and hate mail have reached an alarmingly high level). Research has shown that homophobia is similar to ethnic, racial, and religious prejudice. MaryAnn Dadisman, *Roots of Hate: Homophobia at Its Source*, 18 HUMAN RIGHTS 24, 24 (1991). *But see* Jonathan Alter, *Degrees of Discomfort: is homophobia equivalent to racism?*, NEWSWEEK, Mar. 12, 1990, at 27 (arguing that there is a distinction between objecting to who someone is, in the case of racial discrimination, and objecting to what someone does, in the case of homosexual discrimination).

147 *See, e.g.*, Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984) (upholding the Navy's policy of mandatory discharge for homosexual conduct on grounds that the policy furthers legitimate state interests that include "the maintenance of 'discipline, good order and morale[,] . . . mutual trust and confidence among service members' ") (citation omitted). *But see* Watkins v. United States Army, 551 F. Supp. 212, 222, 223 (D.D.C. 1982), *aff'd*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 384 (1990) (holding that the Army was estopped from relying on a regulation that made homosexuality a nonwaivable disqualification for reenlistment).

It is hypothesized that the ban against homosexuals in the military started after World War I when many soldiers returned home shell-shocked and were consequently institutionalized. Vicki Quade (interview with William Rubenstein), *Gays In The Mili-*

homosexuals, especially in the arena of child custody.[148]

Finally, homosexuals have less political influence than other minority groups.[149] While the homosexual community has been gaining some political strength,[150] this success has been met with a backlash.[151] For example, many religious leaders openly condemn homosexuality with more vigor than other alleged moral sins, such as abortion.[152] Additionally, the deadly AIDS virus has also made the homosexuals' quest for equal rights more difficult.[153]

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tary: Finally Being All That You Can Be, 18 HUMAN RIGHTS 26, 28 (1991). At the beginning of World War II, the psychiatric profession felt it could reduce the number of shell-shocked individuals by screening out "sick" people coming into the military. *Id.* At the time, homosexuals were considered "sick." *Id.*

The issue of gays in the military recently rose to the top of the homosexual political agenda with President Clinton's promise to lift the ban prohibiting homosexuals from serving in the military. Catherine S. Manegold, *The Odd Place of Homosexuality in the Military*, N.Y. TIMES, Apr. 18, 1993, at E1, 3. Allowing homosexuals to serve in the military is a sensitive problem because so many diverging views on the issue exist. *See id.* (listing the arguments as a question of civil rights, control, combat effectiveness, and unit cohesiveness). Perhaps the most meritorious argument against homosexuals in the military is for health reasons. *See* William J. Gregor, *Should the Military End Its Ban on Homosexuals? No: Ending Ban Poses Risks to Health and Discipline*, 133 N.J.L.J. 597, 597 (Feb. 22, 1993) (stating that the threat of sexually transmitted diseases, especially AIDS and hepatitis B, pose a danger to both military and public health). This argument, however, loses viability when it is used to exclude people for illnesses that have not been contracted yet. *See* Patricia Schroeder, *Should the Military End Its Ban On Homosexuals? Yes: Opposition to Gays Is Fueled by Fears, Not Facts*, 133 N.J.L.J. 597, 607 (Feb. 22, 1993) (maintaining that individuals should not be barred from enlistment because of the possibility that they may become sick in the future).

148 *See, e.g., In re* J.S. & C., 129 N.J. Super. 486, 489, 498, 324 A.2d 90, 92, 97 (Ch. Div. 1974), *aff'd*, 142 N.J. Super. 499, 501, 362 A.2d 54, 55 (App. Div. 1976) (holding that a homosexual father's visitation rights should extend only to daytime hours because unrestricted visitation would not be in the best interests of the children). *But cf.* M.P. v. S.P., 169 N.J. Super 425, 427, 438-39, 404 A.2d 1256, 1257, 1263 (App. Div. 1979) (holding that former wife's homosexuality or any embarrassment that her sexual behavior might cause to the children in the eyes of their peers were not grounds for change of custody).

149 *See* Chaitin & Lefcourt, *supra* note 134, at 41 (observing that minority groups have traditionally been excluded from participation in the political process, and consequently, "[t]heir interests have not been protected by the legislative process").

150 *Homosexual's Right to Marry*, *supra* note 122, at 204.

151 Schmalz, *Gay Politics*, *supra* note 145, at 20.

152 *Id.*

153 *See id.* at 21, 29 ("Paradoxically, at the very moment when it is entering the mainstream of American politics, the gay community finds itself drained, beset by infighting, burnout, illness and death."). By 1990, a minimum of 50,500 homosexuals had died of AIDS, and at least an additional 82,500 had become infected with the HIV virus. Eloise Salholz et al., *The Future Of Gay America*, NEWSWEEK, Mar. 12, 1990, at 20. The prevention of AIDS has, in fact, provided a new justification for discriminating against homosexuals with the virus in housing, employment, and medical care. GREENBERG, *supra* note 76, at 479. It has also been argued that AIDS has stimulated gay activism, consequently increasing the political power of homosexuals. Salholz, *supra*, at 20. This power is evidenced, in part, by the fact that there are now about fifty

It is clear that homosexuals exhibit all of the characteristics generally associated with suspect status.[154] Given the pattern of equating suspectness with race in some form or another,[155] however, it is dubious whether the Court will find homosexuals to be a suspect class.[156] Moreover, recent Supreme Court equal protection jurisprudence implies a trend away from formulating additional suspect classes.[157]

B. Why Traditional Equal Protection Analysis Fails

The Equal Protection Clause is not an adequate mechanism through which to obtain equal marital rights for homosexuals.[158] The inherent problem with traditional equal protection analysis is that it requires only that like persons be treated the same.[159] Thus, the equal protection guarantee actually sanctions unequal treatment of people who are different.[160]

In short, the Equal Protection Clause is flawed because it inherently undermines human individuality by equating equality with sameness and inferiority with difference.[161] Additionally, the Equal Protection Clause provides no guidelines for establishing whether people are alike for purposes of equal protection.[162] Moreover,

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openly gay elected officials around the United States, a number that has more than quadrupled since 1980. *Id.* at 21-22.

Arguably, the AIDS epidemic is a strong justification for legalizing same-sex marriage. Closen & Heise, *supra* note 54, at 810-11. Same-sex marriage would encourage long-term monogamous relationships that would unquestionably reduce the spread of the disease. *Id.* at 815.

154 Wilson, *supra* note 15, at 556. *See supra* notes 128-38 and accompanying text (listing and discussing the common characteristics of suspect status).

155 *Constitutional Status of Sexual Orientation*, *supra* note 133, at 1298.

156 *See Homosexual's Right to Marry*, *supra* note 122, at 206 (pointing out a reluctance on the part of the judiciary to grant homosexuals suspect class status).

157 Friedman, *supra* note 12, at 147-48 (citing Cleburne v. Cleburne Living Ctr, Inc., 473 U.S. 432 (1985)).

158 *See generally* Friedman, *supra* note 12, at 146-47 (opining that a due process analysis would require less of the Court in granting homosexuals the right to marry).

