The Constitution and the "Right" to Marry: A Jurisprudential Analysis

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THE CONSTITUTION AND THE "RIGHT" TO MARRY: A JURISPRUDENTIAL ANALYSIS

ARTHUR G. LEFRANCOIS*

INTRODUCTION

The United States Supreme Court has held¹ that there is a right to marry, and that the right is fundamental. This Article considers issues of regulating and restricting marriage as they relate to fundamental rights analysis and to the broader framework of the interplay of law and morals. It is no accident that jurisprudential and constitutional issues present themselves here. In the growing area of family law, an area even more in process, perhaps, than criminal procedure, there is urgent need for a discussion of value questions (whether they occur as constitutional, ethical, or jurisprudential questions). Indeed, the exclusion of such questions would render the present treatment uninteresting and unilluminating, for the term "family law" increasingly means more than, for example, locating a successful legal avenue to the dissolution of marriage.

While the Article investigates the issue of marital restraints, it also explores the problem of the constitutionalization of value (the tendency to secure values perceived to be important through some formal constitutional analytic scheme), and in at least one sense attempts to show the relevance of jurisprudence, that we need not look to Nazi Germany to perceive or undergird its importance. In essence, the Article outlines an issue in which a problem of substantive marriage law stems from a confused equal protection jurisprudence which has its roots in a basic jurisprudential problem (that of legalizing values).

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THE CONSTITUTION AND VALUE: PROVIDING A FRAMEWORK

Law as a Moral Scheme

It is clear that crucial values are at stake in the interaction of legal processes and families. Since the Constitution is at least in part a document of values, the question arises as to its meaning in the emerging field of family law generally, and in the law of marriage specifically. This essay focuses on marital restraints rather than any broader domestic relations topic. To set the stage for that discussion, it is helpful as a logical matter to first inquire into the general issue of the constitutionalization of value.

Inherent in some systems of judicial review of statutes for their constitutionality is a jurisprudential problem of the first magnitude. That problem, simply put, consists in the relation of value and law, of, for example, injecting value into law. Putting aside the more general and intricate question of the relation between law and morals, I have here restricted myself to the consideration of a method by which the Supreme Court has constitutionalized a question of value. While the question of the relation of law and value is pervasive in any coherent study of the law, we are here faced with a question unique to the phenomenon of judicial review: the judicial constitutionalization of value. Occasional reference will be made, in this section of the Article, to courts of equity, or at least to the idea of equitable principles, as a sort of handy parallel, but my real concern is with one area of the constitutional jurisprudence of the Supreme Court.

Curiously, the law itself may be viewed as something like a moral scheme that is, within defined boundaries, absolutist, if not in the Kantian sense. One could even argue that the categorical imperative serves as the prototypical law in the logic of its operation; it commands all and it commands uni-

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2. It would be naive to assert that the general problem pointed to here (the relation of law and value) resides uniquely in constitutional interpretation. For a response to a more general theory of judicial legislation, see Dworkin, Hard Cases, 88 Harv. L. Rev. 1057 (1975).

3. While the literature here is considerable, the exchange between Professors Hart and Fuller is fundamental; see Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958); Fuller, Positivism and Fidelity to Law — A Reply to Professor Hart, 71 Harv. L. Rev. 630 (1958).
formly. Such a view may strike us as perverse and call forth such objections as, "The lack of effective sanctions in such a scheme shows that we have here confused law and morals." But the view expressed, which stresses the similarities rather than differences between law and morals, may give us some insight into the law's operation. I mean the following. We do not treat the law as a body of taste, to be disregarded according to the dictates of fashion. The law, ideally so conceived, commands, and it commands absolutely. Granting this (ideal) categorical nature of law, given its sanctions and its status as something other than mere taste, it is evident that an evolutionary problem of adaptability arises when values emerge that are not reflected in the law, or in our case, heretofore have not been constitutionalized. Adjusting legal rules to the equities of the case involves this tension, as does the operation of the Constitution.

The law may answer that equity itself operates as a part of the law, and that, as American experience shows, equity comes to be a body of recognized rules and categories itself, so that it is largely indistinguishable in the logic of its operation from legal doctrine. To the extent that law and equity are so

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4. I invoke Kant for the position that
the ground of obligation . . . must not be sought in the nature of man or in
the circumstances in which he is placed, but sought a priori solely in the
concepts of pure reason, . . . every other precept which rests on principles
of mere experience, even a precept which is in certain respects universal, so
far as it leans in the least on empirical grounds . . . may be called a practi-
cal rule but never a moral law.

formulation of the categorical imperative is, "Always act according to that maxim
whose universality as a law you can at the same time will." Id. at 55.

5. It should be clear, for example, that defenses to a certain criminal charge are a
feature of this categoricalness, not an exception to it; the proof of an affirmative
defense is simply the escape from a category of culpability to one of innocence, both
categories being established by the law and setting the terms in which dispute goes on
at all.

6. That this conception is ideal need hardly be discussed. One need only look at
the process of plea-bargaining to see an arguable lack of categoricalness.

7. It is not my position that sanctions comprise the differentium of law, or a
necessary condition to its existence. Nor do I mean, in this section of the essay, to
draw any metaphysical parallel between the categorical imperative and law.

8. I do not mean to imply that only doctrines of equity or constitutional inter-
pretation involve this general tension, although quite clearly the constitutionalization
of value is specifically a constitutional problem.
similar, equity fails to perform its Aristotelian function of correcting the deficiencies of legal justice.\textsuperscript{9}

To the extent that equity represents a body of principles—is teleological—it may be seen as something similar to the Constitution, as something that breathes purpose into legal rules.\textsuperscript{10} It is in part through the Constitution that the law considers questions of value.\textsuperscript{11} The Constitution itself may be viewed as a statement of general principles, which commands fidelity to certain goals and values. One question that must be asked concerns the utility of the perception that important values must ultimately be found, somehow, to reside in the Constitution. What should be the constitutional status (or lack thereof) of, for example, the requirement that absent exigent circumstances police officers must announce their authority and purpose before breaking into private premises for the purpose of arresting one within, of the composite requirement of \textit{actus reus} and \textit{mens rea} in the criminal law, or of the disparate impact theory of Title VII?

\textit{The Constitutionalization of Value}

This question of the constitutionalization of value (the tendency to secure values perceived to be important through some formal constitutional analytic scheme) is not identical to questions of the propriety of judicial review, but does relate in part to questions of the virtues of a pure interpretive\textsuperscript{12} or

\begin{itemize}
  \item \textsuperscript{9} It was Aristotle’s view that equity is superior to legal justice, since legal justice is universal and the circumstances of life are often too particular and complicated to be subject to fair treatment via legal formulae. \textit{Aristotle, The Nicomachean Ethics} 1137a35-1138a11 (\textit{The Ethics of Aristotle} 199-200, J.A.K. Thomson trans. 1976). It might be added that any attempt to particularize the law to fit the minutiae of all circumstance would result in a body of principles and rules hopelessly detailed, chaotic, and unpredictable.
  \item \textsuperscript{10} Again, I do not mean to imply that statutes and ordinances in general do not have purposes that are at least theoretically meaningful and discoverable.
  \item \textsuperscript{11} Such questions are also considered through equity, the operation of legislatures, and the reasoning of judges.
  \item \textsuperscript{12} For an illuminating discussion of issues of judicial review and a critique of the “pure interpretive” model, see Grey, \textit{Do We Have an Unwritten Constitution?}, 27 \textit{Stan. L. Rev.} 703 (1975). The essence of pure interpretivism may be seen in the following passage:

What distinguishes the exponent of the pure interpretive model is his insistence that the only norms used in constitutional adjudication must be those inferable from the text—that the Constitution must not be seen as
noninterpretive\textsuperscript{18} model of judicial review. The question I address most directly here deals with the virtues of constitution-
izing certain values by whatever method the Court chooses. It is not irrelevant to ask if we should find any model other than the pure interpretive model to be offensive,\textsuperscript{14} and if we find that model (pure interpretivism) to be inordinately re-
strictive, whether we should press for some theory of noncon-
stitutional review. Of course, a cynic might suggest that any model beyond interpretation, or in fact the method now used by the Court, is essentially nonconstitutional review.\textsuperscript{18}

Given the view that the Constitution is a body of funda-
mental principles, it is not difficult to see why a constitutional jurisprudence is thought to be necessary\textsuperscript{16}—why the Constitu-

licensing courts to articulate and apply contemporary norms not demonstrably expressed or implied by the framers.

\textit{Id.} at 706 n.9.

13. The model "beyond interpretation" is described as follows:

Where the broader view of judicial review diverges from the pure inter-
pretive model is in its acceptance of the courts' additional role as the ex-
ponent of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of posi-
tive law in the written Constitution.

\textit{Id.} at 706. \textit{See generally} Brest, \textit{The Misconceived Quest for the Original Under-
standing}, 60 B.U.L. Rev. 204 (1980).

14. Professor Grey makes the valuable point that the \textit{Marbury v. Madison} model of judicial review is really very narrow. Grey, supra note 12, at 707. He also attempts to show some of the disadvantages of adhering to too restrictive a doctrine of judicial review. \textit{Id.} at 710-14. Judicial review can be thought of as a doctrine that simply allows the court to declare legislation unconstitutional in cases of clear contravention of an explicit provision. The abstract notion of judicial review, then, is \textit{not} the equivalent of what I have called the constitutionalization of value.

15. Beyond a point — however wavering and uncertain that point may be — the legislative tendencies of Supreme Court Justices cannot be excused as the natural consequence of the Court's obligation to interpret a vaguely worded constitutional text. Rather, they are an affront to separation of powers and the concept of a written constitution. Even so, such tendencies would appear to be an inevitable ingredient of Supreme Court decisionmaking, whatever the Court's composition. The ultimate question, then, is not whether the Court should assume the role of "super-legislature," but how it should proceed in exercising that function.


Throughout this Article, indications of omitted footnotes and citations refer only to nonelliptic omissions.

16. It is instructive to compare judicial review to the practice of no judicial re-
view. That tradition becomes most poignant, perhaps, in a country like South Africa,
tion is not reducible to a set of rules; for if it were so reducible it would simply be a document of means, not ends, and would insofar be indistinguishable from the most pedestrian of municipal ordinances. The law might then be a body of rules left unguided by an authoritative statement of goals or values (or at least constitutional purposes and meanings).

Why, then, do constitutional values seem so vague and unpredictable? Is that vagueness necessary to the concept of a constitution, or the doctrine of judicial review? Does the idea

where statutes proscribe protesting the laws and at the same time banish Africans to controlled areas, disallow Africans to join labor unions, set the tone for racially based wage discrimination and the wholesale removal of Africans, and generally oppress the African population. An Afrikaner Justice of the Supreme Court of South Africa has said:

“Our Court . . . applies the law as it finds it. We regard it to be our duty to interpret the law as Parliament has put it on the statute books, not to frustrate the will of Parliament by wide-ranging interpretation of things that Parliament never intended,” . . .

“Many American lawyers who have studied our system have become somewhat confused by the fact that our courts, which claim to do justice to all, are daily enforcing discriminatory legislation. But the answer is that South African constitutional law acknowledges the sovereignty to Parliament and rejects the concept of a fundamental law.”


This is not to say that no constitutional interpretation takes place in South Africa, but is simply to recognize a different locus of the interpretive office, to recognize that the legislative determination is paramount. Any argument that South African experience shows the inability of a legislature so to interpret must be met with at least two observations. The first states the democratic problem and asks whether the judiciary may properly legislate or constitutionalize, given its nonrepresentative status, and the second asks whether, for example, the South African Parliament is not properly interpreting the constitution. The moral defect of oppressive legislation, that is, may have a basis deeper than the statutes themselves. An examination of the South African Constitution reveals little to interpret.

