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Uprooting the Arguments Against Same-Sex Marriages

John G. Culhane



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ARTICLES

UPROOTING THE ARGUMENTS AGAINST SAME-SEX MARRIAGE

*John G. Culhane**

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* Professor of Law, Widener University School of Law; Visiting Professor of Law, Southern Methodist University School of Law (Fall 1998); B.A., 1978, College of William and Mary; J.D., 1982, Fordham University School of Law. Administration, faculty, and staff at S.M.U. supported the completion and placement of this Article, and I thank them for their assistance. I would like to thank Emily Field Van Tassel, whose research into post-slavery restrictions on interracial marriage provided the initial spark for this Article. Thanks, too, to Carlos Ball and Maura Strassberg, both of whom provided insightful and challenging comments on an earlier draft, and to Susan Goldberg, who was particularly helpful on the family law and policy issues. Discussions with Chai Feldblum, William Eskridge, Charles Pouncy, and Erin Daly also directed my thinking on these issues. They all deserve recognition for their thoughtful contributions to this volatile area of law and policy. Alec Ortega provided encouragement and support, as usual. Christine Kear and Vincent Zullo provided valuable research assistance. To all of these people, my sincere appreciation and thanks.

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INTRODUCTION

Why is the debate over same-sex marriage¹ bleeding through society? Although law review articles and other scholarly treatments of the issue began to appear as early as the 1970s² and, since about that same time,³ courts began to consider whether two members of the same sex can legally marry,⁴ there has been nothing short of an explosion of interest in the topic during the

¹ I use *same-sex marriage* as the most descriptive, yet neutral, term. Simply, it refers to the marriage between either two men or two women. Since two men or women who would wish to marry would probably self-identify as gay or lesbian, that inference may be drawn throughout this Article. Of course, the right to same-sex marriage, once recognized, would not have a legally restricted membership. But as I point out *infra* Part III.C, the underlying values of marriage would make unusual the strong commitment entailed by the institution absent a deep, abiding, emotional tie between the two celebrants.

² See articles and other materials cited in Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 96 app. A.

³ See, e.g., *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). All these cases denied the right of same-sex couples to marry.

⁴ Most precisely, the issue is whether a same-sex couple can gain legal recognition for their union. Ceremonial marriages between two members of the same sex are already occurring, and no movement to directly prevent such unions is evident. See Marc A. Fajer, *Toward Respectful Representation: Some Thoughts on Selling Same-Sex Marriage*, 15 YALE L. & POL'Y REV. 599, 619-23 (1997). Of course, as *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995), indicates, the state sometimes punishes those who engage in ceremonies of ritual commitment. In this case an attorney general successfully withdrew an offer of employment to a prospective employee who engaged in a same-sex marriage ceremony. My principal concern in this Article is the legal issue of same-sex marriage, although the reader should bear in mind that many of the same concerns that fuel opposition to legally sanctioned same-sex marriage also make some people uncomfortable with same-sex couples in general (and therefore with any ritual celebration of those relationships). Further, I take seriously Professor Fajer's admonition not to diminish the significance of the ritual marriages that many same-sex couples have celebrated. See Fajer, *supra*, at 622-23.

past few years.⁵ In part, this development is directly traceable to the Hawaii Supreme Court's 1993 landmark holding in *Baehr v. Lewin*.⁶ There, the court held that Hawaii's marriage licensing laws, which had been interpreted as restricted to opposite-sex couples, were presumptively unconstitutional.⁷ The court then called upon the state to adduce, at a subsequent trial, a "compelling state interest" in what it found to be discrimination based on sex.⁸

After sitting idly by for a few years following the decision in *Baehr*, Congress brought the issue of same-sex marriage into sharp national focus in 1996 by holding hearings on, and speedily enacting, the pointedly named Defense of Marriage Act ("DOMA").⁹ Congressional action on this subject was at least partly spurred by the Republican majority's ultimately fruitless search for a galvanizing political issue for the 1996 Presidential election,¹⁰ but the distress wrought by the Hawaii trial court's

⁵ For an exhaustive list of law review articles current to the end of 1995, see Wardle, *supra* note 2, at 97-101 app. B. To these must be added, from among a host of longer works, ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1995) [hereinafter SULLIVAN, VIRTUALLY NORMAL]. Nor has the explosion abated since that time. In addition to another spate of law review articles since Professor Wardle's compendium, the last few years have seen a flurry of anthologies and monographs on the subject. See, e.g., WILLIAM ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE (1996); ON THE ROAD TO SAME-SEX MARRIAGE: A SUPPORTIVE GUIDE TO PSYCHOLOGICAL, POLITICAL, AND LEGAL ISSUES (Robert P. Cabaj & David W. Purcell eds., 1998); SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) [hereinafter MORAL AND LEGAL DEBATE]; SAME-SEX MARRIAGE: PRO AND CON (Andrew Sullivan ed., 1997) [hereinafter PRO AND CON]; SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE (David M. Estlund & Martha C. Nussbaum eds., 1996); MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION (1997). The "explosion" has also shaken the judicial system. Even as the litigation in Hawaii has been diminished by recent events, *see infra* note 80, the focus has shifted to Vermont, where on November 18, 1998, the state supreme court heard arguments in a same-sex marriage case. See Carey Goldberg, *Vermont Supreme Court Takes up Gay Marriage*, N.Y. TIMES, Nov. 19, 1998, at A20. A decision is expected by early Summer 1999, and if the court decides that prohibiting same-sex couples from marrying offends the state's constitution, no referendum defying that holding could be held until 2002 under "Vermont's arcane laws." *Id.*

⁶ 852 P.2d 44 (Haw. 1993).

⁷ See *id.* at 67. In so holding, the court reversed the finding of the appellate court, which had entered judgment on the pleadings for the Director and dismissed plaintiffs' claim with prejudice. The lower court's decision was rendered on October 1, 1991. The subsequent tortured progress of *Baehr*, which is not yet over as of this writing, is chronicled *infra* Part I.B.

⁸ *Id.* at 67-68.

⁹ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1997); 28 U.S.C. § 1738C (Supp. II 1997)).

¹⁰ Cf. *Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 3 (1996) (statement of Sen. Edward M. Kennedy) (stating that a

expected ruling on remand—that the state could not lawfully prevent same-sex couples from marrying—was also at least partly responsible for this delayed-action response.¹¹ In enacting DOMA, Congress sought to define the word “marriage” by explicitly restricting it to the union of a man and a woman and to assure the states that they would not be required to recognize same-sex marriages celebrated in other states.¹² On September 21, 1996, in the middle of the night, President Clinton signed DOMA into law.¹³ Before and after DOMA’s enactment, many states enacted, or sought to enact, statutes seeking to deny full faith and credit to same-sex marriages celebrated in Hawaii or any other state that might allow them.¹⁴

While congressional interest in the issue of same-sex marriage can be assigned to the *Baehr* decision, that case provides only a partial account of the recent blossoming of interest. The more compelling story is that the flurry of scholarly and political debate has been a response to the dramatically heightened visibility of the gay and lesbian community and movement during the 1990s. There has been a dramatic surge in the numbers of gay men and lesbians¹⁵ “coming out”—at work, in their family relationships, and

more accurate title for DOMA would be “the Defense of Endangered Republican Candidates Act”) [hereinafter *Hearing on S. 1740*].

¹¹ *See id.*

¹² *See* DOMA, Pub. L. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1997); 28 U.S.C. § 1738C (Supp. II 1997)). DOMA provides in relevant part:

No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship. . . . In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

Id.

¹³ *See* Todd S. Purdum, *Gay Rights Groups Attack Clinton on Midnight Signing*, N.Y. TIMES, Sept. 22, 1996, at A22. President Clinton avoided contact with the issue to the fullest extent possible. He remarked, at one point, that DOMA was politically motivated and unnecessary, *see House Passes Anti-Gay Marriage Bill*, CHI. SUN-TIMES, July 12, 1996, at 3, and defended signing it with the tautological statement that marriage is “between a man and a woman.” Carol Jouziatis & Terry Wilson, *Gay Leaders Criticize Clinton Stand on Bill: GOP Forces Same-Sex Marriage Issue into Presidential Debate*, CHI. TRIB., May 24, 1996, at 6.

¹⁴ *See* H.R. REP. NO. 104-664, at 9-10 & nn.31-32 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2913-14 (stating that, as of that writing, some 37 states had attempted to pass such legislation).

¹⁵ This Article generally uses the terms *gay men and lesbians* to denote people of same-sex orientation. Occasionally, the term *gay people* is used and includes both men and women.

in connection with legal disputes involving issues such as the custody and adoption of children,¹⁶ the right to recover for a same-sex partner's injury,¹⁷ and the interpretation of rent laws.¹⁸ Thus, perceptive commentators could envision same-sex marriage surfacing as a major issue within a short time.¹⁹ But no one can predict the outcome of this debate, at least in part because the emergence of gay culture and identity from the closet has spawned a powerful effort to "reinforce the invisibility regime."²⁰

Indeed, the level of passion and interest on (what I must simplify by calling) the two sides²¹ has been intense. Opponents of

¹⁶ See Sonja Larsen, Annotation, *Adoption of Child by Same-Sex Partners*, 27 A.L.R.5th 54 (1995). See, e.g., *Adoption of T.K.J. & K.A.K.*, 931 P.2d 488 (Colo. Ct. App. 1996); *In re Adoption of Baby Z.*, 699 A.2d 1065 (Conn. Super. Ct. 1996); *In re K.M. & D.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997).

¹⁷ See, e.g., *Rutgers Council of A.A.U.P. Chapters v. Rutgers, the State Univ.*, 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997) (denying benefits of insurance to a same-sex partner).

¹⁸ See, e.g., *Braschi v. Stahl Assoc.*, 543 N.E.2d 49 (N.Y. 1989); *Koppleman v. O'Keefe*, 535 N.Y.S.2d 871 (App. Term. 1988). See also *infra* Part I.C (discussing *Braschi*).

¹⁹ Mark Strasser has been writing on this and related subjects since at least 1991. His earliest work on same-sex marriage is Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981 (1991). For earlier treatments of the miscegenation analogy, which I discuss *infra* Part III, see Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

²⁰ Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 371 (1997). One of the author's principal points is that the anti-gay initiatives that had been gathering force (at least until *Romer v. Evans*, 517 U.S. 620 (1996), declared one such initiative unconstitutional) were explainable by the effort of the heterosexual majority to coerce and enforce gay and lesbian invisibility. See Schacter, *supra*, at 369-71. Of course, this same impulse still has legal force in the area of same-sex marriage. See, e.g., *id.* at 376.

²¹ In addition to the "pros" and the "antis" (and I include supporters of "marriage lite," such as domestic partnerships, among the "antis") are the more radical element of the gay and lesbian community, some of whom argue that the institution of marriage is stultifying and would be no less so for gay men and (perhaps particularly) lesbians. See, e.g., Frank Browning, *Why Marry?*, N.Y. TIMES, Apr. 17, 1996, at A23, reprinted in PRO AND CON, *supra* note 5, at 132; Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK NAT'L GAY & LESBIAN Q., Fall 1989, reprinted in MORAL AND LEGAL DEBATE, *supra* note 5, at 164. But see ESKRIDGE, *supra* note 5, at 51-85 (discussing the arguments against same-sex marriage but concluding, first, that the commitment and financial rewards of the institution make it worthwhile and, second, that marriage does not create the subjugation of women and children, but reflects societal acceptance of that oppression, so that as attitudes about the issue change, so too will the institution of marriage); Barbara J. Cox, *A (Personal) Essay on Same-Sex Marriage*, in MORAL AND LEGAL DEBATE, *supra* note 5, at 27 (focusing on the "transformative" possibilities of gay and lesbian marriage, and the openness that attends such a commitment). For a recent essay opposing the primacy of same-sex marriage on the gay and lesbian rights agenda, see Paula L. Ettelbrick, *Legal Marriage Is Not the Answer*, HARV. GAY & LESBIAN REV., Fall 1997, at 34. The principal insight of this important

same-sex marriage have cited everything from Biblical injunction, to tradition, to natural law, to legal precedent, and to the asserted immutable “purposes” of marriage in support of their position. On occasion, the arguments have used provocative or sarcastic language—permitting same-sex marriage would be a “slap in the face to millions of Americans,”²² a “novelty” from the state of Hawaii,²³ and a “trivializ[ation]” of the institution of marriage.²⁴ Others have resorted to *ad hominem* attacks on those expressing opposing views.²⁵

On the other side, supporters have been equally passionate and have unleashed an impressive and compelling battery of arguments, aimed both at refuting the positions staked out above and at making the positive case for same-sex marriage. Not surprisingly, there occasionally have been intemperate remarks made here, as well.²⁶

Rhetoric aside, some of the arguments advanced against same-sex marriage must be taken more seriously than others, but all of these, I believe, stem from ill-articulated but deeply held beliefs about what is thought to be the necessary relationship between biological sexual identity and gender and its appropriate expression. Were that not so, one might expect that the basic principle of equality would easily triumph. This Article challenges those assumptions, which stand in the way of the fair legal and

essay, in my view, is that it views the same-sex marriage effort as a tool, or strategy, “to end heterosexual supremacy and oppression, and not as the goal itself.” *Id.* at 35. As developed throughout this Article, my view is that the strategy of emphasizing same-sex marriage is valuable as a means of challenging gender-based assumptions. Ettelbrick seems to overlook the transformative value of same-sex marriages on the institution itself.

²² *Hearing on S. 1740, supra* note 10, at 19 (testimony of Gary L. Bauer, President, Family Research Council).

²³ *Defense of Marriage Act: Hearing on H.R. 3396 Before the House Comm. on the Judiciary*, 104th Cong. (1996) (testimony of Hadley Arkes, Ney Professor of Jurisprudence and American Institutions, Amherst College) [hereinafter *Hearing on H.R. 3396*].

²⁴ House Debate on the Defense of Marriage Act (May 30, 1996) (statement of Rep. Hyde), *reprinted in PRO AND CON, supra* note 5, at 226.

²⁵ *See, e.g.*, House Debate on the Defense of Marriage Act (May 15, 1996) (statement of Rep. Inglis to Elizabeth Birch, Executive Director of the Human Rights Campaign), *reprinted in PRO AND CON, supra* note 5, at 220 (“I know, because you are the head victim, I know, you are in charge of victims, so you will decide who can speak . . . not anybody else.”); *Hearing on S. 1740, supra* note 10 (testimony of Gary L. Bauer) (“[O]rdinary people did not pick this fight.” (emphasis added)).

²⁶ *See, e.g.*, House Debate on the Defense of Marriage Act (May 15, 1996) (statement of Elizabeth Birch to Rep. Inglis), *reprinted in PRO AND CON, supra* note 5, at 220 (“I don’t think you know anything about the struggle of African-Americans in this country *vis-a-vis* gay Americans.”); House Debate on the Defense of Marriage Act (July 11, 1996) (statement of Rep. Lewis), *reprinted in PRO AND CON, supra* note 5, at 228 (“[This bill] should not be called the Defense of Marriage Act. It should be called the defense of mean-spirited bigots act.”).

social treatment of same-sex couples.

Before proceeding further, then, it is crucial to be clear about the specific meaning of the terms “sex” and “gender.” As the above connection between “sex” and “biology” suggests, I use “sex” and “sexual identity” to refer only to the biological differentiation between male and female.²⁷ By “gender,” on the other hand, I follow convention in referring to *the set of characteristics that are typically associated with one sex or the other, as socially learned roles*.²⁸ Although I delve into the notion of gender more fully as the Article progresses, a few examples of such presumed characteristics at the outset are useful. Thus, men are gender-defined as sexually aggressive, while women are “cast” as passive, if not as outright objects;²⁹ men are competitive, while women are cooperative; and men are analytical, while women are intuitive.³⁰

This Article presents a searching effort to get to the very bottom of the discomfort with same-sex relationships, by first unmasking the discomfort in some of the contexts in which it abides, and by then showing why it is ill-founded—“uprooting” it, as the title promises. This process requires identifying the underlying assumptions about the equivalence between biological sex and gender that gay people, by their very existence—especially their *open* existence—call into uncomfortable question. Same-sex marriage, as the ultimate societal vindication of the reality of the lives of gay and lesbian people, understandably creates the deepest disquiet of all.

²⁷ Even this division is open to question. There are a few people who have both male and female sex organs at birth, and others who choose to undergo a sex change. In addition to these rare challenges to the usual understanding of sex, there are those who argue that “there is nothing in the simple biological facts to establish that there are just two sexes. On this view, the brute biology of the matter could mean that there is one sex, or three, or five, or ten.” Cass R. Sunstein, *Homosexuality and the Constitution*, in *SEX, PREFERENCE, AND FAMILY*, *supra* note 5, at 219 (citing THOMAS WALTER LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* (1992)) [hereinafter Sunstein, *Homosexuality and the Constitution*]. In a few places in this Article, I deal with some of these issues. But for the most part, I use the term *sex* to reflect the popular understanding of dichotomous biological differentiation.

²⁸ See Martha C. Nussbaum, *Constructing Love, Desire, and Care*, in *SEX, PREFERENCE, AND FAMILY*, *supra* note 5, at 17-29 (recognizing these definitions, but then suggesting that even certain aspects of so-called biological definition are, to some extent, culturally determined, or at least affected).

²⁹ Cf. Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 *STAN. L. REV.* 691, 696 (1997) (arguing for a theory of sexual harassment as gender harassment).

³⁰ Cf. Susan Moller Okin, *Sexual Orientation and Gender: Dichotomizing Differences*, in *SEX, PREFERENCE, AND FAMILY*, *supra* note 5, at 44-45. For an interesting historical analysis of these stereotypes and the politically useful role they play, see ROBERT L. HAYMAN, JR., *THE SMART CULTURE* 236-41 (1998).

Once the unstated assumptions underlying the discomfort are exposed and challenged, no defensible reason will remain for denying recognition to same-sex couples who, after all, have the very same aspirations, capacity to love and be loved, and sense of commitment as does the entire human community. Further, the reappraisal of the sex-to-gender link that this Article means to trigger can also occasion an overdue rethinking of gender roles within all marriages.³¹

Inasmuch as the assumptions about the connection between sex and gender are so deeply rooted, I identify and discuss them in a variety of different situations before turning to a rigorous analysis of the merits of same-sex marriage. Accordingly, the first several Parts of this Article provide a not-so-random survey of the jurisprudence that has developed around the lives of gay and lesbian people, emphasizing features of the cases and social background that are instrumental in making the deeper point later. With this groundwork in place, this Article can squarely address the arguments against same-sex marriage and show why they fail of their essential purposes.

More specifically, Part I of this Article provides a brief (and pointed) account of the broad judicial landscape relevant to the lives of same-sex couples, including the few state cases on same-sex marriage, as well as several adoption and custody cases. This Part also includes a brief societal and judicial account of the economic and social reality of the lives of same-sex couples who are functioning, to one extent or another, *as if* they were married.³² It turns out that courts have sometimes, for practical reasons, recognized the reality of same-sex couples. Inasmuch as such recognition carries with it a challenge to the strictly polar model of gender identity, I explore the implications of these decisions for the question of same-sex marriage.

³¹ See JAMAKE HIGHWATER, *THE MYTHOLOGY OF TRANSGRESSION: HOMOSEXUALITY AS METAPHOR* (1997). Mr. Highwater impressively surveys a variety of cultures to illustrate that contemporary Western notions of gender roles are by no means compelled. Among Native Americans, for example, those who existed in the space between the traditional poles of male and female were accepted: "Instead of viewing deviation as deformity and transgression, an openness to gender identities persisted wherever traditionalists resisted Christian assimilation . . ." *Id.* at 80. For a more complete discussion of these points, see *infra* notes 248-52 and accompanying text.

³² There is one way of reading this sentence as insulting to gay men and lesbians in committed relationships, who might regard themselves *as* married, not "*as if*" married. In my view, this emphasis on commitment captures the essence of marriage and is an important part of my argument for extending its legal protections to same-sex couples. See *infra* Part IV. The only point of the sentence in the text is that the law does not currently recognize the relationship, at least in important respects. See generally *supra* note 4.

Consideration of specific United States Supreme Court cases that might bear on same-sex marriage is deferred until Part II. After analyzing these cases on marriage, privacy, and the rights of gay men and lesbians, Part II concludes that no prediction regarding the constitutionality of prohibiting same-sex marriage can be extracted from the Court's rulings to date. This is in part because of the clash between its strong support for the formal principle of equality, on the one hand, and the depth of the Court's commitment to traditional notions of gender identity, on the other. This conclusion is hedged, though, because of the explosive power inherent in the Court's 1996 decision in *United States v. Virginia*.³³

Part III considers the much-discussed analogy between miscegenation and same-sex marriage. It argues that the analogy, while not wholly apt, is yet forceful, and that a clear focus on the relationship between the two situations draws into relief the reasons underlying the reluctance to recognize same-sex marriage.

Part IV addresses the arguments for and against same-sex marriage. Even those opposing arguments that have no proper foundation in a secular constitutional democracy are taken seriously here, not because they are persuasive on their own terms, but because of what they reveal about the deeper disquiet with same-sex marriage. This endeavor relies on the insights gained from political liberalism about the proper limits of state action, but does not stop there. I also show, partly by way of response to arguments against same-sex marriage, that such unions are to be welcomed for the normative "goods" they supply.³⁴ The point that has often been missed, however, is that these goods are not likely to be recognized as such by the dominant heterosexual culture. I offer an explanation as to why this is so and make a plea for liberating change.

One aim of this Part is to demonstrate that welcoming committed gay men and lesbians into the institution of marriage will have the effect—unexpected to most—of *strengthening* the institution rather than accelerating its decline. This conclusion depends critically on the premise that our understanding of

³³ 518 U.S. 515 (1996); see also discussion *infra* Part II.B.