159 *See* Lewis, *supra* note 17, at 1785 (asserting that under equal protection analysis "[t]he proclamation of difference, therefore, legitimizes existing inequity").

160 *Id.*

161 *Id.* Lewis argued that a "prejudice towards difference, towards those unlike the norm, is built into equality jurisprudence." *Id.* It is the genetic and social differences of homosexuals, then, that prevent equal treatment under the "similarly situated" ideal. *Id.*; *see also* Edward J. Erler, *Equal Protection and Personal Rights: The Regime Of The "Discrete and Insular Minority"*, 16 GA. L. REV. 407, 409 (1982) (maintaining that the Court's recent interpretations of the Equal Protection Clause "has come perilously close to converting the doctrine of individual rights . . . into a doctrine of class rights").

162 Lewis, *supra* note 17, at 1785.

under equal protection analysis, "[d]ifference is intelligible only as a statement of relationship; rather than intrinsic, difference is a social construct designed to confirm superiority."[163] The equal protection guarantee, therefore, is an illusory form of protection for homosexuals who wish to marry because they are inherently different from heterosexual couples in terms of structure.

V. SAME-SEX MARRIAGE: A DUE PROCESS ANALYSIS

The Due Process Clause of the Fourteenth Amendment[164] provides same-sex couples seeking to marry with an alternative source of constitutional protection.[165] The due process guarantee protects individuals against unwarranted government interference with marriage,[166] family relationships,[167] and procreation.[168] This

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163 *Id.* at 1786. Another problem with the similarly situated ideal is that courts might require plaintiffs to establish that women and men are similarly situated with regard to spousal ability. Friedman, *supra* note 12, at 146. Judges, however, may not view marriage functionally, and thus may not see that men and women are equals in terms of intimacy, companionship, and support. *Id.* A successful equal protection challenge could theoretically depend on a court's willingness to view marriage functionally and disregard traditional stereotypes about the roles of men and women in marriage. *Id.*

164 The Due Process Clause of the Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Due Process Clause guarantees protection against unwarranted government intrusion into rights that are "fundamental" or "implicit in the concept of ordered liberty." Roe v. Wade, 410 U.S. 113, 152-53 (1973) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)). In other words, due process protects against arbitrary decisions. *See* T.M. SCANLON, DUE PROCESS 93, 94 (J. Roland Pennock & John W. Chapman, eds. 1977) (providing a philosophical account of how the absence of "due process" can support legitimate claims against institutional actions). Professor Scanlon noted that certain institutions authorize some people to control or intervene in the lives of others. *Id.* These institutions do so either directly, by permitting some to command others and exert force to compel obedience, or indirectly, by conferring upon some the power to control resources or opportunities of others. *Id.* The requirement of due process serves as a limitation upon this kind of power. *Id.*

165 Friedman, *supra* note 12, at 146-47. A due process analysis centers on the functional aspects of same-sex couples' relationships, instead of the more elusive equal protection question that focuses on whether the opposite-sex requirement treats men and women differently. *Id.* at 152-53. Thus, it is "easier" for the Court to provide relief under the due process right to privacy. *Id.* at 146-47.

166 *See, e.g.*, Turner v. Safley, 482 U.S. 78, 81 (1987) (invalidating state regulation that infringed upon prisoners' freedom to marry); Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) (asserting that intimate relationships help protect "the individual freedom that is central to our constitutional scheme"); Zablocki v. Redhail, 434 U.S. 374, 375, 382 (1978) (striking statute that required parents under court ordered child support obligations to meet certain financial requirements before being permitted to marry); Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (holding that a state's denial of access to a divorce violates due process); Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating statute prohibiting interracial marriage based in part on the recognition of marriage as a "vital personal right").

protection is based upon the Supreme Court's articulation of a right to privacy,[169] which assumes that certain personal rights are

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167 *See, e.g., Roberts*, 468 U.S. at 618-19 (stating that protecting intimate personal relationships from state interference "safeguards the ability independently to define one's identity that is central to any concept of liberty") (citations omitted); Lehr v. Robertson, 463 U.S. 248, 261 (1983) (protecting unwed fathers who had developed substantial relationships with their children against state interference with that relationship under the Due Process Clause); Caban v. Mohammed, 441 U.S. 380, 385-87, 394 (1979) (invalidating a state statute allowing an unwed father's children to be adopted without the father's consent); Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 496, 499, 506 (1977) (invalidating ordinance that allowed only members of a single "family" to live together because the ordinance defined family too narrowly); Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 844 (1977) (citation omitted) ("the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association"); Stanley v. Illinois, 405 U.S. 645, 646, 651-52, 658 (1972) (recognizing right of unwed, biological fathers to maintain relationships with their illegitimate children); Wisconsin v. Yoder, 406 U.S. 205, 207, 228-29, 234, (1972) (protecting Amish parents who declined to send their children to public high school despite the compulsory education law); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (protecting the right of parents to direct the upbringing and education of their children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (noting that liberty "denotes . . . the right of the individual to . . . establish a home and bring up children").

168 *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 681, 687-90 (1977) (protecting a minor's right to obtain contraceptives); Roe v. Wade, 410 U.S. 113, 154 (1973) (protecting a woman's right to an abortion); Eisenstadt v. Baird, 405 U.S. 438, 443, 453, 454-55 (1972) (protecting an individual's right to obtain contraceptives, whether they are married or single); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (protecting married persons' right to use contraceptives).

169 Bloom, *supra* note 82, at 512-13. *See also* Jed Rubenfeld, *The Right Of Privacy*, 102 HARV. L. REV. 737, 738 (1989) (asserting that Supreme Court privacy decisions have focused on sexuality including contraception, marriage and abortion).

The right to privacy is similar to natural law in that no express constitutional guarantee protects the right. *Id.* at 737. Courts and commentators first found authority for the right to privacy in the Ninth Amendment of the Constitution, which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* at 741 (citing U.S. CONST. amend. IX).

The Due Process Clause of the Constitution guarantees the privacy right. Buchanan, *The Right of Privacy*, *supra* note 82, at 487-88. The Court first expressly recognized the right to privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Rubenfeld, *supra*, at 744. The *Griswold* court struck down a state statute criminalizing the distribution and use of contraceptives by married persons. *Griswold*, 381 U.S. at 480, 485-86. The Court proclaimed that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." *Id.* at 484 (citation omitted). This creation of the right to privacy represented a new constitutional protection designed to serve society's needs. Thomas I. Emerson, *Nine Justices In Search Of A Doctrine*, 64 MICH. L. REV. 219, 228, 233-34 (1966).

Two years after *Griswold*, the Court in *Loving v. Virginia* invalidated a statute prohibiting interracial marriage based on the right to privacy as well as the Equal Protection Clause. Loving v. Virginia, 388 U.S. 1, 11-12 (1968).