The development (or lack thereof) of judicial review under the Weimar Constitution and the Nazis is instructive. See Von Mehren, Constitutionalism in Germany — The First Decision of the New Constitutional Court, 1 Am. J. Comp. L. 70, 71-74 (1952). There is a further question of the propriety of allowing constitutional change on the basis of democratic vagaries, fluctuations in popular opinion.

17. Compare Hans Kelsen’s theory of the Grundnorm, wherein he claims that a legal system’s fundamental norm cannot be analyzed or reduced, but is the authority for all law, which must stem from it. The Grundnorm may serve as a genetic device from which to discover a hierarchy of laws, but is itself incapable of reduction. This strict positivist position, then, places some fundamental, bedrock norm as the foundation of a legal system. That norm, or constitution in a logical sense, determines the hierarchical law creation. Kelsen, Pure Theory of Law 193-278 (M. Knight trans. 1970).
of a constitution susceptible of interpretation entail a sort of creation *ex nihilo* of constitutional value to suit public or judicial demand? If the Constitution is so susceptible to the vagaries of arbiters who may balance its provisions out of existence, or create new ones, what remains intact in our legal system? What values are permanent? Are we left with a purposeless set of rules, a Constitution determined by jurisprudential Nielsens? Another way of raising the question is to ask whether the Constitution is whatever the Supreme Court says it is. Does the Court serve as a dispensary of a sort of Aristotelian equitable justice which at the same time rewrites the Constitution? And does an arguably unnecessary constitutionalization of value result in confusion as to the method of constitutional "interpretation," the process of constitutional protection, and the substance of the Constitution itself?

If a constitution is to set forth in some general way the goals and values of a society, the ultimate terms of dispute, then it may also be subject to potentially abusing interpretation. While the vagueness of statutory and common law is objectionable as a practical matter (and perhaps ironically, the former may be constitutionally objectionable), the vagueness of the Constitution may be necessary, in that it establishes the ends of law in such a way as to provide for intelligent application according to shifting circumstance. A too-easy analysis would have it that it is the *application* of constitutional values and not the values themselves that is plastic, and that such plasticity is necessary if the document is to speak through time. An alternative would be to have the Constitution speak in such a way that its values and entailed means were equally clear, not subject to abusing interpretation. To that extent, however, such a document would perhaps cease to be a living document\(^\text{18}\) at all, and would merely be a set of formal rules—instructions for a game. My only point here is that it is not at all clear that while the application of resident constitutional values is subject to interpretation and so somewhat plastic, the values themselves are clear.

\(^{18}\) For a discussion of two senses of the doctrine of a living constitution, one of which — the applicability of constitutional doctrine to new sets of facts — is compatible with a pure interpretive theory, see Grey, *supra* note 12, at 709-10.
The risk of politicization or judicial legislation may be the cost of a responsible constitutional jurisprudence. Put extremely, it might be said that it is fundamentally unclear just what the constitutional values are and will be recognized to be, and that the democratic problem of judicial legislation and constitutional redrafting and amending is insoluble. Such a notion of a constitution is essentially anti-Kantian— is a sort of anthropological, sociological, or historical view, wherein it is maintained that the Constitution is not an embodiment of categorical value, but is rather a set of mores or even procedures set forth in a statement loose enough to apply to the shifting sands of public taste, and perhaps judicial whimsy.

The Court's Perception of Its Role

This question is not so speculative as to be lost on the Court or the history of constitutional jurisprudence. We are all aware of Marbury v. Madison, but its putative progeny are of more interest here. Justice Marshall is at great pains in his dissent in San Antonio Independent School District v. Rodriguez to point out that the Court need not foreshadow alleged adherence to a neat two-tiered equal protection scheme in favor of an "unprincipled, subjective 'picking-and-choos-"

19. I mean this only insofar as we keep in mind the comparison of law with morality.

20. Such a reduction of a constitution to a pure procedural document puts the problem in its clearest form. Yet, even such a strict procedural view would appear to have a strong moral overlay. See Fuller, supra note 3, who argues that "[Professor Hart's] conclusion is that the foundation of a legal system is not coercive power, but certain 'fundamental accepted rules specifying the essential lawmaking procedures.'" Id. at 639 (footnote omitted). Professor Fuller goes on to argue:

When I reached this point in his essay, I felt certain that Professor Hart was about to acknowledge an important qualification on his thesis. I confidently expected that he would go on to say something like this: I have insisted throughout on the importance of keeping sharp the distinction between law and morality. The question may now be raised, therefore, as to the nature of these fundamental rules that furnish the framework within which the making of law takes place. On the one hand, they seem to be rules, not of law, but of morality . . . . Here, then, we must confess there is something that can be called a "merger" of law and morality, and to which the term "intersection" is scarcely appropriate.

Id.

ing,'”23 but that a third choice, that of a principled, presumably “objective” sliding scale exists. As early as *McCulloch v. Maryland*24 Chief Justice Marshall spoke of the Constitution as a living document of ends. Considering the idea of constitutionalism in general, the Chief Justice said:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.25

While there is a decidedly procedural ring to the passage, Chief Justice Marshall here argues from the nature of constitutions, and goes on to delimit a principled approach to interpreting the document while keeping faith with it. In any event, it is no news that the Court itself has expressed repeated concern with the problem of what we might call creative fidelity to constitutional principles.26

More dramatically, perhaps, the history of substantive due process points out just how chaotic the attempted judicial value infusion can be. That doctrine, having fallen into disrepute (or at least a temporary desuetude) as a tool for over-interventionism on the part of the Court, was a teleological doctrine that rendered most talk of equal protection unimportant. It is significant that with the relative demise of the doctrine of substantive due process, the equal protection clause has grown from a deferential, infrequently used means-checker, to a substantive, end-checking instrument,27 and all through the means of judicial interpretation of presumably constant constitutional value. It could be argued that this history tells us more about constitutional procedure than substance, or application than value, but the point remains that,

23. *Id.* at 102 (Marshall, J., dissenting).
25. *Id.* at 407.
27. Compare with the increased use of the equal protection clause the Court’s statement that it had “returned to the original constitutional proposition” that it will not supplant its beliefs in economic and social matters for the determinations of democratically comprised legislatures. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (emphasis added).
for whatever reason, there seems to be a consistent need for the Court to read the Constitution in significant new ways. Whether this has been the result of over-involvement of the judiciary or some more deeply rooted aspect of constitutional government need not be explored here. The point is that the Supreme Court has time and again read the Constitution in new, surprising ways—ways that surely would have been surprising to the framers—and has felt the need at such times to legitimate its moves by invoking some doctrine of pre-existent constitutional value. On one view, such a technique may constitute a necessary Platonic or Machiavellian deception. On another, it may represent a responsible and unobjectionable attempt to secure fundamental values in the process of law. Finally, it may involve the Court in forsaking the language of value precisely when it needs it the most.

One might have thought that the notion of a living constitution carried the implicit limitation that the dictates of the Constitution should be responsive to the changing attitudes of the polis. To be sure, such a view is not without its own problems. But from that perspective, we might have thought the legislature to be the appropriate forum for such change, or perhaps even a national referendum (forgetting for a moment the procedural constitutional limitations of Article V on constitutional change). Yet the narrow sort of judicial review argued for in Marbury v. Madison, and in The Federalist No. 78, has issued into the notion of the Court as engaging in a search for pre-existent constitutional value—a notion which has arguably led to the development of the Court as an essentially legislative body. The Constitution "lives," not because the polis breathes life into it through the legislature, but be-

30. The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way then through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.

cause of the Court's own legislative acts. There is, of course, a real question as to whether the Constitution should reflect changes in majority sentiment (should first amendment protection of an erotic book depend on a popular opinion poll) as well as whether the Supreme Court should serve an essentially democratic function either in democratic or undemocratic ways (should the Court through denying certiorari or standing undercut the arguably unpopular dictates of the exclusionary rule because of that unpopularity, can the Court create politically problematic constitutional dictates, should it retract them in response to popular sentiment).

Marriage and Constitutional Value

It is not surprising that family law comprises one area where the merger of law and value gives rise to issues of fundamental significance. The role of the family has of course been central in the history of civilization. While that role may itself be in process, it is instructive to examine the recent move from the conception of marriage as a relation exclusively within the state's plenary powers. The Supreme Court has, at least since Loving v. Virginia, attempted to constitutionalize some of the values resident in the marital relation. If Loving is viewed more as a race than marriage case, it is still

31. The assertion by the various state legislatures of a broad, plenary power over the marital status is clearly constitutional. It falls directly within the police power of the various constitutions, since regulation of marriage is essential for the public welfare. For this reason many cases have upheld the legislature's power as against constitutional attack.


32. 388 U.S. 1 (1967). Loving declared a Virginia anti-miscegenation statute violative of the equal protection clause and the due process clause. The defendants were convicted of leaving Virginia for the purpose of marrying in violation of the statute, with intention to return to Virginia.

33. But it has been argued that Loving cuts against the state's traditional regulatory powers regarding marriage. Drinan, The Loving Decision and the Freedom to Marry, 29 Ohio St. L.J. 358 (1968). The author states:

In view of the undeniable racist motivation of Virginia's anti-miscegenation law the Supreme Court did not really have to confront the question of the limits of the state's power to regulate the freedom of choosing one's spouse; but the Court, in order to justify its interdiction of governmental decrees restricting the right to marry, felt obligated to delineate the nature of the marriage relation and the role of the state in regulating it. The fact
clear that with the relatively recent decision in Zablocki v. Redhail the notion of marriage as a fundamental right seems to militate against the plenary power view.

Redhail is significant as a locus of analysis that constitutionalizes the right to marry: the value of the freedom to marry in a pluralistic society. The invocation of the equal protection clause in that analysis presents an additional issue of considerable importance to the general question of constitutional jurisprudence: that of a particular protection of value through the Constitution.

If nothing else, Redhail may suggest that the problem of constitutional jurisprudence of which I have been speaking may not be amenable to solution. If that is the case, I would argue that future developments in constitutional law will be even less predictable and more confusing than they have been in the equal protection area. Until a principled explanation of the precise method the Court is using in equal protection

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that the Loving case was the first occasion in American history for the Supreme Court to say anything about the countless laws in every state regulating the formation of the marriage contract may have prompted the Court to move beyond the finding of racism upon which the decision was based.

_id. at 358-59._ Father Drinan goes on to state:

For the first time in history the Court has turned its attention to the questions of the “freedom to marry” and the “freedom of choice” in selecting a marriage partner. . . . Long after the actual result reached in the Loving decision has become an obscure footnote in the tragic story of the American Negro’s struggle for legal equality, the ringing words of the Court about freedom of choice in selecting a spouse will continue to have an impact of enormous significance.

_id. at 360._

It could of course be argued that Loving did not represent such a far reaching change (as shown by subsequent history) and that neither, somehow, does Redhail, that it will be quietly tucked away as a curiosity interesting only for its aberrance. 34. 434 U.S. 374 (1978).

35. It may be misleading to imply that the Court speaks with one voice in such cases, since there appears to be a growing propensity for Justices to concur on special grounds, so that numerous justificational schemes are invoked in any one case. That method of decision clearly creates its own problems, where we have a case result but no clear consensus as to the reasons for the result, no real univocal presentation. Note the following comment about Redhail:

In six separate opinions, three different standards of review were applied to a statute which was found to impinge upon a right which some Justices felt to be fundamental, others asserted to be non-fundamental, and still others insisted was not even a right at all. Added to this was the statute’s effect upon a classification thought by some—but only by some, and then only by
cases is forthcoming, we are left to guess at which of a number of methods of decision is being invoked. Such a constitutional confusion has two obvious consequences. It affects the nature of constitutional law itself (in our case the doctrine of equal protection) and the substance of whatever law with which the case under decision is concerned (in our case the substantive law of marriage). 38

The constitutional perplexity of law and value surfaced dramatically in a 1978 decision of the Supreme Court 39 that struck down a Wisconsin statute that created a disability to marry. The case deals with the equal protection clause, the substantive law of marriage, and the value of the freedom to marry. By inquiring into the case in some detail we can begin to see how a jurisprudential confusion can have concrete effects on federal constitutional law and state marriage law.