³⁴ For this Article's discussion of the "goods" of same-sex marriage, I am indebted to Chai Feldblum, who emphasized this point during a presentation at Temple University School of Law, and to Carlos Ball, whose work was drawn to my attention by Professor Feldblum's remarks. See Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997). Andrew Sullivan appears to have first suggested the point. See SULLIVAN, VIRTUALLY NORMAL, *supra* note 5, at 167 (criticizing liberal thinking for "using the language of rights in an area where it is impossible to avoid the language of goods").

marriage is profitably served by reimagining its interior, while leaving its walls undisturbed.

First, though, a disclaimer is in order. In a case such as this, more modesty than writers usually admit is appropriate. No single law review article—or any other vehicle—can dislodge assumptions that have been deeply fissured into the very core of self-definition. This Article will have been successful to the extent it contributes to that end.

I. CURRENT LEGAL AND SOCIAL STATUS OF SAME-SEX COUPLES

Baehr v. Lewin did not spring, full-blown, as did Athena from the head of Zeus. Indeed, in the years since the landmark Stonewall Uprising,³⁵ several state courts had been asked to either interpret their states' marriage laws as permitting same-sex marriages or to declare such laws unconstitutional. Although all of these efforts were drearily unsuccessful, a brief analysis of a few of these decisions provides the first hint of the deeper concern that motivates the opposition.³⁶ This discussion will also ready us for an appreciation of the significance of *Baehr*. As the final piece of this Part shows, however, courts are not uniformly unwilling to recognize the reality of the lives of same-sex couples. Ferreting out the underlying perceptions behind gay-supportive decisions in other cases involving same-sex couples furthers the understanding of the true discomfort with same-sex marriage, even as it suggests a path toward removing such discomfort.

A. *Early Cases Denying the Right of Same-Sex Couples to Marry*

In *Baker v. Nelson*,³⁷ the plaintiffs, James McConnell and Richard Baker, appealed the trial court's denial of their request for a writ of mandamus to compel the Clerk of the Court to issue the marriage license they had been denied.³⁸ Although nothing in the state law explicitly excluded same-sex couples from obtaining

³⁵ Stonewall was the (as it turned out, apt) name of a gay bar in New York's Greenwich Village section. On June 29, 1969, patrons of that establishment responded to a police raid by resisting arrest, issuing verbal defiance, and, in some cases, fighting back physically. See generally MARTIN DUBERMAN, *STONEWALL* (1993). This event is now considered to have been an important trigger for the gay and lesbian rights movement. See RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 61 (1988).

³⁶ For excellent treatments of these early cases, see Strasser, *supra* note 19, at 982-89, 1010-14; James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 111-16 (1993).

³⁷ 191 N.W.2d 185 (Minn. 1971).

³⁸ See *id.* at 185.

marriage licenses, the Minnesota Supreme Court read the marriage statutes as implicitly limited to unions between men and women.³⁹ One reason the court gave was anchored in the surrounding language of the statute, which was “replete with words of heterosexual import such as ‘husband and wife’ and ‘bride and groom.’”⁴⁰ In addition, the court opined that “the original draftsmen of our marriage statutes” would not “have used the term in any different sense.”⁴¹ These unspectacular statutory conclusions, however, were pointedly undergirded by a fundamental belief that the “historic institution [of marriage] manifestly is more deeply founded than the asserted contemporary concept of marriage . . . for which petitioners contend.”⁴² This “historic institution,” the court noted, “uniquely involv[es] the procreation and rearing of children [and] is as old as the book of Genesis.”⁴³

The *Baker* court can thus be seen as having used a deep, definitional preclusion.⁴⁴ By the “historic institution of marriage,” the court meant to, and did, highlight the fundamental difference in sex.⁴⁵ This was intuited as more central to the institution than the restrictions based *merely* on race that the Supreme Court had disallowed just four years earlier in *Loving v. Virginia*.⁴⁶ But, as Mark Strasser has pointed out, the court’s implied effort at

³⁹ *See id.* at 186.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ For certain other purposes, such as adoption and custody, same-sex couples are sometimes treated as though married. This inconsistency is explored further *infra* Part I.C. Another area in which courts are beginning to recognize the reality of same-sex couples is domestic violence. In *Ohio v. Yaden*, 692 N.E.2d 1097 (Ohio Ct. App. 1997), for example, the Ohio Court of Appeals interpreted a statute that punished violence between persons living as spouses, as applying to cohabitating same-sex partners. *See id.* at 1098-99. What was interesting about the decision for present purposes, though, is that the Ohio Court of Appeals had already defined “cohabitation” as “a man and a woman living together in the same household and behaving as would a husband and wife.” *State v. Williams*, No. C-950530, 1996 WL 107574, at *5 (Ohio Ct. App. Mar. 13, 1996) (quoting *State v. Van Hoose*, No. 3031, 1993 WL 386314 (Ohio Ct. App. Sept. 27, 1993)), *rev’d on other grounds*, 683 N.E.2d 1126 (Ohio 1997). The *Yaden* court noted that this definition did not exclude same-sex couples, who were not “contemplated under the facts of” that case. 692 N.E.2d at 1100. The court then looked at the reality of the relationship of the couple before it, and found that they were cohabitating, thereby bringing the defendant within the statute’s reach. *See id.* at 1101. Note that the result, while commendable in protecting the victim of domestic violence and in recognizing (for this purpose) the lives of the couple, is in tension with the marriage cases where, even absent statutory proscription against same-sex couples, courts have been unwilling to allow them to wed.

⁴⁵ *See Baker*, 191 N.W.2d at 186.

⁴⁶ 388 U.S. 1, 11 (1967).

separating legislative definitions (those based on race, for example) from deeper definitions (those based on sex) does not withstand analysis.⁴⁷

Certainly, for a large part of American history, marriage between the races was regarded as “unnatural”; the statutes prohibiting it were meant to reflect the “deep structure” of racial difference.⁴⁸ A court can decide, though, as the Supreme Court did in *Loving*, that the “deep” definition is not so essential, after all.⁴⁹ There, the Court was willing to encounter the truth that anti-miscegenation laws reflected a “circle the wagons” response to the threatening reality of people’s lives, *not* some temporally required response to a perceived “fact of nature.”⁵⁰

Indeed, as argued in Part III of this Article, the Court’s determination of constitutionality *vel non* is bound to its own views of whether the challenged definitional restriction is “natural” or contingent.⁵¹ But all definitions are contingent, so that judicial attempts to separate nature from “mere” legislative initiative is exposed as an exercise in heuristics, at best, or distressing blindness, at worst. The interesting question, deferred for now, is whether the current, working understanding of marriage and its ends *require* precluding same-sex unions.⁵²

While the Washington Court of Appeals’ denial of a similar request for a marriage license in *Singer v. Hara*⁵³ was also based upon its conviction that “the recognized definition of [the marriage] relationship [is] one which may be entered into only by two persons who are members of the opposite sex,”⁵⁴ the more recent decision by the District of Columbia Superior Court in *Dean v. District of Columbia*⁵⁵ went beyond the preclusion-through-definition analysis, at least rhetorically.⁵⁶ The *Dean* court

⁴⁷ See Strasser, *supra* note 19, at 987-89.

⁴⁸ The best account I have found of the motivations for, sources of, and fears driving these statutes is Emily Field Van Tassel, “*Only the Law Would Rule Between Us*”: Antimiscegenation, the Moral Economy of Dependency, and the Debate Over Rights After the Civil War, 70 CHI.-KENT L. REV. 873 (1995). For a full consideration of Van Tassel’s arguments, see *infra* Part III.

⁴⁹ See *Loving*, 388 U.S. at 7-12.

⁵⁰ See *id.* at 11-12.

⁵¹ See discussion *infra* Part III.

⁵² See discussion *infra* Part III.C.

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

⁵⁴ *Id.* at 1192.

⁵⁵ No. CIV.A. 90-13892, 1992 WL 685364, at *1 (D.C. Super. Ct. June 2, 1992), *aff’d*, 653 A.2d 307 (D.C. App. Ct. 1995).

⁵⁶ The court did use this tactic, stating that marriage *means* the union of male and female. See *id.* at *1 (quoting *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971)). Nevertheless, as noted in the text, the court at least considered whether a fundamental

addressed the issue whether denying a marriage license to a same-sex couple amounts to the denial of a fundamental right. Since a line of Supreme Court cases had established that the right to marry is fundamental, the court would at least seem to have been compelled to consider these cases seriously.⁵⁷ It did not, instead noting that the “inquiry herein involves not the fundamental nature of an abstract ‘right to marry,’ but rather, whether the Constitution confers a fundamental right upon persons of the same sex to marry.”⁵⁸ Once the issue was so cast, of course, the result was ordained; since same-sex couples have never been permitted to marry, their right to do so can hardly be said to be “deeply rooted” in the nation’s history, as the court then required of a fundamental right.

The trial court in *Dean* therefore ended up in the same place as the cases relying exclusively on definition, and for the same underlying reason: the right to marry cannot be understood as anything but the union of man and woman. By aggregating the two parties, and considering their right *only as a couple*, the court managed to make that point in an indirect way. As one commentator has noted, this approach does violence to the Supreme Court’s methodology in the marriage cases, where the analysis has been accomplished in two steps: First, the Court has focused on whether there is a fundamental right to marry (and has found that there is); second, the Court has required the party restricting that right to proffer a compelling justification for doing so.⁵⁹ By collapsing the two issues into a self-answering question,⁶⁰ the Court avoided seriously addressing the issue whether the State may deny a couple the right to marry on the basis of their sex (or sexual orientation).⁶¹

The District of Columbia Court of Appeals endorsed this result in a lengthy and careful opinion.⁶² The appellate court’s

right had been abridged. *See id.*

⁵⁷ *See infra* Part II.

⁵⁸ *Id.*

⁵⁹ *See Trosino, supra* note 36, at 116. Thus, the Court has used the fundamental right to marry as a kind of battering ram, breaking down any barrier to the right and leaving the state essentially defenseless against a finding of unconstitutionality. *See, e.g.,* Turner v. Safley, 482 U.S. 78 (1987) (prisoners); Zablocki v. Redhail, 434 U.S. 374 (1978) (noncustodial parents who are delinquent in child support payments). These and other cases are discussed more comprehensively *infra* Part II.

⁶⁰ Of course, this is not too different from what the Supreme Court did in *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See also infra* Part II.

⁶¹ As the remainder of this Article illustrates, the two questions are closer than might first be thought.

⁶² *See Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. Ct. 1995).

ruling is difficult to discern, however, because the *per curiam* decision was written by Judge Ferren, the one judge who dissented from the conclusion. All three judges agreed with the trial judge that no fundamental right to same-sex marriage could be found⁶³ and that the District of Columbia's Human Rights Act, despite its plain language prohibiting discrimination based on "sex . . . [or] sexual orientation,"⁶⁴ was not intended by the legislature to apply to same-sex marriages.⁶⁵ In addition, all three judges supported the position that "marriage" was understood by the legislature to refer exclusively to the union of one man and one woman.⁶⁶

Nonetheless, Judge Ferren's partial dissent represented a breakthrough on the issue of same-sex marriage. He first expressed concern about deciding such a complex issue, which, for him, hinged in important part on whether homosexuality is immutable, without full factual exploration.⁶⁷ A showing of immutability would raise a presumption that denial of the right of same-sex couples to marry violates equal protection under the laws.⁶⁸ Notably, Judge Ferren took specific exception to the tautological reasoning of his colleagues that the traditional definition of marriage could be used not only to ascertain legislative intent, but also to defeat, pre-analytically, an equal protection claim. As I point out in Part IV.B.1, a definition supported by historical pedigree might explain the current state of the law but cannot be converted into an argument for ignoring the rights of those whom the definition excludes.⁶⁹ If gay people "comprise a suspect or quasi-suspect class[,] they cannot lawfully be denied the right to marry on the constitutionally unprecedented ground that this claimed right, by definition, is impossible to

⁶³ See *id.* at 331-33. This holding was based in part on the assumption that the right to marry is closely tied to procreation and child-rearing.

⁶⁴ The Human Rights Act, D.C. CODE ANN. § 1-2519(a)(1) (1992).

⁶⁵ See *Dean*, 653 A.2d at 319.

⁶⁶ See *id.* at 315.

⁶⁷ Judge Ferren offered a powerful, anti-majoritarian rationale for the finding of legislative facts by a court. See *id.* at 330. More generally, his opinion contains a lengthy and useful explanation of the distinction between adjudicative and legislative facts. See *id.* at 322-31.

⁶⁸ In so doing, Judge Ferren revealed an inner conflict between substantive progressivism and institutional conservatism. On the one hand, he devoted some 25 pages to exploring a rich body of literature and decisional law addressing the threshold issue of whether gay people constitute a suspect class, see *id.* at 333-58, and the tenor of his probing strongly suggests that he believes the suspect classification requirements have been met. On the other hand, he was unwilling to draw any conclusions without a further "ideal" kind of hearing." *Id.* at 356. Much of this hearing would be devoted to exploring whether homosexual orientation is immutable, with some time spent also on the government's justification for banning same-sex marriage. See *id.* at 358.

⁶⁹ See *infra* Part IV.B.1.

confer.”⁷⁰

Judge Ferren’s opinion is ultimately sympathetic to the legal rights of gay people, since it appears he believes the evidence will show that “gayness” is immutable. But the choice of equal protection over fundamental rights is a mistake, because “gayness” may not turn out to be immutable after all.⁷¹ The more serious problem is that this approach is steeped in the very assumptions that should be challenged at every turn. The quest for the grail of immutability is a legal version of a pessimistic view of human possibility: men have certain characteristics, women have others, and gay people are a sort of “third sex” that is only attracted to those of the same biological sex. What, then, of those who identify themselves as bisexual? The presence of bisexuals should alert us to the danger of essentializing, but that danger is no less real in the case of those identified as “straight” or “gay.” While many people believe their sexual orientation to be wholly towards one sex, others do not. And these beliefs can change in particular cases, in any event. Would it not be better to recognize the validity of any loving relationship between two people, such that the State, so long as it is to recognize the institution of marriage at all, welcomes *any* two adults?

Despite Judge Ferren’s lone dissenting voice, states had consistently “view[ed] marriage as an ‘inherently’ male-female institution[,]” that thereby, via definitional fiat, had excluded same-sex couples.⁷² Resting these holdings on history enabled the court to avoid confronting not only the issue of fundamental fairness, but the deeper question of *why* the right to marry must be limited by biological differentiation.⁷³ But, even as *Dean* percolated through the courts, *Baehr v. Lewin* changed the

⁷⁰ *Id.* at 359 (quoting Judge Ferren’s “Postscript: Response to Majority on Equal Protection”).

⁷¹ See HIGHWATER, *supra* note 31, at 129 (quoting STEPHEN J. GOULD, *THE PANDA’S THUMB* (1980)):

[T]he strategy is a dangerous one, for it backfires if the genetic speculation is wrong. If you defend a behavior by arguing that people are programmed directly for it, then how do you continue to defend it if your speculation is wrong. . . . Better to stick resolutely to a philosophical position on human liberty.

⁷² David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 9 (1997).

⁷³ To be fair, *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), did express the view that the biological difference is necessary to the purpose of procreation. But this conclusion only drives the issue down to a deeper level: Is procreation really essential to marriage? And what does stating that it is necessary reveal about the unstated assumptions concerning the differences between men and women? See discussion *infra* Part IV.B.

compass of analysis.

B. Baehr v. Lewin

Not much notice was paid when, on October 1, 1991, the Circuit Court of the First Circuit in the State of Hawaii, issued a dismissal of the plaintiff's complaint for a declaration that the state's denial of marriage licenses to same-sex couples was unconstitutional.⁷⁴ After all, as noted above, several similar decisions had been reached by lower courts, and the appeals from those decisions had uniformly resulted in affirmance.⁷⁵ But the earth shifted out of its orbit on May 5, 1993, when the Hawaii Supreme Court reversed the lower court's holding.⁷⁶ Although the court did not squarely rule that the prohibition was unconstitutional, it sent a clear signal of its ultimate willingness to do so, holding that, at trial, "the burden [would] rest on Lewin to overcome the presumption that [the law] is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights."⁷⁷ On December 3, 1996, Judge Chang of the Hawaii Circuit Court issued the court's ruling that the State had not met the difficult burden that the state supreme court had imposed.⁷⁸

The case was then again appealed to the Hawaii Supreme Court,⁷⁹ but, given the broad discretion afforded the trial judge in findings of fact, the decision seemed unlikely to be reversed.⁸⁰ As

⁷⁴ See *Baehr v. Lewin*, 852 P.2d 44, 52 (Haw. 1993).

⁷⁵ See *supra* Part I.A and cases cited therein.

⁷⁶ See *id.* at 44.

⁷⁷ *Id.* at 68.

⁷⁸ See *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, at *1 (Haw. Cir. Ct. Dec. 3, 1996).

⁷⁹ As of this writing, in March 1999, the court still had not issued its decision. For a discussion of the complex events that have occurred since Judge Chang's decision, see *infra* note 80.

⁸⁰ It now appears unlikely that same-sex couples will be able to marry in Hawaii. During the most recent general election in November 1998, the voters overwhelmingly accepted the following amendment to Article I, section 23, of the state constitution, which the legislature had previously approved: "The legislature shall have the power to reserve marriage to opposite-sex couples." See Sam Howe Verhovek, *From Same-Sex Marriage to Gambling, Voters Speak*, N.Y. TIMES, Nov. 5, 1998, at B1. Since the amendment is not self-executing, however, the legislature still needed to enact the restriction. It did so. The appeal of *Baehr* is still on the docket of the Hawaii Supreme Court, which has requested briefing from the parties on the effect of the amendment on the case before it. See Ellen Goodman, *Gay Marriage Turns into Long Engagement*, DALLAS MORNING NEWS, Jan. 5, 1999, at 9A. One possible outcome, based on the court's finding that disallowing same-sex couples from marrying constitutes gender discrimination, would be a determination that same-sex couples must be afforded all of the benefits of marriage, even if the union is not

the following analysis discloses, the path that the Hawaii Supreme Court has thus far taken to this revolutionary holding, while commendable in its attainment of justice, left behind a strong residuum of just the sort of essentialist, definitional thinking that has long provided other courts cover for avoiding the hard questions of same-sex marriage. And the internal contradictions embedded in the decision may contribute to further problems.

The plaintiffs presented two arguments, both anchored in the Hawaii State Constitution, which goes beyond the United States Constitution in expressly granting a right to privacy⁸¹ and in providing specific protection of civil rights in its constitutional guarantee of equal protection of law.⁸² As to the privacy argument, the court took much the same traditional road as that traversed by the court in *Dean*. The court held that, although the Supreme Court located the fundamental right to marry within the right to privacy, the right to marry was itself defined by “the traditions and collective conscience of our people.”⁸³ Those traditions, the Hawaii court found, did not include the right of same-sex couples to marry. In so holding, the court relied on the traditional understanding of marriage and made the couple stand together in asserting the right to marry.⁸⁴

In the next part of its opinion, though, the court’s earlier focus on the rights of the couple led it to shift in favor of the plaintiff’s position. Once the units to be considered are couples, restricting the right to marriage to opposite-sex couples both implicates the State’s equal protection guarantee and creates a presumptive violation of it, because it amounts to discrimination based on sex.⁸⁵ For the same reason that aggregating individuals into a couple was

so labeled. In a related matter, the case has already resulted in a limited victory for same-sex couples, in that the compromise that produced the ballot initiative has given rise to the most comprehensive domestic partnership laws found in any state. Further, the governor has proposed a package that is yet more sweeping and has in fact been called an “everything but” plan. *Id.* For a then-thorough account of the developments in the Hawaii state legislature since the 1993 *Baehr* decision, see Coolidge, *supra* note 72, at 11-18. For a discussion of the progress of the Hawaii decision current to shortly before the last election, see Evan Wolfson, *How to Win the Freedom to Marry*, HARV. GAY & LESBIAN REV., Fall 1997, at 29, 29.

⁸¹ “The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.” HAW. CONST. art. I, § 6.

⁸² “No person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry.” *Id.* § 5.

⁸³ *Baehr v. Lewin*, 852 P.2d 44, 52 (Haw. 1993).

⁸⁴ Again, this is what the court did in *Dean*. See *supra* notes 55-61 and accompanying text.

⁸⁵ See 852 P.2d at 58.

troublesome for purposes of defining fundamental rights, it might seem odd here. In most cases involving discrimination based on sex, the allegation is that a member of one sex was denied basic rights *because of that sex—male or (usually) female*.⁸⁶ Here, by contrast, the court noted that the State was imposing a broader restriction based on a (presumptively) invalid classification by sex.⁸⁷ Otherwise stated, some *couples* are treated differently than others.⁸⁸

This broad reading of the requirements of the law was expressly tied to the Supreme Court's expansive view of the prohibitions against classifications based on race in *Loving v. Virginia*,⁸⁹ where the Court struck down Virginia's anti-miscegenation statute. But, whereas the Court in *Loving* expressly addressed and rejected the argument that because the statute imposed an equal prohibition against everyone, the proscription against interracial marriages was not race discrimination,⁹⁰ the *Baehr* court expressly declined to decide the parallel argument—whether the marriage law constituted impermissible discrimination based on sexual orientation. Ignoring the plaintiffs' sexual orientation, even in the face of their express proclamation of that orientation, the court noted that parties to a same-sex marriage might or might not be "homosexual."⁹¹

In so holding, the court in some sense disappoints those who seek recognition of rights based on sexual orientation.⁹² The

⁸⁶ See Sunstein, *Homosexuality and the Constitution*, *supra* note 27, at 210.

⁸⁷ See *Baehr*, 852 P.2d at 60.

