EQUAL PROTECTION AND SAME-SEX MARRIAGE: AN IRRESISTIBLE MATCH

by

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At midnight on September 21, 1996, President Clinton quietly and without fanfare signed the Defense of Marriage Act (DOMA) into law.[1] DOMA has two provisions. The first defines "marriage" and "spouse" for the purpose of all acts, rulings, regulations, or interpretations of administrative bureaus and agencies of the United States.[2] "Marriage" is defined as a "legal union between one man and one woman as husband and wife," and "spouse" refers only to a person of the opposite sex who is a husband or wife."[3] The second provision permits states to give no recognition of same sex marriages authorized by other states.[4] Since DOMA became law, thirty-eight states have enacted legislation, modeled after DOMA, mandating (1) that only a female may marry a male and only a male may marry a female, and (2) that a marriage between two persons of the same gender is void.[5] By creating classifications permitting some and prohibiting others from marrying, these statutes deprive the latter of a fundamental right and set the stage for constitutional challenges under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The purpose of this article is to demonstrate that denying individuals the right to enter same-sex marriages violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. More particularly, this article argues that statutes restricting marriage to a man and a woman create a legal classification that disadvantages men and women who want to enter into same-sex marriages, by denying them the fundamental right to marry without any rational basis for the restriction.

Part I of this article will examine the protection provided by the Equal Protection Clause of the Fourteenth Amendment. Part II of this article will explore United States Supreme Court decisions that invalidate classifications on the basis of sex or gender under the Equal Protection Clause. Part III will examine United States Supreme Court decisions that invalidated classifications on the basis of sexual orientation. Part IV will examine the right to marriage as a fundamental right protected by the Constitution of the United States. Part V will examine the justifications advanced for limiting marriage to same-sex couples to ascertain whether there is any basis for restricting marriage to a man and a woman under the Equal Protection Clause. Part VI will ascertain whether the prohibition against same-sex marriages can be sustained under any of the Equal Protection Clause tests.

I. Safeguards provided by Equal Protection Clause

Statutory classifications that adversely affect certain classes of individuals or fundamental interests are examined under the Equal Protection Clause[6] to make sure that all persons similarly situated are treated alike,[7] i.e., the classification is not based on an impermissible purpose or used capriciously to burden a particular group of individuals.[8]

Classifications that impair or jeopardize fundamental rights are accorded the highest level of protection under the Equal Protection Clause. In such instances, the judiciary utilizes "heightened scrutiny" to make sure the classification is supported by an important government interest and is closely tailored to advance those interests only.[9]

Similarly, heightened scrutiny is applied to certain adversely affected groups.[10] The highest level of protection is given to a "suspect" class, which has been defined as a discrete and insular group of individuals,[11] whose central, stigmatizing characteristic cannot easily be controlled.[12] If a statutory classification disadvantages members of a suspect class, the statute will be examined with strict scrutiny to make sure the classification is narrowly tailored and supported by a compelling interest.[13] Classifications included in the suspect class are those defined by race,[14] nationality,[15] religion,[16] and alienage.[17]

Intermediate protection is given to a "quasi-suspect" class, which shares the characteristics of the suspect class but to a less extensive degree.[18] If a statutory classification disadvantages members of a quasi-suspect class, the statute will be examined to make sure it serves an important government objective and is substantially related to achievement of those objectives.[19] Classifications included in the quasi-suspect class are those defined by sex or gender[20] and being born out of wedlock.[21]

The lowest level of protection is given to classifications that do not affect fundamental interests of suspect or quasi-suspect classes, but treat persons similarly situated differently.[22] This classification is reviewed under the "rational basis

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standard," under which legislation is presumed to be valid if the classification employed by the statute is rationally related to

a legitimate state interest.[23] In employing this test, the court must determine that the interest supported by the classification is legitimate, i.e., not a subterfuge for effecting bias or prejudice,[24] that the identified interest is advanced by the classification,[25] and that the statute is applied fairly.[26] Laws such as economic, tax and social legislation that employ classifications that treat persons differently generally fall within the ambit of rational basis review.[27] The rational basis review has been applied to hold statutes unconstitutional under the Equal Protection Clause where the challenged statute inhibits personal relationships: law preventing households made up of unrelated individuals from receiving food stamps[28]; law prohibiting distribution of contraceptives to single persons but permitting distribution of contraceptives to married persons[29]; law requiring home for the mentally disabled to obtain special use permit but not requiring other residences to do so[30]; and law imposing a broad and undifferentiated disability on homosexuals.[31]

By way of summary, statutory classifications that adversely affect classes of individuals are examined under the Equal Protection Cause to make sure all persons similarly situated are treated alike. If the classification impairs a fundamental, constitutionally protected right and/or adversely affects members of a "suspect" class, the classification is examined under the "heightened scrutiny" test, under which the court determines that the classification is supported by an important government interest and is closely tailored to advance that interest. If the classification is applied to a "quasi suspect" class, intermediate protection is provided, and the court will examine the classification serves an important government objective and is substantially related to the achievement of that objective. If the classification does not affect a fundamental interest of suspect or quasi suspect classes, but treats persons similarly situated differently and/or inhibits personal relationships, the rational basis standard is applied, under which the legislation is presumed valid if the classification is rationally related to a legitimate government interest.

II. Application of Equal Protection Clause to groups defined by sex and gender

The United States Supreme Court has invalidated classifications based on sex and gender under the Equal Protection Clause. In *Craig v. Boren*,[32] the United States Supreme Court decided that an Oklahoma statute prohibiting the sale of 3.2% beer to males under the age of twenty-one and to females under the age of eighteen was unconstitutional under the Equal Protection Clause, because it denied equal protection of the laws to males aged eighteen to twenty.[33] The Court observed that, in order to withstand equal protection challenges, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.[34] The justification advanced for the differential treatment was public safety.[35] More particularly, a variety of statistical surveys and data purportedly showed that males aged eighteen to twenty were more likely to drive drunk than females aged eighteen to twenty.[36] The Court, however, questioned the accuracy and methodological value of the statistical evidence, noting that it "exhibit[ed]" a number of "shortcomings that seriously impugn[ed] [its] value to equal protection analysis."[37] The Court concluded that the evidence advanced to show the gender-based classification achieved an important government objective was woefully inadequate:

> [T[he showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving. In fact, when it is further recognized that Oklahoma's statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired (even after purchase by their 18-20 year-old female companions), the relationship between gender and traffic safety becomes far too tenuous to satisfy [the] requirement that the gender-based difference be substantially related to achievement of the statutory objective.[38]

Accordingly, the Court held that Oklahoma's gender-based prohibition preventing males aged eighteen to twenty from purchasing 3.2% beer (but permitting females aged eighteen and older to purchase 3.2% beer) "invidiously discriminates against males."[39] In doing so, the Court applied the "intermediate protection" test to the gender classification, i.e., the proponent of the classification must show that the classification serves important governmental objectives and is substantially related to the achievement of those objectives, if it is to pass constitutional muster.[40]

In *Orr v. Orr*,[41] the United States Supreme Court struck down an Alabama statute that required husbands, but not wives, to pay alimony.[42] The statutory justifications advanced for requiring only husbands to pay alimony were threefold: (1) to reinforce "the State's preference for an allocation of family responsibilities under which the wife plays a dependent role"[43]; (2) to use the sex of the marital partner as a proxy to provide financial assistance to the needy spouse[44]; and (3) to compensate women for past discrimination during marriage, which may have "left them less prepared financially to fend for themselves in the working world following divorce."[45] The Court quickly dismissed the first justification, noting "the 'old notion' that 'generally it is the man's primary responsibility to provide a home and its essentials,' can no longer justify a statute that discriminates on the basis of gender."[46] The Court rejected the second and third justifications, because individualized hearings were conducted in which the parties' comparative financial standing was examined.[47] Those hearings could be used for the purpose of making sure the needy spouse received financial assistance and determining whether a history of discrimination against women caused economic disparity between the spouses.[48] Hence, the statute's purported "proxy" service of providing financial need and eliminating the vestiges of prior discrimination were belied by the statutory scheme.[49] The Court concluded:

> "[T]he gender-based distinction is gratuitous; without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids . . . . Moreover, use of a gender classification actually produces perverse results in this case. As compared to a gender-neutral law placing alimony obligations on the spouse able to pay, the present Alabama statutes give an advantage only to the financially secure wife whose husband is in need. Although such a wife might have to pay alimony under a gender-neutral statute, the present statutes exempt her from that obligation. Thus, '[t]he [wives] who benefit from the disparate treatment are those who were . . . nondependent on their husbands' (citation omitted). They are precisely those who are not 'needy spouses' and who are 'least likely to have been victims of discrimination,' by the institution of marriage. A gender-based classification which, as compared to a gender-neutral one, generated additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny.[50]

Notably, as in *Craig v. Boren*,[51] discussed above, the test applied by the Court to Alabama's alimony statute was intermediate protection, i.e. "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[52] Because the purpose of the alimony statute was better served by a gender-neutral classification (rather than a gender classification that "carries with it the baggage of sexual stereotype"), the statute violated the Equal Protection Clause.[53]

In *Mississippi University for Women v. Hogan*,[54] the United States Supreme Court decided that the policy of the state-related university to limit enrollments to women violated the equal protection rights of a male applicant who was denied admission to the University's nursing program.[55] The Court noted initially that the burden imposed on the party seeking to uphold a statute that classifies individuals on the basis of their gender is substantial, namely providing "exceedingly persuasive justification" that the classification advances an important and legitimate government objective and that the "discriminatory means employed" are directly and substantially related to the attainment of that objective.[56]

Mississippi claimed two principal justifications for the single-sex admissions policy of the School of Nursing: (1) that the policy compensated women for prior discrimination,[57] and (2) that the nursing education provided to female students in the School of Nursing would be adversely affected by the presence of men.[58] The Court rejected the first claim, because there was no evidence demonstrating that women lacked opportunities to obtain nursing education or to attain positions of leadership within the nursing profession.[59] There being no prior discrimination against women requiring compensation, the University's policy of excluding males from the nursing program merely "perpetuate[s] the stereotyped view of nursing as an exclusively woman's job,"[60] and, by assuring more women were admitted than men, "lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy."[61] The Court noted the second claim was belied by the University's practice of permitting males to audit and participate fully in nursing classes and enrolling both men and women in continuing education programs offered by the School of Nursing.[62] In short, the Court concluded, "the record . . . is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of [the University's] educational goals."[63] Mississippi having fallen "far short of establishing the 'exceedingly persuasive justification' needed to sustain the gender-based classification,"[64] the Court ruled the University's policy of excluding men from enrolling in nursing courses for credit violates the Equal Protection Clause.[65]

The three above noted decisions struck down classifications on the basis of sex or gender under the Equal Protection Clause by using the intermediate protection test. Under the intermediate protection test, the classification based on sex or gender cannot be sustained under the Equal Protection Clause unless the party seeking to uphold the classification demonstrates that the classification not only serves an important and legitimate government objective but also is substantially related to the achievement of that objective. Consequently, if the prohibition against same sex marriages is determined to be a classification based on sex or gender, the intermediate test may be applied, and the reasons advanced for the policy of restricting marriages to opposite sex couples must support and advance an important and legitimate government interest.[66]

The Hawaii Supreme Court decided in *Baehr v. Lewin*,[67] that the Hawaii Marriage Law,[68] which restricted marriage to a man and a woman and denied the right to marry to same sex couples, was a discriminatory classification based on sex.[69] The basis for the Court's decision was threefold: (1) the plain language of marriage statute restricted marriage to a male and a female, thereby expressly creating a classification based on sex[70]; (2) the reasoning used in state court decisions[71] that restricted marriage to same sex couples because marriage has traditionally been deemed (and defined) to be a special relationship between a man and a women, was circular and unpersuasive[72]; (3) denying the right to marry to same sex couples was no different than the Virginia miscegenation law declared unconstitutional in *Loving v. Virginia*,[73] because the statute limited the right to marry on the basis of race and criminalized conduct which, if engaged in by members of different races, would be generally accepted.[74]

The Hawaii Supreme Court's reliance on *Loving* is instructive. In *Loving*, the United States Supreme Court decided that two Virginia statutes prohibiting interracial marriages was unconstitutional under the Equal Protection Clause.[75] The first statute declared two activities to be felonies, punishable by imprisonment of not less than one nor more than five years: (1) leaving Virginia to enter an interracial marriage with the intention of returning to Virginia to live as husband and wife, and (2) entering into an interracial marriage.[76] The second statute declared interracial marriages void.[77] Two Virginia residents,

Mildred Jeter, an African American woman, and Richard Loving, a Caucasian man, were married in the District of Colombia, and, shortly after their marriage, returned to live in Virginia.[78] The Lovings were indicted for violating Virginia's ban on interracial marriages, pleaded guilty, and were sentenced to one year in prison.[79] The trial judge agreed to suspend the sentence for a period twenty-five years if the Loving agreed to leave the state and not return to Virginia.[80] The Lovings moved to the District of Columbia, and filed a motion in a Virginia trial court to vacate the judgment and set aside the sentence.[81] The trial court denied the motion to vacate, and the Virginia Supreme Court of Appeals upheld the constitutionality of the antimiscegenation statutes.[82] On appeal to the United States Supreme Court, Virginia argued "that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race."[83] The United States Supreme Court rejected this argument:

> [W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination . . . . In the case at bar . . ., we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.[84]

The Court further noted that racial classifications, particularly in criminal statutes, are subject to the "most rigid scrutiny," and cannot be upheld unless they are "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[85] Stating that the right to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men,"[86] and that denying such a fundamental right "on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law,"[87] the Court reversed the Lovings' convictions.[88]

III. Application of Equal Protection Clause to groups defined by sexual orientation

The United States Supreme Court has invalidated classifications based on sexual orientation under the Equal Protection Clause. In *Romer v. Evans*,[89] the United States Supreme Court decided that an amendment to the Colorado State Constitution, which was adopted by the voters in a referendum and which prohibited all legislative, executive or judicial action at either the state or the local government level designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships,"[90] was unconstitutional under the Equal Protection Clause.[91] The Court observed that the immediate effect of the amendment was two fold: (1) to nullify a broad array of statutes, regulations, ordinances and policies of the state and local government entities that prohibited discrimination on the basis of sexual orientation,[92] and (2) to prohibit any government entity from enacting such protections in the future unless the Colorado State Constitution were first amended.[93] The impact of the amendment was to place homosexuals "in a solitary class with respect to transactions and relations in both the private and government spheres," to withhold "from homosexuals, but no others, specific legal protection from the injuries caused by discrimination," and to prohibit the reinstatement of those laws and protections.[94] The sheer scope of the purloined rights deeply disturbed the Court: loss of protection against injuries under public accommodation laws; nullification of "legal protections in housing, sale of real estate, insurance, health and welfare services, private education and employment"; elimination of protection against discrimination at every level of government; and the prohibition against reinstatement of those rights in the future, unless homosexuals are able to enlist the citizens of Colorado to amend the Colorado Constitution.[95] Noting that the amendment cannot be sustained under the Equal Protection Clause unless it bears a rational relation to some legitimate end, the Court excoriated the amendment, because:

- "[It imposes] a broad and undifferentiated disability on a single named group."[96]
- "[I]ts sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."[97]
- "[I]t lacks a rational relationship to legitimate state interests."[98]
- "[I]t identifies persons by a single trait and then denies them protection across the board."[99]
- "[It imposes] disadvantage . . . born of animosity toward the class of persons affected."[100]

The Court therefore concluded the amendment "classifies homosexuals not to further a legitimate legislative end but to make them unequal to everyone else" and "stranger[s] to [Colorado's] laws."[101] Hence the amendment was unconstitutional under the Equal Protection Clause.[102] In reaching this decision, however, the Court utilized the rational basis standard, the lowest level of protection under the Equal Protection Clause, possibly implying that legislatively enacted discrimination against homosexuals must merely bear some rational relation to a legitimate end to pass muster under the Equal Protection Clause.[103] Likewise, while the Court did not explicitly consider whether homosexuals constitute a suspect or quasi-suspect class,[104] the application of the rational basis standard may imply that classifications based on sexual orientation are not suspect or quasi-suspect. Perhaps, then, the Court merely recognizes that homosexuals are entitled to protection from statutes designed to effectuate anti-gay bias or motivated by animosity toward gays.[105]

Nonetheless, the *Romer* decision's antipathy toward legislative enactments "born of animosity toward the class of persons affected"[106] was pivotal to the United States Supreme Court decision in *Lawrence v. Texas*,[107] holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct[108] violated the due process clause of the Fourteenth Amendment.[109] In *Lawrence*, police officers, dispatched to a private residence to investigate a reported weapons disturbance, entered an apartment where they observed two men engaging in sexual activity.[110] The two men were charged with and convicted of the crime of "deviate sexual intercourse," a misdemeanor.[111] The Texas Court of Appeals, relying on *Bowers v. Hardwick*,[112] rejected their argument that their convictions violated the Equal Protection and the Due Process Clauses of the Fourteenth Amendment.[113] The United States Supreme Court granted certiorari to determine whether (1) the criminal convictions for deviate sexual intercourse under Texas law, which applied only to same sex couples, violated the Equal Protection Clause, (2) the criminal convictions for deviate sexual intercourse under Texas law violated the Due Process Clause of the Fourteenth Amendment, and (3) whether *Bowers* should be overruled.[114]

The United States Supreme Court declined to address the Equal Protection claims of the defendants.[115] Rather, the Court determined that "the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment."[116] Relying on *Planned Parenthood of Southeastern Pa. v. Casey*,[117] the Court reaffirmed its commitment to "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"[118] and the autonomy of the person in making "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment."[119] The Court noted that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[120] Relying on *Romer v. Evans*,[121] and reiterating its conclusion that legislative enactments "born of animosity toward the class of persons affected" and lacking a rational relation to a legitimate governmental purpose cannot pass Constitutional muster,[122] the Court concluded:

> [This case involves] two adults who, with full and mutual consent from each other, engaged in sexual practices common to the homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct with out intervention of the government. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private live of the individual.[123]

The Court overruled *Bowers*,[124] and provided several strong justifications for doing so. First, the Court rejected the premise on which *Bowers* rested.[125] More particularly, the Court emphasized that *Bowers* was not simply a prohibition against engaging in certain sexual conduct,[126] but an impermissible attempt to control a personal relationship:

> To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purpose, though, have more far reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.[127]

The Court emphasized that states cannot define or limit the meaning of a personal relationship in the absence of "injury to a person" or "abuse of an institution the law protects,"[128] and emphasized that "adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons," whether or not it is manifested in intimate sexual conduct, which "can be but one element in a personal bond that is more enduring."[129] The Court also indicted the *Bowers* court's historical analysis,[130] noting that "the historical grounds relied upon in Bowers are more complex than the majority and concurring opinions" and certainly "overstated."[131] The Court noted that the Bowers decision was contrary to the ALI Model Penal Code,[132] contrary to the practice of most states not to enforce sodomy laws,[133] contrary to the European Convention on Human Rights,[134] and contrary to ensuing decisions, discussed above, protecting the autonomy of individuals to make intimate, personal choices and decisions.[135] Hence, the Court determined that Bowers "was not correct when it was decided, and . . . is not correct today" and "should be and now is overruled."[136]

Significantly, Justice O'Connor filed a concurring opinion in which she agreed the Texas statute banning same-sex sodomy was unconstitutional.[137] Notably, however, Justice O'Connor determined the statute was unconstitutional under the Equal Protection Clause, rather than the Due Process Clause as determined by the majority opinion.[138] Justice O'Connor noted that the Texas statute criminalized sexual conduct between same-sex individuals, but permitted the same conduct between opposite-sex partners,[139] thereby making homosexuals unequal in the eyes of the law and, whenever the statute is enforced, imposing on them criminal sanctions that carry significant consequences (e.g., disqualifying them from professional licensure, compelling them to register as sex offenders should they relocate to four other states, and branding them as criminals).[140] Justice O'Connor determined that the only state interest advanced by the statute was "moral disapproval" of homosexual sodomy,[141] and emphasized that "moral disapproval of this group, like a bare desire to harm the

group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."[142] Further, "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'"[143] For that reason, Justice O'Connor stated, a state "cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law."[144]

As noted above, *Loving v. Virginia* played a pivotal role in the Hawaii Supreme Court's conclusion in *Baehr v. Lewin* that prohibition of same sex marriage was gender based discrimination. Similarly, *Lawrence v. Texas* played a role in the Massachusetts Supreme Court decision in *Goodrich v. Department of Public Health*,[145] striking down the prohibition on same-sex marriages under the due process and equal protection provisions of the Massachusetts Constitution.[146] Noting that *Lawrence* prohibits a state from regulating conduct in a way that "demeans human dignity, even though that statutory discrimination may enjoy broad public support,"[147] the Massachusetts Supreme Court concluded that the prohibition against same sex marriage discriminated on the basis of sexual orientation.[148]

Several conclusions can be drawn from the opinions discussed above dealing with classifications based on sexual orientation. First, the Equal Protection Clause prohibits the enactment of legislation classifying individuals on the basis of their sexual orientation for the purpose of inflicting animosity on the persons so classified. Second, the Equal Protection Clause prohibits classifications based on sexual orientation for the purpose of disadvantaging or disfavoring the group so classified. Third, the Due Process Clause protects the autonomy of individuals to make personal choices and decisions in personal relationships that are part of the personal dignity and autonomy of the individual. Fourth, the Equal Protection Clause mandates that moral disapproval of conduct cannot in and of itself constitute a sufficient government interest to justify a classification whose the sole purpose is to disadvantage the group burdened by the law.

IV. Constitutional protection of the fundamental right to marry

Several decisions of the United States Supreme Court confirm that the right to marry is a fundamental right. The Court has characterized marriage as "the most important relation in life,"[149] the "foundation of the family and of society, without which there would be neither civilization nor progress."[150] and "fundamental to the very existence and survival of the race."[151] The Court stated 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," and that laws arbitrarily depriving individuals the freedom to marry violate the Due Process Clause.[152]

The right to marry is deemed by the Court to be part of the fundamental right of privacy implicit in the Due Process Clause,[153] and the decision to marry is included among the personal decisions protected by the right of privacy,[154] one which the individual may make without unjustified government interference.[155] As the Court noted in *Griswald v. Connecticut*,

> We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."[156]