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36. Other less obvious effects have to do with other areas of constitutional, statutory, and common law that seem initially unrelated to the subject of dispute. (And others are such sociological effects as the diminution in the public’s perception of judicial integrity.)

REGULATING AND RESTRICTING MARRIAGE: PART ONE

Zablocki v. Redhail

The case in point is Zablocki v. Redhail.\(^{38}\) That case establishes the proposition (allegedly already established) that the right to marry is fundamental, that it is a right of such stature as to require, in some cases, not the deferential rational relation test, but a stricter scrutiny.

Redhail was brought as a class action challenging a Wisconsin statute\(^{39}\) that required that a legislatively defined class

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39. The relevant part of Wisconsin Statute § 245.10 is as follows:

(1) 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. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow said person to submit proof of his compliance with such prior court obligation. No such order shall be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of such minor issue is given notice of such proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the court upon good cause shown, and, if the minor issue were of a prior marriage, unless a 5-day notice thereof is given to the family court commissioner of the county where such permission is sought, who shall attend such hearing, and to the family court commissioner of the court which granted such divorce judgment. If the divorce judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if said person submits such proof and makes a showing that such children are not then and are not likely thereafter to become public charges, the court shall grant such order, a copy of which shall be filed in any prior proceeding . . . or divorce action of such person in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted and such showing is made, but any court order withholding such permission is an appealable order. Any hearing under this section may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by said person of his financial resources that the latter has complied with prior court orders or judgments affecting his minor children, and also has shown that such children are not then and are not likely thereafter to become public charges. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of
of persons secure court approval before marrying. That class consisted of any resident having minor issue not in his custody that he was under an obligation to support by court order or judgment. In effect, a person so situate was disallowed to marry until he showed proof that (1) he had complied with his prior support obligations and (2) such children were not then and were not likely to become public charges. After a hearing or an examination of the records satisfied the court that the dual requirements were met, the marriage would not be disallowed on these statutory grounds.

Based upon the requirements of the statute, Milwaukee County Clerk, Thomas Zablocki, denied Roger Redhail's application for a marriage license. Redhail was under a court order to pay $109 per month in support of a baby girl of whom he was, in a paternity action, determined to be the father. Redhail had not obtained court permission to marry. An arrearage in excess of $3,700 had accrued as to the illegitimate child, and the child had been a public charge since birth. 40

Justice Marshall's opinion for the Court 41 determined:

Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that "critical examination" of the state interests advanced in support of the classification is

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40. A court order permitting such marriage is filed with said county clerk.

41. If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, he must, prior to such marriage, obtain permission of the court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within 5 days send a copy of the order of permission to marry, stating the obligations of support, to such party not present.

40. 434 U.S. at 378.
41. The Chief Justice entered a concurring opinion, while Justices Powell, Stewart, and Stevens entered opinions concurring in the judgment, and Justice Rehnquist dissented.
required.\textsuperscript{42}

Justice Marshall cites Loving v. Virginia,\textsuperscript{43} Skinner v. Oklahoma,\textsuperscript{44} Maynard v. Hill,\textsuperscript{45} Meyer v. Nebraska,\textsuperscript{46} and Griswold v. Connecticut\textsuperscript{47} to show the fundamental status of the right to marry.\textsuperscript{48} The Court goes on to say that since Redhail's pregnant paramour had a fundamental right to seek an abortion or to bring the child into life under the stigma of illegitimacy,\textsuperscript{49} then surely a decision to marry and bring up the child in a "traditional family setting" must receive equal protection. The Court then points to the right to procreate and indicates that it must imply a right to enter the only relationship in which sexual relations may legally take place in Wisconsin.\textsuperscript{50}

After "reaffirming"\textsuperscript{51} the stature of the right to marry as fundamental, the opinion takes a subtle turn.

[W]e do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.\textsuperscript{52}

The opinion goes on to point out that poor persons and persons unable to prove that their children will not become public charges are "absolutely prevented"\textsuperscript{53} from getting married,

\textsuperscript{42} 434 U.S. at 383 (citations omitted).
\textsuperscript{43} 388 U.S. 1 (1967).
\textsuperscript{44} 316 U.S. 535 (1942).
\textsuperscript{45} 125 U.S. 190 (1888).
\textsuperscript{46} 262 U.S. 390 (1923).
\textsuperscript{47} 381 U.S. 479 (1965).
\textsuperscript{48} It is not cynical to suggest that the Court's prior opinions did not make clear the fundamental importance of the right to marry, unless a right of fundamental importance is something other than a fundamental right.
\textsuperscript{49} The Court speaks of the "fundamental right to seek an abortion . . . or to bring the child into life to suffer the . . . disabilities that the status of illegitimacy brings." 434 U.S. at 386 (citations omitted).
\textsuperscript{50} Id.\textsuperscript{51} Id.\textsuperscript{52} Id. (citing Califano v. Jobst, 434 U.S. 47 (1977)). While the language here might lead one to conclude that regulations that do significantly interfere may not be legitimately imposed, that is not the Court's meaning.
\textsuperscript{53} 434 U.S. at 387.
that others will be coerced into forgoing their right to marry, and that even those who marry will suffer a serious intrusion into their freedom of choice.\(^{54}\)

Justice Marshall’s opinion of the Court maintains that Wisconsin’s interests in counseling the applicant and protecting his issue are legitimate interests, but that the means that section 245.10\(^{56}\) uses to further these interests unnecessarily impinge on the right to marry.\(^{56}\) The Court points out that the statute, for instance, does not deliver money into the hands of the applicant’s children, that it is both overinclusive and underinclusive as to maintaining prior support obligations, and that the state has other means for exacting compliance with support orders.\(^{57}\)

The Court used the following test: “When 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.”\(^{58}\)

**Equal Protection**

To begin, it was not at all clear, prior to *Redhail*, that the right to marry is fundamental and thus entitled to special safeguarding under the equal protection clause. To be sure, the Court *tells* us that its prior opinions make clear the fundamental stature of the right, but that assertion seems to be the result of an unjustified language of certitude. Prior cases do provide some support for the view that the right to marry is fundamental.\(^{59}\) At all events, *Redhail* stands foursquare for the proposition that the right to marry is a fundamental right, entitled, it would seem, to some special protection under the Court’s interpretation of the equal protection clause of the fourteenth amendment. The nature of that protection is the subject of the immediate inquiry.

\(^{54}\) *Id.*

\(^{55}\) See note 39 *supra* for the relevant portions of the statute.

\(^{56}\) 434 U.S. at 388-91.

\(^{57}\) *Id.* at 389-90.

\(^{58}\) *Id.* at 388.

\(^{59}\) Taken together, *Loving, Skinner, Maynard, Meyer*, and *Griswold* emphasize the central role of married and family life in our civilization.
It is at least ironic, and arguably predictable, that an area of law that pretends to be so formulaic is precisely where we continue to be surprised, where there seem to be as many formulae as cases, where we develop a set of code words to attempt to explain the ineffably complex set of understandings and misunderstandings that comprise the area of analysis. While this Article does not attempt to present a theory of equal protection as it is, or even as it appears to be, it is helpful to point to some examples of equal protection analysis in order to better understand its application to the law of marriage.

We run across the rational relation test (sometimes called minimal scrutiny) which results in the upholding of statutes so long as there is some conceivable set of facts which would justify the state classification. We encounter as well the “minimal scrutiny with bite” test. This test is stricter than the original rational relation test, and requires a fair and substantial relation between the means chosen to effectuate the legislative purpose and the important objective itself. This test may require that a statutory classification substantially further the articulated objective of the legislation. Further, there is the strict scrutiny test (the second tier of the double-tiered Warren Court standard) which is purportedly invoked in the case of a suspect class or fundamental right and re-


63. See Reed v. Reed, 404 U.S. 71 (1971).

64. The requirement of articulation may be identical or at least similar to that found in Redhail, 434 U.S. at 383.

65. As to the constitutional status of certain classes, see Ambach v. Norwick, 441
quires that the statutory classification be justified by a compelling state interest, and that the statute be closely tailored to effectuate the interest.\textsuperscript{67} There remain a sliding scale test suggested by Justice Marshall,\textsuperscript{68} which considers the constitutional significance of the interest affected along with the invidiousness of the classification, and an arguably bizarre irrebuttable presumption test that purports to avoid equal protection analysis in favor of procedural due process.\textsuperscript{69} Finally,\textsuperscript{70} we have the \textit{Redhail} test, which is arguably a new species of equal protection. Just as arguably, the test used in \textit{Redhail} fits into the present equal protection framework as a rationality plus or strictest minus standard,\textsuperscript{71} a sliding scale standard, or strict scrutiny. It may be fundamentally unclear how to interpret the Court’s \textit{caveat} that even though the right to marry is fundamental, many statutes affecting the exercise of that right will not have to pass “rigorous scrutiny.”\textsuperscript{72}

\textit{Identifying Redhail’s Test}

There is a dual question resident in \textit{Redhail}, which asks what standard is used in that case, and what standard will be used in \textit{other} cases which are \textit{similar} but not identical. It is, in fact, indicative of the confusion surrounding, and perhaps in-


\textsuperscript{70} The term “finally” here is essentially a disguised equivocation. It is unclear whether any list exhausts the discoverable tests in the equal protection area and whether \textit{Redhail} fits into a category already enumerated. One could add to my list of tests a means test, a suspect class test, a fundamental rights test, a gender test, and so continue perhaps \textit{ad infinitum}.

\textsuperscript{71} See Trimble v. Gordon, 430 U.S. 762 (1977). Some might argue that the existence of a “middle-tier” test indicates the presence of the sliding scale.

\textsuperscript{72} 434 U.S. at 386.
herent in, Redhail, to observe its interpretation by several recent commentators. It has been said that “the Court applied strict scrutiny,” 73 “the Court employed a ‘critical examination’ or strict scrutiny test,” 74 and “[t]he Court was therefore required to strictly scrutinize the statute.” 75 With equal certitude it has been claimed that, “[i]n Redhail the Court rejected strict scrutiny, which had been applied by the district court,” 76 and that

the Court indicated that state legislative restrictions upon this fundamental right will not exact the same degree of judicial scrutiny that the Court applies when reviewing statutory restrictions upon other recognized fundamental rights . . . . [I]t is implicit that deference will be given to the traditional role played by the state in regulating marriage, . . . . 77

Finally, commenting that Justice Powell in his concurrence expresses a fear that all marriage regulations will have to pass the compelling state interest test, one writer says that such fears reflect a lack of understanding of the nature of the flexible approach to equal protection analysis and indicate a mis-

73. Treiman, supra note 60, at 212.
74. Fundamental Right, supra note 37, at 684. But compare the following passage:

Despite appearing to adopt a two-tiered approach to equal protection cases in Redhail which he had rejected in other cases, on closer inspection it becomes clear that Justice Marshall’s reasoning in Redhail and in dissent in Murgia and Rodriguez are not very different . . . . The traditional areas of suspect class and fundamental right would be “functionally equivalent” under his approach to an application of the second tier of the Court’s two-tier approach, strict scrutiny.