The Court extended its *Griswold* holding beyond the marital relationship in *Eisen-*

fundamental, and worthy of significant constitutional protection.[170] Thus, the recognition of marriage as a fundamental

stadt v. Baird. Eisenstadt, 405 U.S. at 454-55. The *Eisenstadt* Court held that the privacy doctrine protects the right of unmarried persons, as well as married persons, to use contraceptives. *Id.* at 453-55; *see also Carey*, 431 U.S. at 681, 693-94, 699, 700 (striking a statute that dramatically restricted contraceptive distribution to both minors and adults).

The privacy right was extended to the abortion context in *Roe v. Wade*. *Roe*, 410 U.S. at 153. In *Roe*, the Court concluded that the right of privacy was broad enough to include a woman's decision on whether or not to end her pregnancy. *Id.* The Court warned, however, that the decision did not allow a woman to terminate her pregnancy whenever and in whatever manner she chooses. *Id.* The Court divided pregnancy into three trimesters, and prescribed a different rule for each, the effect of which was to increase the difficulty of obtaining an abortion as a pregnancy progresses. *See id.* at 162-66 (setting forth the specific requirements for obtaining an abortion at each trimester of a pregnancy).

The privacy doctrine was further expanded with *Moore v. City of East Cleveland, Ohio*, in which the Court expressly relied on the *Griswold* line of cases to invalidate a zoning ordinance that restricted occupancy of dwelling units to members of a nuclear family. *Moore*, 431 U.S. at 495-96, 499.

The Supreme Court's privacy doctrine has been denounced as "elusive and ill-defined." Schwarzschild, *supra* note 4, at 94 (citation omitted). While the Court invoked the right to privacy in the above cases, it has failed to explain what the doctrine consists of aside from decisions pertaining to contraception, childbearing, and family matters. Bloom, *supra* note 82, at 513. The concern of both judges and commentators is that privacy provides judges with a mechanism through which to interpret the law based on their own personal beliefs about morality. Schwarzschild, *supra* note 4, at 94-95. Schwarzschild noted that "[w]hile deemed appropriate for legislatures, [moral rule-making] is felt to be unsuitably ideological for the judicial role." *Id.* In *Bowers v. Hardwick*, the majority believed that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." Bowers v. Hardwick, 478 U.S. 186, 194, *reh'g denied*, 478 U.S. 1039 (1986).

One commentator has described the privacy decisions relating to marriage, family, and procreation as articulating a "freedom of association." Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 625 (1980). Professor Karst argued that the "freedom of association" is an effective organizing principle for it is the foundation that most clearly defines our humanity. *Id.* at 692.

[170] Zimmer, *supra* note 42, at 698. Fundamental rights have been defined as "[t]hose which have their origin in the express terms of the Constitution or which are necessarily to be implied from those terms." BLACK'S LAW DICTIONARY 607 (5th ed. 1979) (citations omitted). There is, however, no universally accepted definition of a fundamental right. NOWAK & ROTUNDA, *supra* note 119, at § 11.7.

Additionally, the Supreme Court justices have not agreed upon which rights are fundamental for due process purposes. *Compare Bowers*, 478 U.S. at 206, 204 (Blackmun, J., dissenting) (maintaining that individuals have a fundamental interest in "controlling the nature of their intimate associations with others . . . . We protect [fundamental] rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life.") *with Bowers*, 478 U.S. at 190-91 (majority opinion) (defining the right to privacy much more narrowly: "[W]e think it evident that none of the rights announced in [the line of privacy] cases bear[ ] any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . .").

right[171] would subject any state interference with this right to strict scrutiny review, requiring the state to prove that the challenged legislation was the least restrictive means to further a compelling government interest.[172] Accordingly, the due process right to privacy is a much better weapon than the Equal Protection Clause for recognizing a marriage between same-sex couples because the marriage and family rights embodied in the due process guarantee are equally applicable to homosexuals' interest in marriage.[173]

The Court clearly began to narrow the privacy doctrine in the *Bowers* decision. *See* Mark J. Kappelhoff, Note, Bowers v. Hardwick*: Is There A Right To Privacy?*, 37 AM. U. L. REV. 487, 500-01, 512 (1988) (arguing that *Bowers* conflicted with Supreme Court precedent and could seriously infringe upon individual liberty interests, especially sexual privacy). In *Bowers*, a 5-4 majority held that a state could criminalize homosexual sodomy without violating the right to privacy. *Bowers*, 478 U.S. at 192. Hardwick was charged with committing sodomy in his bedroom with another adult male in violation of a Georgia statute prohibiting sodomy. *Id.* at 187-88. Although Hardwick was never indicted, he nevertheless brought suit in the District Court contending that a statute criminalizing sodomy violated the Constitution. *Id.* at 188.

The Court framed the issue in terms of whether homosexuals have a fundamental right to engage in sodomy. *Id.* at 190. Reasoning that the fundamental rights espoused in the line of privacy cases apply only to family, marriage, and procreation, the Court held that the privacy doctrine does not encompass a fundamental right to homosexual conduct. *Id.* at 190-91 (citations omitted). The Court stressed that the line of privacy cases did not permit all consensual sexual conduct. *Id.* at 191.

The implication of *Bowers* is that privacy interests will not be considered fundamental unless the asserted right can be connected with marriage, family, or procreation. George W.M. Thomas, Note, *Privacy: Right or Privilege: An Examination of Privacy After* Bowers v. Hardwick, 39 SYRACUSE L. REV. 875, 895-96 (1988). Thomas suggested that an intermediate test regarding the constitutionality of decisions important to an individual's identity, but not considered fundamental, be employed to give these decisions more meaningful protection. *Id.* at 896. The unfortunate effect of *Bowers* is that the decision allows the states to encroach upon the privacy and associational interests of many individuals. Mitchell L. Pearl, Note, *Chipping Away at* Bowers v. Hardwick*: Making the Best of an Unfortunate Decision*, 63 N.Y.U. L. REV. 154, 154-55 (1988).

171 Currently, the Court appears to regard marriage as a fundamental right only for heterosexual couples. *See supra* note 126 (listing two Supreme Court cases protecting heterosexual couples' right to marry).

172 *See, e.g., Carey*, 431 U.S. at 686 (demanding that "where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests"); Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (explaining that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests").

173 Friedman, *supra* note 12, at 152. Friedman argued that "because the values served by the institution of marriage—'family values'—are reflected most straightforwardly in [the] substantive due process privacy doctrine, states' failure to recognize same-sex marriages is most appropriately challenged under that doctrine." *Id.* As early as 1923, the Court recognized the right to marry and establish a home as central to the due process guarantee. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (citations omitted). Later, in *Cleveland Bd. of Educ. v. LaFleur*, the Court stated that it "ha[d] long recognized that freedom of personal choice in matters of marriage and family life is

A. *Marriage as a Fundamental Right*

In *Loving v. Virginia*,[174] the Supreme Court declared that the freedom to marry is a fundamental right.[175] The *Loving* Court invalidated a Virginia statutory scheme prohibiting interracial marriage on the grounds that it violated due process of law.[176] The

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one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (citations omitted).