Because the right to marry is a fundamental, constitutionally protected right, statutory classifications that interfere with that right must be examined under the Equal Protection Clause. The United States Supreme Court did so in *Zablocki v. Redhail*,[157] in which the Court decided that a Wisconsin statute, which prohibited certain individuals from marrying without prior approval of the court, was unconstitutional under the Equal Protection Clause.[158] The statute in question provided that no Wisconsin resident, who had minor children not in his custody whom he was obligated to support pursuant to a court order or judgment, was not permitted to marry without prior court approval.[159] While a minor in high school, Appellee, Roger Redhail, fathered a daughter born out of wedlock.[160] During a paternity action, Redhail admitted he was the parent of the child, and the court ordered him to pay child support in the amount of $109 per month.[161] Unemployed and indigent, Redhail was unable to make any support payments.[162] About two years later, Redhail filed an application for a marriage license, and the County Clerk denied his application, because Redhail had not obtained a court order granting him permission to marry.[163] Redhail instituted an action seeking to have the statute declared unconstitutional.[164] The District Court examined the challenged statute under the Equal Protection Clause, applied strict scrutiny because the classification interfered with a fundamental right, and, finding the classification was not necessary for the attainment of the interests advanced by the state, declared the statute invalid.[165] Wisconsin directly appealed to the United States Supreme Court.[166]

The United States Supreme Court decided that, because the right to marry is a fundamental right[167] and because the classification in question significantly interfered with that right, "critical examination" of the state interest was required.[168] Noting that statutory classifications which interfere with fundamental rights cannot be upheld unless they are supported by important state interests and are closely tailored to achieve those interests,[169] the court addressed the two interests advanced for the classification: providing the opportunity to urge the applicant to fulfill his prior support obligations, and protecting the welfare of the out-of-custody child.[170] Because the statute as enacted failed to provide for counseling,[171] the Court concluded that the first interest could not support the restriction on the right to marry.[172] The Court determined the second interest was also inadequate: the process did not in fact produce funds for the minor children; other enforcement mechanisms, such as

wage assignments, civil contempt proceedings, and criminal penalties, were available to effect compliance with support orders; and adjusting the criteria for determining the amounts to be paid for the support orders might better provide for the minor children.[173] Furthermore, the court disputed the state claim that the statute prevented the parent from incurring new support obligation, because it did not limit any of the many other ways new financial commitments might be undertaken, and ignored the possibility that the new spouse may actually improve the applicant's financial situation and contribute to the preexisting obligation of support.[174] Finally, the Court noted, preventing the applicant from marrying may only result in additional children being born out of wedlock.[175] Because the statutory classification was not be justified by the interests it purportedly served, the Court affirmed the decision of the District Court declaring the statute to be unconstitutional under the Equal Protection Clause.[176]

It appears well settled, then, that the right to marry is a fundamental, constitutionally protected right, and that statutory classifications interfering with the right to marry must past muster under the Equal Protection Clause. Because a fundamental right is impaired, the court is required to view the classification under the heightened scrutiny test: the classification must support an important government interest and must be closely tailored to achieve that interest.

V. Justifications advanced for limiting marriage to same sex couples

Various arguments have been raised against permitting same sex couples to marry. Professor Teresa Stanton Collett argues that the marriage of a man and a woman is a mutual and complete self-giving, a union unique in its potential to qualitatively surpass other human relationships. The act of marital intercourse, she claims, permits the couple to express their unity and to join together for the creation of new life; the conception of a child within marriage provides the best opportunity to nurture the child to maturity. While same sex unions may mirror the same commitment, she argues, same sex couples cannot create new human life, and cannot give and receive the gift of each person's fertility. Hence, their union is rendered finite and sterile, and society has no stake in their sexual union.[177]

This argument incorrectly assumes that the paramount purpose of marriage is procreation and rearing of children. Many marriages do not beget children because the couple is either unwilling or unable to have issue, and those marriages are not deemed sterile and finite.[178] Likewise, it cannot be said that the state has an interest only or principally in those marriages that produce children. Indeed, marriage promotes many interests of the couple that are part of their overall well being, and it is dangerous to permit the state to use a classification that creates a hierarchy of those interests. Rather, the married couple decides what interests their marriage should advance. Further, if the state were to implement this suggested hierarchy of interests and to place procreation as the top of the list, all of the personal liberties implicit in *Griswold* would be jeopardized and an even more repugnant classification would be created.

Professor Anita Blair argues that restricting marriage to unions of a man and a woman does not discriminate on the basis of sex, because men and women are treated exactly the same for reasons related to their enduring physical differences and their ability to provide a legal structure in which the couple may raise their children.[179] This argument assumes incorrectly that same-sex couples cannot be considered families and cannot raise children in a secure, protected family unit.[180] This argument is also belied by *Loving*. That the Virginia miscegenation statute treated whites the same as blacks in denying both the right to enter an interracial marriage race did not eliminate the discrimination created by the classification, even if at that time the restriction was a popularly accepted one. Likewise, prohibiting a male from marrying another male and a female from marrying another female cannot pass constitutional muster simply because it equally infringes on their rights, even if it is popularly supported by a great majority of Americans. Such a prohibition is a classification explicitly based on the party's sex, just as the miscegenation statute is a classification based on race. Professor Blair also argues that the clamor in support of same sex marriage is the merely the exercise of an interest group attempting to achieve a result denied by the democratic process and better implemented legislatively.[181] This argument overlooks the heart of the matter: that the statute defining marriage itself creates the classification that interferes with a fundamental right.

Professor Lynn Wardle argues that marriage has always referred to the union of a man and a woman in a unique relationship of commitment and intimacy, and is currently overwhelmingly defined as a heterosexual union. Marriage between a man and a woman, Wardle contends, is not only one of the great constants in human history, but part of the very nature and reality of the marriage relationship itself, which is uniquely structured to provide the greatest benefit for the individuals and society.[182] This argument is circular, i.e., marriage has traditionally been defined as the union of a man and a woman, and therefore the state can deny a fundamental right to same sex couples because that is how the state defines marriage.[183] More importantly, the argument misses the point: the definition limiting marriage to a man and a woman creates a classification that infringes upon a fundamental right.

Professor Richard Duncan argues that *Loving* was based on the notion that one race was superior to the other, whereas a definition of marriage restricting it to a man and a woman is not. The absence of a motive to promote the superiority of one group over another in restrictions limiting marriage to same sex couples, Duncan contends, renders *Loving* is inapplicable, and precludes a finding of sex or gender discrimination. This argument is fallacious, because restricting marriage to opposite sex unions assumes those unions are superior to same-sex unions; otherwise there is no reason to limit marriages to opposite sex couples. Duncan concedes this when he further argues that prohibiting same-sex marriage is really a classification based on sexual orientation. This argument also fails. If Duncan is correct, and if the objective of the

marriage statute is to prohibit two people with the same sexual orientation, the statute is necessarily overbroad, because it moves beyond sexual orientation to gender. More particularly, if the statute seeks to prohibit gay men from marrying each other, but prohibits all males from marrying other males, the statute precludes heterosexual men, who may have legitimate economic reasons to enter marriage, from marrying each other.[184]

Perhaps the best way to demonstrate that prohibitions on same sex marriages do not advance a legitimate state interest is to examine the fundamental interests normally associated with marriage: procreation of children, raising children, intimate association, and recognition as a social unit. None of these interests is unique to a same sex marriage.[185] Children can be and are procreated both inside and outside marriage; hence marriage is not the *sine qua non* of procreation. Likewise, there is no requirement that marriage results in the procreation of children and no prohibition against marriage of couples who are unable or who do not want to procreate children. While the state does have an interest in having children raised in stable homes, there is absolutely no reason same sex couples cannot provide such a home, and a growing number of gay and lesbian couples are adopting and successfully raising children.[186] The desire to enter into an intimate relationship and to declare that relationship a marriage, and the joy and fulfillment that comes with an intimate marital relationship, is not limited to heterosexuals.[187] While some do not approve of intimate sexual activity between same sex partners, the right of consenting adults to do so in the confines of their homes and private lives, and at the same time to retain their dignity as free persons, is a fundamentally protected right that cannot be defeated by the personal or moral disapproval of others.[188] Likewise, recognition as a social unit is equally important to both same-sex and opposite-sex couples; permitting the latter to have it, while restricting the former to cohabitation, treats parties similarly situated differently, by denying them the right to affirm their commitment publicly[189] and depriving them of significant legal protections and benefits. [190]