Id. at 691-92 (footnote omitted).
75. Due Process, supra note 37, at 166 (footnote omitted). Compare the passage at 172:

Another anomaly in Justice Marshall’s equal protection analysis is his statement that “reasonable regulations that do not significantly interfere with the marriage relationship may legitimately be imposed . . . .” Justice Marshall’s suggestion that the state might impose “reasonable regulations” with regard to the right to marry seems more consistent with the classic substantive due process approach of weighing the degree of the burden on the right against the state interest in imposing the burden.

(Footnotes omitted).
76. Restricting the Right to Marry, supra note 37, at 339.
77. Constitutional Analysis, supra note 37, at 73 (footnote omitted).
reading of the majority opinion, for rather than speak of the need for a "compelling state interest," the majority only required that the statute be "supported by sufficiently important state interests" and be "closely tailored to effectuate only those interests."78

That writer earlier states that the "critical examination" language allowed Justice Marshall to "further his campaign for the more flexible approach to equal protection analysis enunciated in Dandridge v. Williams, while avoiding too deferential a standard of review."79 The writer there refers, finally, to the "spectral nature of equal protection"80—an equivocation, even if unintentional, of striking accuracy.

It may be tempting, if for no other reason than that the statutory scheme was struck down in Redhail, to conclude that the test applied is strict scrutiny; but the question is more complex than that, and involves the further issue of the triggering of the test. It appears that the lesson of Redhail is that strict scrutiny81 will apply, but only when triggered by certain facts: those that constitute significant interference.82 That view warrants us in concluding that it is not the fundamental status of the right to marry that is dispositive, and leads to the question of what equal protection scheme is operative at the present moment. While the concept "fundamental right" may have served as a hesitant, uncertain triggering mechanism, its conjunction with "significant interference" would not appear ameliorative.

**Redhail and Jobst**

As indicated, the Court accomplishes Redhail scrutiny through the interjection of the "significant interference" lan-

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79. *Id.* at 546 (footnote omitted).
80. *Id.* at 549 (emphasis added).
81. The language of "critical examination" in Redhail may be confusing, but may simply be a translation of the term "strict scrutiny." See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976). *But see* text accompanying notes 78-79 supra.
82. The key to significant interference appears to be directness and substantiality. The question is discussed in Treiman, *supra* note 60, at 212-14; *Constitution and the Family*, supra note 37, at 1251-55; *Fundamental Right to Marry*, supra note 37, at 611-12. *See Redhail*, 434 U.S. at 387 n.12.
guage. In the absence of a statutory scheme that significantly interferes with the fundamental right of marriage, critical examination will not be required. Thus, a case such as *Califano v. Jobst*[^83] purportedly can be distinguished.

In *Jobst*, a provision of the Social Security Act[^84] was upheld even though it created a hardship on a class of persons seeking to marry. The provision specifies that secondary benefits received under the Act by a disabled dependent child terminate when such child marries a person not entitled to benefits under the Act, even though that person is totally disabled, and even though marriage to a person entitled to benefits under the Act would not terminate the benefits.

Congress essentially enacted an exception to the older


[^84]: The relevant part of the Social Security Act, 42 U.S.C. § 402 (1976) is as follows:

(d)(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits or of an individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and

(i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or

(ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and

(C) was dependent upon such individual—

shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits and ending with the month preceding whichever of the following first occurs—

(D) the month in which such child dies or marries,

(5) In the case of a child who has attained the age of eighteen and who marries—

(A) an individual entitled to benefits under subsection (a),

(b), (e), (f), (g), or (h) of this section or under section 423 (a) of this title, or

(B) another individual who has attained the age of eighteen and is entitled to benefits under this subsection,

such child's entitlement to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) of this subsection but subject to subsection (a) of this section, not be terminated by reason of such marriage;

Subsection (s)(2) makes clear that the relevant part of (d)(5) applies only to children under a disability at the time of marriage.
termination-of-benefits rule in order to make that rule operate less harshly. The older rule had required that a secondary beneficiary’s entitlement terminate upon marriage. Since that rule appeared too harsh, Congress enacted an exemption, so that one marrying another beneficiary would not lose one’s entitlement. In effect, a double-loss was thereby avoided.

The question addressed in Jobst was whether Congress’ failure in 1958 to create a larger amendatory class of marriages that do not terminate benefits was irrational. A unanimous Court, in an opinion delivered by Justice Stevens, determined that it was not.

The Court ruled that the general rule of termination of benefits upon marriage was rational as a test of probable dependence, and thus constitutionally permissible despite the burdening or deterrent effect it might have. The Court claimed that the rule “cannot be criticized as . . . an attempt to interfere with the individual’s freedom to make a decision as important as marriage.”

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The opinion in Jobst went on to consider whether the 1958 amendment invalidated the general rule by excepting marriages between beneficiaries. Again, a rationality test was used, as Justice Stevens’ opinion for the Court stated that the classification was not “wholly irrational,” and that the exception was a “reasonable” curative for the hardship imposed on some by the general rule.

The essence of Jobst is its focus on administrative convenience. The statutory provision is called “simple to administer,” and it is made clear that it is not incumbent on Congress to take the wisest step in such a case, that the underinclusiveness of the 1958 amendment simply reflects the fact that the goal of eliminating the hardship of the general rule was only partially achieved, and that there is no constitutional dictate that such goals be fully achieved. Then, engaging in some not inconsiderable psychology, the Court states that the congressional step was in the “right direc-

85. 434 U.S. at 54 (footnote omitted).
86. Id. at 55.
87. Id.
88. Id. at 56-57.
tion," and was not motivated by antagonism. After all, reads the opinion, "Congress' purpose was simply to remedy the particular injustice that occurred when two dependent individuals married and simultaneously lost their benefits."

Well. One is tempted to ask whether there was antagonism on the part of the Wisconsin legislature in drafting and passing the statute in Redhail and if so, what difference it makes; why the purposes advanced in Redhail—to safeguard children and counsel parents—are not at least as important as those in Jobst—to prevent an economic double-loss; why it matters whether the rule in Jobst cannot be criticized as an attempt to interfere with the freedom to marry; and why the burdening, intruding, and chilling effects of the Jobst statute are ignored for the sake of administrative convenience, while those same effects appear to be fatal in Redhail.

A more basic question resolves itself to this. Why, if marriage is a fundamental right and had allegedly been held to be long before Redhail, is minimal scrutiny applied to the statute in Jobst? That statute clearly impinges on the right to marry. Surely, if the right to vote were affected similarly, the Court would not be so cavalier in allowing the statute to pass muster.

To begin, it may be claimed that Redhail does find the interests asserted by Wisconsin to be of at least as great an importance as those asserted in Jobst. Through the application of a more stringent test, however, the Wisconsin scheme fails. More to the point, it may be argued that Jobst is fundamentally different from Redhail in the nature of the legislation underlying it.

While Justice Stevens' repeated references to the psyche of Congress may be miseducative, there nonetheless may be a real difference between the statutes involved in the two cases, and their impact on the right to marry. Justice Stevens, for example, seems to argue in his Redhail concurrence that the

89. Id. at 58.
90. Id.
91. Id. (emphasis added).
92. It should be noted that both sets of purposes go, at least in part, to protecting dependents, although the dependents in a Redhail situation are likely to be much younger, and perhaps more dependent than those in a Jobst situation.
Jobst classification was one based on marital status, while the Redhail classification determines who may marry, and that there is a significant difference between the two.\textsuperscript{93}

Another way to put the point is to say that the social security provision in Jobst is of the following logical type:

\[ M, X \text{ (if you marry, then } X \text{ happens, where } X = \text{termination of benefits)} \]

while the Wisconsin statute in Redhail is of the following logical type:

\[ X, \sim M \text{ (if } X \text{ happens, then you cannot marry, where } X = \text{failure to comply with prior support obligations).} \]

The Jobst provision, then, is seen as a burden to marriage, while the Redhail statute is seen as a downright prohibition against some marriages.

That analysis falters when one considers what we might call the degree of impediment on the exercise of the marriage right (a question we might have thought the “significant interference” test would have resolved). If a Jobst sort of impediment is great enough (and it is not hyperbolic to suggest that a loss of income could be great enough), then we have a proscription against marriage that is as powerful as the outright disallowance and sanction in Redhail,\textsuperscript{94} and that is all the more invidious for its subtlety, for its appearance as a rule that does not tell anyone that he may not marry. Viewed in that light, the social security provision appears to have the identical logical structure \((X, \sim M)\), to be a conditional of the same magnitude, as the Wisconsin statute, at least in a great run of cases.

Realistically, then, the social security provision can prevent a marriage just as absolutely as section 245.10 of the Wisconsin statute.\textsuperscript{95} It may be insufficient to say that some

\textsuperscript{93} 434 U.S. at 403-04 (1978) (Stevens, J., concurring in the judgment). Justice Stevens cites Jobst as an example of the former and Loving as an example of the latter. \textit{Id.} at 404 n.2. One assumes he finds Redhail in the latter category: “Under this statute, a person’s economic status may determine his eligibility to enter into a lawful marriage.” \textit{Id.} at 404.

\textsuperscript{94} See \textit{id.} at 408 (Rehnquist, J., dissenting).

\textsuperscript{95} It should be pointed out that the Jobsts married (and so perhaps the impediment was not so great after all). They were eligible, however, for the Supplemental Security Income Program, which meant that they lost only $20 per month due to the
persons under Wisconsin's scheme were "absolutely prevented from getting married," and thereby attempt to distinguish the cases. Further, to distinguish Jobst from Redhail on the grounds that "[t]he social security provisions placed no direct legal obstacle in the path of persons desiring to get married," and to argue that there was, in Jobst, "no evidence that the laws significantly discouraged, let alone made 'practically impossible,' any marriages" may be to reify a skewed vision of the world in order to secure a mechanism for distinguishing cases. Viewed differently, the 1958 amendment could be seen as creating an irrebuttable presumption and so violating the due process clause of the fourteenth amendment. Most importantly, however, the case becomes particularly poignant when we realize that a disabled person's choice of a marital partner will be, in some cases, another disabled person.

Such logical analysis aside, Redhail itself refers to the chilling effect that was held insufficient to overthrow the provision in Jobst.

Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry. And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental.

Does not the loss of benefits through marriage have a significant burdening, coercive quality, and does it not cause a serious intrusion into the decision to marry? Once we remove the artificial distinction that Redhail involves an absolute prescription prohibiting marriage and Jobst does not, it is diffi-

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96. 434 U.S. at 387.
97. Id. at n.12.
98. Id.
99. See generally cases cited note 69 supra.
100. 434 U.S. at 387 (footnote omitted).
cult to see how the cases may be distinguished.

Since it is the absolute proscription, rather than the chilling effect, that decides Redhail, let us assume *arguendo* that the distinction based on the degree of interference is valid. It is unclear how that distinction is germane in a case involving a fundamental right, to the extent that in one case strict scrutiny is arguably used, and in the other a very deferential rational relation test is used. Is not marriage a fundamental right? Is its exercise not affected in *Jobst* by a statutorily created class? Why then does the *Jobst* Court justify the statute by saying that the legislative determination is not irrational and that the underinclusiveness of the statute is simply the result of man's imperfection, and is not worth our worry, and why is administrative convenience treated as an overriding concern?101 In *Redhail* the Court expresses concern that the statute does not deliver money into the hands of needy children,102 even though it may well put the parents in a realistically better position to support. Why is the legislated class less salutary in *Redhail* than in *Jobst*? Does it not make as much sense to conclude that a parent who seeks entry into a new marriage may be less able to support his children not in his custody as to conclude that marriage terminates dependence, except in cases of marriage to one entitled to certain social security benefits?103

**Significant Interference**

The answer (and the problem), of course, lies in the "significant interference" language of *Redhail*—language that some may take to indicate that something like a sliding scale has been somehow integrated into "official" equal protection analysis. Justice Marshall, dissenting, objected in *San Antonio Independent School District v. Rodriguez*104 that the Court pretends that equal protection analysis consists of two distinct categories, when in fact the Court has used a "spec-

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102. 434 U.S. at 389.
103. It is interesting to note that in one statutory scheme marriage is assumed to create a deficit, and in the other a resource.
trum of standards," 105 depending on the constitutional and social importance of the affected interest and the invidiousness of the classification. 106 It is also possible to claim that Redhail keeps faith with the two-tiered scheme by focusing on the triggering element—that set of facts which will call forth one test or the other. 107

It is possible to view the Redhail-Jobst tandem as a recognition of a Trimble v. Gordon 108 middle-tier sort of test, if we take Trimble to stand for the proposition that in some circumstances the rational relation test has increased bite. It may be accurate to conceptualize both Trimble and Redhail as an indication that, whatever the proper nomenclature, the Court is more prone than ever to use more than two tests, to fashion the precise standard according to the interests involved in the case before it.