⁸⁸ Another way to view the denial of equal protection is suggested by ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS* 205-07 (1995). Focusing on individuals, not on groups, Wintemute persuasively argues that "mirror image symmetry" is not equality, but instead a variant of "separate but equal" treatment (the equality being illusion, not reality). The mirror image idea is as follows: If *A*, but not *B*, can do something (say, marry) with *C*, but not *D*, then it is not discriminatory if *B*, but not *A*, is permitted to do something with *D*, but not *C*. As Wintemute notes, this approach attempts to justify one discrimination with another. See *id.*

⁸⁹ 388 U.S. 1, 2 (1967), *quoted in Baehr*, 852 P.2d at 67-68.

⁹⁰ In *Loving*, the Court noted that the purpose of anti-miscegenation statutes was to protect white supremacy. See 388 U.S. at 7. Thus, even though the statute, on its face, treated white and black people alike, it was an effort to keep the races separate and therefore "to maintain the form and the conception of racial difference that are indispensable to white supremacy." Sunstein, *Homosexuality and the Constitution*, *supra* note 27, at 208-09. For a discussion of Sunstein's thesis, see *infra* Parts III-IV.

⁹¹ *Baehr*, 852 P.2d at 51-52 & nn.11-12. This observation achieves a strange uncoupling of sex and marriage that perhaps betrays the discomfort felt even by the Hawaii court in contemplating homosexual intimacy. As strategically imprudent as it might seem (at least in the short term), it is essential for same-sex marriage advocates to acknowledge the sexual dimension of most of their relationships. See Chai R. Feldblum, *Keep the Sex in Same-Sex Marriage*, HARV. GAY & LESBIAN REV., Fall 1997, at 23.

⁹² See Anthony C. Infanti, *Baehr v. Lewin: A Step in the Right Direction for Gay*

decision is conservative, in a way, because the court avoided creating rights that it could not find announced in the organic law of the state. At the same time, however, the Hawaii Supreme Court left itself open to criticism—and to second-guessing by other courts—that it misconstrued *Loving*, which found racial discrimination only because of the underlying goal of maintaining the supremacy of the white race. Following *Loving*, one might ask, rhetorically: How can Hawaii's law against same-sex marriage be construed as entrenching either sex in a position superior to the other?

In fact, though, the Hawaii court may have struck a deeper vein than it realized. As we shall see, the focus on sex discrimination can provide a window into the problems with sex and gender-typing that implicitly support the ban on same-sex marriage.⁹³ In brief, instead of entrenching the view that one sex is superior to the other,⁹⁴ restricting the right to marry to opposite-sex couples may serve to support stereotypical ideas about gender and its expression that constitute the deepest kind of sex bias. This issue is treated in more depth throughout this Article.

C. *The Lives of Same-Sex Couples*

Sartre reminds us that “the greatest evil of which persons are capable is to treat as abstract that which is concrete.”⁹⁵ In this brief Part, I hope to provide just enough information about the “married” lives of gay men and lesbians to accomplish two purposes. First, the focus on these relationships suggests that the law is operating inconsistently; as we have seen, when the issue is marriage itself, courts have said no to same-sex couples. When the issue presented is not *directly* marriage, on the other hand, tacit judicial recognition of same-sex marriage has sometimes been

Rights, in LAW & SEXUALITY: A REVIEW OF LESBIAN AND GAY LEGAL ISSUES (1994), reprinted in MORAL AND LEGAL DEBATE, *supra* note 5, at 227-28. Infanti stated that the case:

[M]ay be somewhat of a failure [inasmuch as the] plurality took every opportunity to distance itself from gay marriage and explicitly based its decision on the farcical construct of a “same-sex marriage”: a marriage touted to be not just for gays, but for any two persons of the same sex who wish to marry.

Id. at 228.

⁹³ See discussion *infra* Parts III-IV.

⁹⁴ A case could be made, though, that the institution of marriage continues to permit, and perhaps subtly to encourage, the subjugation of women. See Eitelbrick, *supra* note 21, at 164; Koppelman, *supra* note 19, at 159-60. If this is true, the analogy to *Loving v. Virginia* is complete without the more recondite point about embedded notions of gender.

⁹⁵ Daniel Maguire, *The Morality of Homosexual Marriage*, in MORAL AND LEGAL DEBATE, *supra* note 5, at 57, 60 (citing Jean-Paul Sartre (without specific reference)).

evident. I offer some suggestions as to why this might be so. A second, and related point, is that these lives offer testimony to the creative transformation that marriage, regardless of the gender of the couple, has undergone and continues to undergo. As David Coolidge points out, marriage is not defined solely by the State;⁹⁶ at least this is true when one is attempting a *description* of it apart from its legal definition. The trick is to make the courts see that the flexibility and commitment that inheres in same-sex couples impels them to take the final step, by allowing those commitments to be state-solemnized.

1. Same-Sex Couples: The Basic Unit

We should probably begin with the most basic unit, the couple. Many thousands of gay men and lesbians are living lives that, except for how they express sexual love for each other, are indistinguishable from those of their opposite-sex counterparts. Of course, this is not to say that either same or opposite-sex couples follow one model. Couples may be more or less monogamous,⁹⁷ or exhibit different levels of emotional commitment to each other; they may live together always, or be separated for a time; and they may be financially independent or united. These variations may be expanded with little imagination. The only difference defined by sexual orientation, though, is that the same-sex couples are closed off from the benefits that the state confers on those opposite-sex couples that choose to marry.

The economic benefits of marriage are well known. The federal boons have recently been comprehensively catalogued by the United States General Accounting Office, according to which there were 1,049 laws affecting married couples as of February 7, 1997.⁹⁸ There are, of course, many benefits conferred by individual

⁹⁶ See Coolidge, *supra* note 72, at 51-54. Unfortunately, Coolidge presents strict requirements for membership in the social institution of marriage that exclude same-sex couples. See *id.* at 53.

⁹⁷ This obvious point, which Andrew Sullivan made the tactical mistake of acknowledging in *VIRTUALLY NORMAL*, *supra* note 5, at 202-04, is sometimes seized upon in arguing that gay people should not have the right to marry. See discussion *infra* Part IV.B. For an interesting discussion of monogamy versus openness in a "marriage," see Feldblum, *supra* note 91, at 25. In her view, the debate about the ends of marriage needs to be expressly engaged by gay activists. It also needs to be engaged by *straight* people, whose own ideas about marriage are not exactly uniform.

⁹⁸ See U.S. GENERAL ACCOUNTING OFFICE, *Defense of Marriage Act (1997)* (GAO/OGC-97-16) (report to Congressman Hyde on laws in the United States Code involving marital status) (visited Feb. 15, 1999) <<http://www.gao.gov/AIndexFY97/abstracts/og97016.htm>>; Lou Chibbaro Jr., *1,049 Laws Affect Married Couples*, *GAO Says*, WASH. BLADE, Feb. 21, 1997, at 17. The GAO did not specify how many of these laws constitute actual benefits, but one can state with

states as well, as the Hawaii Supreme Court noted in *Baehr*.⁹⁹ In addition, there is the social standing that comes with membership in a privileged institution. Although this standing is not always apparent to its members, it *is* apparent to those who are excluded: “The lack of . . . social support[t] represents a constant reminder of society’s view of same-sex liaisons as transitory, illicit, and not to be taken seriously.”¹⁰⁰

That gay men and lesbians are often involved in relationships that somewhat mirror those of straight men and women is neither a revelation nor an argument. But it does remind us of the human beings too easily covered up by the arguments made on both sides of this issue. In fact, although courts are not often sympathetic to the plight of same-sex couples denied the legal benefits that married people take for granted, there are notable exceptions. Perhaps the best known of these is *Braschi v. Stahl Associates*,¹⁰¹ where the New York Court of Appeals ruled that the surviving same-sex partner of a tenant was a “family” member within the meaning of the rent control law and therefore not subject to dispossession by the landlord.¹⁰² The *Braschi* court was willing to interpret the word “family” so as to reflect the reality of the living situation. Does this decision recognize the validity of the marital relationship between the two men, though? On closer examination, the answer is at least less than clear.

The regulation in question in *Braschi* prohibited dispossession of “either the surviving spouse of the deceased tenant *or some other member of the deceased tenant’s family* who ha[d] been living with the tenant.”¹⁰³ The Court of Appeals agreed with the trial court’s determination that the surviving man qualified as a member of the deceased’s family, while avoiding any express consideration of whether the couple might be considered as “spouses” under the statute. Further, even the definition of “family” here must be read in light of the narrow purposes of the rent control statute. If “family” were defined as the landlord urged—in the same way as in intestacy law, by “relationships of

confidence that the law provides substantial advantages to those who enjoy the state’s approval in the marital relation.

⁹⁹ See *Baehr*, 852 P.2d at 59. The court, for understandable reasons, did not “engage in an encyclopedic recitation of all of” these benefits, but did list fourteen of the most important. *Id.*

¹⁰⁰ BETTY BERZON, PERMANENT PARTNERS: BUILDING GAY & LESBIAN RELATIONSHIPS THAT LAST 11 (1988).

¹⁰¹ 543 N.E.2d 49 (N.Y. 1989).

¹⁰² See *id.* at 53-54.

¹⁰³ *Id.* at 50 (emphasis added) (quoting N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d) (1997)).

blood, consanguinity, and adoption”¹⁰⁴—the purposes of the statute would be ill-served, said the court. Those purposes had little to do with the succession of real property, but were instead seen as “a means of protecting a certain class of occupants from the sudden loss of their homes.”¹⁰⁵ The court then opted for a definition of family that would serve the goal of protecting occupants, by including “two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence.”¹⁰⁶

Thus, the court could recognize the couple in “the relatively limited economic context of landlord and tenant,”¹⁰⁷ and under the guise of interpreting a statute. Nonetheless, there is no escaping that the holding to some extent validates the relationship between these same-sex partners. Indeed, although the court seized on the statutory definition of “family” and not “spouse,” several of its pronouncements in dicta are powerfully affirming of the same-sex relationship. The court purposefully eschewed “fictitious legal distinctions [and] genetic history,” instead building its protection from the “foundation [of] the reality of family life.”¹⁰⁸

In remitting the case to the appellate division for a determination of the family status of the parties, the court supplied factual guidance that went even further towards recognizing the two men as life partners. Note the use of the word “spouse” in the following description:

[The two] lived together as permanent life partners for more than 10 years. They regarded one another, and were regarded by friends and family, as spouses. The two men’s families were aware of the nature of the relationship, and they regularly visited each other’s families and attended family functions together, as a couple. Even today, appellant continues to maintain a relationship with [the deceased’s] niece, who considers him an uncle.¹⁰⁹

These fascinating statements suggest the following observations. First, once the court started with “family,” as

¹⁰⁴ *Id.* at 52 (citing N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1998)).

¹⁰⁵ *Id.* at 53.

¹⁰⁶ *Id.* at 54. As my colleague Susan Goldberg pointed out to me, the issue of relationship is important for the landlord-tenant relationship, and no longer in itself. After all, the case only arises when one of the two is dead. It could be noted that the death of one spouse might have made the court less squeamish about the relationship.

¹⁰⁷ Trosino, *supra* note 36, at 118.

¹⁰⁸ *Braschi*, 543 N.E.2d at 53.

¹⁰⁹ *Id.* at 54.

opposed to “spouse,” all evidence in support of that definition was fair game, including acknowledging the “virtual spousehood” of the couple. Further, the court’s focus on the couple’s relationship to their extended family provided it with one way to look past the couple itself, in a way that shifts focus from homosexuality to the more traditional notion of “family.” Doing so, I submit, enabled a vision more consonant with the court’s own sense of family; the sexless uncles attended family functions and were accepted by the niece, thereby creating a simulacrum of straight life that enabled dodging the challenge to gender-based assumptions that would otherwise be presented.

Its equivocation notwithstanding, *Braschi* is an unusually progressive decision.¹¹⁰ In tort law, by way of contrasting example, courts have not permitted recovery for relational injury involving same-sex couples.¹¹¹ In fact, research has disclosed *no case* in which a court has allowed a cause of action by a same-sex partner for either negligent infliction of emotional distress or the loss of consortium.¹¹² This is not surprising. Success on each of these

¹¹⁰ Unfortunately, the promise of this decision has not been kept by the New York Court of Appeals. In *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991), that court refused to grant standing as a “parent” to a woman who had been the co-parent of the child of her lesbian partner for more than two years before the couple separated.

¹¹¹ By *relational injury*, I follow accepted doctrine in using the term to refer to cases in which the plaintiff seeks to recover against a tortfeasor who has caused direct injury to someone closely associated with the plaintiff. I have found only one case, *Coon v. Joseph*, 237 Cal. Rptr. 873 (Ct. App. 1987) (denying recovery), that even addresses the issue of recovery by same-sex couples for emotional distress, and research has disclosed none on the issue of loss of consortium. To be fair to the judiciary, self-censorship by same-sex couples wary of presenting their relationships to attorneys and (potentially) juries, and similar advice from attorneys (driven by the contingent fee system), may mean that few of these cases are ever even lodged.

¹¹² In negligent infliction of emotional distress cases, some courts allow recovery on behalf of those who contemporaneously witness injury to a close relation. See, e.g., *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); *D’Amicol v. Alvarez Shipping Co.*, 326 A.2d 129 (Conn. Super. Ct. 1973); *Dziokonski v. Babineau*, 380 N.E.2d 1295 (Mass. 1978). Thus, the issue turns on whether unmarried co-habitants qualify as “close relations.” Compare *Dunphy v. Gregor*, 642 A.2d 372 (N.J. 1994) (holding that complaint stated a cause of action), with *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988) (no claim), and *Lindsey v. Vistec, Inc.*, 804 F. Supp. 1340 (W.D. Wash. 1992) (no claim). In a loss of consortium claim, the close relationship requirement is more intrinsically a part of the tort itself; the plaintiff seeks to recover for the loss of society, service, and sexual relations occasioned by the defendant’s negligent infliction of injury on the plaintiff’s “relative.” This relatively ancient tort began as a way of compensating men for the loss of services of wives and children. See, e.g., *Bailey v. Long*, 90 S.E. 809 (N.C. 1916); PETER B. KUTNER & OSBORNE M. REYNOLDS, JR., *ADVANCED TORTS* 11-12 nn.1-3 (2d ed. 1997) (listing and discussing the theory of older cases). Today, it is a vehicle for recovery available to either spouse, see, e.g., *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669 (Cal. 1974); both parents, see *RESTATEMENT (SECOND) OF TORTS* § 703 (1977); and, in a few jurisdictions, children as well, see *KUTNER & REYNOLDS, supra*, at 37 n.2. Further, modern courts recognize that this loss of services model no longer reflects the loss created by injury and have moved

claims requires focus on the relationship between the couple; indeed, the emotional distress claim is *defined* by the strength and closeness of the couple, while consortium's sibilant triad of "society, sex and service" summons the court and jury to consider issues it might rather avoid. In short, the movement away from the role-challenging same-sex couple that was possible in *Braschi* has not been seen as an option in these cases.

It is also worth noting that at least a few jurisdictions *do* allow unmarried *opposite* sex couples to recover for negligent infliction of emotional distress.¹¹³ This result is particularly counterintuitive since the opposite-sex couples have the option of marrying.¹¹⁴ But some courts and jurists have been willing to acknowledge the actual living situation of opposite-sex couples, marriage aside. Indeed, in these cases there is no special reason for requiring marriage in the first place.¹¹⁵ That courts refuse to recognize the injury to same-sex couples again underscores that the judiciary is often willfully blind to their very existence.

toward a theory of recovery that values the society and companionship afforded by the relationship. See RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 920-22 (6th ed. 1995) (discussing the modern cases and the Restatement position). It is therefore notable that courts have not allowed the walls of the legal family to be extended outward to take in unmarried partners—whether of the opposite or the same sex. Thus, even in *Dunphy*, 642 A.2d at 382, the New Jersey Supreme Court refused to recognize the reality of the actual relationship—an opposite-sex couple engaged and cohabitating—for loss of consortium purposes. Research discloses no cases discussing the issue in the same-sex context.

Wrongful death statutes are, to some extent, analogs to the common law loss of consortium claim, and apply where the primary victim dies as a result of the defendant's negligence. These statutes specifically name their beneficiaries and always include "husband and wife" or "spouse." Typical is Pennsylvania's statute, which lists as beneficiaries "the spouse, children or parents of deceased." 42 PA. CONS. STAT. § 8301(B) (1997). Under these statutes, an unmarried partner could receive benefits only if the decedent was not survived by any statutory beneficiaries. Even then, the partner could only recover if named personal representative of the decedent; and such recovery would be limited to only those damages most obviously caused by the injury—medical and funeral expenses, and costs of administration. See *id.* § 8301(D) (1997). Research has disclosed no cases in which courts have "relaxed" the definition of spouse to include unmarried couples, of either the same or opposite sex. In this area, therefore, courts have not followed *Braschi's* lead in looking to the reality of the relationships underlying the logic of the categories established by the statutes.

¹¹³ The leading case in this area is *Dunphy v. Gregor*, 642 A.2d 372 (N.J. 1994).

¹¹⁴ See *Elden*, 758 P.2d at 591 (Broussard, J., dissenting).

¹¹⁵ As suggested *supra* note 112, the issue of marriage only comes into the negligent infliction of emotional distress cases because some courts have established that the party asserting the claim must have had a "close relationship" with the injured party in order to qualify as a foreseeable plaintiff. The leading case in this area is *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

2. Same-Sex Couples and Children

Nowhere is the difficulty of courts in trying to reconcile their unexamined views of same-sex couples with the truth more apparent than in the law relating to parents and children. It is well beyond my purposes here to survey the law of the adoption, custody, and care of children.¹¹⁶ I do consider here a few of the adoption and custody cases, however, in order to make some observations about juridical facility in looking beyond the traditional definition of marriage, when the issue spills into the hard question of how best to serve children.

Let us first consider the following hypothetical case, involving a same-sex female couple. Enza and Sarah are raising a child, Hope, who is the “product” of an earlier marriage involving Enza and Bob. Enza and Bob divorced, amicably, when Enza realized she was in love with Sarah. Bob and Enza agreed that Enza would have custody of Hope. Sarah and Enza have recently decided that Sarah should adopt Hope, so that the two women can raise Hope as her legal parents. Bob is involved in this decision. Since his employment is about to take him to Australia, and, since Hope is only three years old, he agrees to relinquish his parental rights so that Sarah may adopt Hope. Will the courts allow Sarah to do so?

The answer depends on whether the court will apply the so-called “stepparent exception” to this case.¹¹⁷ That exception removes the usual requirement that the person seeking to adopt establish that the biological parent is unfit in order to adopt. As Mark Strasser notes, the exception makes sense: where the adopting parent and the biological parent are contesting custody, requiring a demonstration of unfitness is reasonable; whereas, if the *stepparent* and the biological parent are going to raise the child *together*, as Enza and Sarah plan to do, the requirement is counterproductive.¹¹⁸

The problem is that, since the same-sex couple cannot be legally married, the partner wishing to adopt is not legally a “stepparent.” With the exception therefore unavailable, the very absurdity that it was designed to avoid could be reintroduced; Sarah would need to establish Enza’s unfitness as a parent in order

¹¹⁶ For such a treatment, see Strasser, *supra* note 19, at 75-99; see also WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 827-68 (1997). For a comprehensive recent treatment of judicial treatment of gay and lesbian families, see Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 *CARDOZO L. REV.* 1299 (1997).

¹¹⁷ This discussion owes a heavy debt to Mark Strasser’s treatment of the issue in Strasser, *supra* note 19, at 94-99.

¹¹⁸ *See id.*

to adopt Hope. The practical result in jurisdictions following this approach would be to discourage the non-biological partner in a same-sex couple from seeking to adopt.

These cases force courts to choose between two results they might find unpalatable: either recognize the reality of the same-sex couple's "marital" status, or operate against the best interest of the child by strictly reading the exception and disallowing the adoption.¹¹⁹ Perhaps surprisingly, the majority of courts that have considered the issue have read the statute to *permit* the stepparent exception to apply in these cases.¹²⁰ It is important to highlight that the courts can only reach this result by a "creative" reading of the relevant statute—a reading that, for this purpose at least, recognizes the same-sex couple as effectively married. And the courts are at least tacitly aware that they are doing so, pointing to the length of the relationship as evidence that the child's best interests will be served by allowing the adoption to go forward.¹²¹

Focusing on children is an effective means of bringing about policy change; whatever else policymakers disagree on, they are (at least on the record) "for" children.¹²² These decisions dramatically support that observation, as most courts brush aside the "pesky" statutory language, finding that its strict application would create an absurd result. As the Vermont Supreme Court noted: "[The] paramount concern should be with the effect of our

¹¹⁹ Some would argue that being raised by a same-sex couple is *not* in the best interests of a child. See, e.g., REPORT OF THE HAWAII COMMISSION ON SEXUAL ORIENTATION AND THE LAW (Dec. 8, 1995), reprinted in MORAL AND LEGAL DEBATE, *supra* note 5, at 211 (including the minority report and the majority's response) ("The minority is seriously concerned about the adverse effect legalizing homosexual marriage will have on the social, sexual and psychological development of children."). But see *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, at *3-9 (Haw. Cir. Ct. Dec. 3, 1996) (discussing defendant's expert witnesses' conclusions that same-sex parents can indeed be fit to raise children); *In re Opinion of the Justices*, 530 A.2d 21 (N.H. 1987) (Batchelder, J., dissenting) ("[T]he overwhelming weight of professional study on the subject concludes that no difference in psychological and psychosexual development can be discerned between children raised by heterosexual parents and children raised by homosexual parents."). I return to this subject *infra* Part IV.B.2.c.

¹²⁰ See, e.g., *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993). But see *Angel Lace M. v. Terry M.*, 516 N.W.2d 678 (Wis. 1994). Even in *Angel Lace*, however, a concurring judge expressed frustration at being constrained by the statute and encouraged the legislature to rewrite it. See *id.* at 687 (Geske, J., concurring).