Finally, the desire of same-sex couples to enter marriage cannot be seen as injurious or divisive to the more traditional opposite-sex marriage. The classification preventing same-sex individuals from marrying is an impermissible, sex-based classification prohibited by the Equal Protection Clause. In contrast, prohibitions against child, incestuous, or polygamous marriages are gender neutral, and can easily demonstrate a rational basis.[191] Likewise, permitting same sex couples to marry does not harm the institution of marriage. As noted in *Goodridge v. Department of Public Health*,

> [P]laintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.[192]

Part VI. Testing the prohibition against same-sex under the Equal Protection Clause

As noted above, statutory classifications that adversely affect classes of individuals are examined under the Equal Protection Cause to make sure all persons similarly situated are treated alike. If the classification impairs a fundamental, constitutionally protected right and/or adversely affects members of a "suspect" class, the classification is examined under the "heightened scrutiny" test, under which the court determines that the classification is supported by an important government interest and is closely tailored to advance that interest. Hence, prohibitions against same sex marriage can survive the Equal Protection Clause only if the classification advances an important government interest in a narrowly tailored manner.

If the classification is applied to a "quasi suspect" class, intermediate protection is provided, and the court will examine the classification serves an important government objective and is substantially related to the achievement of that objective. *Craig v. Boren*,[193] *Orr v. Orr*,[194] and *University for Women v. Hogan*,[195] struck down classifications on the basis of sex or gender under the Equal Protection Clause by using the intermediate protection test. Certainly classifications that prohibit same-sex individuals marrying deprive them of a fundamental, constitutionally protected right, and can pass muster under the Equal Protection Clause only if they support a significant government interest and are substantially related to advance that interest.

If the classification does not affect a fundamental interest of suspect or quasi suspect classes, but treats persons similarly situated differently and/or inhibits personal relationships, the rational basis standard is applied, under which the legislation is presumed valid if the classification is rationally related to a legitimate government interest. In *Romer v. Evans*,[196] the United States Supreme Court applied the rational basis test to strike down an amendment to the Colorado constitution enacted via referendum prohibiting all legislative, executive or judicial action designed to protect homosexual persons from discrimination. While it is not clear whether the Court applied the rational basis test because it is applicable to discrimination on the basis of sexual orientation or because the amendment was so egregious it could not survive even under the rational basis test, it is conceivable that prohibitions against same sex marriages will be tested by the rational basis test.

As discussed above in Part V, regardless of the test applied, it is clear that the prohibitions against same sex marriage are not rationally connected to and do not advance any legitimate government interests. The primary purpose of civil marriage is not the procreation of children, and the ability, intent or desire to conceive children is not a condition of marriage. Rather, the primary purpose of marriage is the exclusive and permanent commitment of the married partners to one another. Children are brought into families by birth or adoption whether the parents are married or unmarried, heterosexual, homosexual or bisexual. Traditional families headed by opposite-sex spouses are no longer the average American family; the composition of the family varies from household to household. It cannot be said that opposite-sex spouses are better parents than same-sex spouses; and prohibiting same-sex partners from marrying only makes it harder to fulfill parental duties, because their status is reduced to being outsiders to marriage. Families are not more loving, secure and protective because they headed by opposite-sex couples; but depriving same-sex spouses from benefits and protections made available to opposite-sex families through marriage makes it more difficult for same-sex spouses to do so. Allowing same sex couples to marry does not trivialize or harm opposite-sex marriages, any more that allowing interracial marriages trivializes or harms same-race marriages. Marriage of same-sex individuals does not diminish marriage; it reinforces the importance of marriage to society, and enhances the enduring role of marriage both in the law and in human life. In short, there is no rational connection between prohibitions on same-sex marriages and any purported government interest. Indeed, permitting same-sex marriages may even spur the economy by injecting "hundreds of millions of dollars" into the nation's $50 billion wedding industry and establish Massachusetts as the nation's gay wedding capital.[197] Hence, regardless of the test employed, state prohibitions against same-sex marriages cannot pass muster under the Equal Protection Clause of the Fourteenth Amendment.

Summary

Thirty-eight states have enacted legislation, modeled after DOMA, prohibiting same-sex individuals from entering marriage by mandating that only a female can marry a male and only a male can marry a female. Such prohibition is by its own terms a classification based on gender or sex. Prohibiting same-sex individuals from entering marriage deprives them of a fundamental, constitutionally protected right and violates the Equal Protection Clause of the Fourteenth Amendment regardless of whether the strict scrutiny, intermediate scrutiny or rational basis standard is used, because there is no rational connection between the prohibition on same-sex marriages and any purported government interest.

Footnotes

[1] Kevin H. Lewis, *Equal Protection After* Romer v. Evans*: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175 and n.3 (1997).
[2] 1 U.S.C.A. § 7.
[3] *Id.*
[4] 28 U.S.C.A. § 1738C: "No State, territory, or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."
[5] Thomas Prol and Daniel Weiss, *Lifting A Lamp: Will New Jersey Create A Safe Harbor for Gay and Lesbian Immigration Rights?*, NEW JERSEY LAWYER, April 2004, at 25. Sherrill Wm. Colvin, *Indiana Marriage: What Lawyers Need to Know*, RES GESTAE, March 2004, at 5. Same-sex marriages are permitted in Belgium, Canada, and the Netherlands. *See* Michelle Mann, *Will Canada Lead the Way in Same-Sex Marriages*, ABA JOURNAL E-REPORT, July 11, 2003, and Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 New Eng. L. Rev. 569, 584 (2004).
[6] "[N]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.
[7] Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985), and Plyler v. Doe, 457 U.S. 202, 216 (1982).
[8] Mark Strasser, *Domestic Relations Jurisprudence and the Great Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 *FORDHAM L. REV.* 921, 937 (1995), citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.2 (1995).
[9] Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (if a statute or classification affects a fundamental right, heightened judicial scrutiny is required); Cent. State Univ. v. Am. Ass'n of Univ. Professors, 526 U.S. 124, 127-28 (1999) (unless a classification involves a fundamental right, no heightened scrutiny is required); Nordinger v. Hahn, 505 U.S. 1, 10 (1992) (if the exercise of a fundamental right is jeopardized, the equal protection clause requires heightened scrutiny); Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 906 n.6 (1986) (where the classification infringes on a constitutionally protected, fundamental right, heightened scrutiny under the Equal Protection Clause is required); Harper v. Virginia, 383 U.S. 663, 670