174 388 U.S. 1 (1967). For sources discussing *Loving*, see Alfred Avins, *Anti-Miscegenation Laws And The Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1225, 1255 (1966) (concluding that the Fourteenth Amendment was not intended to preclude state laws prohibiting interracial marriage, and suggesting that if the original Constitution is outdated it can be amended pursuant to Article V); Rev. Robert F. Drinan, S. J., *The* Loving *Decision And The Freedom to Marry*, 29 OHIO ST. L.J. 358, 360, 376-79 (1968) (suggesting norms which should guide the states' establishment of marriage regulations against the backdrop of the *Loving* decision); Walter Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute In Historical Perspective*, 52 VA. L. REV. 1189, 1190 (1966) (providing a historical background of Virginia's miscegenation laws and its problems); Donald W. Merritt, Recent Case, 17 BUFF. L. REV. 507, 512 (1968) (contending that *Loving* established marriage as a fundamental legal right entitled to due process guarantees); Sidney L. Moore, Note, 19 MERCER L. REV. 255, 257 (1968) (predicting that *Loving* stands for a basic change in social philosophy that will probably endure for many years).

175 *Loving*, 388 U.S. at 12. The Court set forth 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. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.*(quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)); *see also* Karst, *supra* note 169, at 627 (footnote omitted) (stating that marriage is a "fundamental freedom"); Merritt, *supra* note 174, at 512 (concluding that *Loving* affirmed marriage as a fundamental right); Strasser, *supra* note 16, at 999 (declaring that the individual's interest in marriage is so strong as to be fundamental).

As early as 1888, the Court recognized marriage as "the most important relation in life" and as "the foundation of the family and of society, without which there would be neither civilization nor progress." Maynard v. Hill, 125 U.S. 190, 205, 211 (1888); *see also* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (describing the right to marital privacy as "older than the Bill of Rights . . . . It is an association that promotes a way of life, not causes; a harmony in living . . . . Yet it is an association for as noble a purpose as any involved in our prior decisions."); Skinner v. Oklahoma, 316 U.S. 535, 536-37, 541 (1942) (invalidating a state statute which provided for mandatory sterilization of certain felons on the grounds it unduly infringed upon the fundamental rights of marriage and procreation). For a discussion of *Skinner*, see Note, *Constitutionality Of State Laws Providing Sterilization For Habitual Criminals*, 51 YALE L.J. 1380, 1386-87 (1942) (concluding that a due process analysis would have been more appropriate than the equal protection analysis in *Skinner* because the statute concerned the right to have children).

176 *Loving*, 388 U.S. at 12. In 1958, a white male and a black female, both Virginia residents, were legally married in the District of Columbia. *Id.* at 2. Upon returning to Virginia, they were convicted of violating a state statute prohibiting interracial marriage. *Id.* at 2-3. The Court unanimously reversed the convictions, holding that the statute was unconstitutional because it was based on invidious racial discrimination in violation of the Fourteenth Amendment. *Id.* at 12. Rejecting the state's contention

Court proclaimed that the Constitution protects "the freedom to marry, or not marry, a person of another race[,]" and the decision should be an individual one without state interference.[177] This landmark decision would seem to stand for the freedom to choose a spouse, regardless of whether the selected partner is of the same or opposite sex.[178]

The Supreme Court in *Zablocki v. Redhail*,[179] reiterated that the right to marry is fundamental.[180] The Court invalidated a Wisconsin law which required that parents under a court order for child support meet certain financial requirements before being permitted to marry.[181] Limiting the *Loving* Court's declaration of mar-

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that the statute did not constitute an invidious discrimination because it applied equally to blacks and whites, the Court maintained that a racial classification must still be subjected to strict scrutiny. *Id.* at 8-9. The Court next concluded that no legitimate purpose existed to support the racial classification. *Id.* at 11. Holding that the statute violated due process, the Court stated:

> To deny this fundamental freedom on so insupportable 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.

Id. at 12.

177 *Id.*

178 *See* Drinan, *supra* note 174, at 360 (opining that *Loving* can be interpreted to represent freedom of choice in selecting a marriage partner); Friedman, *supra* note 12, at 156 (asserting that the "right to marry protects an individual's choice of a marriage partner"); Rubenfeld, *supra* note 169, at 745 (interpreting *Loving* as prohibiting states from infringing upon the freedom to choose whom to marry).

179 434 U.S. 374 (1978). For sources discussing *Zablocki*, see Jane C. Atkinson, Note, Califano v. Jobst, Zablocki v. Redhail, *and the Fundamental Right to Marry*, 18 U. LOUISVILLE J. FAM. L. 587, 613 (1980) (recognizing that *Jobst* and *Zablocki* fail to define the parameters of marriage as a fundamental right); John Zawadsky, Note, 1979 WIS. L. REV. 682, 685 (1979) (concluding that because the right to marry is fundamental, state restrictions can no longer be easily substantiated by way of the traditional deference accorded to the states in the area of family law).

180 *See Zablocki*, 434 U.S. at 383 (recognizing that the Court's "past decisions make clear that the right to marry is of fundamental importance"); Zawadsky, *supra* note 179, at 704 (asserting that *Zablocki* establishes marriage as a fundamental right). *But see* Serena Kafker, Recent Case, 47 U. CIN. L. REV. 334, 340 (1978) (cautioning against placing too much weight on the *Zablocki* holding, given the dissension among the Justices regarding the grounds for the decision and the applicability of a strict standard of review).

181 *Zablocki*, 434 U.S. at 375. Specifically, the statute required that the parent comply with the support order, and also demonstrate that the child was not at present likely to become a public charge. *Id.*

The Court asserted that marriage is a fundamental right protected by the due process right to privacy. *Id.* at 383-84 (citation omitted). The Court recognized:

> [T]he decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with re-

riage as a fundamental right, the *Zablocki* Court warned that not every state interference relating to marriage would be strictly scrutinized, but only those that substantially infringed upon the right to marry.[182]

After *Zablocki*, the fundamental right to marry appeared to be firmly entrenched, at least with regard to heterosexuals.[183] Given the *Zablocki* majority's emphasis on the fundamental nature of the right to marry, however, it would appear inconsistent to deny this right to homosexual couples.[184] Indeed, the *Zablocki* decision compels extension of the right to marry to homosexuals because state prohibition of same-sex marriages constitutes substantial interfer-

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spect to the decision to enter the relationship that is the foundation of the family in our society.

Id. at 386. Nonetheless, the statute was invalidated under the equal protection guarantee. *Id.* at 377, 382. Applying strict scrutiny to the statute, the Court found that it substantially interfered with the right to marry. *Id.* at 387-88.

Justice Stewart, concurring, would have based the decision on due process rather than equal protection grounds because the classification was not discriminatory, and the Constitution did not expressly guarantee a right to marry. *Id.* at 391-92 (Stewart, J., concurring). The Justice did, however, assert that the right to marry is embraced in the due process guarantee, and that the statute at issue directly infringed upon that freedom. *Id.* at 392-93 (Stewart, J., concurring). Justice Stewart opined that restricting an indigent from marrying is an irrational means of furthering the legitimate state goal of reducing the state's welfare load. *Id.* at 394 (Stewart, J., concurring).