¹²¹ See *Tammy*, 619 N.E.2d at 316 (10 years); *Jacob*, 660 A.2d at 398 (19 years); *B.L.V.B. & E.L.V.B.*, 628 A.2d at 1272 (seven years).

¹²² See Lawrence A. McAndrews, *Health Care for Children Needs Attention*, ALBANY TIMES, Jan. 20, 1997, at A7 (citing survey indicating that "children's issues beat out Medicare, Social Security and crime when voters cast their ballots for president last November").

laws on the reality of children's lives."¹²³ Given this first principle, "it would be against common sense to terminate the biological parent's rights when that parent will continue to raise and be responsible for the child, albeit in a *family unit* with a partner who is biologically unrelated to the child."¹²⁴

The stepparent example illustrates that courts do have the ability, even the inclination, to suspend their essential definition of marriage as requiring two sexes when the rights of an "innocent third party" are involved. But it is important to recognize that they are doing so only to benefit the child—the "innocent" third party—and not directly to honor the same-sex couple. In cases involving child welfare, this impulse can hardly be gainsaid, but the tendency to divide may have less benign consequences in other contexts. Public health responses to crises occasioned by infectious disease provide a powerful illustration of this impulse. In the early part of the twentieth century, doctors identified what they termed *venereal insontium*, literally venereal disease of the innocent, taken to include both children and women who had been infected by "guilty" spouses.¹²⁵ In modern times, of course, the HIV/AIDS¹²⁶ crisis showcases the same impulse to separate, then blame, those thought responsible for the disease's spread—principally those engaging in homosexual or drug-using behavior.¹²⁷ These cases reveal that, where policymakers have the ability to divide in this way, they have shown a distressing

¹²³ *B.L.V.B. & E.L.V.B.*, 628 A.2d at 1276. The neighboring state of New Hampshire, however, was not so progressive in a case involving the related issue of whether a law prohibiting gay men and lesbians from adopting a child was constitutionally valid. *See In re Opinion of the Justices*, 530 A.2d 21 (N.H. 1987).

¹²⁴ *B.L.V.B. & E.L.V.B.*, 628 A.2d at 1274 (emphasis added).

¹²⁵ *See* Allan M. Brandt, *A Historical Perspective*, in *AIDS LAW TODAY: A NEW GUIDE OF THE PUBLIC* 46-47 (Scott Burris et al. eds., 1993).

¹²⁶ *HIV* is the acronym for *Human Immunodeficiency Virus*, which usually—but it appears not always—leads to *AIDS*, or *Acquired Immune Deficiency Syndrome*.

¹²⁷ The comparison is importantly limited, though, because the issue of same-sex marriage implicates lesbians and gay men on something close to the same level, while only gay men, not lesbians, are at risk—and blamed—for HIV/AIDS. As Eskridge and Hunter point out, "[t]o date, there have been no confirmed cases of transmission of HIV through lesbian sexual contact." *ESKRIDGE & HUNTER, supra* note 116, at 1066; *see also* Paula A. Treichler, *AIDS, Homophobia and Biomedical Discourse: An Epidemic of Significance*, 1 *CULTURAL STUD.* 263 (1987), *reprinted in* *ESKRIDGE & HUNTER, supra* note 116, at 1069, 1073 (noting that, for some, the "AIDS crisis lends force to . . . fear and hatred of gays" and that some even see divine retribution in the epidemic's spread); Lynda Richardson, *Wave of Laws Aimed at People with H.I.V.*, *N.Y. TIMES*, Sept. 25, 1998, at A1 ("[The] latest wave of legislation shifts the focus from earlier laws that protected the civil liberties of HIV-infected people to laws that seek to identify certain people with the virus, notify partners, and in some cases punish those who intentionally place others at risk of contracting the virus.").

eagerness to do so.

So too it is with the relation between adoption and same-sex marriage. In the adoption cases, pinpoint judicial focus on the interest of an “innocent” third party may lead courts away from seeing that they are to some extent recognizing same-sex relationships. In contrast, although the best interest of the child might be expected to lead the courts to permit these same, child-raising, same-sex couples to marry, when the focus shifts to marriage *itself*, this conclusion is resisted, forgotten, or ignored. The gender-role challenges with which same-sex couples confront courts then reemerge and cause a kind of judicial panic. Although this “panic” is not on the same level as some of the astounding lapses in reason that have been occasioned by the HIV/AIDS crisis,¹²⁸ its grip is nonetheless powerful. How else is one to explain the tautological denial of the right to marry that the cases discussed earlier rely on? Since the court believes it knows, based on biology, what a man and a woman *are*, the idea that the important facts about these identities are socially constructed is never addressed. This failure to come to grips with the true richness of relationships stems from a particular view of natural law; one that I expose as a constricting and dehumanizing myth, *infra* Part V.B.3.¹²⁹

Unfortunately, the lesson about the reality of same-sex families is sometimes also forgotten when a parent who is a member of a same-sex couple is pitted against either a former spouse, or even a more distant relative, in a custody dispute. Because the central issue and focus remain the child’s best interests, the courts have had to accommodate their own views about the supposed superiority of opposite-sex orientation to the reality of the child’s life. What should be done, for example, when an irresponsible straight parent is pitted against a highly

¹²⁸ Not surprisingly, the worst impulses have been evident in the area of criminal law, where judicial impatience with criminals compounds the problem. In the infamous *Texas v. Weeks* case, the HIV positive defendant was convicted of attempted murder and sentenced to 99 years in prison for spitting at a correctional officer. 58 U.S.L.W. 2343 (Tex. Dist. Ct. Nov. 4, 1989) (No. 15-183), *aff’d sub nom.* *Weeks v. State*, 834 S.W.2d 559 (Tex. Crim. App. 1992). A subsequent petition for a writ of habeas corpus was also denied. *See Weeks v. Collins*, 867 F. Supp. 544 (S.D. Tex. 1994), *aff’d sub nom.* *Weeks v. Scott*, 55 F.3d 1059 (5th Cir. 1995). These decisions are troubling given the complete lack of evidence that HIV can be transmitted through saliva. For a good general discussion of these draconian prosecutions as of 1993, see Harlon L. Dalton, *Criminal Law, in AIDS LAW TODAY*, *supra* note 125, at 242.

¹²⁹ As I point out *infra* Part IV.B.3, this richness belongs both to opposite- and same-sex couples. But while societal notions of the “proper” roles of men and women stifle the creative potential of opposite-sex couples, at least they do not operate under the complete legal disability that hounds same-sex couples.

functioning, loving, and responsible gay parent? This imagined tension has led to confusion and inconsistency in the decisional law.

Although some courts have moved away from a *per se* rule excluding gay and lesbian parents from gaining or retaining custody of their children,¹³⁰ a number of them have impeded custody (or even visitation) by parents of same-sex orientation by creating presumptions against or imposing special conditions on them.¹³¹ The power of these presumptive rules is evident in the infamous *Bottoms v. Bottoms* case,¹³² where the Virginia Supreme Court, although noting that it had earlier discarded the rule that a lesbian parent was *per se* unfit,¹³³ upheld the trial judge's determination that custody should be awarded to the *grandmother*, not the biological (lesbian) mother, even though the trial judge had *applied the per se rule*. Ordinarily, of course, the lower court's application of the wrong rule of law would have resulted in a remand for new findings, if not a new hearing.¹³⁴ Since the mother was a lesbian, the Virginia Supreme Court did not trouble itself to follow the proper procedure. The court presumably believed it was acting in the best interest of the child in awarding custody to the grandmother, but its willingness to dispense with the proper procedures in reaching that conclusion is noteworthy and troubling.

Even in those jurisdictions exhibiting a more enlightened approach, the cases are sometimes redolent of homophobic assumptions about the "best interests" of the child. For example, in *Conkel v. Conkel*,¹³⁵ the appellate court stressed the child's best

¹³⁰ See ESKRIDGE & HUNTER, *supra* note 116, at 832 (citing early cases and literature). One commentator has discerned three broad approaches to the question of the suitability of a gay or lesbian parent. Some courts create an irrebuttable presumption against such a parent; others require the parent to rebut a presumption of unfitness; and still others do not regard same-sex orientation as disqualifying, although they do look to see whether a harm to the child is likely. See Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 619 (1989). One should not make too much of such categories, however, especially in an area so volatile. One recent work places the English courts somewhere between the second and third categories mentioned above. See NICHOLAS BAMFORTH, *SEXUALITY, MORALS AND JUSTICE: A THEORY OF LESBIAN AND GAY RIGHTS LAW* 52 (1997).

¹³¹ See ESKRIDGE & HUNTER, *supra* note 116, at 837. As the authors point out, some state statutes require the court to consider the parent's "moral fitness," while the judiciaries in other states have created a presumption against the gay or lesbian parent in a dispute with their straight former spouses.

¹³² 457 S.E.2d 102 (Va. 1995).

¹³³ See *id.* at 108.

¹³⁴ This point was expressed in Justice Keenan's dissent. See *id.* at 109 (Keenan, J., dissenting).

¹³⁵ 509 N.E.2d 983 (Ohio Ct. App. 1987).

interest in upholding the trial court's decision to allow overnight visitation to the gay father. But that same decision imposed the condition that the father not have present any non-related male person.¹³⁶ As Eskridge and Hunter point out, it is less than clear that such a condition would have been imposed, or allowed by the appellate court, if the father were involved with a woman.¹³⁷ The court's repeated assumption that same-sex orientation is a "fault"—meant, oddly, as supporting the rights of a gay parent, since we all have "faults"—underscores the court's disparate treatment of straight and gay parents.¹³⁸ Again, moving the focus to the gender-challenging private lives of same-sex couples turns out to be bad strategy.

This Part has explored the social and economic situation of same-sex couples and has shown that the courts inconsistently appreciate the essence of the relationships they are called upon to recognize. Further, the inconsistency seems somehow dictated by whether the court "has the luxury" of ignoring that reality. Courts can uncritically fall back on the historically defining characteristics of marriage where the parties' requests would compel focus on changing that definition. On the other hand, where this unexamined view of "marriage" would materially harm a child, judicial unease with same-sex couples often vanishes, or can at least be managed. Thus, the step towards recognition of same-sex marriages might seem logically quite short.

But it would be a mistake to think it inevitable that courts will discover this link between the elements of family life and same-sex

¹³⁶ Some recent decisions have refused to impose such a requirement. *See, e.g.,* *Birdsall v. Birdsall*, 243 Cal. Rptr. 287 (Ct. App. 1988); *In re Marriage of Diehl*, 582 N.E.2d 281 (Ill. App. Ct. 1991); *North v. North*, 648 A.2d 1025 (Md. Ct. Spec. App. 1994); *Blew v. Verta*, 617 A.2d 31 (Pa. Super. Ct. 1992).

¹³⁷ *See* ESKRIDGE & HUNTER, *supra* note 116, at 836-37.

¹³⁸ One other curious point seems worth noting here. Although the cases are in conflict, at least some courts have allowed one member of a gay couple to adopt the other. The reasons for such an adoption are usually economic and emotional, and nothing in the enabling statutes prohibits such action. *See, e.g., In re Adoption of Swanson*, 623 A.2d 1095 (Del. 1993) (allowing a 66-year-old man to adopt his 51-year-old companion of many years); *In re Adult Anonymous II*, 452 N.Y.S.2d 198 (App. Div. 1982) (allowing a 32-year-old male to adopt 43-year-old male companion where adoption was sought, at least in part, to gain benefit of the rent laws protecting immediate family members). *But see In re Adoption of Robert Paul P.*, 471 N.E.2d 424 (N.Y. 1984) (disallowing adoption of 50-year-old male by 57-year-old companion). What could explain the judicial willingness to allow adoption instead of marriage, the more appropriate expression of the commitment between two adults? My guess is that the very "creepiness" of the adoption makes courts more comfortable since it reinforces the idea that gay couples are "weird" and "different." To allow marriage, on the other hand, would be to recognize that such couples are, in relevant respects, no different from other couples—including many of the judges and their spouses.

marriage. Explicit recognition of the latter would involve confronting the sleeping dog, by challenging the rigidity of gender role and identity that conspires with political will to deny the creative possibility and richness in *all* lives of committed intimate relation.

II. THE SUPREME COURT ON MARRIAGE AND SEXUAL ORIENTATION: READING TEA LEAVES

Attempts to predict the Supreme Court's view on any issue are parlous. But this exercise seems especially speculative regarding the issue of same-sex marriage. One obvious impediment is that the Court has never spoken on this issue directly. Nonetheless, a substantial and creative body of scholarship has been devoted to dissecting the Supreme Court's jurisprudence on the related subjects of marriage and the rights of the minority of same-sex couples.¹³⁹ In this Part of the article, I analyze recent Supreme Court decisions on the issues of marriage and sexual orientation. We will come to see that it is difficult to extract relevance for same-sex couples from the Court's broad pronouncements in favor of the right to marry, because it is likely that the Court carries a deeply grounded definition of marriage as requiring a man and a woman. One of the central projects of this Part is to analyze the uncritical assumptions about male and female roles that permeate marriage cases—assumptions that are difficult to find but undeniably present.

Furthermore, the jurisprudence on the only two sexual orientation cases of note confuses, rather than illuminates, the Court's view. After discussing these cases, this Part concludes with some suggestions pertaining to how the Court could extend the lessons of its recent jurisprudence in the field of gender discrimination to the question of same-sex marriage.

Although the typical treatment of Supreme Court jurisprudence includes *Loving v. Virginia* in the general discussion of marriage, I have purposely deferred discussion of that case and its implications until Part III, where separate consideration of the issue will provide a useful transition to Part IV's examination of the fundamental arguments for and against same-sex marriage.

¹³⁹ An interesting synthesis of two of the principal arguments from these cases is found in Coolidge, *supra* note 72, at 62-78. The arguments considered are those found in ESKRIDGE, *supra* note 5, at 62-76, 124-27, 132, 137-52, 160, 183; Wardle, *supra* note 2. See also Kevin Aloysius Zambrowicz, 'To Love and Honor All the Days of Your Life': A Constitutional Right to Same-Sex Marriage?, 43 CATH. U. L. REV. 907, 909-16, 924-28 (1994).

A. *The Marriage Cases*

What is the Supreme Court's view of marriage? While early cases generally reflect a limited role for the state in regulating marriage,¹⁴⁰ the Court first recognized marriage as an aspect of the right of privacy in *Griswold v. Connecticut*.¹⁴¹ “[P]rivacy,” Justice Douglas noted for the majority, “surround[s] the marriage relationship.”¹⁴² Moreover, this “right to privacy [is] older than the Bill of Rights. . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being *sacred*.”¹⁴³ This statement concludes with a religious punch that could easily exclude same-sex couples. By grounding marriage in tradition and religion, the Court established a bedrock on which only those recognized as appropriate subjects for marriage—one man and one woman, at least as far as the Court knew—could stand.¹⁴⁴

Griswold was soon followed by *Eisenstadt v. Baird*.¹⁴⁵ *Eisenstadt* is important for its recognition that the privacy right belongs to individuals, not to some “independent entity” called a marital couple. The facts of the case would have made this plain, independent of the Court's language. *Griswold* involved the right of a married couple to purchase contraceptives, while *Eisenstadt* answered the same question regarding unmarried individuals. Neither case, however, addressed the issue of whether the state had the authority to determine *eligibility* for the institution of marriage. The issue of the limits of permissible intrusion by the

¹⁴⁰ For one commentator's brief history of early Supreme Court cases relating to the family and marriage, see Coolidge, *supra* note 72, at 62-65.

¹⁴¹ 381 U.S. 479 (1965).

¹⁴² *Id.* at 486.

¹⁴³ *Id.* (emphasis added). As we shall see, the connection between the sexual intimacy of the couple and the “sacred” infects much of the discussion concerning natural rights. I imagine that Justice Douglas, liberal as he was, would have been surprised (to say the least) to see his insight applied to sexual relations between a same-sex couple.

¹⁴⁴ The statement in the text is qualified because of the debate about whether, and in what form, same-sex unions have been recognized throughout history. See generally JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993). Boswell's work has spawned an interesting debate on the significance of such unions. See Ralph Hexter, *Same-Sex Unions in Pre-Modern Europe: An Exchange*, NEW REPUBLIC, Oct. 3, 1994, at 39; Brent D. Shaw, *A Groom of One's Own?*, NEW REPUBLIC, July 18 & 25, 1994, at 33. Both are reprinted in PRO AND CON, *supra* note 5, at 7-21. The two agree that ceremonies uniting two men as “brothers” were performed, but Shaw makes the point that such unions were not “marriages” as the term is understood today. See *id.* Hexter responds that Boswell was quite careful to disclaim equivalence between the ceremonies he describes and contemporary marriages, and faults Shaw for incomplete understanding of the source materials. See *id.*

¹⁴⁵ 405 U.S. 438 (1972).

state on individual liberties—whether or not one is married—is analytically distinct from that of who can enter into the marital relation.

Two important subsequent cases, however, plainly limited the state's right to deny membership in this privileged "club," establishing that the right to marry is itself fundamental.¹⁴⁶ In *Zablocki v. Redhail*,¹⁴⁷ the Court grappled with the constitutionality of a Wisconsin statute that required any state resident with child support obligations to obtain the permission of the court before marrying in Wisconsin or elsewhere.¹⁴⁸ In addition, the statute authorized the court to issue an order permitting the marriage only if the applicant could affirmatively demonstrate that the child(ren) were not public charges, or were unlikely to attain that status in the future.¹⁴⁹

The Court declared the statute unconstitutional, using "ringing phrases"¹⁵⁰ that made express the tie between individual liberty and the state's presumed lack of authority to restrict the right to marry. Significantly, the Court devoted less space to the merits of the restriction than to an expansive reading of the marriage cases; cases which, the Court now found, established that "the right to marry is of fundamental importance for all individuals."¹⁵¹ The Court exercised no special care in separating the equal protection arguments from those of substantive due process. In fact, the Court linked the two, since the fundamental right to marry (substantive due process) could only be abridged if the state could show a compelling interest (equal protection analysis).¹⁵²

Justice Stewart and Justice Powell filed concurrences, which sounded a cautionary note, however. Justice Stewart disagreed

¹⁴⁶ The Court in *Loving v. Virginia*, 388 U.S. 1 (1967), did hold marriage to be a "basic civil right." *Id.* at 12. But the case's origin in the area of racial discrimination left unclear whether the right would be recognized in other cases in which equal protection analysis is historically less stringent. *See Zablocki v. Redhail*, 434 U.S. 374, 398 (1978) (Powell, J., concurring) ("*Loving* involved a denial of a 'fundamental freedom' on a wholly unsupported basis—the use of classifications 'directly subversive of the principle of equality at the heart of the Fourteenth Amendment").

¹⁴⁷ 434 U.S. 374 (1978).

¹⁴⁸ *See id.* at 375 n.1.

¹⁴⁹ The plaintiff/appellee was denied a marriage license for failure to comply with the statutory requirement of a court order, but the parties stipulated that he would have been ineligible for such a court order in any event since he was in arrears on his payments and because his child had been a public charge since her birth. *See id.* at 378.

¹⁵⁰ *Id.* at 396 (Stewart, J., concurring) (quoting *Williams v. Illinois*, 399 U.S. 235, 260 (1970) (Harlan, J., concurring)).

¹⁵¹ *Id.* at 384.

¹⁵² *See id.* at 383-85.

with the claim that the right to marry is of constitutional provenance, stating that it was “a privilege [that is] to be defined and limited by state law.”¹⁵³ Stewart went on to note that the state can, and does, “absolutely prohibit” marriages in certain cases without implicating the Constitution.¹⁵⁴

Justice Powell expanded on what Justice Stewart had introduced. While acknowledging that “there is a right of marital and familial privacy which places some substantive limits on the regulatory power of government,”¹⁵⁵ Justice Powell indicated that he would have started the analysis by pointing out that “marriage . . . traditionally has been subject to regulation . . . by the secular state.”¹⁵⁶ He claimed that “[t]he State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people.”¹⁵⁷ Moreover, Powell noted that “[s]tate regulation has included bans on incest, bigamy, and homosexuality.”¹⁵⁸

The concurring Justices’ retreat from the broad guarantee of the right to marry set forth in the majority opinion raises interesting questions. Was the decision intended to be sufficiently sweeping to foreclose the type of restriction raised by Justices Powell and Stewart? My guess is that the opposite is true. At the time *Zablocki* was decided, none of the Justices in the majority believed that anyone would seriously argue for same-sex marriage, so they did not anticipate the need to restrict their holding. It is even possible that state-recognized unions between members of the same sex may have simply been beyond the Court’s ken. One does not refute what one does not see.

Despite Justice Powell’s misgivings, *Turner v. Safley*¹⁵⁹ pressed the issue of the individual’s fundamental right to marry further still.¹⁶⁰ There, Justice O’Connor, writing for the majority, affirmed

¹⁵³ *Id.* at 392 (Stewart, J., concurring).

¹⁵⁴ *Id.* (offering as examples of what a state may prohibit: polygamy, incest, age restrictions, and public health concerns).

¹⁵⁵ *Id.* at 397 (Powell, J., concurring).

¹⁵⁶ *Id.* at 398.

¹⁵⁷ *Id.* at 399. One might take some comfort from Justice Powell’s strong affirmance of *Loving v. Virginia*, which, he noted, represented an instance of a state tearing at the heart of the Fourteenth Amendment’s principle of equality. *See id.*

¹⁵⁸ *Id.* It should also be noted here that one of the only two Justices still on the Court since *Zablocki* is now-Chief Justice Rehnquist, the lone dissenter in that case. Justice Rehnquist, who never mentioned any of the cases finding a fundamental right to marry, tersely stated that the legislature should be given “the traditional presumption of validity.” *Id.* at 407 (Rehnquist, J., dissenting).