(1966) (where the classification "invades or restrains" a fundamental right heightened scrutiny is required), and City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (when state laws impinge on constitutionally protected personal rights, heightened scrutiny is required).
[10] Strasser *supra* note 8 at 937, and Kevin H. Lewis, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L. J. 175, 179-80 (1997).
[11] Sugerman v. Dougall, 413 U.S. 634, 642 (1973) (classifications based on alienage are subjected to close judicial scrutiny).
[12] Parham v. Hughes, 441 U.S. 347, 353 (1979) (state classifications based on illegitimacy may punish a child who is in no way responsible for his situation and is unable to change it).
[13] Loving v Virginia, 388 U.S. 1, 11 (1967), and Strasser *supra* note 8 at 937 citing NOWAK, § 14.3.
[14] Loving v. Virginia, 388 U.S. at 12 ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.")
[15] Korematsu v. United States, 323 U.S. 214, 216 (1944) (misdemeanor conviction of individual of Japanese ancestry for remaining in a restricted area declared off limits to all persons of Japanese ancestry upheld; classification based on ancestry deemed to be suspect class).
[16] Burlington N. R.R. Co. v. Ford, 504 U.S. 648, 651 (1992) (Montana venue rules neither infringe a fundamental right nor classify on suspect lines like race and religion); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.")
[17] Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419-20 (1948) (California law prohibiting issuance of commercial fishing licenses to aliens violated Equal Protection protections).
[18] Strasser, *supra* note 8 at 937.
[19] Craig v. Boren, 429 U.S. 190, 197 (1976).
[20] *Id*., and Nguyen v. I.N.S., 533 U.S. 53, 60 (2001) ("For a gender-based classification to withstand equal protection scrutiny, it must be established at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives" (internal quotation marks removed)). *See* United States v. Virginia, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action.")
[21] Trimble v. Gordon, 430 U.S. 762, 767 (1977) (classification based on illegitimacy is not so suspect as to require that it survive strict scrutiny but it must, at a minimum, bear some rational relationship to a legitimate state purpose); Mathews v. Lucas, 427 U.S. 495, 506 (1976) (Social Security Act's discrimination between individuals on basis of their legitimacy does not require judicial scrutiny traditionally devoted in cases involving discrimination along lines of race or national origin; statutory classifications that condition the eligibility of certain illegitimate children for a surviving child's insurance benefits by requiring that the deceased wage earner was, at the time of his death, living with the child or was contributing to his support, are permissible because they are reasonably related to the likelihood of dependency at death); Parham v. Hughes, 441 U.S. 347, 353 (1979) (Georgia statute precluding a father who has not legitimated a child from suing for the wrongful death of the child is not unconstitutional on ground that it imposes differing burdens or awards differing benefits to legitimate and illegitimate children); and Mills v. Habluetzel, 456 U.S. 91, 100 (1982) (Texas statute providing that a paternity suit to identify the natural father of an illegitimate child for purposes of obtaining support must be brought before the child is one year old or the suit is barred denies equal protection to illegitimate children in Texas, since a state that grants opportunity for legitimate children to obtain parental support must also grant that opportunity to illegitimate children).
[22] Danridge v. Williams, 397 U.S. 471, 485 (1970) (in the areas of economics and social welfare, if the classification has some reasonable basis; it need not be made with mathematical nicety and may in practice result in some inequality); F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (classification for purposes of tax legislation must be reasonable, and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike), Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446 (1985) (mental retardation does not qualify as a suspect or quasi-suspect class; to withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose); Louisville Gas & Electric Co., v. Coleman, 277 U.S. 32, 37 (1928) ("the power of the state to classify for purposes of taxation is of wide range and flexibility provided always that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").
[23] Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 449 (1985) (requiring a special use permit for proposed group home for the mentally retarded violated equal protection clause, in absence of any rational basis in record for believing that group home would pose any special threat to city's legitimate interests); Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (Food Stamp Act provision prohibiting participation of unrelated household member was reviewed under rational basis standard and prohibited by Equal Protection Clause); Romer v. Evans, 517 U.S. 620, 632-33, 635 (1996) (Colorado constitutional amendment eliminating all protections against discrimination against homosexuals violated Equal Protection

Clause; legislation seeking to make a class of individuals unequal to itself has no "identifiable legitimate purpose or discrete objective"; Nordlinger v. Hahn, 505 U.S. 1, 11-12 (1992) (unless classification interferes with fundamental right, Equal Protection Clause requires only that the classification advance a legitimate state interest; this standard is "especially deferential" to tax law classifications); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) ("The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary."); Baxtrom v. Herold, 383 U.S. 107, 111 (1966) (classification of mentally ill individuals as either insane or dangerously insane bore no reasonable connection for distinguishing the commitment of individual nearing the end of his prison term from those incarcerated through civil commitments).

[24] Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (the central purpose of the Fourteenth Amendment was to eliminate governmentally imposed racial discrimination; court order granting custody of daughter to father and denying custody to mother was motivated by racial prejudice not legitimate public concern; the law cannot give effect to private biases and the possible injury they may cause).

[25] Trimble v. Gordon, 430 U.S. 762, 769 (1977) (Equal Protection Clause requires more than a statement of state purpose; there must be a demonstration of how the classification is related to legitimate legislative ends); McLaughlin v. Florida, 379 U.S. 184, 191 (1964) (Florida statute criminalizing cohabitation by a white man and a Negro woman or a Negro man and a white woman violated Equal Protection clause; that the statute applied equally to the members of the identified class was insufficient; the court must also determine whether there was an arbitrary discrimination between classes covered by the cohabitation law); and Mississippi University for Women v. Hogan, 458 U.S. 718, 728 (1982) (denying admission of males to nursing program of state-supported university that limited enrollment to women violated Equal Protection Clause; state claim that enrollment classification favoring women was needed to ameliorate prior discrimination against women cannot be sustained in absence of evidence showing women were not admitted to nursing program in the past or were prevented from gaining leadership positions in nursing profession).

[26] Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.")

[27] Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 357 (2001) ("the minimal 'rational basis' review [is] applicable to general social and economic legislation"); Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446-47 (1985) ("legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate government purpose"); Fitzgerald v. Racing Assn. of Central Iowa, 529 U.S. 103 (2003) (Iowa tax law classifying revenues obtained within the state is subject to rational-basis review).

[28] Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

[29] Eisenstadt v. Baird, 405 U.S. 438, 447-55 (1972).

[30] Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446-47 (1985).

[31] Romer v. Evans, 517 U.S. 620, 632 (1996) (amendment to Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination violated equal protection clause).

[32] 429 U.S. 190 (1976).

[33] Craig v. Boren, 429 U.S. 190, 210 (1976).

[34] *Id.* at 197.

[35] *Id.* at 200-01.

[36] *Id.*

[37] *Id.* at 202.

[38] *Id.* at 204.

[39] *Id.*

[40] *Id.* at 197.

[41] 440 U.S. 268 (1979).

[42] Orr v. Orr, 440 U.S. 268, 283 (1979).

[43] *Id.* at 279.

[44] *Id.* at 280.

[45] *Id.*

[46] *Id.* at 279-80. *See* Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.")

[47] Orr v. Orr, 449 U.S. at 281.

[48] *Id.*

[49] *Id.* at 281-282.

[50] *Id.* at 282-83.

[51] Craig v. Boren, 429 U.S. 190, 197 (1976).

[52] Orr v. Orr, 449 U.S. at 278. *Cf.* Califano v. Webster, 430 U.S. 313, 316-17, 318 (1977) (reducing the economic disparity between men and women as a result of lengthy discrimination against women is an important government objective, and permitting women to eliminate more low-earning years than men in computing their social security benefits and thereby providing women with higher monthly benefits than men was permissible under the Equal Protection Clause to remedy the economic disparity). *See* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (allowing women to take an additional four years to reach a particular rank before automatically discharging them was permissible under the Equal Protection Clause, because women were barred from combat duty and had fewer opportunities for promotion than males).
[53] *Id.* at 283. *See* Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 280 (1979) (Massachusetts' veterans' preference statute giving all veterans who qualify for state civil service position priority over nonveterans did not deprive women of equal protection, because the preference was given to both male and female veterans and did not prefer one sex over the other. The court applied intermediate scrutiny to classifications based on gender: "Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination. (citation omitted) The Court's recent cases teach that such classifications must bear a close and substantial relationship to important governmental objectives." *Id.* at 273.)
[54] 458 U.S. 718 (1982).
[55] Mississippi University for Women v. Hogan, 458 U.S. 718, 733 (1982).
[56] *Id.* at 724 and 725.
[57] *Id.* at 727.
[58] *Id.* at 730.
[59] *Id.* at 729.
[60] *Id.* at 729-30.
[61] *Id.* at 730.
[62] *Id.* at 731.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] In contrast, the Superior Court of Alaska decided in *Brause v. Bureau of Vital Statistics*, 21 P.3d 357 (1998) that the denial of a marriage license sought by two men was a classification based on gender, and that Equal Protection Clause of the Constitution of Alaska required the state to have a compelling interest in support of its refusal to recognize same sex marriages. The Court reached its conclusion using the following analogy:

> That this is a sex based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious. *See* 1998 WL 88743 at 6.