As indicated, 109 however, it is possible to read Redhail as establishing no new test at all, as simply stating that the traditional testing scheme applies, but as always, a particular test is triggered by a particular set of facts—in our case, significant interference. That view is supported in fact to the extent that Redhail does not explicitly allow for some immediate balancing of governmental and individual interests, but requires, instead, the invocation of strict scrutiny where direct, substantial (significant) interference exists. Governmental interest, that is, is considered after the degree of interference is established—after the appropriate standard is selected. 110 The question that remains is whether the trigger-

105. Id. at 98 (Marshall, J., dissenting).
106. Id. at 99. See also Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring).
107. See generally Treiman, supra note 60, at 213-14.
108. 430 U.S. 762 (1977). Trimble held a section of the Illinois Probate Act violative of equal protection. The section allowed illegitimate children to inherit by intestate succession only from their mothers. While the class of illegitimates was determined not to be suspect, the Court applied a non-toothless version of minimal scrutiny. The suggestion has been made that Trimble involved infringement upon a fundamental right and yet strict scrutiny was not applied. Constitutional Analysis, supra note 37, at 76-77 n.44. It is likely more accurate to categorize Trimble as a simple rationality plus case.
109. See text accompanying note 107 supra.
110. But consider the argument that since Redhail establishes the fundamental status of the right to marry, the right’s due process status logically should be the
ing mechanism really changes the essence of the test itself, or merely restricts the stimuli for its invocation. Clearly, even the latter could be thought to significantly change the substance of equal protection. But does some theory of significant interference not yet expounded here resolve the problem of finding a principled distinction between Redhail and Jobst? Or does some other device explain the difference?

Perhaps a distinction may be drawn along the following lines. The legislation in Redhail is essentially punitive, it is *ad hominem*, while the legislation underlying Jobst is simply part of a general scheme of the administration of the social security system. Justice Stevens argues that the Wisconsin statute "appears to reflect a legislative judgment that persons who have demonstrated an inability to support their offspring should not be permitted to marry and thereafter to bring additional children into the world."111 That rationale may explain Justice Stevens' references in Jobst to the purpose of Congress.112 Justice Stewart, in the course of a general argument to the effect that the Court's placement of the case in the realm of equal protection is at best misguided, claims that, "the fact remains that some people simply cannot afford to meet the statute's financial requirements. To deny these people permission to marry penalizes them for failing to do that which they cannot do."113 Future cases may tell us that in cases of restrictions on marriage, those restrictions, even if based on administrative convenience and a policy in support of children, must not be punitive in nature. Given that rationale, one might ask whether equal protection is the relevant constitutional doctrine at all.114

same, *ergo* courts are free to balance the significance of any interference against the weight of the government interest. Constitution and the Family, supra note 37, at 1255-56.

111. 434 U.S. at 404-05 (Stevens, J., concurring in the judgment) (footnote omitted).


113. 434 U.S. at 394 (Stewart, J., concurring in the judgment).

114. As to the propriety of using the equal protection clause in Redhail over its less popular fourteenth amendment sibling see Due Process, supra note 37; Constitution and the Family, supra note 37, at 1255-56. For a discussion of Justice Stewart's substantive due process analysis in his Redhail concurrence see Fundamental Right, supra note 37, at 694-97. This discussion contains a curious argument that the right
Further, one could argue that it is the effect of the statute, and not its purpose that is essential in determining the constitutionality of the act in question.\textsuperscript{115} I have already completed that analysis.\textsuperscript{116} But again, accepting arguendo the propriety of even the punitive/nonpunitive distinction, why are different tests used in Redhail and Jobst? Are we to infer that nonpunitive purpose automatically calls forth a deferential rationality test? Is that why states may continue unabated in their quest to prevent marriages between relatives or imbeciles? Is it, in fact, the \textit{ad hominem} claim which has even greater force than the test of significant interference?

Another distinction may play some role in the analysis of Redhail and Jobst. Marriage regulations restrict in different ways. A statute may disallow one to marry \textit{at all}. Other restrictions, such as those which are age-oriented, delay the exercise of the right, or perhaps establish that the right attaches at a certain point in time. Other restrictions limit one's marital choice, but do not prevent one from marrying altogether. The rule that a woman may not marry the son of her son or daughter represents this type of restriction.\textsuperscript{117}

The Wisconsin legislation at issue in Redhail appears to be a case of the first type of restriction: an absolute disallowance to marry. The social security provision challenged in Jobst, on the other hand, has a different effect; it may deter marriages, but only those between a disabled dependent receiving benefits and a disabled person not receiving benefits. That distinction may have real force (certainly more than the claim that no restriction of marriage is involved), but it must be met with two observations. First, as a psychological matter, one wonders about the effect of telling someone that he may not marry his chosen partner (say in an affinity case), or that if he does, his income will be reduced to nothing (as in Jobst situations). Choosing a marriage partner, one assumes, is not the same sort of enterprise as searching the market place of

\textsuperscript{115} Compare the disparate impact theory in Title VII litigation, Griggs v. Duke Power Co., 401 U.S. 424 (1971). The reference is intended only to point out one possible treatment of intention and effect.

\textsuperscript{116} See text accompanying notes 90-99 \textit{supra}.

\textsuperscript{117} See \textit{Leviticus} 18:6-18 for similar proscriptions which have been codified.
fungible goods. Second, even Roger Redhail was not told that he could never marry anyone. Instead, he was told that he would have to better his financial position and show ability to support his daughter. His right to marry simply may have been delayed, while the Jobsts' was threatened permanently. This is not to support the Wisconsin scheme, but is simply to raise a question regarding the sufficiency of any such distinguishing of the cases.

A distinction may exist wherein the nature of welfare law plays a great role. The Court may simply be hesitant to attempt to regulate the administration of the social security system on the basis of some arguable claim regarding the right to marry. The federal government may be freer to regulate marriage (or at least affect the exercise of the right) through the administration of such programs than are the states through their substantive marriage laws.

**Balancing Values: Moral and Legal Discourse**

*Interpretation and Tests*

At all events it remains to be seen whether in the future the Court will in all cases (except perhaps cases of suspect classes) balance the constitutional significance of the individual interest affected, the invidiousness of the classification, and the degree of interference, with the interest of the government in forwarding the legislation and the fit between the legislation and its articulated purpose.

Some such balancing arguably removes the edifice of objectivity which is erected when a set of facts is said to invoke strict rather than minimal scrutiny. While it has been forcefully argued that abandoning the two-tiered test for a more flexible analysis would assign to certain activities a status somewhere between a right and a nullity and so remove the need for the Court to create havoc by obscuring the doctrinal bases of its decisions, it could be claimed (not inconsistently) that *Redhail* exacerbates the balancing problem by its confusing triggering analysis, by the ambiguities resident in the term “significant interference.”

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118. Yarbrough, supra note 15, at 170.
Even under traditional equal protection theory, it is not the test invoked that is of logical primacy, but is instead what set of facts is thought to exist. A simple balancing (or perhaps a sliding scale, or perhaps a flexible multitude of tests) may be claimed to be a more forthright method of dealing with the complex issues of applying the equal protection clause to cases far beyond the horizons envisaged by its drafters. Such a univocal test may seem unprincipled or lacking in guidance, but it may be as forthright and coherent as the logical subterfuge heretofore encountered in the Court's opinions. As for guidance, the logical geography of the present equal protection terrain would appear to be a cartographer's nightmare.

One advantage of an overt and simple balancing test is that it allows us to see the constitutional issue as an ethical issue—as a question of values. It seems to have been precisely in the most teleological constitutional areas that the Court is most afraid to admit that it is dealing with value questions, with issues not susceptible to the quasi-empirical language of tests. A balancing of interests may allow the frank admission that the discussion and refinement of values is going on, and that constitutional jurisprudence either is irreducibly affected by changes in moral sentiment or is a species of ethical discourse bounded by some permanent values.

There is as well the further issue of whether the very constitutionalization of value may be part of the problem, of whether the Court should or can protect values by some method other than constitutionalization. Is it the case that all fundamentally significant legal questions are or should be questions of constitutional interpretation? Perhaps the application of equal protection analysis in Redhail is symptomatic of a court's overreaching, of an attempt to bring under one constitutional clause an issue that bears little relation to the thrust of the clause at all.

As to the issue of constitutionalism and moral sentiment, Justice Douglas, writing for the Court in Harper v. Virginia Board of Elections, argued that the Equal Protection Clause is not shackled to the political

119. See Treiman, supra note 60, at 226-27.
theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change . . . When, in 1954 . . . we repudiated the "separate-but-equal" doctrine of Plessy as respects public education we stated: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written." 121

First, it should be pointed out that if any claim is made against a "nonconstitutional judicial review" model (the idea that courts may resolve some fundamentally important moral issues which are not constitutionally resolvable) because it allows courts to legislate, such claim can be answered with the assertion that on a pure interpretive model of judicial review, the doctrine of separate-but-equal protection is probably all that the Constitution can be said to require here. 122 Second, while Justice Douglas was not pressing for some sliding scale or balancing test, and while he likely would have had strong reservations about withholding strictest scrutiny in the case of a right held to be fundamental, his admission that changes in what he calls "political theory" have consequences on how we read the Constitution, on our "notions" of what constitutes equal treatment, calls forth a language different from that in which sets of facts are taken to initiate certain tests.

The pseudo-scientific language of tests may serve as a sort of heuristic device, but it may also issue into a fundamental jurisprudential confusion. By conceptualizing a fact situation in a particular way, by labeling it as fact situation N, a certain legal standard is applied. The real valuational question is begged by using the language of facts. Now, it may be claimed that the categories "fundamental right" and "suspect

121. Id. at 669-70 (citations omitted) (footnote omitted) (quoting Brown v. Board of Educ., 347 U.S. 483, 492 (1954)).

122. See Grey, supra note 12, at 712. It is not my understanding that Professor Grey there argues for a nonconstitutional review model. He argues instead for a model beyond interpretation.
class” do not pretend to be factual categories, but are instead legal terms of art. It may be answered in part that both categories are in a sense judicially created “facts,” but insofar we have only pointed out a similarity between those categories and many others. The simplest terms often require judicial clarification. But what do we make of “significant interference?” That category as well obviously represents a problematic legal concept, a term whose meaning requires some judicial clarification. Looking to Redhail and Jobst, however, it appears that both fundamental rights and significant interference are fact-oriented in at least this sense; they seem to be terms of conclusion, terms that resolve by categorization rather than analysis.123 Where is the guidance allegedly implicit in the use of such named and putatively objective tests?