¹⁵⁹ 482 U.S. 78 (1987).

¹⁶⁰ Eskridge’s discussion of this case is particularly helpful. *See* ESKRIDGE, *supra* note

the right of a prisoner to enter into the institution of marriage. Although imprisonment might result in the denial of access to some of the goods of marriage, many others are available. Justice O'Connor's enumeration of those goods bears repetition:

First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock).¹⁶¹

Note that the Court in *Turner* began with the premise that the inmate's constitutional rights were limited to those that were not inconsistent with the circumstances of confinement. Nonetheless, the Court declared unconstitutional the state's regulation that a prisoner must receive the approval of the relevant penal authority in order to marry. Thus, the Court reaffirmed its strong commitment to the right of the individual to be free of governmental restriction when choosing to enter into the "historic institution" of marriage.¹⁶²

5, at 130-33.

¹⁶¹ See *Turner*, 482 U.S. at 95-96.

¹⁶² For a dissenting view of the Court's establishment of a right to marry, see Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949 (1992). Professor Maltz zeroes in on the misgivings expressed by the concurring and dissenting justices in *Zablocki*, see *id.* at 952-53, and then (ignoring the precedential value of the cases) atomizes the "goods of marriage," striving thereby to show that marriage is not necessary for such "goods" to be attained. See *id.* at 956-67. By way of response, it is enough to note that this attempt to separately analyze each of the benefits of marriage exhibits willful blindness to the reality that marriage is the deep expression of commitment, both by the parties and by the witnessing society, that other arrangements simply do not convey, and that it carries unique entitlements. This obvious point has been recognized both by the Supreme Court, through its decisions, and same-sex couples, through their realization that excluding them from marriage relegates them to second-class citizenship. I suspect that Maltz's effort at questioning the Court's unambiguous holdings that marriage is (or should be) a fundamental right is part of a larger agenda of opposition to gay and lesbian rights. At one point, he addresses the ocean of scholarly opposition to *Bowers v. Hardwick*, 478 U.S. 188 (1986) (upholding

When the issue of same-sex marriage reaches the Supreme Court, as it one day surely will, Justice O'Connor's enumeration of the "goods of marriage" will be used by both sides, because the text provides support for either position. Interestingly, the passage breaks down neatly to bolster both sides. The first "goods" of marriage—the public statement of commitment and emotional support, and the religious significance (since many same-sex couples are now recognized by the religions with which they are affiliated) of the ceremony—apply with equal force to same-sex couples. The remaining "goods"—the expected "consummation" of the relationship and the tangible economic benefits—apply only to opposite-sex couples. Of course, the elements of commitment and consummation, in particular, could be turned around. As I argue in Part III.B.3 even same-sex commitments that most closely resemble those of opposite-sex couples may be viewed scornfully by the dominant, heterosexual society. On the other side, advocates of same-sex marriage will point out that "consummation" should neither be required (for a dramatic example of why not, consider the seriously disabled couple) nor rigidly defined in the way Justice O'Connor may have had in mind.

The cases analyzing the constitutional right to marry have been analyzed before, but without sufficient emphasis on evidence of the central, underlying assumption that marriage applies exclusively to opposite-sex unions. In other words, these cases could be vitally important for their strong commitment to a principle of equality and liberty, or dismissed with a wave: "We weren't talking about same-sex marriage." The latter position would reflect deep assumptions about what men and women *are*.

B. *The Emerging Law of Same-Sex Orientation*

As noted above, the Court could disallow same-sex marriage by focusing on the historical pedigree of the institution and then converting it into a disqualifying condition. Such a result would square with the nearly unanimous result in the same-sex marriage cases decided under state law¹⁶³ and would reflect the same kind of comfortable gender-based assumptions that this Article challenges. The Court's terse holding in *Bowers v. Hardwick*¹⁶⁴ heightens this possibility. *Bowers* is a cataclysmic decision that reveals an embarrassing unwillingness, or inability, to consider seriously the

Georgia's anti-sodomy law), sharing his belief that such "criticisms have been vastly overstated." *Id.* at 960.

¹⁶³ See *supra* Part I.B.

¹⁶⁴ 478 U.S. 186 (1986).

rights of gay men and lesbians.¹⁶⁵ Whether the Court's more recent holding in *Romer v. Evans*¹⁶⁶ represents a repudiation of *Bowers* remains to be seen. In the remarks that follow, I link the *Bowers* holding to a reading of the marriage cases that could disqualify same-sex couples. I then reinfuse a measure of hope, by considering *Romer* and a more recent decision that are likely to have a bearing on the issue.

Bowers called upon the Court to consider the constitutionality of a statute that prohibited consensual sodomy.¹⁶⁷ The text of the statute did not differentiate between heterosexual and homosexual sodomy, nor did it create any exception for married couples. The procedural history of the case, however, gave the Court the opportunity to avoid the question of whether the law could constitutionally be applied to heterosexual couples, and the five-Justice majority lunged at the chance to consider only the right of the defendant before it, who had been arrested while engaging in oral sex with another man.¹⁶⁸ With the homosexuality of the defendant then directly in view, the Court undertook a two-step path to its conclusion. First, it distinguished and criticized¹⁶⁹ the bulwark of cases establishing and expanding the right of privacy. Justice White made the remarkable statement that none of the

¹⁶⁵ See *infra* notes 167-80 and accompanying text.

¹⁶⁶ 517 U.S. 620 (1996).

¹⁶⁷ The statute defined sodomy as "any sexual act involving the sex organs of one person and the mouth or anus of another." *Bowers*, 478 U.S. at 188 n.1 (quoting GA. CODE ANN. § 16-6-2 (1984)).

¹⁶⁸ See *id.* at 188 n.1. In dissent, Justice Blackmun strongly objected to the Court's strategy, finding that the majority had "ignore[d] the procedural posture of the case," "distorted the question [the] case presents . . . and [engaged in] almost obsessive focus on homosexual activity . . ." *Id.* at 200 (Blackmun, J., dissenting); see also Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 538-39 (1992). The author there notes that, since 1973, eight states have amended their anti-sodomy statutes to cover *only* activity between same-sex partners. Further, *Bowers* is not the only case in which the government prosecutes, where it does at all, only same-sex sodomy. See Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update on the Fight Against "Sodomy" Laws*, 21 FORDHAM URB L.J. 997 (1994). These references reinforce the notion that both courts and legislatures, at least at present, are exclusively concerned with same-sex conduct. It was not always thus. See *Bowers*, 478 U.S. at 190-92 (Blackmun, J., dissenting). As to what happened to the defendant during the course of his arrest and subsequent confinement, see RICHARD D. MOHR, *A MORE PERFECT UNION* 19 (1994) (describing how Michael Hardwick, for engaging in consensual sex in his own home, had his bedroom forcibly intruded upon, was "handcuffed to the floor of the squad car for half an hour," and had to endure twelve hours of humiliation and taunts).

¹⁶⁹ The tone of Justice White's decision makes clear his skepticism with the entire enterprise of what he called "announcing rights not readily identifiable in the Constitution's text." *Bowers*, 478 U.S. at 191. In addition to the just-quoted language, he stated that at least some of the privacy cases "recogniz[e] rights that have little or no textual support in the constitutional language." *Id.*

privacy cases, nor any of “the rights announced in those cases[,] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . asserted in this case.”¹⁷⁰ The privacy cases were explicitly tied to the contexts of marriage, procreation, and family from which they arose. Since homosexual sodomy bore no connection to any of these roots, privacy protection was unavailable.¹⁷¹

Having achieved the uncoupling of privacy and “homosexual sodomy,” the Court could decide whether to “extend a fundamental right to homosexuals to engage in acts of consensual sodomy.”¹⁷² The Court had no trouble holding in the negative, since the right to sodomy was neither “implicit in the concept of ordered liberty,”¹⁷³ nor “deeply rooted in [the] Nation’s history and tradition.”¹⁷⁴ The Court noted that the proscription against sodomy has “ancient roots”¹⁷⁵ and had been, as of the decision in *Bowers*, the law in almost half the states.¹⁷⁶

The implications of *Bowers* for same-sex marriage could be enormous. The Court’s reading of the right to privacy to what it saw as inherently opposite-sex activities—marriage, procreation, and family—suggests an understanding of those terms quite inhospitable to gay and lesbian unions. If the right to privacy does not prevent the state from criminalizing even the *most* private conduct, only wishful thinking would suggest judicial support of the intrinsically public institution of marriage. Moreover, the seeming break from precedent achieved by *Bowers* is probably best explained by the Court’s inability to regard same-sex coupling (to use the most serviceable term in this context) as anything other than a disturbing affront to the rules of gender identity affirmed in the more traditional marriage and privacy cases.

The point is emphasized in considering *Bowers* alongside *Turner*. Although the broad language chosen by Justice O’Connor in defining the goods of marriage and the individuals entitled to them might otherwise suggest recognition of same-sex marriage, bear in mind that, *just one year earlier*, Justice O’Connor had signed on to the majority opinion in *Bowers*. Why? When a prisoner or any other person who wishes to marry someone of the opposite sex is the subject, the Court looks at the institution of

¹⁷⁰ *Id.* at 190-91.

¹⁷¹ *See id.* at 191.

¹⁷² *Id.* at 192.

¹⁷³ *Id.* at 191 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

¹⁷⁴ *Id.* at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

¹⁷⁵ *Id.*

¹⁷⁶ *See id.* at 192-94.

marriage and at its intrinsic connection to the fundamental right to privacy. But, when gay men and lesbians are under discussion the question is reformulated to focus on what they do in their most intimate moments. Once that subject looms into view, the Court's uneasiness with the gender-threatening activities of same-sex couples poisons the soil of decision.

This point has recently been exhaustively documented by Professor Larry Cata Backer,¹⁷⁷ and was made in *Bowers* by Justice Blackmun, in his dissent. For Blackmun, the issue was the same as in all privacy cases—whether the state could justify such a substantial restriction on a person's life—and *not* “about ‘a fundamental right to engage in homosexual sodomy,’ as the Court purports to declare.”¹⁷⁸ Thus, if the Court were to follow the approach of the majority in *Bowers* in a same-sex marriage case, it might avoid the basic question of the fundamental right to marry by focusing on what same-sex partners do. The earlier observation, that the *Bowers* Court went out of its way to avoid deciding the identical legal issue with respect to opposite-sex couples, bolsters this reading. Had the Court considered opposite-sex conduct, the lack of symmetry between the treatment of same-sex and opposite-sex couples would have been laid bare, because the Court would not have asked whether a married couple had a “fundamental right to engage in sodomy.”¹⁷⁹ Rather, it would phrase the question to be whether the state could interfere with the intimate life of a married couple. Considering the precedent established in cases such as *Griswold* and *Roe v. Wade*,¹⁸⁰ it is difficult to imagine what defensible justification could have been adduced in support of such a proscription.

This disparate treatment announces a cruel circularity. Opposite-sex couples come within the protections of the marital relation, even if, as in *Eisenstadt*, they are not actually married; whereas same-sex couples cannot marry because of the assumptions about what marriage requires, and then are denied the protections afforded those eligible for the institution. Further, since *Bowers*, in a sense, outlaws homosexuality by allowing the suppression of some of its most intimate expression, the decision grounds other deletions of gay men and lesbians from the bodies political and social. For example, consider the New Hampshire

¹⁷⁷ See Larry Cata Backer, *Constructing a “Homosexual” for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996).

¹⁷⁸ *Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting); see also *id.* at 199.

¹⁷⁹ *Id.* at 191.

¹⁸⁰ 410 U.S. 113 (1973).

Supreme Court's decision upholding a state law that prohibited gays and lesbians from adopting children, or even from serving as foster parents:¹⁸¹ the court expressly cited *Bowers* in support of its holding.¹⁸²

Perhaps one should not be so pessimistic, however. The Supreme Court had occasion in 1996 to consider another case involving the legal rights of gay men and lesbians. In *Romer v. Evans*,¹⁸³ the Court had before it a state constitutional amendment that, had it ever gone into effect, would have barred any state governmental entity from protecting against discrimination based on sexual orientation. By a six to three majority, the Court struck down the law (Amendment 2 to the Colorado State Constitution) on equal protection grounds.¹⁸⁴ This decision raises a number of hard questions, none of which can be answered definitively: Does *Romer* implicitly overrule *Bowers*? If not, which case is more directly relevant to the issue of same-sex marriage? What does *Romer* mean for the future of legal protection based on sexual orientation? The difficulty in answering any of these questions is that they relate to each other in ways the Court itself has not yet considered. In the brief remarks that follow, I offer a few observations about the potential significance of *Romer* for the issue of same-sex marriage.

As one commentator has noted, one problem with *Romer* is that "the opinion is strikingly enigmatic in ways that make it perilous to venture strong claims about what the case means."¹⁸⁵ Nonetheless, several central principles can be discerned. First, the Court emphasized and criticized the *comprehensiveness* of the amendment, noting that it would place protections afforded others beyond gay men and lesbians. "Sweeping . . . is the change in legal status effected by this law Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations The amendment withdraws from homosexuals, but no others, specific legal protection from . . . discrimination."¹⁸⁶ Second, the Court noted that the law violated the Fourteenth Amendment's guarantee of equal protection under the laws "in the most literal

¹⁸¹ See *In re Opinion of the Justices*, 530 A.2d 1095, 1098 (N.H. 1987).

¹⁸² See *id.*

¹⁸³ 517 U.S. 620 (1996).

¹⁸⁴ See *id.* at 635.

¹⁸⁵ Schacter, *supra* note 20, at 364. Schacter has commendably dissected the opinion, and my treatment of the case here is in her debt. See also Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 53-71 (1996) [hereinafter Sunstein, *Foreword*].

¹⁸⁶ *Romer*, 517 U.S. at 627.

sense,”¹⁸⁷ by making it “more difficult for one group of citizens than for all others to seek aid from the government.”¹⁸⁸ A third point that emerges from the latter is that Colorado’s blunderbuss approach told the Court that the law was not rational but was supported by animus towards gays and lesbians.¹⁸⁹

The Court, then, was *at least* holding that something more than such animus will be needed in the future to sustain laws disfavoring people based on their sexual orientation. How much need be shown, we have yet to learn. But *Romer* holds a couple of clues. First, although the Court did not apply a strict scrutiny standard in *Romer*,¹⁹⁰ it did note, in addressing *Davis v. Beason*,¹⁹¹ a polygamy case, that denying a group of persons the right to vote because of *status* would trigger strict scrutiny. While it is true, as Justice Scalia wrote in his dissent,¹⁹² that the standard only applies because the right to vote is fundamental, so too is the right to marry. Further, the Court’s use of the word “status”—as opposed to “conduct”—in describing polygamists and advocates of polygamy suggests a movement away from *Bowers*’s focus on conduct.¹⁹³

¹⁸⁷ *Id.* at 633.

¹⁸⁸ *Id.*

¹⁸⁹ This point is subtly explored by Schacter, *supra* note 20, at 380-81.

¹⁹⁰ The Supreme Court is usually thought to apply three different standards of review in equal protection cases, depending on the group and the legal right involved. At one end is “strict scrutiny,” which requires a showing by the government that the law in question meets a compelling state need and that there is no less restrictive alternative available for achieving that end. This high threshold is used for cases in which the statutory discriminations are based either on “suspect classifications,” which have usually involved race, national origin, or religion, or on the infringement of a fundamental right. Next comes the intermediate level of scrutiny, which has generally required that the statute be substantially related to an important state interest. This standard has been most closely associated with classifications based on sex or gender. Finally, the remainder of the cases are analyzed under the least demanding test, that of “rational basis.” In these cases, the state need only show that the challenged regulation is rationally related to a legitimate government interest. I return to this issue briefly, *see infra* notes 274-81 and accompanying text. For a more detailed discussion of these standards, and how they should be applied to discriminations based on sexual orientation, see STRASSER, *supra* note 5, at 23-48.

¹⁹¹ 133 U.S. 333 (1890).

¹⁹² *See Romer*, 517 U.S. at 650 n.3 (Scalia, J., dissenting).

¹⁹³ Of course, *Bowers* concerned a statute banning an activity, so it was not surprising to see the Court focus on conduct. *See Bowers v. Hardwick*, 478 U.S. 186, 188 n.1 (1986). But, the Court could have looked more deeply at the classification between people that the conduct proscription (applied only to homosexual sodomy, remember) imposed. Justice Scalia understood the implications of this point by the *Romer* majority for the holding in *Bowers*. *See Romer*, 517 U.S. at 650 n.3 (Scalia, J., dissenting) (“[T]he Court’s suggestion that . . . Amendment 2 [denies] rights on account of ‘status’ (rather than conduct) opens up a broader debate involving the significance of *Bowers* to this case . . .”).

Second, the whole tone of Justice Kennedy's opinion suggests that any law disqualifying an entire class of citizens from its benefits will be treated with skepticism. The very first paragraph of the decision makes clear the Court's unshakable conviction that Amendment 2 to the Colorado State Constitution, and like measures, violate the Constitution. The first sentence contains a then-unheeded, but prescient, statement from Justice Harlan, dissenting in the infamous *Plessy v. Ferguson* case,¹⁹⁴ that "classes among citizens" are neither "know[n] nor tolerate[d]."¹⁹⁵ The Court then states that "those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake."¹⁹⁶

Romer's movement from conduct to status, as well as its suggestion that animus can be based on the breadth of the prohibitions drawn, augurs well for same-sex marriage. First, as to status, *Bowers* contains one of two unstated assumptions: either that homosexuality literally does not exist, at least as a state of being that carries its own sexual urges,¹⁹⁷ or that, even if it does exist, it should not be expressed (or at least a state can so decree). If gay men and lesbians cannot even cause the Court to acknowledge them, it is hard to imagine what rights they might be afforded.¹⁹⁸ Therefore, *Romer* represents signal progress by at least acknowledging the presence of gay-identified citizens within the society. For this progress gay men and lesbians are indebted to

¹⁹⁴ 163 U.S. 537 (1896).

¹⁹⁵ *Romer*, 517 U.S. at 623 (quoting *Plessy*, 163 U.S. at 559). I agree with Sunstein that this sentence, especially in that it opens the opinion, is "stunning." Sunstein, *Foreword*, *supra* note 185, at 71.

¹⁹⁶ *Romer*, 517 U.S. at 623.

¹⁹⁷ Interestingly, the emergence of a distinctly homosexual, or gay, identity is a relatively recent phenomenon. Until little more than a century ago, the focus was on acts, not on a specifically gay identity. See HIGHWATER, *supra* note 31, at 201-02. Nonetheless, there have undoubtedly always been people who have been primarily sexually attracted to members of the same sex.

¹⁹⁸ I am aware, and more than a bit cautious, about the "essentializing" of gay identity that this treatment of the issue may imply. Two observations seem appropriate. First, although there are people whose sexual identity is fluid, there are many homosexual and heterosexual people who are, and have been for as long as they can recall, constitutively attracted to members of one sex only. See SULLIVAN, VIRTUALLY NORMAL, *supra* note 5, at 3-7. Sullivan's account of his own sexual awakening, unique though it of course must be, carries a certain resonance for many gay people, who have been aware of their sexual urges towards members of the same sex from an early age. Second, the undeniable presence in the society of those whose sexual identity they themselves would define as fluid does not defeat the argument about same-sex marriage, although it may complicate it. The point about allowing same-sex couples to wed, as we shall see in Part IV, is that it honors the committed relationship of two consenting adults. Denying that right at least requires a good reason, and I have seen none that withstands analysis.

those who have “come out” in numbers sufficient to make denial of their existence no longer a comfortable, or even a realistic, option. Whether that “comfort level” would cause the Court to recognize the *intimate* lives of same-sex couples is more difficult to gauge, though. Where gay men and lesbians are concerned, any movement from the political arena to the personal has tended to make courts squeamish.

Second, the Court’s admonition against imposing broad disabilities should be emphasized. Given the social, legal, and economic rights entailed by marriage, the problems imposed by a breadth of a law disallowing same-sex partners from marrying are great, indeed. The problem in drawing too much from *Romer* is that the Court never clearly spells out what constitutes impermissible animus. If that term is simply meant as a surrogate for the breadth of the amendment, the portents are good, but not certain. The Court could, on that reading, retreat to *Bowers*, and describe the marital relationship as fundamentally defined by the union of a man and a woman. But if, as Professor Schacter suggests, the impermissible animus is “intolerance of homosexuality framed in terms of traditional values,”¹⁹⁹ the fight against same-sex marriage is probably over. It is likely that the Court has not yet considered the full implications of *Romer*, since the case itself presented such a clear instance of the most basic unfairness. What, for example, would Justice O’Connor make of same-sex marriage? One must remember that she signed on with the majority in both *Bowers* and *Romer*. Predicting Justice Kennedy’s position is even more hazardous. As Justice Scalia pointed out in his dissent in *Romer*, then-Judge Kennedy had once upheld the Navy’s policy of discharging homosexuals, “because the general policy of discharging all homosexuals is rational.”²⁰⁰ Would Justice Kennedy consider it enough for the State to adduce *some* rational reason for disqualifying gay men and lesbians from entering into marriage? More pointedly, how much deference would he grant a state’s determination that its policy served some rational goal? And, would the Court’s understanding of rationality be informed by the members’ own ideas of marriage, possibly as deeply defined by traditional roles of men and women?²⁰¹

¹⁹⁹ Schacter, *supra* note 20, at 381.

²⁰⁰ *Romer*, 517 U.S. at 643 (Scalia, J., dissenting) (quoting *Beller v. Middendorf*, 632 F.2d 788, 808-09 n.20 (9th Cir. 1980)).