Alaska subsequently amended its Constitution to prevent same sex marriages, removing the issue of same sex marriages from a state constitutional challenge. *See* Brause v. Alaska, 21 P.3d 357, 363 and n.29 (2001).
[67] 74 Haw. 530 (1993). In Baehr v. Lewin, the Hawaii Supreme Court ruled that the Hawaii Marriage Law, which restricted marriage to a man and a woman, was unconstitutional under the Equal Protection Clause of the Hawaii Constitution. *Id.* at 580. Notably, the Hawaii Equal Protection Clause, like the equal protection clause in the Alaska Constitution, required the court to apply the strict scrutiny test to suspect categories. *Id.* at 571-72.
[68] Hawaii Revised Statutes § 571-1.
[69] Baehr v. Lewin, 74 Haw. at 563.
[70] *Id.* at 564.
[71] Jones v. Hallahan, 501 S.W.2d 588, 589-90 (Ky.Ct.App. 1973) (because marriage has long and customarily been considered a union of a man and a women, the refusal to issue a marriage license to two females did not deny them a basis constitutional right to marry, because their proposed union was not a marriage), and Singer v. Hara, 11 Wash.App. 247, 249 (1974) (the plain language of the Washington marriage statute demonstrated that the legislature has not authorized same-sex marriages; the two males who were not denied a marriage license because of their sex, but because of the nature of marriage itself). *Contra*, Dean v. District of Columbia, 653 A.2d 307, 343-44 (D.C. 1995) ("This difference arguably amounts to invidious discrimination because the state would be withholding from homosexual couples a status that heterosexual couples could elect to legitimize for themselves the very same conduct . . . that homosexual couples would be helpless to legitimize.") *See* Baker v. Vermont, 170 Vt. 194, 224 (1999) (none of the interests asserted by the State provides a reasonable and just basis for exclusion of same-sex couples from the benefits of a civil marriage license under the common benefits clause of the Vermont constitution). *See also* Standhardt v. Superior Court, 77 P.3d 451, 463 (2003) (because homosexual men do not have a fundamental right to enter a same-sex marriage, there is no abridgment of a fundamental right and Arizona's marriage statutes can be analyzed under the rational basis standard; because Arizona's marriage statutes are rationally related to the state's interest in encouraging procreation, there is no equal protection violation); Adams v. Howerton, 486 F.Supp. 1119, 1125 (D.C. Ca. 1980) (the claim by two male plaintiffs, one an Australian and one an American, that they were married in Colorado was rejected by Colorado and federal law; hence denial of claim of "immediate relative" status for the Australian

citizen did not constitute a denial of due process and equal protection rights); Baker v. Nelson, 291 Minn. 310 (1971) (county clerk was not required to issue marriage license to applicants who were of the same sex, because marriage law does not authorize same-sex marriages; Equal Protection Clause of the Fourteenth Amendment is not offended by state's classification of persons authorized to marry).
[72] Baehr v. Lewin, 74 Haw. at 565.
[73] 388 U.S. 1, 10-12 (1967).
[74] Baehr v. Lewin, 74 Haw. at 568-69.
[75] Loving v. Virginia, 388 U.S. 1, 12 (1967).
[76] § 20--58 of the Virginia Code provided: "If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20--59, and the marriage shall be governed by the same law as if it has been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage." § 20--59 provided: "If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one year nor more than five years." *See Loving*, 388 U.S. at 4.
[77] § 20--57 of the Virginia Code provided: "All marriages between a white person and a colored person shall be absolutely void without any decree of divorce of other legal process." *See* Loving, 388 U.S. at 5.
[78] Loving, 388 U.S. at 2.
[79] *Id.* at 2-3.
[80] *Id.* at 3.
[81] *Id.*
[82] *Id.* at 3-4.
[83] *Id.* at 8.
[84] *Id.*
[85] *Id.* at 11.
[86] *Id.* at 12.
[87] *Id.*
[88] *Id.*
[89] 517 U.S. 620 (1996).
[90] The amendment states:

> "Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self executing." *See* Romer v. Evans, 517 U.S. 620, 624 (1996).

[91] Romer v. Evans, 517 U.S. at 635.
[92] *Id.* at 626-27.
[93] *Id.* at 627.
[94] *Id.*
[95] *Id.* at 629-31.
[96] *Id.* at 632.
[97] *Id.*
[98] *Id.*
[99] *Id.* at 633.
[100] *Id.* at 634
[101] *Id.* at 635.
[102] *Id.*
[103] *Id.* at 631. The court stated: "[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." It is not clear whether the Court applied the "rational basis" test because it thought it appropriate to a classification based on sexual orientation, or because the statute was so egregious it flunked the least protective test. *See* Lewis *supra* note 4 at 190. *Cf.* Goodridge v. Dept. of Public Health, 440 Mass. 309, 331 (2003) ("Because the statue does not survive the rational basis review, we do not consider the plaintiff' argument that this case merits strict judicial scrutiny.")
[104] *See* Lewis *supra* note 1 at 190.
[105] *Id.*
[106] Romer v. Evans, 517 U.S. at 634.
[107] 123 S.Ct. 2427 (2003).

[108] Texas Penal Code Ann. § 21.06(a) (2003) defines the crime of deviate sexual intercourse as follows: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." *See* Lawrence v. Texas, 123 S.Ct. 2472, 2476 (2003).
[109] Lawrence v. Texas, 123 S.Ct. at 2488.
[110] *Id.* at 2475.
[111] *Id.* at 2476, 2482.
[112] *Id.* at 2476. In Bowers v. Hardwick, 478 U.S. 186, 196 (1986), the United States Supreme Court upheld the constitutionality of a Georgia statute making it a criminal offense to engage in sodomy, whether or not the participants were of the same sex. The facts in *Bowers* are remarkably similar to those in *Lawrence*. In *Bowers*, a police officer, whose right to enter was not questioned, observed the male defendant in his own bedroom engaging in intimate sexual conduct with another man.
[113] Lawrence v. Texas, 123 S.Ct. at 2476.
[114] *Id.*
[115] *Id.* at 2482 ("[C]ounsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.")
[116] *Id.* The Court's bypassing the equal protection issues in favor of reaching the due process issues is criticized for creating a new constitutional right permitting consenting adults to engage in private acts of sodomy and providing a "remarkably tepid gay rights victory." See Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 Tulsa L. Rev. 95, 100-101 (2003).
[117] 505 U.S. 833 (1992).
[118] Lawrence v. Texas, 123 S.Ct. at 2481, quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).
[119] Lawrence v. Texas, 123 S.Ct. at 2481.
[120] *Id.* at 2482.
[121] 517 U.S. 620 (1996).
[122] Lawrence v. Texas, 123 S.Ct. at 2482.
[123] *Id.* at 2484.
[124] *Id.*
[125] *Id.* at 2478.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* at 2480-2481.
[131] *Id.* at 2480.
[132] *Id.*
[133] *Id.* at 2481.
[134] *Id.*
[135] *Id.*
[136] *Id.* at 2484.
[137] *Id.*
[138] *Id.*
[139] *Id.* at 2485.
[140] *Id.* at 2485-2486.
[141] *Id.* at 2486.
[142] *Id.*
[143] *Id.*
[144] *Id.* at 2477. Justice O'Connor emphasized, however, that the Equal Protection Clause did not prevent other classifications based on sexual orientation that that were reasonably related to a state interest, such as the preservation of marriage. *Id.* at 2488.
[145] 440 Mass. 309 (2003).
[146] Goodrich v. Dept. of Public Health, 440 Mass. 309, 969-70 (2003).
[147] *Id.* at 328 n.17.
[148] *Id.* at 328. The Court said:

"In this case, . . . a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance - the institution of marriage - because of a single trait: skin color in . . . *Loving*, sexual orientation here. As it did in . . . *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination."