What constitutes a fundamental right or significant interference? The Court treats value by utilizing the language of facts. Perhaps this is an offshoot of the theory of judicial review in which the Court is seen as attempting to discover pre-existent constitutional value, or value that is at least some epiphenomenon of the corners of the constitutional document and perhaps the minds of the framers. At all events, some tests are invoked by sets of putative facts and so these tests appear to be neutrally activated, objective, and perhaps on occasion empirically verifiable. Take, for example, the Court’s recognition in Redhail of the fundamental stature of the right to marry, a stature that the Court says had long been associ-

123. The difficulty pointed to here resides in any legal system that operates without a philosopher-king, and is at least a cognate of the phenomenon which caused Aristotle to assert the superiority of equitable justice over legal justice. Note 9 supra. One assumes that a goal of a coherent legal system is minimization of the use of conclusion where analysis is necessary.

Justice Stewart discusses the issue of using substantive due process analysis in the guise of equal protection and the tendency to overlook the proper concerns of equal protection, such as the nature of the individual interest involved, the relationship between legislative means and purpose, the presence of alternative means, etc.:

To conceal this appropriate inquiry invites mechanical or thoughtless application of misfocused doctrine. To bring it into the open forces a healthy and responsible recognition of the nature and purpose of the extreme power we wield when, in invalidating a state law in the name of the Constitution, we invalidate pro tanto the process of representative democracy in one of the sovereign States of the Union.

434 U.S. at 396 (Stewart, J., concurring in the judgment).
ated with marriage. It appears instead that *Redhail* creates the fundamental right to marry, and at the same time cuts back on the importance or significance of that recognition via the significant interference analysis. The issue of the constitutionalization of value connects with the issue of the language of tests.

One problem generated from the constitutionalization of value is this. Given the Court's understandable desire to be perceived as something other than a super-legislature, and perhaps its own responsible view of its functions and limitations, a considerably complex doctrine grows up in regard to any area of constitutional interpretation. The Court seeks to act in a technical, principled manner. A survey of cases in general shows the extent to which the Court invokes the language of tests in order to determine the proper resolution of whatever issues it sees as being properly before it.

While it might be suggested that the apparently neutral language of tests masks a result oriented Court, a model of judicial responsibility might also explain the appeal of tests (what do local standards say about a certain movie, is a grand jury line-up a critical stage of criminal proceedings, is a handwriting exemplar in a forgery case essentially testimonial). Put simply, how does a Court give principled guidance in the absence of articulated tests? It makes no sense, that is, to object to the idea or use of tests *in general*.

The difficulty of the constitutionalization of value leads to the difficulties of the technical complexities of tests, and the relation between such tests, facts in the real world, and the core meaning of the Constitution. It has been said, for example, that in equal protection analysis the Court is forced by its own language to disguise the doctrinal bases of its decisions.\(^{124}\)

**Verification and the Language of the Law**

How may a court frame a coherent analytic scheme which may be applied to a variety of circumstances? If a court's behavior is to be predictable, should its interpretations of the Constitution be somehow verifiable? A logical positivist such

\(^{124}\) See Yarborough, *supra* note 15, at 170.
as A.J. Ayer might argue that to say "the right to marry is of fundamental importance" or "the statutory scheme does not significantly interfere with the exercise of the right" is to say something very much akin to, something with as much literal sense as, "the Absolute enters into, but is itself incapable of, evolution and progress."\textsuperscript{125} The statements, that is, are equally meaningless in that they are not empirically verifiable.

Now, it might be thought bizarre to apply the tenets of logical positivism to the law in such a way. But it is possible to argue for something like empirical verification here, in that constitutional arguments, for example, can be grounded in and compared to the text of the document, the history surrounding it, the best reasoned view of the framers' intent, etc.\textsuperscript{126} A trickier argument, and one which may represent some popular sentiment, would be that a national referendum would serve some verificational function.

On another view, if the statement "the right to marry is of fundamental importance" is taken to be a meaningful proposition, that meaning derives from the office of the speaker. The statement, that is, is like the statement "I now pronounce you man and wife," or the statement "I would like to congratulate you." The statement is performative, it creates the fact to which it refers. To what extent should judicial statements, in constitutional cases, be performative? To what extent does the observation raise the democratic problem?

I am not here arguing that any pronouncement by the Court that is the least imaginative or interpretive is consigned to the realm of the senseless or otherwise should be disregarded. Indeed, I leave open the possibility for a nonconstitutional theory of judicial review. Aside from the fact that logical positivism entails its own refutation and so is engaged in a


\textsuperscript{126} It might be argued that a court that uses the language of tests must be willing to subject its tests to analyses of verifiability and predictability, but the appropriate response to the claim would point out the difficulty of "verifying" policies, principles, and values. Predictability, however, might be another matter. The verification argument put forth here seems in any case to point in a direction different from some nonconstitutional review theory. See text accompanying note 122 \textit{supra}. The similarities between some verification theory and pure interpretivism are probably great. See Brest, \textit{supra} note 13 for a discussion of the argumentative resources of textualist, intentionalist, and other interpreters.
self-referential fallacy of the first magnitude, there are other difficulties with using its analytical scheme to study the law. Nevertheless, I am pointing up a danger in the conception of the Court as engaged in a metaphysical search for pre-existent constitutional value. To be sure, there are arguable virtues to such a view; among others, it may serve as a heuristic device that insures some attempt to stay within reasonable interpretive boundaries, and it may incline us even toward some “verification” view of constitutional and statutory interpretation, making sure that some attention is paid to constitutional text, history, and perhaps the concept of the framers' intent. But the danger of such a view is its tendency to mask the language of morals, to make us disregard the critical language of ethics precisely when we should explicitly utilize its resources in reasoned debate. To mimic the surface features of the natural sciences in order to create a false sense of certitude in regard to a moral issue (either through a disguised language of conclusion or the pretense that an ambiguous text reads clearly) is something like explaining the Copernican world in the language of Ptolemy. It is inappropriate and miseducative, and very likely confusing to the speaker as well as the listener.

It should be clear that the resources of moral debate and the use of a simple balancing analysis issue into dangers of their own. Perhaps the guidance that such a balancing

127. That is, the proposition that “a sentence had literal meaning if and only if the proposition it expressed was either analytic or empirically verifiable” is neither analytic nor empirically verifiable. Quoting A.J. Ayer, supra note 125, at 5.

128. Witness the use of a balancing of governmental and individual interests in recent exclusionary rule cases: United States v. Havens, 100 S. Ct. 1912 (1980) (defendant’s statements made in response to proper cross-examination reasonably suggested by defendant’s direct examination are subject to otherwise proper impeachment by the government by illegally obtained evidence that would be admissible in the government’s case in chief); Stone v. Powell, 428 U.S. 465 (1976) (where there has been, on the state level, an opportunity for full and fair litigation of a fourth amendment claim, federal habeas relief will not be granted where unconstitutionally obtained evidence was introduced at trial); United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule not applicable to grand juries).

In Havens, Justice Brennan argues:

[T]he Court has undertaken to strike a “balance” between the “policies” it finds in the Bill of Rights and the “competing interest[ ]” in accurate trial determinations. This balancing effort is completely freewheeling. Far from applying criteria intrinsic to the Fourth and Fifth Amendments, the Court
scheme entails is minimal. The principled decision of cases can be said to be without the purview of some loose balancing scheme (witness the history of substantive due process). I will not repeat here what may be the advantages of a principled balancing method, but will only point out that Redhail seems to create a confusion by its use of an uncertain test of uncertain status, by its lack of guidance regarding the triggering mechanism, that it may diminish the status of state marriage regulations as well as that of fundamental rights, and that a test such as "compelling state interest" can be criticized as allowing the Court to "pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test." 129 Is this last procedure essentially legislative?

Judicial Legislation and the Ethical Enterprise

The problem of the Court as a super-legislature 130 is a difficult one. So too is the question whether alleged adherence to a two-tiered equal protection scheme exacerbates the problem. In a different constitutional area Justices Stewart, Powell, and Stevens have addressed the general problem by claiming that

while we have an obligation to insure that constitutional

resolves succeeding cases simply by declaring that so much exclusion is enough to deter police misconduct. That hardly conforms to the disciplined analytical method described as "legal reasoning," through which judges endeavor to formulate or derive principles of decision that can be applied consistently and predictably.

Ultimately, I fear, this ad hoc approach to the exclusionary rule obscures the difference between judicial decisionmaking and legislative or administrative policymaking. More disturbingly, by treating Fourth and Fifth Amendment privileges as mere incentive schemes, the Court denigrates their unique status as constitutional protections. Yet the efficacy of the Bill of Rights as bulwark of our national liberty depends precisely upon public appreciation of the special character of constitutional prescriptions. The Court is charged with the responsibility to enforce constitutional guarantees; decisions such as today's patently disregard that obligation.

100 S. Ct. at 1920 (Brennan, J., dissenting) (citations omitted) (second brackets in original).

129. Shapiro v. Thompson, 394 U.S. 618, 662 (1969) (Harlan, J., dissenting). One writer has called this quotation a criticism of a balancing test which allows the Court to create rights. Treiman, supra note 60, at 215.

130. See, e.g., Shapiro v. Thompson, 394 U.S. at 661 (Harlan, J., dissenting).
bounds are not overreached, we may not act as judges as we might as legislators.

"Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."\(^{131}\)

Justice Brennan, in the same case, argues that

\[
\text{[t]his Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, \ldots "moral concepts" require us to hold that the law has progressed to the point where we should declare that the punishment of death, \ldots is no longer morally tolerable in our civilized society.}^{132}\]

Is the Court the ultimate arbiter of the meaning of the Constitution? Should it be? Does Marbury v. Madison serve as authority for the view, or does some more general run of cases provide the precedential support for a broad theory of constitutional interpretation as opposed to constitutional application? Should the Court be limited to the face of the document? Is there any self-referential difficulty in the assertion by the Court of broad powers of constitutional review? Is that broad power really a power of nonconstitutional review? Justices Stewart, Powell, and Stevens had argued that "[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."\(^{133}\) Is that response sufficient? What do we do in the case of morally iniquitous legislation—hope that the problem never arises?


\(^{132}\) 428 U.S. at 229 (Brennan, J., dissenting) (footnote omitted).

\(^{133}\) Id. at 175 (plurality opinion of Stewart, Powell, and Stevens, J.J.) (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)).
Many problems merge here, among them the relation of law and morals, the extent to which questions of value are or should be constitutional questions, and what the role of the Supreme Court in all of this should be. A more “practical” question that remains is why, in two cases of infringement of a fundamental right, do the standards applied differ. What is the Court telling us about fundamental rights? What is the nature of a fundamental right if the assurance of its equal accessibility or exercise does not require the strictest of scrutinies?

REGULATING AND Restricting Marriage: Part Two

Plenary Powers, Fundamental Rights

It has been traditional that marriage is within the purview of state authority. The police power includes the power to regulate marriage and marital choice, and it has been thought that a state could unequivocally interfere to a great degree with one’s right to marry.134 As recent decisions have indicated, however, there is some reason to believe that the autonomy of the state in this area may have been significantly reduced. This development, even if beneficial on the whole, may simply be another off-shoot of a confused constitutional jurisprudence. Indeed, it could be claimed with some propriety that if for no other reason, Redhail is curious for its possible diminution of the stature of fundamental rights and state marriage regulations. One might have thought of these as opposed disjuncts, and that any decision would necessarily promote one at the expense of the other (once marriage, that is, was subsumed in the class “fundamental right”).