²⁰¹ One additional point must be made here. Despite the close connection between arguments grounded in equal protection and those based on fundamental rights, the two are analytically distinct. While *Romer* is a strong case on equal protection grounds for

Against that last potential reading of *Romer*, which depends critically upon a notion of gender identity that will not even see same-sex couples, one should oppose the Court's decision in *United States v. Virginia* ("VMI case").²⁰² In a decision powerfully destructive of assumptions based on what is appropriate to each gender, Justice Ginsburg joined a near-unanimous Court in holding that the Virginia Military Institute ("VMI") had run afoul of the constitutional guarantee of equal protection when it set up a "sister" program at Mary Baldwin College that attempted to meet what the state thought were the different needs of female students.²⁰³ The VMI program stressed an "adversative, or

requiring states to recognize same-sex marriage, recent Supreme Court decisions based directly on a fundamental rights argument have followed *Bowers* in reverting to a more "traditional" notion of the concept. In fact, one might more easily chart the course of a mosquito than that of the Court. In the right-to-die cases, the Court initially seemed to assume that a terminally ill patient had a constitutionally protected right to die. In *Cruzan v. Director Missouri Department of Health*, 497 U.S. 261, 277-80 (1990), the Court derived a right to refuse medical treatment from the common law principle of informed consent, and noted that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." *Id.* at 278 (The Court nonetheless upheld state law requiring that surrogate decisionmaker's substituted consent be established by "clear and convincing evidence." *Id.* at 281). But, in a more recent case, *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court reimagined its holding in *Cruzan* as limited to the principle that one has a protected right to refuse "life-saving hydration and nutrition." *Id.* at 723, 725. The case also follows a methodology of assigning dispositive importance to tradition in deciding whether a right is fundamental and defines the right in issue in extremely narrow terms: "[W]e have required . . . a 'careful description' of the asserted fundamental liberty interest." *Id.* at 721. This approach, of course, echoes that taken in *Bowers*, where the Court defined the right in question as "consensual sodomy" rather than privacy and self-determination. On the other hand, the language in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), announces an approach to fundamental rights that, with little effort, can be applied to issues touching the issues of importance to gay and lesbian people. Although the holding of the case was controlled by the joint opinion of Justices Kennedy, O'Connor, and Souter, the soaring rhetoric in parts of the decision, reminiscent of Justice Kennedy's powerful language in *Romer*, suggests his hand here, too: "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id.* at 847. Later, speaking of personal decisions relating to, among other things, marriage, this startling language appears: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 851. Thus, the promise of fundamental rights is occluded; so it may turn out that the choice of theory—equal protection or substantive due process—assumes importance central to the outcome of whatever case ultimately reaches the Court.

²⁰² 518 U.S. 515 (1996).

²⁰³ It should be noted that Virginia only did this in the first place under the duress of a directive from the United States Court of Appeals for the Fourth Circuit, which, in vacating the district court's holding that the VMI's exclusion of women did not violate the equal protection clause of the Fourteenth Amendment, directed Virginia to remedy the problem and suggested three possibilities for doing that: admitting women to VMI; going private; or establishing a parallel program. *See United States v. Virginia*, 976 F.2d 890, 900

doubting, model of education' which feature[d] 'physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values[,]'"²⁰⁴ while Mary Baldwin's program was designed to provide "a cooperative method which reinforces self-esteem."²⁰⁵

For the Supreme Court, this effort embodied an insupportable assumption that men and women are fundamentally different in ways that justified Virginia's creation of separate institutions around those differences. As Justice Ginsburg stated: "[G]eneralizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."²⁰⁶ *Some* women, the Court stressed, could and wished to take advantage of precisely the kind of adversative training that Virginia found worth defending. On the other hand, the adversative training model was not appropriate for most men, either. Thus, the state's attempt at remediation was ill-conceived, since it proceeded from "fixed notions concerning the roles and abilities of males and females."²⁰⁷ Fidelity to the equal protection clause instead requires "equal opportunity to aspire, achieve, participate in and contribute so society based on . . . *individual* talents and capacities."²⁰⁸

This language has power that should not be missed. In requiring the State to furnish an "exceedingly persuasive justification" for its decision to create a gender-based apartheid system, the Court rejected the view that men and women are "supposed" to behave in certain ways. These modes of thinking, the Court suggests, have impeded women from realizing their full potential. Such a rejection of assumed limitations could echo loudly through the same-sex marriage debate, since the hidden fuel for opposing such unions is some intrinsic idea of what men and women *are*—both as sexual beings and as the social people thought to emerge inexorably from this basic sexuality. In short, if men and women are improperly defined, and limited by historical and social assumptions, as the *VMI* case holds, the

(4th Cir. 1992). Virginia might have chosen what it considered the least of three evils.

²⁰⁴ *United States v. Virginia*, 518 U.S. at 522 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1421 (W.D. Va. 1991) (upholding, by the district court in the first decision, the school's single-sex education), *vacated and remanded*, 976 F.2d 890 (4th Cir. 1992)).

²⁰⁵ *Id.* at 527 (quoting *United States v. Virginia*, 852 F. Supp. 471, 476 (W.D. Va. 1994)).

²⁰⁶ *Id.* at 550.

²⁰⁷ *Id.* at 541 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

²⁰⁸ *Id.* at 532 (emphasis added).

inappropriateness of those assumptions provides an equally compelling argument against the refusal to recognize the gender challenge posed by same-sex couples.

VMI could have that effect. However, questions about the meaning and reach of *Romer* cannot be answered until the Court has occasion to provide its own interpretation of the holding. In the Parts that follow, I offer ways of expanding the insight of *VMI* in ways that permit cognizance of the deeper issues of gender identity that may persuade the Court, or other policymakers, that the asserted justifications for banning same-sex marriage cannot withstand even the slightest scrutiny.

III. MISCEGENATION, SAME-SEX UNIONS, AND "WHAT'S BRED IN THE BONE"²⁰⁹

In firm and terse language, the Supreme Court ruled in 1967 that Virginia's law prohibiting interracial marriage violated the equal protection clause of the Fourteenth Amendment.²¹⁰ That case, *Loving v. Virginia*, has such clear implications for the issue of same-sex marriage that it has become the source of several incisive commentaries on the subject, most of which argue, in one way or another, that the injustices are analogous.²¹¹ While reiterating the caution about what the Supreme Court may do with the issue of same-sex marriage, I argue that the analogy is powerful and persuasive. In addition, the underlying reason for the strength of the analogy also supplies a more general source of argument for legal recognition of such unions. In brief, the analogy is powerful because, in both interracial and same-sex marriages, embedded but fallacious assumptions about the *nature* of the parties attempting to marry enable a blindness that has resisted cure. Unmasking these assumptions provides a handy bridge to this Article's final Part, which argues for same-sex marriage and exposes the weakness of the opposing position.

This Part is designed as follows: First, I reveal the sources of the deeply grounded opposition to interracial marriage, as a prelude to understanding the difficulty with which the result in

²⁰⁹ This phrase comes from a Robertson Davies novel, entitled (not surprisingly) *What's Bred in the Bone*. ROBERTSON DAVIES, *WHAT'S BRED IN THE BONE* (1985). The title refers to attributes about oneself that are too deeply grounded to be defied. As we shall see, such deep assumptions about gender, as well as sexual identity and role, support laws and practices that injure gay people.

²¹⁰ See *Loving v. Virginia*, 388 U.S. 1 (1967).

²¹¹ See, e.g., Koppelman, *supra* note 19; Law, *supra* note 19; Strasser, *supra* note 19; Sunstein, *Homosexuality and the Constitution*, *supra* note 27; Trosino, *supra* note 36. *But see* Wardle, *supra* note 2, at 83-88.

Loving was achieved. Next, after briefly explaining the holding in *Loving*, I argue that the opposition to same-sex marriage partakes of a set of unexamined assumptions strikingly similar to those that frustrated interracial marriage for so long. I then offer observations about the similarities and differences between the position of gays and lesbians in society today and that of African-Americans leading up to the decision in *Loving*, and briefly discuss the arguments against the analogy. Finally, I connect the miscegenation argument to Part IV by noting that excavating the true importance of *Loving* does not quite finish the task of making the case for same-sex marriage.

Before we begin, an important point should be made. Much of the writing concerning the miscegenation analogy has focused on the obvious sexual orientation discrimination that the same-sex marriage prohibition visits on gay men and lesbians.²¹² While I agree substantially with the arguments made in those pieces, the emphasis here is on the more subtle issue of sex-based discrimination. I have chosen this less obvious route because the insights gleaned from this exploration reinforce the Article's central points about the deep structure of gender, gender identity, and the corollary definition of marriage that exert such unacknowledged power.

A. *Loving's Social and Legal History*

Both interracial marriage and "fornication" were prohibited in most states even before the Civil War.²¹³ Since most black men and women were slaves at that time, not much attention was paid to such marriages. As Professor Van Tassel has noted, the relationship between master and slave-servant was one of dependency.²¹⁴ The master was permitted to extract obedience and labor from the slave. The slave, in return, had a moral claim to "protection, the right of counsel and guidance, the right of subsistence, [and] the right of care and attention in sickness and old age."²¹⁵ Thus, the master-slave relationship could be seen as an extension of the family relations of the time, in which the father

²¹² See STRASSER, *supra* note 5; Strasser, *supra* note 19; Trosino, *supra* note 36.

²¹³ See Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189 (1966).

²¹⁴ Even free blacks were often folded into the culture of dependency, through such devices as guardianship and legal rules prohibiting descent of property. See Van Tassel, *supra* note 48, at 887-88.

²¹⁵ *Id.* at 882 (quoting E.N. ELLIOTT, AN INTRODUCTION TO COTTON IS KING AND PRO-SLAVERY ARGUMENTS, reprinted in EUGENE GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 76 (1976)).

ruled the rest of the family (his wife and children) but was expected, in return, to provide for them.²¹⁶ Further, slaves were at the bottom of the family hierarchy, below (in this order) wives, children, and other servants. Particularly in the context of slavery, marriage between the races can be seen as inconsistent with the child-like dependency that the relationship created.²¹⁷

The Civil War changed all that. Once the dependency relationship was (at least legally) removed, the issue of how to reconfigure the social and civil relations between the races was starkly presented. With the first true challenge to the hegemony of their power, white males in state legislatures and Congress voiced consistent and often hysterical concern about *social* equality. So it was that states moved to strengthen their proscriptions against interracial marriage, while, at the same time, raising the specter of such marriages whenever issues of civil rights came up. Such unions could be seen as the endpoint of social equality.

One stark example of the fear with which interracial unions were viewed is the action of the Georgia state constitutional convention held in 1865, just after the Civil War. Georgia, which had not banned interracial marriages until 1861, when it had placed such a proscription in the state's code, specifically made the ban part of the organic law of the state in 1865, enshrining it in the state constitution.²¹⁸ Another example is the action taken by South Carolina. While the state acted progressively in repealing discriminatory laws, the interracial marriage prohibition was expressly exempted from those laws in 1866.²¹⁹

At the federal level, where the subject of marriage was not specifically up for discussion,²²⁰ the fear of interracial marriage

²¹⁶ See *id.* at 880-83.

²¹⁷ Of course, this did not mean that white men invariably refrained from sexual relations with slaves. See *id.* at 899.

²¹⁸ "The marriage relation between white persons and persons of African descent, is forever prohibited, and such marriage shall be null and void . . ." GA. CONST. of 1865, art. V, § 1 (emphasis added). Alabama and Tennessee did the same, as Professor Van Tassel notes. See *id.*; see also ALA. CONST. of 1865, art. I, § 31; TENN. CONST. of 1870, art. XI, § 14.

²¹⁹ Van Tassel, *supra* note 48, at 892.

²²⁰ It is worth stating that the Congress did not believe it should involve itself in marriage, which it believed to be a states' rights issue. DOMA represents the first serious incursion by Congress into what has historically been thought the states' prerogative regarding the rules of marriage. During the *Hearings of the House Judiciary Committee on DOMA*, Representative Barney Frank (D-Mass.) pointed out that Congress's giving to the states power they always assumed they had, under the full faith and credit clause of the Constitution, might serve to undermine such state power by creating a presumption that the states do not have such power unless Congress gives them permission. See *Hearings*

provided a useful “scare tactic” for those opposing civil rights legislation. Telling is one of President Andrew Johnson’s stated reasons for vetoing the Civil Rights Act of 1866,²²¹ an act which sought to reduce to legislation the imperatives of the civil war amendments. The Act, which passed despite the President’s veto, gave all persons born in the United States contract and property rights, as well as “full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.”²²² Although this law was apparently unexceptionable in its implementation of the amendments, President Johnson expressed fear that Congress would then soon repeal state statutes banning interracial marriage.²²³

Further, as several commentators have noted, the Civil Rights Act of 1875²²⁴ was fiercely resisted on the grounds that it, too, would one day lead to the abolition of the ban on interracial marriage. Although one position is that such arguments were merely *in terrorem*,²²⁵ the more persuasive view, supported in part by the lock-up amendments discussed above,²²⁶ is that the Southern Democrats were *indeed* fearful of interracial marriage and saw the expansion of civil rights as pushing inexorably in that direction. Professors Bank and Van Tassel have further demonstrated the reality of this fear through extensive analysis of the congressional debates preceding the 1875 Act.²²⁷ Consider, as one absurd manifestation of this fear, the following statement made on the floor of the House of Representatives during the debate over the Act:

I suppose there are gentlemen on this floor who would arrest, imprison, and fine a young woman in any State of the South if she were to refuse to marry a negro man on

Before the House Judiciary Comm. on the Defense of Marriage Act, 104th Cong. (1996) (testimony of Rep. Barney Frank), reprinted in PRO AND CON, *supra* note 5, at 214.

²²¹ Ch. 31, 14 Stat. 27 (codified at 42 U.S.C. §§ 1981-1982 (1994)).

²²² *Id.*

²²³ See President Andrew Johnson’s Veto of “An Act to Protect All Persons in the United States in Their Civil Rights and Furnish the Means of Their Vindication.” WEEKLY COMP. PRES. DOC. 3603, 3605, 3610-11 (Mar. 27, 1866), reprinted in Van Tassel, *supra* note 48, at 892.

²²⁴ Ch. 114, §§ 3-5, 18 Stat. 336, 337 (1875). See, e.g., Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966); Trosino, *supra* note 36; Van Tassel, *supra* note 48; Wadlington, *supra* note 213; Steven A. Bank, Comment, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303 (1995).

²²⁵ See Avins, *supra* note 224, at 1227.

²²⁶ See *supra* notes 218-19 and accompanying text.

²²⁷ See Bank, *supra* note 224, at 306-14; Van Tassel, *supra* note 48, at 906-08.

account of color, race or previous condition of servitude . . .
 . . . That would be depriving him of a right he had under
 the amendment²²⁸

Of course, no one was considering a *requirement* that anyone of one race marry a person of a different race. But the deeper question remains: Why the strong opposition to interracial marriage? Professor Van Tassel's plumbing of the original sources leads her to conclude that the primary fear in the 1800s was of social equality, but that, as the present century began to unfold, the focus shifted to maintaining the "purity of the races."²²⁹ These two concerns are closely related, and together suggest a complex and paradoxical view. On the one hand, race was regarded as conferring a fixed set of characteristics. The strength of this view is dramatically underscored by the pseudo-scientific belief that the races literally *could not* be "mixed," that they were, in effect, different species. One version of this view had it that the third generation of such mixed unions would be sterile!²³⁰

On the other hand, the fear was voiced that, when mixing of the races did occur, the result would be an "inferior product." More specifically, the *white* "race" would be diminished by intermarriage.²³¹ As a particularly striking example of this fear, consider the increasingly frantic efforts of the Virginia legislature to prevent such "mixing" through either interracial marriage or sexual coupling.²³² Although the offense of miscegenation did not change in basic definition from 1849 through 1967, the definition of racial classifications did, and in telling ways. In 1866 complexities in racial classifications were removed in favor of fractional definitions. Anyone with "one-fourth or more of negro blood" was "deemed a colored person"²³³ and thereby captured within the proscriptive language of the miscegenation statute. In 1910 the statute was amended to lower the amount of "Negro

²²⁸ CONG. GLOBE, 43d Cong., 1st Sess. 343 (1873), *reprinted in* Van Tassel, *supra* note 48, at 906.

²²⁹ *See* Van Tassel, *supra* note 48, at 904-17.

²³⁰ *See* F. JAMES DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION 25 (1991).

²³¹ *See, e.g.*, 2 CONG. REC., pt. I, at 409 (1874) (statement of Cong. Blount), *reprinted in* Avins, *supra* note 224, at 1246 n.118 ("[T]he whites naturally view [miscegenation] as an attempt at ultimate amalgamation. This necessarily involves their degradation. A mean alliance always begets a progeny below the level of the better parent.").

²³² The following discussion borrows heavily from Wadlington, *supra* note 213. Wadlington's analysis traces treatment and attitudes toward miscegenation all the way back to shortly after the founding of the Jamestown colony in the early 1600s and shows the states' consistent legal and moral disapproval of both interracial marriage and sex. I focus here on the period between the end of the Civil War and 1967, when Virginia's miscegenation statute was declared unconstitutional. *See id.* at 1195-1201.

²³³ *Id.* at 1196 (quoting 1865-1866 Va. Acts ch. 17, § 1, at 84).

blood” from one-fourth to one-sixteenth.²³⁴ Finally, in 1924 the statute that became the basis for the Supreme Court’s decision in *Loving* was enacted. This statute had the broadest possible sweep, forbidding any white person from marrying *anyone* other than a white person (by this time including not just “Negroes,” but all other races), where “white person” was redefined as one “who has no trace *whatsoever* of any blood other than Caucasian.”²³⁵

As Professor Wadlington points out, this provision can lead to absurd results. In theory, a white person receiving a blood transfusion from a “Negro” would then be unable to marry another “white person.”²³⁶ The best explanation for such a plainly unworkable prohibition is that the walls between the races were crumbling, however slowly, and the legislature, through increasingly severe measures, sought to prop them up. This was an attempt to buttress the imperiled dominance of the white male, for whom the eliding of racial distinctions posed a threat to deeply held notions of both racial and gender-based superiority. The threat to race is self-explanatory. The threat to gender dominance stemmed from the view that racial mixing would: (1) deprive white males of exclusive ownership of white females, to that extent eliminating their culturally embedded superiority over both women and black men; and (2) more radically undermine the naturalness of such superiority when white men chose to “mix” with black women, thereby (in their view) empowering black women to the detriment of (the rest of) the white male population.²³⁷ The law continued to reflect these views as late as 1967.

B. *Loving v. Virginia: Exposing the Racist Assumptions*

In deciding *Loving*, the Supreme Court did not miss the racist underpinnings of Virginia’s anti-miscegenation statute. Brushing aside the “symmetrical equality” argument—that the statute treated the races alike in imposing a facially identical disability on

²³⁴ See *id.* at 1197 (citing 1910 Va. Acts ch. 357, § 49, at 581).

²³⁵ *Id.* at 1200 (citing 1924 Va. Acts ch. 371, § 5, at 535 (codified at VA. CODE ANN. § 20-54 (Michie 1960))) (emphasis added).

²³⁶ *Id.* at 1203-04. This conclusion, however, may not be inevitable. By “blood” the legislature may well have intended to mean ancestry. Today we would take such a meaning as less literal (and therefore less likely to be intended) than the notion that “blood” refers to the serum that circulates through the body.

²³⁷ Here, it is particularly important to distinguish between interracial sex—which, as between white men and black women, had long been accepted as a manifestation of white male sexual prerogative, see Van Tassel, *supra* note 48, at 899, and interracial marriage. The comment in the text refers to the latter.

each—the Court saw through to the core of legislative motivation, to enshrine “White Supremacy.”²³⁸ Blacks were able to marry Asians, for example, and vice versa; the only group that was enjoined from intermarriage was whites.²³⁹ Thus, the asserted evenhandedness of the law was easily pierced.

In deciding that the statute was unconstitutional, the Court did not repudiate what it saw as the *fact* of race. Indeed, defeating the state’s argument entailed a recognition of such categories and the state’s attempt to hold steady those boundaries.²⁴⁰ But the long-term fallout from the *Loving* holding is inexorable. When the “blood barrier” between the judicially defined races is breached, the definition of race will become blurred and revealed as a matter more of convention than of biology.²⁴¹ Evidence that this result is still resisted is found in popular culture²⁴² and opinion polls, which

²³⁸ *Loving v. Virginia*, 388 U.S. 1, 7 (1967). As Professor Sunstein has noted, the Court used the term “White Supremacy” for the “only time in the nation’s history” and pointedly cast the term in upper-case letters. Sunstein, *Homosexuality and the Constitution*, *supra* note 27, at 209.

²³⁹ On the surface, there is something odd about declaring that a statute that imposes a prohibition on one race unconstitutionally discriminates against a race *not* by terms subject to the prohibition. But the Court, to its lasting credit, saw that the prohibition was more fundamentally about protecting the white race against impurity, thereby affirming its status atop the societal pecking order.

²⁴⁰ Professor Sunstein perhaps attributes a more post-modern view of race to the Court than is warranted. *See id.* (implying that the Court saw that “in a world with racial mixing, it would be unclear who was really black and who was really white. The categories themselves would be unsettled—revealed to be a matter of convention rather than nature.”). Nonetheless, he is correct that the implication of the decision is the ultimate collapse of the categories of race so ardently defended by states such as Virginia.

²⁴¹ One must be careful to avoid oversimplification in these matters. As Professor Sunstein has pointed out in the context of gender identity, one must only believe that categories such as race and gender are *to some extent* constructions of social convention in order to recognize the limitations of such definitions. *See id.* at 210, 219. For one account of the convergence between intrinsic and social differences of both race and gender, see Malcolm Gladwell, *The Sports Taboo*, *NEW YORKER*, May 19, 1997, at 50 (mixing anecdotal observations and empirical findings to suggest the complexity of difference in athletics and certain kinds of intelligence).