Justice Powell, also concurring, expressed his concern that the majority's rationale was too expansive for an area that had traditionally been left to state regulation. *Id.* at 396 (Powell, J., concurring). The Justice noted that the Court had never expressly held marriage to be a fundamental right requiring strict scrutiny of all state marriage regulations. *Id.* at 397 (Powell, J., concurring).

In the final concurrence, Justice Stevens posited that the statute need only be subjected to intermediate scrutiny, which it would not withstand regardless, because the law was irrational in many ways. *Id.* at 406 (Stevens, J., concurring).

Dissenting, Justice Rehnquist rejected the majority's basic premise that marriage is a fundamental right requiring more than a rational basis standard of review. *Id.* at 407 (Rehnquist, J., dissenting). Instead, Justice Rehnquist concluded that the statute would pass a rational basis test as an exercise of the state's power to regulate family life. *Id.* at 407, 408 (Rehnquist, J., dissenting). For a discussion acknowledging the lack of guidance from the *Zablocki* Court regarding the level of scrutiny to be applied to this penumbral fundamental right, see Nathaniel Abbate, Jr., Note, 56 U. DET. J. URB. L. 537, 553 (1979).

182 *Zablocki*, 434 U.S. at 386. The Court noted that a state may impose reasonable restrictions that do not interfere significantly with the decision to marry. *Id.* (citation omitted).

183 *See* Schwarzschild, *supra* note 4, at 102 (noting that the Court's invocation of strict scrutiny evidences the fundamental character of the right to marry in the heterosexual community); *see also Zablocki*, 434 U.S. at 383 (articulating that past Supreme Court decisions illustrate the fundamental nature of marriage).

184 *See generally* Karst, *supra* note 169, at 671 (observing that *Zablocki* indicates the beginning of an extensive re-examination of the constitutionality of the state laws limiting some forms of intimate association).

ence.[185] Moreover, the state lacks a compelling interest to justify the denial of homosexual marriages because same-sex marriages embody the same esteemed qualities and purposes of a heterosexual marriage, namely, commitment, intimacy, loyalty, and family values.[186]

B. Procreative Privacy as a Fundamental Right

Encompassed within the privacy doctrine is an individual's freedom of choice in all matters pertaining to procreation.[187] The right to procreative autonomy and the right to marry are interrelated.[188] Illustrating this relationship is the fact that courts have used homosexuals' lack of ability to procreate as a justification for denying same-sex couples the right to marry.[189]

The Supreme Court first addressed the issue of procreative freedom in *Griswold v. Connecticut*.[190] In *Griswold*, the Court upheld

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185 *See* Friedman, *supra* note 12, at 157 (asserting that *Griswold* and its progeny indicate that a statute which places obstacles in the way of individuals who want to marry must survive strict scrutiny to be upheld). Friedman contended, however, that the current state of the law presents a legal hurdle for same-sex couples who wish to marry. *Id. But see Homosexual's Right to Marry*, *supra* note 122, at 200-01 (arguing that *Zablocki* is not useful precedent for enjoining prohibitions against same-sex marriage because not only did the Court warn against widespread application of its holding, but it also referred only to heterosexual couples when it characterized marriage as a fundamental right).

186 *See* Friedman, *supra* note 12, at 157 (suggesting that because the values of heterosexual and homosexual couples are the same, restrictions prohibiting homosexual marriage must be strictly scrutinized); Penas, *supra* note 13, at 552-53 (positing that same-sex marriage would promote the fundamental interests of marriage—commitment, loyalty, and intimacy—as well as heterosexual couples). According to one psychologist, "the settled-in qualities of the homosexual couple tend to be precisely those which characterize the stable heterosexual relationship. The similarities evidenced in daily life are especially noticeable. . . . [T]here are clearly more differences between individuals and individual couples than there are between kinds of couples." *Id.* (quoting C. TRIPP, THE HOMOSEXUAL MATRIX (2d. ed. 1987)).

187 *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977) (protecting a minor's right to obtain contraceptives); Roe v. Wade, 410 U.S. 113, 153 (1973) (protecting a woman's right to an abortion); Eisenstadt v. Baird, 405 U.S. 438, 443, 453-55 (1972) (protecting an unmarried individual's right to obtain contraceptives); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (protecting married persons' rights to obtain contraceptives).

188 Treuthart, *supra* note 5, at 96.

189 *See, e.g.*, Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) ("[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union.").

190 381 U.S. 479 (1965). For sources discussing *Griswold*, see Robert G. Dixon, Jr., *The* Griswold *Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 218 (1966) (accusing the Court of "play[ing] charades with the Constitution" to reach a commendable result); Herbert J. Lustig, Note, 17 SYRACUSE L. REV.

the right of married persons to use contraceptives.[191] The Court stressed the importance of protecting intimacy within the marital relationship.[192]

553, 556 (1966) (concluding that *Griswold* failed to denote the parameters of the privacy right); Comment, *Privacy After* Griswold*: Constitutional Or Natural Law Right?*, 60 NW. U. L. REV. 813, 832-33 (1966) (noting that the Court had begun to develop the privacy interest out of the entire constitutional scheme, arguably supporting the notion that the privacy right is a natural law concept); Note, *Supreme Court Finds Marital Privacy Immunized From State Intrusion as a Bill of Rights Periphery*, 1966 DUKE L.J. 562, 577 (1966) [hereinafter *Supreme Court Finds*] (suggesting that the Court has merely espoused the accepted, although poorly defined, concept of a privacy interest that establishes two interrelated rights: the right to make decisions regarding family planning, and the right to marital intimacy free from state intrusion).

191 *Griswold*, 381 U.S at 485-86. The defendants in *Griswold* were the executive and medical directors of a Planned Parenthood in Connecticut. *Id.* at 480. Both directors were convicted of counselling married persons regarding the use of contraceptives in violation of a state statute that forbade the use of contraceptives and counselling of others in their use. *Id.* (citations omitted). The Court struck down the statute as violative of married persons' right to privacy. *Id.* at 485-86.

192 *Id.* at 482, 485-86. Justice Douglas did not base his decision expressly on substantive due process. *See id.* at 481-82 (noting that the contraceptive issue invokes many due process questions). Instead, the Justice opined that several of the Bill of Rights guarantees protect a "zone of privacy." *Id.* at 482-85. Concluding that the right of married persons to use contraceptives fell within this zone, the Court reasoned, "[the idea of a police search] of marital bedrooms for telltale signs of the use of contraceptives . . . is repulsive to the notions of privacy surrounding the marriage relationship. . . . Marriage is . . . intimate to the degree of being sacred." *Id.* at 485-86.

All of the Justices agreed that the law was unconstitutional, and that the Fourteenth Amendment protected only those rights which are fundamental. *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 105, 163 (1965/66). Dissension among the Justices arose, however, regarding how those fundamental rights were to be discovered. *Id.*

Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, authored a concurring opinion agreeing that the birth control law intruded upon the right to marital privacy. *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring). The concurrence emphasized the relevance of the Ninth Amendment to the Court's decision. *Id.* at 487 (Goldberg, J., concurring). Justice Goldberg quoted the Ninth Amendment, which reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* at 488 (Goldberg, J., concurring) (quoting U.S. CONST. amend. IX). Recognizing that the Constitution did not expressly mention the right of marital privacy, Justice Goldberg nonetheless believed that the Constitution was meant to protect these fundamental rights. *See id.* at 495-96 (Goldberg, J., concurring) (arguing that "as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution").