[149] Maynard v. Hill, 125 U.S. 190, 205 (1888);
[150] *Id.* at 211.
[151] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
[152] Loving v. Virginia, 388 U.S. 1, 12 (1967).
[153] Zablocki v. Redhail, 434 U.S. 374, 384 (1978). *See also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (the right "to marry, establish a home and bring up children" is a central part of liberty protected by the Due Process Clause).
[154] Whalen v. Roe, 429 U.S. 589, 598-600 (1977).
[155] Carey v. Population Services International, 431 U.S. 678, 684 (1977).
[156] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
[157] 434 U.S. 374 (1978).
[158] Zablocki v. Redhail, 434 U.S. 374, 390-91 (1978).
[159] Wisconsin Stat. § 245.10 provided:

"No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order."

See Zablocki v. Redhail, 434 U.S. at 375.
[160] *Id.* at 377-78.
[161] *Id.* at 378.
[162] *Id.*
[163] *Id.*
[164] *Id.* at 378-79.
[165] *Id.* at 381.
[166] *Id.* at 381-82.
[167] *Id.* at 386. ("[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 respect to the decision to enter the relationship that is the foundation of our society.")
[168] *Id.* at 383.
[169] *Id.* at 388.
[170] *Id.*
[171] The statute in question as originally introduced provided for counseling; the statute as enacted did not. See Zablocki v. Redhail, 434 U.S. at 388.
[172] *Id.* at 389.
[173] *Id.* at 389-90.
[174] *Id.* at 390.
[175] *Id.*
[176] *Id.* at 391.
[177] Teresa Stanton Collett, *Recognizing Same Sex Marriages: Asking for the Impossible?*, 47 CATH. U. L. REV. 1245, 1268-69 (1993).
[178] *See* Goodridge v. Dept. of Public Health, 440 Mass. 309, 332 (2003) ("While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.")
[179] Anita K. Blair, *Constitutional Equal Protection, Strict Scrutiny, and the Politics of Marriage Law*. 47 CATH. U. L. REV.1231, 1238 (1998).
[180] Goodridge v. Dept. of Public Health, 440 Mass. 309, 335 (2003) ("No one disputes that the plaintiff couples are families, that many are parents, and that the children they are raising, like all children, need to grow up in a secure, protected family unit.")
[181] *Id.* at 1239.
[182] Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate A Retreat from Marriage By Redefining Marriage*, 39 S. Tex. L. Rev. 735, 748-49 (1998).

[183] *See* Brause v. Alaska, 21 P.3d 357, 1998 WL 88743 at 2 ("It is not enough to say that 'marriage is marriage' and accept without any scrutiny the law before the court. It is the duty of the court to do more than merely assume that marriage is only, and must only be, what most are familiar with.")
[184] *See* Strasser supra note 10 at 74. *See also* Randi E. Frankle, *Does Marriage Really Need Sex?: A Critical Analysis of the Gender Restriction on Marriage*, 30 Fordham Urb. L.J. 2007 (2003) (discussing implications of prohibitions on same-sex marriages on homosexuals, lesbians, transsexuals, and intersex individuals).
[185] *See* Strasser supra note 10 at 951-968.
[186] *See* Dal Gilgoff, *The Rise of the Gay Family,* U.S. NEWS & WORLD REPORT, May 24, 2004, at 40.
[187] A description of the plaintiffs in Goodridge v. Dept. of Public Health, 440 Mass. 309, 313-14 (2003) is instructive:

> The Plaintiffs are fourteen individuals from five Massachusetts counties. As of April 11, 2002, the date they filed their complaint, the plaintiffs Gloria Bailey, sixty years old, and Linda Davies, fifty-five years old, had been in a committed relationship for thirty years; the plaintiffs Maureen Brodoff, forty-nine years old, and Ellen Wade, fifty-two years old, had been in a committed relationship for twenty years and lived with their twelve year old daughter; the plaintiffs Hillary Goodridge, forty-four years old, and Julie Goodridge, forty-three years old, had been in a committed relationship for thirteen years and lived with their five-year old daughter; the plaintiffs Gary Chalmers, thirty-five years old, and Richard Linnell, thirty-seven years old, had been in a committee relationship for thirteen years and lived with their eight year old daughter and Richard's mother; the plaintiffs Heidi Norton, thirty-six years old, and Gina Smith, thirty-six years old, had been a committee relationship for eleven years and lived with their two sons, ages five years and one year; the plaintiffs Michael Horgan, forty-one years old, and Edward Balmelli, forty-one years old, had been in a committed relationship for seven years; and the plaintiffs, David Wilson, fifty-seven years old, and Robert Compton, fifty-one years old, had been in a committed relationship for four years and had cared for David's mother in their home after a serious illness until she died.

[188] *See* Lawrence v. Texas, 123 S.Ct. 2472, 2486 (2003) (Justice O'Connor concurring) ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law.") *See also* Department of Agriculture v. Moreno, 413 U.S. 528, 633 (1973)
[189] Goodridge v. Dept. of Public Health, 440 Mass. 309, 314 (2003) ("Each plaintiff attests to a desire to marry his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded married couples and their children.")
[190] 440 Mass. 309, 314 (2003). The legal protections and benefits afforded married couples and their children, which are not available to same sex couples who cannot marry, are significant. They include:

- substantial rights in the assets of the other spouse
- separate and permanent support or alimony
- holding property in tenancy in the entirety
- right to separate support on separation of parties that does not result in divorce
- protections against creditors
- automatic descent of property
- automatic right to inherit property where there is no will
- right to an elective share of an estate
- entitlement to wages owed to deceased employee
- eligibility to continue business of deceased spouse
- continuation of health care coverage when a spouse loses a job or dies
- right to bring claims for wrongful death and loss of consortium
- right to invoke spousal privilege in evidentiary matters
- bereavement or medical leave to care for family member
- automatic "family member" preference to make medical decisions for an incompetent or disabled spouse
- application of predictable rules for child custody, visitation, support, and removal out-of-state when spouses divorce
- priority rights to administer the estate of the deceased spouse who dies without a will
- right to internment in a lot or tomb owned by one's deceased spouse.

Id. at 322-325.
[191] Goodridge v. Dept. of Public Health, 440 Mass. 309, 343 n.34 (2003) ("[N]o one argues that the restrictions on incestuous or polygamous marriages are so dependent on the marriage restriction that they too should fall if the marriage restriction falls. Nothing in our opinion today should be construed as relaxing or abrogating the consanguinity or polygamy prohibitions of our marriage laws. (citation omitted) Rather, the statutory provisions concerning consanguinity or polygamous marriages shall be construed in a gender neutral manner.")
[192] *Id.* at 337.
[193] 429 U.S. 190 (1975).

[194] 440 U.S. 268 (1979).
[195] 458 U.S. 718 (1982).
[196] 517 U.S. 620 (1996).
[197] William C. Symonds and Jessi Hempel, *The Gay Marriage Dividend: Same-Sex Nuptials Will Mean Millions for Businesses in Massachusetts*, BUSINESS WEEK, May 24, 2004, at 50 ("roughly 8,500 same-sex couples are expected to wed in Massachusetts in the next year or so, pumping some $200 million into the state economy").