²⁴² In the popular movie *GUESS WHO’S COMING TO DINNER?* (Columbia Pictures 1967), the dramatic hinge on which the plot pivoted was the reaction of Katharine Hepburn’s character—a liberal, educated woman—to her daughter’s decision to marry a black scientist (played by Sidney Poitier). That movie was released in the same year as the Supreme Court’s decision in *Loving*, but the depth of the discomfort it captured was not extinguished by judicial proclamation. In 1973 an unknown rock group called “The Stories” took *Brother Louie*—a song about a white “guy” (Louie was “whiter than white”) bringing his African-American “girlfriend” (“she was black as the night”—and, not incidentally, unnamed) home to “meet his momma and poppa”—all the way to the top of the Billboard Hot 100. *See* JOEL WHITBURN, *THE BILLBOARD BOOK OF TOP 40 HITS* 442 (6th ed. 1996). Note the emphasis on the polarity of color in the lyric, presumably intended to heighten the difficulty of acceptance faced by the couple. The Stories, by the way, were sympathetic to the couple, stating: “Ain’t no difference if you’re black or white” Mercifully, the group disappeared without a trace, becoming yet another band

show that more Americans still oppose than support interracial marriages.²⁴³ Thus, powerfully held notions of race and its “definition” continue to cast their spell over a population long-steeped in identity definitions, reinforced by political will, fear, and expedience.

Only more recently has it come to be appreciated that such rooted assumptions also direct thinking and discourse about gender, its identity, and its “proper” expression. Unmasking these assumptions can go a long way toward redirecting the debate about same-sex marriage. To this end I now turn.

C. *Loving’s Implications: Exploring the Analogy*

Part I explored the means by which courts have continued to use a “deep” definition of marriage, as restricted to a union of what might be called “biologically opposed” persons—a man and a woman. As noted, courts have had recourse to sources as ancient as the Book of Genesis in affirming this dichotomy. But what if the rigid split between man and woman turns out to contain an important element of social construction? Further, what if this construction is threatened by homosexual identity and (or?) behavior? In this Part, I contend that social construction plays at least some part in the widely accepted definitions of male and female and that much of the fear of homosexuality and, by extension, of same-sex marriage can be traced to its threat to received limits as to the appropriate expression of gender. Thus, disallowing same-sex marriage becomes a form of discrimination based on sex or on uncritical judicial assumptions about sex and gender, which amount to the same thing. Once these conclusions are in place, the arguments in Part IV about the wisdom of same-

in the proud tradition of “one-hit wonders.” It is debatable how much the lyrics of such popular songs urging tolerance of racial difference have changed, even in the 1990s. See, e.g., MICHAEL JACKSON, *Black or White*, on DANGEROUS (Music Entertainment 1991) (“I’m not going to spend my life being a color . . . but if you’re thinkin’ about my baby it don’t matter if you’re black or white.”).

²⁴³ In 1991 a Gallup poll of white Americans found that 45 percent disapproved of interracial marriage, while only 44 percent approved of it. When the question involved the marriage of a close relative to an African-American, however, the disapproval registered in a separate poll jumped to 65 percent. See Lynne Duke, *25 Years After Landmark Decision, Still the Rarest of Wedding Bonds*, WASH. POST, June 12, 1992, at A3. When the issue is the more extreme one of legal proscription, a 1991 poll (of all races) revealed a much lower figure—20 percent in opposition. This represents a drastic decline from a 1971 poll, in which about 40 percent held that position. See Barbara Karkabi, *Love, Marriage, Race & Kids: Interracial Families Build Successful Lives with Support of Family*, HOUS. CHRON., Oct. 11, 1992, at 1. This deep and persistent opposition to racial mixing may account for the relatively late date at which the Court finally addressed the issue of miscegenation.

sex marriage fall out rather easily.

One might be forgiven for asking, at the outset: How can sex be “socially constructed”? Is not one’s sex an immutable fact? These questions repeat the earlier noted confusion between gender and biological sex. Certainly women and men have physical differences, but assigning meaning to such physical differences is an important part of the creation of gender identity.

Some scholars have questioned the conclusion that even basic sexual identity—the male-female dichotomy—is inevitable, observing that nothing in the “brute biology” of the matter compels division of human beings into just two sexes.²⁴⁴ This division is a shorthand construction based on a few characteristics that have been singled out for special recognition, most significantly the differences in reproductive organs. But we might also have divided people by age groups—“pre-reproductive,” reproductive, and “post-reproductive.” Again, what of people who cannot reproduce? Or what of those who have the sexual organs of both sexes? The difficulty involved in imagining such redrawn borders reemphasizes that the social and historical commitment to black-and-white and male/female divisions of the human species runs very deep.

Certainly, as one moves beyond sexual identity to the question of gender, the social constructions become more apparent. Susan Moller Okin has effectively criticized the consistent commitment to making the social and political roles assigned to the sexes seem intrinsic.²⁴⁵ This need strictly to dichotomize the sexes can result in almost comical perplexity. For example, Aristotle was mystified by the reproduction and sexual identity of bees because he was unable to transcend his own biases about the characteristics that males and females *must* have.²⁴⁶ This need to believe that the sexes are different in fixed ways, Moller Okin plausibly claims, accounts for the discomfort in “not being able to assign a sex to someone we meet or even casually pass by[,]” as well as the vertigo caused by transsexualism.²⁴⁷

Jamake Highwater has noted that cultures less “Western” than our own have often imagined the connection between

²⁴⁴ See THOMAS LAQUEUR, MAKING SEX (1992), reprinted in Sunstein, *Homosexuality and the Constitution*, *supra* note 27, at 219.

²⁴⁵ See Okin, *supra* note 30, at 44, 47-49 (discussing the views of Hegel and Rousseau, among others).

²⁴⁶ See *id.* at 47.

²⁴⁷ *Id.* at 47-48. In an interesting corollary, Professor Okin opines that a society not as tied to rigid gender assumptions might be less likely to create people so uncomfortable with their biological sex that they seek a sex change. See *id.* at 45-46.

biological sex and gender identity in fluid ways that would startle us.²⁴⁸ A Native-American himself, Highwater draws on examples from different tribes to make this point. The pre-Columbian Natchez tribe had among them a biological man who was called “the chief of the women.”²⁴⁹ This person had the dress and occupations of the women in the tribe and had the interesting role of household helper to the male hunters, at times accompanying them on hunts in place of their wives.²⁵⁰

More recently, the Zuni Indians of the Southwest had among them a biological male, We’wha, whose sex was presumed female, even to the anthropologist who was studying the Zunis, until We’wha’s death. We’wha was both a religious and a tribal leader and one of a recognized group of what the Zunis called *Ihamana*, which we might roughly translate as male transvestite. In recognition that We’wha’s *body* was male, he was buried on the men’s side of the cemetery—but in mostly women’s clothing. Only the location of burial, Highwater notes, “countered the gender she had chosen during her lifetime. Her behavior had determined her gender in life; her anatomy only was the determinate of her gender in death. From the Zuni point of view, We’wha’s spirit was that of a woman; only her body was that of a man.”²⁵¹ Further, when the anthropologist Matilda Coxe Stevenson inquired as to why no one had told her about We’wha, the response was, in essence, “Told you about what?” To the Zunis, We’wha’s expression of gender was not to be stigmatized, but celebrated as a manifestation of the divine.²⁵²

Even if one is unwilling to go so far as to accept that sexual identity and gender are completely socially constructed, stories like the ones above, and the logic of experience make inescapable the conclusion that gender is, at least to some extent, a phenomenon emergent from the socio-political context of any particular age. Even obvious differences such as those relating to physical strength are, at least in some measure, an outgrowth of societal norms that have long discouraged women from pursuing athletics.²⁵³ *A fortiori*, other differences assigned to the two genders can be shown as interpretations of the significance of biological differences. Many of these conclusions do not require a

²⁴⁸ See HIGHWATER, *supra* note 31, at 80.

²⁴⁹ *Id.*

²⁵⁰ See *id.* at 80 (citing DUMONT DE MONTIGNY, MEMOIRES HISTORIQUE SUR LA LOUISIANE (1753)).

²⁵¹ *Id.* at 81.

²⁵² See *id.* at 80-81.

²⁵³ See Sunstein, *Homosexuality and the Constitution*, *supra* note 27, at 218.

law review article to enumerate, as they are so well known and broadly accepted: Men are aggressive, women passive; men are concerned with the “affairs of the world,” women are nurturers and “nesters”; men are “strong” (in many senses of that word); women “weak” (again, in many ways).

Once the fixed notion of gender identity is seen as a construction—as was so with the identity of race—the objection at the very bottom of the possibility of same-sex marriage stands revealed, as based on impermissible sex discrimination. Homosexuality²⁵⁴ presents a challenge to the seductively implanted definitions of gender, in which men are the aggressors, and women the passive participants. Homosexual men may be *either* active or passive in sexual relations, and many move fluidly between these roles, or (more accurately) activities.²⁵⁵ Thus, heterosexual males who might be able to imagine themselves engaging in insertive anal sex with another male (or who may actually have done so, without identifying themselves as “gay”) might be repulsed at the thought of being the receptive or “female” partner. And the thought that one might be active one day, passive the next, could be unsettling in the extreme. As Professor Sunstein has astutely observed, this unnerving challenge to role may explain Justice Burger’s otherwise puzzling citation in the *Bowers* case to Blackstone, who declared homosexuality “as an offense of ‘deeper malignity than rape.’”²⁵⁶ Since rape involves an intentional act of extreme and nonconsensual violence against another human being, while homosexual sodomy (as presented in *Bowers*) occurs between consenting adults, it is difficult to think of any other reason for such a statement.

The concerns with lesbianism are different, but related. Lesbianism makes women unavailable to men and suggests that woman can and do sometimes take on the active role in sexual

²⁵⁴ For the moment, I am being deliberately vague about the distinction between conduct and behavior.

²⁵⁵ The same is also true of heterosexual relations. Some straight-identified men play the passive role in sexual relations, at least some of the time. Why this activity has not resulted in greater acceptance of homosexual sex is something of a mystery to me. It may be that, although those men who are more fluid in their sexual play are less likely to be intolerant of homosexuality, there simply are not enough of them to make a difference, or that the societal disapproval of homosexuality and general notions of propriety disable people from emphasizing this point.

²⁵⁶ *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215). This passage was quoted in Sunstein, *Homosexuality and the Constitution*, *supra* note 27, at 208, and was further analyzed *id.* at 220. Sunstein also notes boxer Mike Tyson’s threat to an opponent that Tyson would “make [him his] girlfriend.” *Id.* In other words, he would defeat him so thoroughly as to “feminize” him.

relations. Is this why socially active women are often stigmatized as lesbians, as Professor Sunstein suggests?²⁵⁷ Perhaps; the conclusion is not hard to draw from the premises. These distressing questions present the other side of the challenge to gender identity that homosexuality reveals.

The implications of these observations for same-sex marriage are obvious enough. If those who identify as gay or lesbian are permitted to marry, an institutional blessing will have been given to those who most fundamentally, and by their very presence, challenge the gender roles that have served those with the largest stake in them so well for so long. My strong suspicion is that this same uneasiness accounts for the tendency of courts—one need look no further than *Bowers*—and of people in general to focus on, or “see,” the sexual conduct of gay and lesbian people, (and perhaps unconsciously) to ignore the rich depth of their humanity. With those identified as homosexuals, the identity and the conduct are merged and then disapproved. This, again, amounts to a form of sex-based discrimination, just as state statutes banning interracial marriage constituted race discrimination.

D. *Limits of the Analogy*

One of the most interesting differences between interracial and same-sex marriage is the striking difference in the speed with which the issue has ascended to the top of the agenda. In the case of interracial marriage, more than 100 years passed between the end of the Civil War and the Supreme Court’s decision in *Loving*. Even viewing the issue through the shorter lens of the civil rights movement, interracial marriage came last. The seminal Supreme Court proclamation on the unconstitutionality of school segregation in *Brown v. Board of Education*²⁵⁸ came in 1954 and was followed by a succession of other cases that both implemented *Brown*’s central commitment to racial equality and extended that commitment to other contexts.²⁵⁹ Even Congress had taken action before *Loving*, enacting the Civil Rights Act of 1964²⁶⁰ and the Voting Rights Act of 1965.²⁶¹ Thus, *Loving* constituted the final

²⁵⁷ See *id.* at 220-21.

²⁵⁸ 347 U.S. 483 (1954).

²⁵⁹ See Florida *ex rel.* Hawkins v. Board of Control, 347 U.S. 971 (1954), *reh’g denied*, 350 U.S. 413 (1956) (applying *Brown* to higher education); HAYMAN, *supra* note 30, at 84-92 (discussing the post-*Brown* cases that carried out its mandate).

²⁶⁰ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

²⁶¹ 42 U.S.C. §§ 1971, 1981-1983 (1994).

piece of the puzzle of formal equality.²⁶²

The issue of interracial marriage was able to lie dormant for so long, especially in certain pockets of the South,²⁶³ because the highly stratified and formalized relations between “black” and “white” imposed by slavery were not quickly or easily transformed. Social, political, and economic racial separation remained a fact of life for long after slavery was abolished, partly because of the will of the white majority that dramatically reasserted its control and prerogatives in the post-Reconstruction era, and, in a related way, because of the deeply fixed views on race that held sway. As the Civil Rights movement gathered momentum, and the notion of social equality began to take hold—at least as a goal—marriage could at last be considered as the “final frontier” in the attainment of formal equality.

Compare same-sex marriage, which has appeared on the political horizon with shocking speed; as of this writing, there is no federal legislation specifically protecting gay men and lesbians from discrimination of any kind,²⁶⁴ and only some ten states have such legislation.²⁶⁵ Yet at least one state may be on the verge of permitting same-sex marriage, and—as I hope this Article has already shown—the subject is very much on the “front burner.”

²⁶² I use the term *formal equality* deliberately, intending to exclude the entire issue of affirmative action thereby. In my view, some forms of affirmative action are needed to achieve real equality of opportunity, but this charged issue is beyond the scope of this Article. It seems to me that the special history of race relations in the United States calls for a remedy such as affirmative action, but that the quite different history of gay men and lesbians may make *that* remedy a clumsy fit in cases concerning equal opportunity for gay and lesbian people. Thus, the parallel being drawn here is between the basic package of civil rights that establish at least formal equality for African-Americans and gay people, respectively.

²⁶³ At the time *Loving* was decided, 15 other states still had some form of anti-miscegenation statutes in force. See ALA. CONST. art. IV, § 102 (1958); ARK. STAT. ANN. § 55-104 (1947); DEL. CODE ANN. tit. 13, § 101 (1953); FLA. STAT. ch. 741.11 (1965); GA. CODE ANN. § 53-106 (1961); KY. REV. STAT. ANN. § 402.020 (Michie 1966); LA. REV. STAT. ANN. § 14:79 (West 1950); MISS. CONST. art. XIV, § 263; MISS. CODE ANN. § 459 (1956); MO. ANN. STAT. § 451.020 (West 1966); N.C. CONST. art. XIV, § 8 (1953); OKLA. STAT. Ann. tit. 43, § 12 (West 1965); S.C. CONST. art. III, § 33 (1962); TENN. CONST. art. XI, § 14 (1955); TEX. PENAL CODE ANN. § 492 (West 1952); W. VA. CODE § 4697 (1961).

²⁶⁴ The Employment Non-Discrimination Act, which would ban employment discrimination on the basis of sexual orientation, has been introduced into Congress repeatedly. The closest it came to passage was in 1996, when the Senate defeated the measure by a 50-49 vote. See David Lawsky, *Congress Sends Clinton Bill Curbing Gay Marriage*, Sept. 10, 1996, available in LEXIS, News Library, Wires File.

²⁶⁵ The states are: California, Connecticut, Hawaii, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. A complete and up-to-date list of these statutes, including full citations, appears in *The Employment Nondiscrimination Act of 1997: Hearing on S. 869 Before the Senate Comm. on Labor and Human Resources*, 105th Cong. (Oct. 23, 1997) (statement of Chai R. Feldblum, Associate Professor of Law, Georgetown University Law Center).

Why have these developments preceded the enactment of a basic package of civil rights?

Gay men and lesbians are situated rather differently in relation to the larger society than were (and, to some extent, are) African-Americans. Because of the nature of “gayness,” gay men and lesbians “lurk” in families that span the social and economic spectrum. For example, an upper-middle class family that assiduously avoided contact with members of other races, or even religions, has available no defensive barrier, besides outright rejection, to a family member who “comes out.” Similarly, workplace colleagues who come from the same class may establish social relationships, which may be sufficiently strong to weather disclosure of one colleague’s same-sex orientation.²⁶⁶ The expression “we are everywhere” is deadly accurate. As gay men and lesbians have lately become “noticed,” they stand revealed as woven throughout the social fabric. At that point, the denial of the *whole package* of legal, social, and economic rights suddenly seems unfair—not just to those directly affected, but to at least some of those who know (and have always known) them well.

Of course, matters are never so simple. As Andrew Sullivan has pointed out,²⁶⁷ this rushing out of the closet—in part driven by the exigencies of the epidemic of HIV/AIDS—has visibly unnerved many people who believed that a societal “don’t ask, don’t tell” policy had worked well enough. Friends, employers, and family may have thought they had a “pretty good idea” of who among them had a same-sex orientation, but a tacit agreement not to discuss the matter was in evidence.²⁶⁸ Indeed, the discussion concerning same-sex marriage at times reflects ill-concealed anger at gays and lesbians for breaching this unspoken understanding.²⁶⁹

This observation expands upon the earlier point about the

²⁶⁶ I do not mean to suggest that coming out in the workplace is without problems. For a particularly chilling account of one man’s horrific treatment at the hands of fellow employees and the failure of Chrysler management to stop it, see James B. Stewart, *Coming Out at Chrysler*, NEW YORKER, July 21, 1997, at 38.

²⁶⁷ See Andrew Sullivan, *When Plagues End*, N.Y. TIMES, Nov. 10, 1996, § 6 (Magazine), at 52.

²⁶⁸ Not everyone followed these “rules” of course. There have always been gay men and lesbians who made their sexual identity public. But the widespread “coming out” of the gay and lesbian population is a recent phenomenon.

²⁶⁹ See, e.g., 142 CONG. REC. S10124-25 (daily ed. Sept. 10, 1996) (testimony of Sen. Bill Bradley on DOMA) (“I wish I did not have to deal with this issue. It makes me feel uncomfortable.”); Testimony of Rep. Henry Hyde on DOMA, *reprinted* in PRO AND CON, *supra* note 5, at 225-26 (“This is a miserable, uncomfortable, queasy issue [T]here is a moral issue No one wants to talk about it A loving relationship between people of the same sex ought to be their relationship. It ought to be private, and keep it private.”).

threat to gender role and identity presented by homosexuality. By remaining in the closet, gays and lesbians had long permitted the gender assumptions to go unchallenged. The rising strength of the gay rights movement, however, shakes the very foundation of these scripted roles. Senator Bill Bradley, speaking on behalf of DOMA, described his discomfort with the whole issue of same-sex relations with a telling metaphor: "I feel I'm on ground full of quicksand."²⁷⁰

Thus, while both interracial marriage and same-sex marriage require a peeling away of tightly guarded assumptions, the rapid ascendance of the issue for gay men and lesbians presents an odd difficulty: Although their presence in the dominant social structure has perhaps driven the question to the fore quickly, that same speed means that, for many, the issue is not yet comfortable.²⁷¹ The late Congressman Sonny Bono (of all people) perhaps best captured this discomfort, in his startlingly candid exchange with openly gay Congressman Barney on the subject: "I simply can't handle it yet, Barney. It's nothing—nothing else. . . . I wish I was ready, but . . . [I] don't think I [am] yet. . . . I don't want to justify it because I can't."²⁷² Mr. Bono, whose own daughter is an open lesbian, could not "justify" his position, I submit, because he did not fully understand it, at least on a conscious level. Notions of gender are so deeply embedded that they come to seem natural and therefore go unexamined.²⁷³ But, as demonstrated above, such an examination will reveal the artificiality of many of the distinctions thought to flow from gender difference.

A second distinction between the issue of interracial and

²⁷⁰ 142 CONG. REC. S10125 (daily ed. Sept. 10, 1996) (testimony of Sen. Bill Bradley on DOMA).

²⁷¹ Professor Sunstein has recognized this problem, leading him to take the institutionally conservative position that, although same-sex marriage is constitutionally required, the Supreme Court should manage its docket to avoid deciding the question for now. See Sunstein, *Homosexuality and the Constitution*, *supra* note 27, at 221-24. He states:

If the . . . Court accepted the argument [now] we might expect a constitutional crisis, a weakening of the legitimacy of the Court, an intensifying of homophobia, a constitutional amendment overturning the Court's decision, and much more It would be far better for the Court to start cautiously and to proceed incrementally.

Id. at 223. He makes a similar point in Sunstein, *Foreword*, *supra* note 185, at 96-99.

²⁷² Transcript of the Mark-Up Record of the Defense of Marriage Act, *reprinted* in PRO AND CON, *supra* note 5, at 223, 224 (statement of Rep. Sonny Bono).

²⁷³ See Sunstein, *Homosexuality and the Constitution*, *supra* note 27, at 219 ("It is at least possible that the differences between men and women have such foundational status only because of the ways in which inequality and social practice make gender crucial.").

same-sex marriage relates to a possible difference in the legal standard to be applied to each situation. Because of the historical complexity of the issue of race in the United States, race-based statutory classifications have long come in for the strictest possible scrutiny by the Supreme Court:²⁷⁴ the state must show a compelling interest, *and* that there is no less restrictive alternative to achieving the same result available.²⁷⁵ Race has become what is called a “suspect class.” Thus, one might argue that the attempt to analogize same-sex marriage fails because the legal standards differ. A few words of response should suffice.