Justice Harlan, also concurring, argued that the Fourteenth Amendment Due Process Clause did not merely incorporate the specific Bill of Rights guarantees, but instead stood on its own to protect those basic values "implicit in the concept of ordered liberty." *Id.* at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Justice White, concurring, also focused on the Due Process Clause to find that the statute was not narrowly tailored to further the state's policy against illicit sexual relationships. *Id.* at 502-05 (White, J., concurring).

Dissenting, Justice Black argued that only those rights expressly protected by the

In *Eisenstadt v. Baird*,[193] the Supreme Court extended the *Griswold* holding to include unmarried individuals.[194] The *Eisenstadt* Court focused on the importance of reproductive freedom not only to married people, but also to the individual.[195] This decision is significant because it represents the first time the Court endorsed the right of an individual to make family choices outside of the traditional family structure.[196]

Bill of Rights were protected by the Fourteenth Amendment. *Id.* at 520-21 (Black, J., dissenting). The Justice had certain reservations:

> Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would . . . jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.

Id. at 521 (Black, J., dissenting).

Although agreeing with the majority opinion in terms of morality, Justice Stewart, dissenting, wrote that the birth control law was unconstitutional. *Id.* at 527 (Stewart, J., dissenting). Like Justice Black, Stewart found no general right of privacy in the Bill of Rights or in any Supreme Court precedent. *Id.* at 530 (Stewart, J., dissenting).

The result of this lack of agreement regarding basic constitutional law provides little solid guidance from the Court in the privacy area. *Supreme Court Finds*, *supra* note 190, at 577.

193 405 U.S. 438 (1972).

194 *Id.* at 441-42, 443. At issue in *Eisenstadt* was a statute that made it a felony for anyone to distribute contraceptives, except in the case of a registered physician or pharmacist administering them to married persons. *Id.* at 440-42. Justice Brennan phrased the issue in terms of whether the different treatment accorded married and unmarried persons under the statute was rational. *Id.* at 447. Rejecting the argument that the statute deterred pre-marital sexual relationships, the Court concluded that no rational reason existed for distinguishing treatment between the two. *Id.* at 443, 447, 448-50. The Court observed that the widespread availability of contraceptives for disease prevention cast doubt on the legislative purpose of discouraging extra-marital relations. *Id.* at 448-49 (citation omitted).

Second, the Court rejected health as the purpose of the legislation, based upon its history as a moral regulation. *Id.* at 450, 452. Furthermore, the Court found that if the statute were legitimately a health measure, it discriminated against single persons. *Id.* at 450.

195 *Id.* at 453 (citations omitted). The majority held that if the statute's sole purpose was to prevent contraception, it violated the Equal Protection Clause of the Fourteenth Amendment because the access rights of married and unmarried individuals must be the same. *Id.* at 453-55. The Court's reasoning, however, was flavored with substantive due process. *See id.* at 453 (citations omitted) (asserting that "[i]f the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

196 Zimmer, *supra* note 42, at 702; *see also*, Daniel Ellis, Note, 4 SETON HALL L. REV. 264, 276 (1973) (opining that the effect of *Baird* is to place the focus on individuals as opposed to marital or familial relations with regard to sexual privacy); Katherine R. Jones, Comment, Eisenstadt v. Baird: *State Statute Prohibiting Distribution of Contraceptives to Single Persons Void on Equal Protection Grounds*, 3 N.Y.U. REV. L. & SOC. CHANGE 56, 69 (1973) (concluding that *Baird* is the Court's attempt to expand the privacy

Griswold and *Eisenstadt* illustrate the illogic of granting reproductive freedom to all individuals while simultaneously restricting homosexual couples from marrying based upon their presumed inability to procreate.[197] If procreation is the sole purpose of marriage, all couples unwilling or unable to have children, whether homosexual or heterosexual, would, or at least should, be prohibited from marrying.[198]

C. *The Changing Family Structure*

The right to privacy also embodies the right to free choice in matters pertaining to the family.[199] The family is protected because it promotes social stability[200] by transmitting society's most revered values, both moral and cultural.[201] In addition, the family serves as an emotional and economic support system.[202] Although the traditional family has given way to many alternative forms,[203] these non-traditional forms are functionally equivalent to the traditional nuclear family insofar as these "families" promote the same values and interests.[204]

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interest to include an individual's freedom to decide whether to have a child without unwarranted government interference).

197 *See generally Friedman*, *supra* note 12, at 158 (arguing that the Court's refusal to sanction homosexual marriage is at odds with the right to privacy).

198 *Id.*

199 *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (establishing "the liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing that the rights to family and marriage are "essential to the orderly pursuit of happiness by free men").

200 *Developments in the Law*, *supra* note 35, at 1287.

201 Moore v. East Cleveland, Ohio, 431 U.S. 494, 503-04 (1977). President Ronald Reagan has proclaimed:

> Strong families are the foundation of society. Through them we pass on our traditions, rituals, and values. From them we receive the love, encouragement, and education needed to meet human challenges. Family life provides opportunities and time for the spiritual growth that fosters generosity of spirit and responsible citizenship.

Friedman, *supra* note 12, at 134 n.1 (quoting WHITE HOUSE WORKING GROUP ON THE FAMILY: PRESERVING AMERICA'S FUTURE epigraph (1986) (quoting Ronald Reagan in the Proclamation of National Family Week (November 15, 1984))).

202 *Developments in the Law*, *supra* note 35, at 1215. The family also provides a forum for the development of social skills. *Id.*

203 *See supra* notes 6, 11, and accompanying text (discussing the changing American family).

204 Treuthart, *supra* note 5, at 91-92. For example, permanence is one characteristic of marriage and family that spawns stability for the individual and society by providing a forum for emotional support. *Developments in the Law*, *supra* note 35, at 1283. Permanence is equally likely to be found in either a homosexual or a heterosexual relationship because a successful relationship is characterized by the same attributes,

Significantly, the judiciary has begun to acknowledge and protect non-traditional families.[205] For example, the Supreme Court extended the definition of family in *Moore v. East Cleveland, Ohio*,[206] to include an extended familial structure, rather than the limited traditional nuclear composite.[207] The *Moore* Court invalidated a zoning ordinance, which allowed only members of a single family[208] to live together, on grounds that the ordinance defined family too narrowly.[209] The plurality held that the Constitution

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such as the couple's abilities to compromise and resolve conflicts. *Homosexual's Right To Marry, supra* note 122, at 197-98. Furthermore, the homosexual community is more monogamy-oriented than many people realize. *Id.* at 197. Thus, permanence is even more likely to exist in a homosexual relationship because a successful committed homosexual relationship may be stronger because the couple has stayed together without society's support. *Id.* at 198.