Given the status of marriage as a fundamental right (as finally resolved by Redhail) and the test (as already analyzed) of Redhail and Jobst, what effect ensues on state marriage laws? The conceptualization of marriage as a fundamental right calls for a new evaluation of our marriage laws.135 While

134. See H. Clark, supra note 31, at 35; Constitutional Analysis, supra note 37, at 74-75.

135. This observation has been made by several authors. See Constitutional Analysis, supra note 37; Constitution and the Family, supra note 37; Due Process, supra note 37; Equal Protection, supra note 35; Fundamental Right, supra note 37.
the future assumption may be that the state is impinging on a fundamental right in its regulation of marriage, the traditional assumption has been that the state is empowered to regulate marriage as it sees fit (or nearly so).\textsuperscript{136} Given this shift in em-

\textsuperscript{136} For a curiously strident example of this latter assumption, see \textit{In re Goalen}, 30 Utah 2d 27, 512 P.2d 1028 (1973), \textit{appeal dismissed, cert. denied}, 414 U.S. 1148 (1974), wherein the Utah Supreme Court disposed in the following way of an appeal from a denial of a petition for a mandate ordering the warden of the Utah State Prison to allow Ms. Goalen to marry an inmate:

We agree that marriage is "fundamental." We believe that like motherhood and the Boy Scouts, it is an institution, a status, an entente, if you please, with reality, and with whatever man's own religion says it is,—because all of these are universal precepts. However, this does not mean that the Constitution of the United States, which in no uncertain terms says the states are supreme in this country and superior to the philosophy of federal protagonists who urge to suggest that a coterie of 3 or 5 or even 9 federal persons immune from public intolerance, by use of a pair of scissors and the whorl of a 10¢ ball-point pen, and a false sense of last-minute confessional importance, can in one fell swoop, shakily clip phrases out of the Constitution, substitute their manufactured voids with Scotch-taped rhetoric, and thus reverse hundreds of cases dimmed only by time and nature, but whose impressions indestructibly already indelibly had been linotypesed on the minds of kids and grandkids who vowed and now would or will vow to defend, not only the institution of marriage and motherhood, but to reserve to the states a full budget of legitimate, time-tested mores incident to that doctorate.

\textit{Id.} at 30, 512 P.2d at 1029-30. Apparently referring to the fourteenth amendment, the court says:

That troublesome bit of history was conceived in a Civil War birth-rate aura, a reconstruction flight to hysterectomy, and a doubtful birth, whose legitimacy has been condoned or legitimized, not in fact, but by use of blinders justified only by passage of time and tradition.

\textit{Id.}, 512 P.2d at 1029. Finally, in a passage almost Faulknerian for its lack of terminal punctuation, the court says:

When and if the Supreme Court of the United States says the Fourteenth Amendment guarantees an unrestricted right for two persons of any character or status to marry—the 50 states to take it lying down—simply because citizens or resident aliens or felons, or syphilis, etc. profess to have unlimited civil rights, and that a felon has the same constitutional right to marry, and perhaps become a behind-bars father without any semblance of parental control,—which also would deny to the states a right to prevent a couple of homosexuals, for example, from marrying, or condone the switch of wives by swingers, this country then will have switched to legalized indiscriminate sex proclivities with a consequent rising incidence of disease, poverty, and indolence,—but worse, to subject unwary citizens to the whim and caprice of the federal establishment,—not the states,—leading to a substitution of a bit of judicial legislation for plain ordinary, horse sense.

\textit{Id.} at 29-30, 512 P.2d at 1029 (footnote omitted).
phasis, it is probably not ill-adviced to suggest that some unresolved questions exist regarding the constitutional sufficiency of state marriage laws. The Court could, of course, quoting Redhail, 'label all such statutes “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship.”' but that phrase was directed more to the type of legislation at issue in Jobst (a social security provision that impinged on the marital right). One wonders about such a description applying to substantive marriage law itself. Is a state statute that prohibits, for example, consanguineous marriages not significantly interferent with the marriage right because of some lack of directness or substantiality? If it is significantly interferent, how may it pass Redhail muster?

Parts of the marriage law of Pennsylvania were re-

137. 434 U.S. at 386.
   § 1—5. Restrictions on the issue of marriage license
   No license to marry shall be issued by any clerk of the orphans' court:
   (b) If either of the applicants for a license is under the age of sixteen
   years, unless a judge of the orphans' court shall decide that it is to the best
   interest of such applicant, and shall authorize the clerk of the orphans'
   court to issue the license.
   (c) If either of the applicants is under the age of eighteen years, unless
   the consent of a parent or guardian of said applicant shall be personally
   given before the clerk, or be certified under the hand of a parent or a
   guardian, attested by two adult witnesses, and, in the latter case, the sig-
cently examined\(^{139}\) for constitutional defects in light of *Redhail*. It was the opinion of the commentator there that while most of Pennsylvania's restrictions on marriage pass *Redhail* muster, several provisions may not. These latter provisions have to do with mental competence,\(^{140}\) consanguinity\(^{141}\) (in the case of first cousins), affinity,\(^{142}\) and a restriction unique to Pennsylvania which disallows a party divorced for adultery to marry the named correspondent during the lifetime of the spouse.\(^{143}\)

More narrowly, the Wisconsin legislature passed an alternative to section 245.10, the section deemed impermissible in *Redhail*, after the district court's rejection of it, only to repeal the alternative after the Supreme Court decided *Redhail*.\(^{144}\) It has been pointed out:

> It does not appear that any statute could be defined narrowly enough to reflect only the interests Wisconsin wished

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A man may not marry his mother.
A man may not marry his father's sister.
A man may not marry his mother's sister.
A man may not marry his sister.
A man may not marry his daughter.
A man may not marry the daughter of his son or daughter.
A man may not marry his first cousin.
A woman may not marry her father.
A woman may not marry her father's brother.
A woman may not marry her mother's brother.
A woman may not marry her brother.
A woman may not marry her son.
A woman may not marry the son of her son or daughter.
A woman may not marry her first cousin.

*Degrees of Affinity*
A man may not marry his father's wife.
A man may not marry his son's wife.
A man may not marry his wife's daughter.
A man may not marry the daughter of his wife's son or daughter.
A woman may not marry her mother's husband.
A woman may not marry her daughter's husband.
A woman may not marry her husband's son.
A woman may not marry the son of her husband's son or daughter.

141. Id. § 1—5(i).
142. Id.
143. Id. § 1—5(h).
144. *Fundamental Right*, supra note 37, at 695.
to advance in sections 245.10 and 245.105 [the alternative statute that was later repealed]. The real repugnance of the two statutes stemmed not so much from the fact that Redhail's class was denied the right to marry, as from the fact that the state denied anyone the fundamental right to marry. Thus it appears Justice Stewart's observation was correct. *Redhail* was really a substantive due process decision.\textsuperscript{145}

It is arguably one of the benefits of *Redhail* that it may remove some personal incapacities to marry, but it is just as likely one of the detriments of the case that it makes it less than clear just what sort of regulations are "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship,"\textsuperscript{146} and what sort of regulations are permissible even though they do significantly interfere with the exercise of the right to marry. And worse, it has not really been made clear that *Redhail* does remove personal incapacities (apart from those identical to those found under the facts of *Redhail*).

Indeed, the Court's use of the reasonable regulation language is followed, as has been pointed out, by a reference to *Jobst*,\textsuperscript{147} a case which surely seems to involve significant interference with the right to marry (although in terms of "constitutional" art, the interference there apparently lacks the directness and substantiality requisite for significance). We have learned that the Court's view of that case, as distinct from *Redhail*, stems from the fact that *Jobst* had to do with a social security provision that indirectly impacted on the right to marry, while *Redhail* dealt with a rule that absolutely prohibited (immediately, by explicit operation of the statute alone) some marriages.

If we accept, as a hallmark of distinction, this absolute proscription rationale (and as I argue earlier,\textsuperscript{148} we should not) we are left to conclude that if any portion of a state's marriage law that is of the type:

\begin{quote}
if either applicant is X, then no marriage license shall issue
\end{quote}

\textsuperscript{145} *Id.* at 697.
\textsuperscript{146} 434 U.S. at 386.
\textsuperscript{147} *Id.* at 386-87.
\textsuperscript{148} See text accompanying notes 93-99 *supra*.
or even of the type:

if either applicant is X, then no marriage license shall issue except upon order of the court

(where X represents an act that has not been done, a disease that an applicant has, an age that an applicant is, etc.) or of any other type that acts directly and personally to incapacitate as to marriage, it is then significantly interferent with the decision to enter marriage and must pass muster as something more than a reasonable regulation; that is, it must be "supported by sufficiently important state interests" and must be "closely tailored to effectuate only those interests."¹⁴⁹

This is, of course, not surprising. We can see, however, that in these cases courts will be compelled into the second tier balancing act largely as a result of the linguistic form of the statutory scheme in question, and apparently not on the basis of the real force and effect of the legislation. Thus, a regulation of marriage which resembles the provision in Jobst passes muster without any such balancing at all. The state may intrude upon the right to marry in a host of ways, then, as long as it does not place the regulation in its marriage act or does not use the language of direct prohibition.

This potential for incursion on the right to marry is surprising, to the extent that we take seriously the language of close tailoring to effectuate only sufficiently important state interests.¹⁵⁰ A tax or welfare scheme that negatively impacts

¹⁴⁹. 434 U.S. at 388. The conception of the world as a sort of radical atomism wherein it is possible for a statute to have only the effects for which it is designed, and no others, is likely problematic itself.

¹⁵⁰. Id. In Mapes v. United States, 576 F.2d 896 (Ct. Cl. 1978) plaintiffs sought a refund of $1,220.10 for the tax year 1976, which sum represented the additional amount of tax they paid as a consequence of being married. The Court of Claims held the legislation at issue to be constitutionally valid and engaged in the unevitable enterprise of interpreting Redhair and Jobst:

Admittedly, the right to marry is a fundamental right. Nevertheless, we read the Jobst and Zablocki cases together to imply that the application of strict scrutiny is appropriate only where the obstacle to marriage is a direct one, i.e., one that operates to preclude marriage entirely for a certain class of people, as in Zablocki. The effect of the rates in Code section 1 is somewhat analogous to the effect of the termination of social security benefits in Jobst: the elevated tax burden might in fact dissuade some couples from entering into matrimony, but does not present an insuperable barrier to marriage.
on the right to marry may have been thought to fail the close tailoring test. Yet on the Court’s reading of Redhail and Jobst, a tax or welfare provision would fail to have the directness and substantiality requisite to stricter scrutiny. The treatment of marriage as a right for equal protection purposes in a case such as Redhail is assumedly a cause of such confusion. And apparently the Court views the welfare field as a Pandora’s box so far as fundamental rights theory is concerned.

Single-Gender Marriage

What about the requirement, sometimes couched in the language of assumption in state statutes, that applicants for a marriage license are to be male and female? How does one conceptualize single-gender marriages under Redhail? If the right to marry is fundamental, how may its exercise be prohibited simply on the basis that the partners to a proposed marriage do not represent both genders?

The most evident response is that marriage is, ex hypothesi, a state-sanctioned relationship between a man and woman, that marriage through the ages has been conceived

Id. at 901. The court indicates that the tax system has the virtue of being a test of love: “[O]ur Internal Revenue Code provides an opportunity to the young to demonstrate the depth of their unselfishness, however kind and beautiful the beloved may be” and counsels cohabitation in some cases for the “tax-minded young man and woman”; “[t]hereby they can enjoy the blessings of love while minimizing their forced contribution to the federal fisc. They can synthesize the forces of love and selfishness.” Id. at 898.

151. PA. STAT. ANN. tit. 48, § 1—3 (Purdon 1965): “Such application shall contain a statement of the full Christian name and surname of the male and female applicant . . . .”


153. See, e.g., Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973) in which two female applicants sought review of a judgment that they were not entitled to marry. The contentions of marriage, association, and religion rights were disposed of on authority of Merriam-Webster:

The sections of Kentucky statutes relating to marriage do not include a definition of that term. It must therefore be defined according to common usage.