205 *See infra* notes 206-14 (discussing *Moore v. East Cleveland, Ohio*, 431 U.S. 494 (1977), and *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49 (N.Y. 1989), two cases that addressed the constitutionality of laws affecting non-traditional families).

206 431 U.S. 494 (1977). The constitutionality of restricting one's choice of household companions first arose in *Village of Belle Terre v. Boraas*. Village of Belle Terre v. Boraas, 416 U.S. 1, 2-3 (1974). The Belle Terre ordinance restricted land use solely to one-family dwellings, and defined "family" as persons related by blood, adoption, or marriage that lived and cooked together as a single unit. *Id.* at 2. Six unrelated college students leased a home in Belle Terre, and, along with the owner of the house, were subsequently found in violation of local zoning ordinances. *Id.* at 2-3.

Justice Douglas, writing for the majority, began with a broad reaffirmation of the deference traditionally afforded local zoning regulations. *Id.* at 3-5. Declaring that the ordinance did not implicate any constitutional fundamental rights, such as voting or privacy rights, the Justice rejected the students' allegations of infringement of their fundamental rights to privacy, association, and travel. *Id.* at 7 (citations omitted). Instead, the Court characterized the ordinance as "economic and social legislation," that only needed to be rationally related to a permissible state objective to pass equal protection scrutiny. *Id.* at 8. Justice Douglas found the Belle Terre objectives of securing family values and "the blessings of quiet seclusion and clean air" sufficient to sustain the ordinance. *Id.* at 9.

Dissenting, Justice Marshall argued that the ordinance significantly burdened the fundamental rights of privacy and association guaranteed by the Constitution, and that strict scrutiny should have been applied. *Id.* at 13 (Marshall, J., dissenting). The Justice stressed the interrelationship between the freedom of association and the right to privacy as a basis for the students' right to live together. *Id.* at 15-16 (Marshall, J., dissenting). According to Justice Marshall, an individual's choice of "family, friends, professional associates, or others" as household companions deserves constitutional protections. *Id.* at 16 (Marshall, J., dissenting).

207 *Moore*, 431 U.S. at 503-04.

208 The ordinance defined family as encompassing only certain biological and marital relationships. *Id.* at 496 n.2. A woman who lived with her two grandsons, who were cousins, challenged the ordinance because the group did not constitute a family as defined by the ordinance. *Id.* at 496-97.

209 *Id.* at 506. Writing for the plurality, Justice Powell noted that family freedoms are protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 499 (citations omitted). The Justice asserted that government intrusions upon the family must be carefully scrutinized. *Id.* Although minimizing traffic and over-crowding

protected extended familial relationships because such relationships occupied a place in the American tradition similar to the nuclear family.[210]

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were legitimate goals, the Justice posited that the ordinance in question did not rationally further these goals. *Id.* at 499-500.

Justice Powell next pointed out the danger of deciding which liberties should be protected under substantive due process without extensive guidance from the Bill of Rights. *Id.* at 501-02. The Court resolved this problem by admonishing respect for societal values. *Id.* at 503.

[210] *Id.* at 503-06. Specifically, the Court set forth:

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. . . . Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.

Id. at 503-04.

Five disparate opinions accompanied the plurality opinion authored by Justice Powell and joined by Justices Brennan, Marshall, and Blackmun. *Id.* at 495. Justice Brennan, concurring, emphasized the closed-mindedness of the ordinance insofar as it ignored large segments of society of which the extended family consisted. *Id.* at 507-08 (Brennan, J., concurring). Justice Stevens, also concurring, maintained that East Cleveland's ordinance constituted a taking of property without due process of law or just compensation. *Id.* at 521 (Stevens, J., concurring).

Chief Justice Burger dissented, reasoning that because an administrative remedy—a local zoning variance—was available, a constitutional issue did not exist until available administrative remedies had been exhausted. *Id.* at 521, 528 (Burger, J., dissenting). Justice Stewart, also dissenting, asserted that *Belle Terre* should be controlling. *Id.* at 534 (Stewart, J., dissenting). East Cleveland's ordinance, the Justice asserted, was rationally related to the same legitimate purposes articulated in *Belle Terre*, such as family values and quiet seclusion. *Id.* at 534, 539 (Stewart, J., dissenting). The final dissenter, Justice White, stressed that the substantive due process doctrine should be used with extreme caution, and that application to the facts in the case at bar stretched that doctrine too far. *Id.* at 544, 549 (White, J., dissenting). The Justice concluded that the facts at issue did not implicate any due process rights, and that the statutory classification should be sustained absent a reasonable justification. *Id.* at 551 (White, J., dissenting).

For sources discussing *Moore*, see Frederick E. Dashiell, Note, *The Right of Family Life:* Moore v. City of East Cleveland, 6 BLACK L.J. 288, 295 (1980) (concluding that the *Moore* decision is especially important to black family life because of the economic and social plight of black citizens); Mark Langstein, Note, *Constitutionally Protected Notions of Family:* Moore v. City of East Cleveland, 19 B.C. L. REV. 959, 973 (1978) (pointing out that although *Moore* established constitutional protection for family autonomy, the parameters of this protection are unclear); Margaret A. MacFarlane, Comment, Moore v. City of East Cleveland, Ohio*: The Emergence of the Right of Family Choice in Zoning*, 5 PEPPERDINE L. REV. 547, 572 (1978) (proposing that the state should define family according to the degree of emotional ties exhibited as opposed to blood relations); Kathe J. Tyrrell, Comment, 6 HOFSTRA L. REV. 1087, 1100 (1978) (predicting that *Moore* is the first step toward full protection of a "personal lifestyle right"); *see also* United States Dep't of Agric. v. Moreno, 413 U.S. 528, 529, 532-33 (1973) (holding that the federal government could not constitutionally limit the benefits of food stamps to households of related individuals). *But see* Michael H. v. Gerald

Similarly, state courts have also begun to acknowledge alternative family forms including homosexual relationships.[211] Recently, in *Braschi v. Stahl Assocs. Co.*,[212] New York's highest court held that the term family, as used in the non-eviction provision of New York City's rent-control laws, protected an unmarried lifetime gay partner and not just persons related by blood or law.[213] The court asserted that the law allowing rent succession "should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life."[214] More recently, in *In Re Guardianship of Kowalski*,[215] the Minnesota Court of Appeals held that a lesbian partner had a right to be appointed guardian of

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D., 491 U.S. 110, 121, 127, 129 (1989) (denying a non-biological father visitation rights even though he maintained a substantial relationship with the child); Village of Belle Terre v. Boraas, 416 U.S. 1, 2-3, 7 (1974) (upholding a zoning ordinance that prevented most groups of unrelated persons from living together because such persons had no fundamental right to live together). *Michael H.* and *Village of Belle Terre* seem to indicate a reluctance by the Supreme Court to protect alternative family arrangements. Cox, *supra* note 11, at 23.

211 *See In re* Guardianship of Kowalski, 478 N.W.2d 790, 791, 797 (Minn. Ct. App. 1991) (awarding a woman guardianship of her lesbian partner on the grounds that they constituted a "family of affinity"); State v. Hadinger, 573 N.E.2d 1191, 1193 (Ohio Ct. App. 1991) (proclaiming that a partner in a same-sex couple was protected under Ohio's Domestic Violence Act); Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 50-51, 53-54 (N.Y. 1989) (holding that "family" as used in the rent-control laws included an unmarried lifetime gay partner); Donovan v. Workers' Compensation Appeals Bd., 187 Cal. Rptr. 869, 873 (Cal. Ct. App. 1982) (remanding to a review board to determine whether petitioner, as the gay partner of the deceased employee, was a dependent covered by the Workers' Compensation Act); Bramlett v. Selman, 597 S.W.2d 80, 85 (Ark. 1980) (imposing a constructive trust upon property settled in one man's name for the benefit of his male partner); Weekes v. Gay, 256 S.E.2d 901, 902-03, 904 (Ga. 1979) (imposing an implied trust on the proceeds for the living partner who had supplied part of the purchase money, after the house shared by a gay couple was destroyed by fire). *But see In re* Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991) (holding that a lesbian non-biological parent did not have standing to seek visitation rights with the child she and her ex-partner shared); *In re* Interest of Z.J.H., 471 N.W.2d 202, 204, 212 (Wis. 1991) (refusing to protect a nonlegal parent and child of an alternative family).

212 543 N.E.2d 49 (N.Y. 1989) (plurality decision).

213 *Id.* at 53-54. Mr. Braschi, the gay partner of the tenant in a rent-controlled apartment, was granted a preliminary injunction to stay an eviction proceeding after his partner died. *Id.* at 50-51.

214 *Id.* at 53. The court delineated that this "reality" could be assessed by factors such as degree of emotional commitment and interdependence, interwoven social life, financial interdependence, cohabitation, and exclusivity. *Id.* at 55. The *Braschi* holding is essentially limited to its facts, however, because it avoided the constitutional issues, and instead centered on interpretation of the relevant statutes. Post, *supra* note 10, at 750.

215 478 N.W.2d 790 (Minn. App. 1991). In *Kowalski*, the plaintiff fought for legal guardianship of her lesbian partner who was incapacitated as a result of a serious car accident. *Id.* at 791. The lower court named the victim's father as guardian, and the court of appeals reversed. *Id.* at 791, 797.

her disabled partner because the relationship constituted a "family of affinity."[216]

VI. CONCLUSION

Same-sex couples are not at present permitted to marry.[217] Consequently, gay and lesbian couples are denied the legal, emotional, and economic benefits that are automatically bestowed upon legally married couples.[218] While legal alternatives to marriage such as adult adoption, domestic partnership, and contracts provide some recourse to homosexual couples,[219] each ultimately fails as a solution because these options do not adequately define the relationship or the rights conferred.[220] The limited scope of these alternatives illustrates the inherent unfairness of precluding lesbian and gay marriages.

The significance of the right that is being denied to homosexual couples cannot be underestimated. The Supreme Court has described marriage as "the most important relation in life,"[221] and has even characterized it as a fundamental right.[222] Marriage and family are clearly interrelated.[223] Although the traditional family form has been subsumed by many alternative family forms, including families headed by same-sex couples,[224] these alternative families are often refused the benefits automatically granted to legally recognized families.[225] Because non-traditional families are functionally equivalent to the heralded traditional families insofar as

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216 *Id.* at 797.

217 Schmalz, *In Hawaii*, *supra* note 109, at A14; *see also* Singer v. Hara, 552 P.2d 1187, 1188, 1197 (Wash. Ct. App. 1974) (affirming a state's refusal to issue a marriage license to two men); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (upholding the denial of a marriage license to a same-sex couple); Burkett v. Zablocki, 54 F.R.D. 626, 626 (E.D. Wis. 1972) (dismissing an action by two females seeking an order compelling the county clerk to issue an application for a marriage license); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (upholding a state statute denying a marriage license to same-sex couples).

218 *See supra note* 20 (listing and discussing legal and economic benefits of marriage).

219 *See supra* notes 39-74 and accompanying text (discussing and evaluating the alternatives to marriage).

220 Zimmer, *supra* note 42, at 688.

221 Maynard v. Hill, 125 U.S. 190, 205 (1888).

222 *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (declaring "the right to marry is of fundamental importance"); Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing marriage as a "vital personal right").

223 Treuthart, *supra* note 5, at 96.

224 Minow, *supra* note 6, at 930-32.

225 *Looking for a Family Resemblance*, *supra* note 14, at 1640.

they promote the same values and interests,[226] the current jurisprudence in this area must be re-examined and changed to protect all families equally.

The Equal Protection Clause of the Fourteenth Amendment protects against legislation that infringes upon certain individual rights[227] by requiring only that all persons similarly situated with respect to a statute's purpose be treated alike.[228] This underlying premise of the Equal Protection Clause, however, makes the equal protection argument an inadequate mechanism through which to obtain equal marital rights for same-sex couples because it equates equality with sameness and inferiority with difference.[229] Consequently, the fact that same-sex couples are inherently different from heterosexual couples works to their detriment under traditional equal protection analysis.[230]

The due process right to privacy provides same-sex couples with a much more formidable weapon because it protects individuals against unreasonable interference with marital[231] and family relationships,[232] and procreation decisions.[233] Although the traditional American family has evolved into an array of alternative forms, these non-traditional forms parallel the traditional family in terms of furthering the same values and interests, such as commitment, loyalty, and intimacy.[234] The close similarity between families headed by same-sex couples and those lead by heterosexual couples demands that same-sex couples have the same opportunity to legally marry, and, consequently, have equal access to the social and economic benefits of the marital relationship. Given the changing family structure, courts accordingly have taken the first

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226 Treuthart, *supra* note 5, at 91-92.

227 Wilson, *supra* note 15, at 548-49.

228 Reed v. Reed, 404 U.S. 71, 75-76 (1971) (citation omitted).

229 Lewis, *supra* note 17, at 1785.

230 *See id.* (arguing that the Equal Protection Clause is flawed because it undermines human individuality).

231 *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 375, 382 (1978) (holding unconstitutional a statute requiring parents under child support obligations to meet certain financial requirements before being permitted to marry); Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating Virginia statute prohibiting interracial marriage).

232 *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) (asserting that family relationships protect "the individual freedom that is central to our constitutional scheme"). *See supra* note 167 (listing additional cases protecting the family).

233 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (upholding a woman's right to choose to abort); Eisenstadt v. Baird, 405 U.S. 438, 453, 454-55 (1972) (protecting an unmarried individual's right to obtain contraceptives); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (protecting married persons' rights to obtain contraceptives).

234 Friedman, *supra* note 12, at 169; Penas, *supra* note 13, at 552-53.

steps toward extending the right to marry to homosexuals.[235] While these steps are laudable, they fall short of conferring upon homosexuals the cornucopia of rights afforded to heterosexuals. Only by recognizing the legitimacy of same-sex marriage will the homosexual population be adequately protected by the laws.

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235 *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 68 (1993) (remanding to trial court for determination of whether denial of same-sex marriage can withstand strict scrutiny analysis under Hawaii's equal protection laws).