Webster’s New International Dictionary, Second Edition, defines marriage as follows:

“A state of being married, or being united to a person or persons of the opposite sex as husband or wife; also, the mutual rela-
as the nucleus of the family, and that it is family life that is the bedrock of our civilization. Indeed, Redhail itself refers to the 1888 case of Maynard v. Hill and quotes that opinion for the proposition that marriage is "‘the most important relation in life,,'”\textsuperscript{154} and is "‘the foundation of the family and of society, without which there would be neither civilization nor progress.'”\textsuperscript{156} The Court goes on to quote Meyer v. Nebraska for authority that protected by the due process clause is the right to "‘marry, establish a home and bring up children,'”\textsuperscript{158} and cites Skinner v. Oklahoma for the proposition that marriage (assumedly so conceived) is "‘fundamental to the very existence and survival of the race.'”\textsuperscript{157}

As to Redhail itself, the Court says that we must protect the right to "‘marry and raise the child in a traditional family setting,’”\textsuperscript{158} and refers to marriage as "‘the relationship that is the foundation of the family in our society.'”\textsuperscript{159} The Court goes on to indicate that the right to procreate must imply a right to enter into marriage (the only relation in which Wisconsin allows sexual relations to legally take place).\textsuperscript{160}

Does the fundamental right to marry, one might ask, imply the right to enter into a state-sanctioned nonprocreative...
relationship? It is clear that the Court conceives of marriage along traditional lines.\textsuperscript{161} Marriage is intimately tied to procreation, family life, and a role as the essential social building block. It is not, on that view, looked on as a relationship valued and valuable for its own sake, as a private relationship entered into by two persons for their mutual betterment and satisfaction. The Court has adopted a view of marriage under which its restriction to couples the members of which are of opposite genders is justified on utilitarian grounds. We must protect marriage so that it may ensure procreation, a stable family setting, and the essential building block and social structure of our civilization. These interests, along with others such as "morals," speak against single-gender marriages. We may question the validity of both the utilitarian and moral claims for the restriction. Is there no utility to state recognized single-gender marriages? Is it less than that associated with traditional marriages? Do marriage partners have a duty to procreate?\textsuperscript{162} Is a nonhomosexual single-gender marriage less offensive than a homosexual single-gender marriage? That is, it is unclear, except on utilitarian grounds, why the honorific term "marriage" should not apply to a relationship whose union is nonsexual. If sexual union is thought to serve procreative purposes, should contraceptives be disallowed in marriages?

Beyond this, it has been argued that single-gender marriages may well promote social goals of marital intimacy and stability, that homosexuals will not procreate if disallowed to

\textsuperscript{161} See text accompanying notes 152-59 supra.

\textsuperscript{162} Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the Griswold rationale, the classification is no more than theoretically imperfect. We are reminded, however, that "abstract symmetry" is not demanded by the Fourteenth Amendment.


Griswold had held that a state criminal statute, which sought to prohibit the use of contraceptives by married couples, violated the due process clause of the fourteenth amendment through its interference with marital privacy. Griswold v. Connecticut, 381 U.S. 479 (1965).
enter into homosexual marriages, that population growth may not be a compelling state interest, or even a rational goal, that homosexuals will not ordinarily raise children, and that even if they do, they may be as fit as heterosexual parents.\textsuperscript{163}

It remains to be seen whether \textit{Redhail} was meant to have any effect on any of this, whether it will, and whether courts will simply and in cavalier fashion claim that the issue of single-gender marriage is untouched by \textit{Redhail} or that the state interests associated are so clearly compelling or sufficiently important that there can be no real doubt as to the validity of restrictions against homosexual or single-gender marriages.

\textit{Other Restraints}

While the case of single-gender marriage may strike some as a sort of exotic extreme, it should be clear that if we take \textit{Redhail} seriously, state regulation of marriage encounters serious obstacles. One may reasonably question the validity of, for example, license fees, ceremonial form requirements, age restrictions, requirements of mental and physical health, consanguinity and affinity proscriptions, and residency requirements for divorce. \textit{Redhail} seems to erect obstacles to such restrictions, and yet it appears that the Court would be unwilling to invalidate such regulatory schemes.

The Court has arguably taken upon itself the task of determining the proper limits that may be put on the right to marry. One might ask whether, if it is now offensive to support a tradition that disallowed miscegenation, is it not also offensive to support a tradition that disallows an alleged mental incompetent of some sort or other to marry. Any proscription against the “weak-minded” or “mentally unsound” would seem to fail for vagueness and lack of tailoring.\textsuperscript{164}

\begin{flushright}
163. Constitution and the Family, supra note 37, at 1285-87.
\end{flushright}

\begin{quote}
The data still is inconclusive on the suitability of a retarded person as a parent and/or spouse, but two things are clear: (1) most state statutes do not limit or prohibit marriage for other recognizable groups having an established high risk of unsuitability as a parent or spouse, \textit{i.e.}, the poor, the alcoholics, etc.; and (2) the fact that some logical reasons for restricting the rights of certain retarded individuals may exist does not give the legislature
\end{quote}
What degrees of consanguinity in marriage may be disallowed? And what justifications allow restrictions on degrees of affinity?\textsuperscript{165} One need only consider the cases of first cousins\textsuperscript{166} and adoptive relations to raise a clear question as to the constitutional sufficiency of such restrictions on marital choice.

Redhail would seem to impact on divorce restrictions and regulations as well. Impediments to divorce serve in at least one sense as impediments to marriage. In Sosna v. Iowa\textsuperscript{167} the Court rejected an equal protection claim regarding the appellant's dismissed petition for divorce. She had failed to meet Iowa's statutory requirement that the petitioner in a divorce action have been a resident of that state for one year preceding the filing. The Court held that the appellant was not irretrievably foreclosed from obtaining some part of what she sought and that the residency requirement was reasonably justified on grounds of the state interests in ensuring that a petitioner is attached to the state and in protecting divorce decrees from collateral attack.\textsuperscript{168} One might have thought that the Sosna legislation dealt with the right to remarry as much as did the statute in Redhail, and that the regulatory scheme

\textsuperscript{165} See also Constitution and the Family, supra note 37, at 1259-63.
\textsuperscript{166} Constitutional Analysis, supra note 37, at 85-89.
\textsuperscript{167} The comment to § 207 (Prohibited Marriages) of the Uniform Marriage and Divorce Act (amended 1971-1973) includes the observation that "[t]he Act follows the recent legislative trend toward permitting first cousin marriages . . . ." The Section itself is as follows:

\textbf{SECTION 207. [Prohibited Marriages.]}  
(a) The following marriages are prohibited:
\begin{enumerate}
\item a marriage entered into prior to the dissolution of an earlier marriage of one of the parties;
\item a marriage between an ancestor and a descendant, or between a brother and a sister, whether the relationship is by the half or the whole blood, or by adoption;
\item a marriage between an uncle and a niece or between an aunt and a nephew, whether the relationship is by the half or the whole blood, except as to marriages permitted by the established customs of aboriginal cultures.
\end{enumerate}
(b) Parties to a marriage prohibited under this section who cohabit after removal of the impediment are lawfully married as of the date of the removal of the impediment.
(c) Children born of a prohibited marriage are legitimate.

\textbf{Uniform Marriage and Divorce Act § 207.}
\textsuperscript{167} 419 U.S. 393 (1975).
\textsuperscript{168} Id. at 406-07.
in *Redhail* could “reasonably be justified on grounds other than purely budgetary considerations or administrative convenience.”\(^{169}\) One wonders whether the emphasis in *Sosna*, had it been post-*Redhail*, would have been more on the right to marry than on the right to travel, and whether a stricter test would have applied to the statutory scheme. In fact, Justice Marshall’s dissent points out that the interests associated with marriage and divorce have been accorded special deference\(^ {170}\) and that the Court has recognized that the right to divorce is closely related to the right to marry.\(^ {171}\) He goes on to argue:

> Having determined that the interest in obtaining a divorce is of substantial social importance, I would scrutinize Iowa’s durational residency requirement to determine whether it constitutes a reasonable means of furthering important interests asserted by the State. The Court, however, has not only declined to apply the “compelling interest” test to this case, it has conjured up possible justifications for the State’s restrictions in a manner much more akin to the lenient standard we have in the past applied in analyzing equal protection challenges to business regulations. I continue to be of the view that the “rational basis” test has no place in equal protection analysis when important individual interests with constitutional implications are at stake. But whatever the ultimate resting point of the current readjustments in equal protection analysis, the Court has clearly directed that the proper standard to apply to cases in which state statutes have penalized the exercise of the right to interstate travel is the “compelling interest” test.\(^ {172}\)

The use of a deferential test in *Sosna* appears similar to such use in *Jobst*, and the question must be asked whether that analysis is any longer appropriate in the post-*Redhail* world of equal protection and marriage law. In *Sosna* we are left to guess why a deferential test is used and whether such

\(^{169}\) *Id.* at 406.

\(^{170}\) *Id.* at 419-20 (Marshall, J., dissenting).

\(^{171}\) *Id.* at 420. Justice Marshall pins the close relation to the fact that both marriage and divorce “involve the voluntary adjustment of the same fundamental human relationship” rather than to the fact that one is disallowed to remarry to the extent that one is unable to secure a divorce. *Id.*

\(^{172}\) *Id.* at 420-21 (citations omitted).
residency requirements do in fact have continuing validity. Is the nature of the restriction similar to an age restriction, where it might be argued that there is no significant interference since there is merely a delay of the exercise of the right? Are the state interests equivalent in magnitude in a durational residency case to those in an age case? Is the concept of significant interference fluid, so that its invocation in a divorce-remarriage case issues into different consequences from its use in a child support-remarriage case? Are the state interests so clearly important that even assuming significant interference, such regulations are permissible? Is marriage not regulated or restricted through divorce statutes? What of statutory waiting periods which are instituted subsequent to a divorce and prior to remarriage?

**Conclusion**

Thus we arrive at a series of difficult questions regarding the nature of marriage and the power to regulate and restrict it. The analytical difficulties result from fundamental jurisprudential and moral issues. Giving constitutional value to marriage has involved the complex enterprise of establishing some fundamental right to marry and yet recognizing that the right is not absolute, that the state may restrict it, deter its exercise, withhold the "granting" of it, and define it so as to exclude certain persons and classes of persons. Perhaps Justice Marshall, for one, is willing to pay the price of diminution of the status of the class of fundamental rights in order to expand the list of activities protected thereunder.

Legal debate, at least at certain stress points, must be guided by reasoned moral analysis, with an explicit and refined consideration of the consequences implicit in any value position. If moral discourse is essentially open-ended, if it does not lead us to any one answer in some area of dispute, it does nevertheless frame questions and focus attention on reasons, arguments, and consequences. Through constitutional doctrine the Court has staked out a tentative position on mar-

173. It should be reiterated that Redhail had been deemed a parent by virtue of a paternity action. 434 U.S. at 377-78. The case is more appropriately categorized, then, as a "child support-marriage" case.
riage and its regulation and restriction. The notions that Roger Redhaill's equal protection rights were contravened by the Wisconsin legislation, that there is a fundamental right to marry, that marriage is to be defined by an unexamined argument from possibly obsolete utilities, and that economic disincentives or positive impediments to marriage are not constitutionally significant so long as they do not reside in the marriage sections of some statutory scheme (or are part of a federally administered program) are all positions that require more coherent judicial analysis than they have heretofore received. It is simply insufficient to make a pretense of analysis through the conclusory use of the operative legal nomenclature. If the theory of fundamental rights is not to undergo a further serious atavism, and if marriage is a fundamental right, the problems enumerated here require resolution. And perhaps the theory of fundamental rights itself requires serious judicial, and not merely scholarly, reevaluation.