First, sex-based classifications, such as the ban on same-sex marriage, are also subject to heightened scrutiny. While the Court’s rulings on classifications based on sex have not been a model of clarity,²⁷⁶ it is at least true that such classifications must bear a substantial interest to a legitimate governmental interest,²⁷⁷ and, as demonstrated in Part IV.B, no such interest can be shown. Further, under the more straightforward argument that the ban on same-sex marriage constitutes discrimination based on sexual orientation, a strong argument is at hand for deeming sexual orientation a suspect class.²⁷⁸ As such, it should be subject to a heightened level of scrutiny—similar to that applied to race-based classifications—under standards that the Court has itself endorsed.²⁷⁹ Finally, and perhaps most significantly, since the right

²⁷⁴ See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986).

²⁷⁵ See *id.*

²⁷⁶ The Supreme Court’s most recent thorough treatment of the appropriate standard is *United States v. Virginia*, 518 U.S. 515 (1996). There, the Supreme Court seemed to move from what had been described as an “intermediate level of scrutiny” of sex-based discrimination. That standard had been established in *Craig v. Boren*, 429 U.S. 190, 197 (1976), and required that, “[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Id.* In *United States v. Virginia*, the Court mentioned that standard only briefly, and in a more recent incarnation requiring the State to “at least” meet the above standard. 518 U.S. at 533 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). Furthermore, the Court repeatedly stated that the state was compelled to adduce an “exceedingly persuasive justification” for its discriminatory actions. *Id.* at 523, 530-35, 543-44, 558. This standard appears closer to the strict scrutiny test thus far reserved for race and national origin discrimination. See *id.* at 530 n.6.

²⁷⁷ See *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980); *Craig*, 429 U.S. at 197.

²⁷⁸ See STRASSER, *supra* note 5, at 27-44.

²⁷⁹ See Sunstein, *Homosexuality and the Constitution*, *supra* note 27, at 213-15 (making a cogent argument for that result, but recognizing that the Court is unlikely to adopt such a position); see also *Rowland v. Mad River Sch. Dist.*, 470 U.S. 1009 (1985) (denying petition for writ of certiorari); *id.* (Brennan, J., dissenting) (noting, inter alia, that one issue to be resolved was whether sexual orientation should be treated as “suspect classification” for the purposes of equal protection analysis). *But see Romer v. Evans*, 518 U.S. 515 (1996) (assuming that a rational basis test applies, without considering whether

to marry is, as the Court has stated, fundamental, the state must offer a compelling justification for interfering with it.²⁸⁰ Thus, the state would be required to make the same kind of showing in order to abridge the right of an entire class of people to marry in the same-sex case as in *Loving*.²⁸¹

The foregoing limitations of the analogy having been dealt with, I conclude that it is, at bottom, compelling. But the work of this Article is not quite finished, because it remains possible for those opposing same-sex marriage to adduce other reasons for opposing it. I demonstrate, however, that the points developed throughout this Article provide a ready response to these arguments. As we shall see, they all partake of the set of gender-identity based assumptions that are so inhumed.

IV. THE ARGUMENT FOR SAME SEX-MARRIAGE

This section is divided into two. Part A makes the positive argument for same-sex marriage. The reader will be delighted and amazed at the brevity of this undertaking, because the case is quite simple and clear. Part B addresses the serious questions that have been raised in opposition to legal recognition of same-sex unions and demonstrates that each of these arguments depends critically on assumptions and prejudices that are ill-founded and gender-based, and that there is no independent justification for such arguments.

A. *The Simple Case for Same-Sex Marriage*

Although marriage is not necessary for a fulfilling life, those who choose to marry are often provided with deep, broad, and warm support from society.²⁸² The commitment of the couple is encouraged by family, friends, and community, financially

sexual orientation "qualifies" for strict scrutiny).

²⁸⁰ See *supra* Part II.A.

²⁸¹ See STRASSER, *supra* note 5, at 51-52 (noting that this result can be avoided if marriage is defined in a way that places procreation at its center, but then showing that the Supreme Court's decisions should not be read as tying the right to any such requirement).

²⁸² Often, that is, if the marrying couple is already somewhat well-situated within the society. For a comprehensive recent treatment of the limited potential of the legal right to marry to improve materially the lot of those most marginalized, see Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 585-602 (1997). Drawing expertly on a rich body of scholarship criticizing the centrality of same-sex marriage to the equality of *all* gay and bisexual people, Hutchinson makes a convincing case that the right to marry will do little to diminish the injustices suffered by men and women of color, and that white gay males (and, to a lesser extent, white lesbians) have failed to appreciate the complex intersections of oppression.

supported by the government,²⁸³ and seen as a common incident of citizenship. So basic is the coming together of a couple in marriage that the institution is recognized by religious groups as well as by the state.²⁸⁴ The Supreme Court's recognition of the fundamental nature of the right to marry²⁸⁵ reflects this view, which is as close to one of consensus as is likely in a democratic society.

Because of the stability and commitment that the institution of marriage seeks to encourage, exit remains somewhat difficult. At least in part, this difficulty is meant to create an implied condition of the social, economic, and civic benefits that marriage confers.²⁸⁶ Yet, because the state correctly values self-determination, the institution is open to virtually any two consenting adults who declare their willingness to abide by its requirements. In declaring that neither prisoners²⁸⁷ nor debtors²⁸⁸ can be denied the right to marry, and in demolishing the arguments against interracial marriage,²⁸⁹ the Court has underlined both the importance of the right, and the state's very limited ability to second-guess the decisions of its citizens on such a cardinal subject.

This *laissez faire* approach should be extended to same-sex couples, since our Constitution and our basic moral precepts "neither know[] nor tolerate[] . . . classes among citizens."²⁹⁰ Basic equality demands that people who identify themselves as being of same-sex orientation²⁹¹ be permitted entry into the institution of marriage. By expressly disallowing same-sex unions, the state devalues the lives of its gay and lesbian citizens, denying their very citizenship in a vital respect that others take for granted. As Andrew Sullivan has pointed out,²⁹² this denial is particularly poignant, since the state itself confers the benefits of marriage. As

²⁸³ See *supra* note 98 and accompanying text.

²⁸⁴ See Fajer, *supra* note 4, at 619-23.

²⁸⁵ See *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

²⁸⁶ See William N. Eskridge, *Beyond Lesbian and Gay 'Families We Choose,'* in *SEX, PREFERENCE AND FAMILY*, *supra* note 5, at 286-87 (emphasizing the importance of commitment and approving of the current marriage rules that make "exit . . . merely hard and not impossible").

²⁸⁷ See *Turner v. Safley*, 482 U.S. 78 (1987).

²⁸⁸ See *Zablocki v. Redhail*, 434 U.S. 374 (1978).

²⁸⁹ See *Loving v. Virginia*, 388 U.S. 1 (1967).

²⁹⁰ *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

²⁹¹ My argument does not depend on whether sexual orientation is biologically grounded, environmentally based, a combination of the two, or something else entirely. The central point is that some people are primarily attracted to members of the same sex, just as others—the great majority—are generally attracted to people of the opposite sex.

²⁹² See SULLIVAN, *VIRTUALLY NORMAL*, *supra* note 5, at 179-80.

we shall see, the arguments against such recognition melt when subjected to the slightest heat. Moreover, as the ensuing sections elucidate, same-sex unions also provide a positive good: The couple willing to undertake the solemn commitments comprising the marital relationship can, *qua* committed couple, aspire to the same package of desirable effects as do their opposite-sex counterparts.²⁹³

B. *Uprooting the Arguments Against Same-Sex Marriage*

This final section considers the most often voiced objections to same-sex marriage. Notwithstanding the considerable overlap among these objections, they have been separated to the extent possible for purposes of clarity. We shall see that each of these arguments either fails internally—the conclusion does not follow from the premises—or is anchored in unexamined assumptions about gender identity that cannot operate to exclude fundamental rights. I further make the case that a less rigid conception of gender would also allow society to recognize that same-sex marriages can create a benefit to the marital institution.

The following arguments against same-sex marriage are discussed in this Part: (1) Marriage simply *means* the union of a man and a woman; (2) The state has legitimate—indeed compelling—reasons for discouraging both homosexuality and same-sex marriage; and (3) The laws restricting marriage to members of the opposite sex reflect principles of natural law with which the state should not interfere. These arguments might have been ordered differently, and others might be added. I try, in the analysis that follows, to consider additional arguments that seem to stem from the basic three set forth above.²⁹⁴

²⁹³ I say “aspire to” for the obvious reason that substantial numbers of married couples never achieve a committed and unitive state. Same-sex couples will of course face the same human limitations. As to the general point that same-sex unions can provide normative goods, see *id.* at 179-85; Eskridge, *supra* note 286. For an exhaustive argument that political liberalism is, by itself, insufficient to make the case for same-sex marriage, see Ball, *supra* note 34.

²⁹⁴ This section does not deal specifically with the arguments from the (mostly) gay and lesbian left, because these seem to me irrelevant to the question of *legal* rights (although they are certainly important to the question of whether the issue is worth making a priority), and because these arguments generally coincide with the central theme of this Article: that the institution of marriage, currently constituted, reflects certain uncritical and unexamined assumptions about appropriate identity and expression of gender. As I show, recognizing same-sex marriage may be an important step toward the public dismantling of such assumptions. See Barbara J. Cox, *The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy*, 33 CAL. W. L. REV. 155 (1997).

1. Marriage Is, as a Matter of Definition, the Union of a Man and a Woman

This assertion contains two separate strands. The first element embodies the defense based on pure definition: Whatever else the union of a same-sex couple might be, it would not be a marriage, for that term refers simply to the legal union of man and woman. The second part, to an extent buried within the first, is that once begun, expansion of the definition recognizes no logical stopping place. If marriage can be defined as the union of two members of the same sex, next will be unions of three or more, of immediate family members, or (most absurdly) of people and members of different species.

The first point is not an argument at all; a fact which can be drowned out by the frequency with which the point is made. As discussed in Part I, state courts have resorted to this expedient in denying the right of same-sex couples to marry.²⁹⁵ Congressional testimony²⁹⁶ and the remarks of President Clinton²⁹⁷ in support of DOMA,²⁹⁸ in addition to some general dictionary definitions, reinforce this common perception.²⁹⁹ Richard Posner, in an odd spin on the issue, has noted that extending the definition of marriage to same-sex couples would reduce the informational value of the word “marriage,” since we would no longer know, in hearing that Jones and Smith were married, that the couple consisted of one man and one woman.³⁰⁰

As stated earlier,³⁰¹ this “argument” gets nowhere. Tautologically, marriage is always defined by who has access to the institution; thus, in the pre-*Loving*³⁰² era, marriage could have been defined as the union of a man and a woman of the same race. These definitions do not instruct us on what to do; they tell us

²⁹⁵ See *supra* notes 37-73 and accompanying text.

²⁹⁶ See *supra* notes 10-11 and accompanying text.

²⁹⁷ See *supra* note 13 and accompanying text.

²⁹⁸ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1997); 28 U.S.C. § 1738C (Supp. II 1997)).

²⁹⁹ See, e.g., BLACK'S LAW DICTIONARY 972 (6th ed. 1990) (“[l]egal union of one man and one woman”); WEBSTER'S THIRD NEW INT'L DICTIONARY 1384 (1986) (“the state of being united to a person of the opposite sex as husband or wife”). But see *id.* (including a definition of marriage as “an intimate or close union”).

³⁰⁰ See RICHARD A. POSNER, SEX AND REASON (1992). However, Posner also points out that there would be an information benefit to allowing same-sex marriage, as the couple choosing to marry would thereby be able to signal the strength of their commitment, an option now (at least in part) denied them. See *id.*

³⁰¹ See *supra* Part I.A.

³⁰² See *Loving v. Virginia*, 388 U.S. 1 (1967).

what *is*.³⁰³ That this exclusion by definition is uncritically offered even by courts reflects deeply embedded assumptions about gender identity. Such assumptions often prevent courts and other policymakers from discharging their responsibility squarely to consider the arguments for and against same-sex marriage.

The concern that extending marriage to members of the same sex would lead, inexorably, to the destruction of all rules concerning eligibility for membership is similarly flawed. Making the case for a given extension is simply that; it does not open an unsealable rift through which every candidate for marriage could then pour. If advocates of polygamy wish to make the case for recognition of unions of more than two persons, that issue should and must be addressed on its own terms.³⁰⁴ Interestingly analogous is the similar panic that appeared when the barriers to interracial marriage were threatened.³⁰⁵ Doing justice in that case has not led

³⁰³ This point can be seen as the “tip” of a much larger iceberg: that marriage *must mean* the union of a man and a woman because of principles of natural law. See Hadley Arkes, *The Closet Straight*, NAT’L REV., July 5, 1993, reprinted in PRO AND CON, *supra* note 5, at 154, 157-58. This issue is addressed *infra* Part IV.B.3.

³⁰⁴ It is therefore beyond my purposes to examine the reasons for or against other unions that could potentially be suggested if same-sex marriage were permitted. These same unions could be proposed whether or not legally acknowledged same-sex marriage ever comes to be; each request for such recognition would need to be considered separately. Some of these, such as the union of members of differing species, would then quickly be seen as nothing more than efforts at demonizing gay men and lesbians. Apart from a form of carnal satisfaction, not one of the “goods of marriage” would be realized by permitting such unions. Unions presenting more serious issues, such as polygamy, would have to be considered if raised as a possibility. Some commentators seem to assume, illogically, that the possibility that other definitional extensions of marriage might be examined proves the absurdity of same-sex marriage. See, e.g., Charles Krauthammer, *When John and Jim Say ‘I Do,’* TIME, July 2, 1996, reprinted in PRO AND CON, *supra* note 5, at 282; William Safire, *Time Has Come to Make a Case for Polyandry*, reprinted in MORAL AND LEGAL DEBATE, *supra* note 5, at 180 (attempting a Swiftian argument). I have my own concerns about polygamy, but they are not relevant to the issue of same-sex marriage. For an effective response to Krauthammer, see Jonathan Rauch, *Marrying Somebody*, in PRO AND CON, *supra* note 5, at 285. Incidentally, *Time* did not bother to publish Rauch’s rejoinder to Krauthammer. For a thorough scholarly treatment of the dispositive differences between polygamy and same-sex marriage, see Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997). Professor Strassberg argues that monogamous marriage, including same-sex marriage, is “an essential part of the institutional structure of the liberal state[,]” under a modern reconstruction of the Hegelian theory of marriage. *Id.* at 1510.

³⁰⁵ See, e.g., Trosino, *supra* note 36, at 100 (quoting Constitution and Ritual of the Knights of the White Camelia (1869) (“[T]he result of . . . miscegenation would be gradual amalgamation and the production of a degenerate and bastard offspring, which would soon populate these states with a degraded and ignoble population, incapable of moral and intellectual development and unfitted to support a great and powerful country.”)); Andrew Sullivan, *Three’s a Crowd*, reprinted in PRO AND CON, *supra* note 5, at 280 (“[T]he same panic occurred when interracial marriage became constitutional . . .

to parents marrying their children, to groups of twelve marching down the aisle, or to *any* of the implausible consequences that were trotted out.³⁰⁶ The issue, again, is whether an entire class of persons can morally and constitutionally be excluded from an institution so highly valued by the society. As we shall see, the answer is no.

2. Same-Sex Marriage Would Ill-Serve Society

Two easily conflated arguments should be separated at the outset. First, some have argued that homosexuality—and *a fortiori*, perhaps, same-sex marriage—is immoral.³⁰⁷ This argument itself comes from two flanks. First, there is the somewhat abstract position based on one conception of natural law, treatment of which is deferred until Part IV.B.3. Second, there is the position that homosexuality is wrong because God, as represented through the Bible, says so.³⁰⁸ In addition to these arguments from morality, there have been efforts to show that even a liberal political democracy has good reasons for disallowing same-sex marriages, which, according to some, would lead to various types of negative social consequences, while failing to promote any “good” ones.³⁰⁹ This Part primarily addresses the consequentialist position, while the next section tackles the argument from natural law, defeating it on its own terms and showing that same-sex marriage in fact produces normative goods.

and when women no longer had to be the legal property of their husbands.”).

³⁰⁶ See *supra* Part III.

³⁰⁷ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, J., concurring) (arguing that the proscriptions against sodomy have ancient roots); *Hearing on H.R. 3396*, *supra* note 23, at 87 (statement of Hadley Arkes, Edward Ney Professor of Jurisprudence and American Institutions at Amherst College) (stating that the “natural teleology” of the body “requires” that marriage be between man and woman); John M. Finnis, *Law, Morality, and ‘Sexual Orientation,’* 69 NOTRE DAME L. REV. 1049 (1994) (making the “natural law” argument that all homosexuality is wrong); Robert H. Knight, *How Domestic Partnerships and ‘Gay Marriage’ Threaten the Family*, in MORAL AND LEGAL DEBATE, *supra* note 5, at 108 (stating that gay marriage would violate freedom of religion by telling those whose religions oppose such unions “that they must accept as ‘moral’ what their faiths teach is immoral”); Dennis Prager, *Homosexuality, the Bible, and Us—A Jewish Perspective*, in PRO AND CON, *supra* note 5, at 61 (seeking textual support from the Bible for the proposition that homosexuality is immoral); Cal Thomas, *Marriage from God, Not Courts*, in MORAL AND LEGAL DEBATE, *supra* note 5, at 42 (equating God’s will with morality and stating that God defined marriage as between man and woman only).

³⁰⁸ Occasionally, one also sees a reference to the Muslim religion on this point. See Knight, *supra* note 307, at 108. But inasmuch as the religions overwhelmingly represented in the United States—Jewish and Christian—are anchored in the Bible, these will be the subjects of this section.

³⁰⁹ See *infra* Part IV.B.2.a-b.

However, before addressing the political reasons for and against same-sex marriage, a brief discussion of the argument from the perspective of religion is appropriate.

The rules and proscriptions set forth in the Bible, taken literally, may guide or even dictate the actions of certain segments of the Judeo-Christian faith. Those who subscribe to such a position have found textual support for the proposition that homosexuality contradicts the dictates of God;³¹⁰ others disagree, finding such matters less clear.³¹¹ Further, many Judeo-Christians reject a literal reading of the Bible, preferring instead, interpretations more consonant with the current age.³¹²

The outcome of these intra-religious debates is beyond my purposes here. It warrants mentioning, however, that the Bible also condemns—to the same extent as it does homosexual acts, for which death is mandated—the gathering of wood on the Sabbath,³¹³ for example³¹⁴—and recognized the institution of slavery.³¹⁵ Furthermore, many deeply religious people, including

³¹⁰ Probably the strongest Biblical injunction against homosexuality states that: “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.” *Leviticus* 20:13 (King James). For a contemporary interpretation of this text that supports the condemnation of homosexuality, see Knight, *supra* note 307. As to the New Testament, see *Romans* 1:26 (King James) (“And likewise also the men, leaving the natural use of the woman, burned in their lust toward one another; men with men working that which is unseemly, and receiving in themselves that recompense of their error which was meet.”).

³¹¹ See Rabbi Yoel H. Kahn, *The Kedushah of Homosexual Relationships, reprinted in PRO AND CON, supra* note 5, at 71, 73 (looking beyond the Biblical proscription found in *Leviticus*, and noting that “dissenting from *Leviticus* has not been an obstacle for us before”). A pathbreaking treatment of the question of homosexuality in the Bible appeared in 1976. See JOHN J. MCNEILL, *THE CHURCH AND THE HOMOSEXUAL* (4th ed. 1993). Father McNeill devotes a substantial chapter to the contemporary interpretation of scriptural teachings on homosexuality. See *id.* at 36-66. McNeill concludes that homosexuality as a condition was unknown to the Bible at the time of its writing and that its concern was therefore with homosexual acts, not persons. The “sin” to be condemned, McNeill believes, is the action of those with a heterosexual orientation who engage in sexual conduct with members of their own sex, not the conduct of those of same-sex orientation.

³¹² See SULLIVAN, *VIRTUALLY NORMAL, supra* note 5, at 29-49 (arguing that consistency and logic should impel the Catholic Church to recognize the difference between homosexual acts and identities); Kahn, *supra* note 311, at 73-77.

³¹³ See *Numbers* 15:32-36.

³¹⁴ Dennis Prager concedes this point but attempts to distinguish the two cases on the ground that the Bible “makes a moral statement about homosexuality,” but not about gathering wood on the Sabbath. Prager, *supra* note 307, at 63. Is an additional moral condemnation really needed once the offense is made capital? Moreover, in the very next paragraph, Prager acknowledges that homosexuality is condemned with a fervor equal to that of child sacrifice, but, in this case, he rejects the equation (which is to say, I presume, that he finds death too strong a punishment for homosexuality). See *id.* But then how are we to know whether to take Biblical injunctions literally?

³¹⁵ *Id.* at 62 (but noting that the Bible never accepts slavery as good and distinguishing

clergy, openly support same-sex unions.³¹⁶ So little clarity is achieved by examining religious doctrine and teachings.³¹⁷

Yet there is a deeper problem with reliance on the Bible which is obvious upon reflection: Regarding matters of legal and civil rights, the Bible is not controlling, given the requirement of the separation of Church and state.³¹⁸ Expressly to rely on the Bible in matters of law would be impermissibly to further the establishment of religion.³¹⁹ That the Bible cannot be legally applied, however, does not mean that its teachings should be ignored. After all, in many areas Biblical injunctions have been recognized as consonant with good morals; societies understand and agree upon the wisdom of rules prohibiting theft, murder, lying, and other conduct long criminalized.³²⁰

Once the Bible is acknowledged as an indirect source of morality, the question must be addressed: What *independent* moral reason remains for opposing same-sex unions? This crucial step is tellingly missing from most of the religious objections to same-sex marriage. Excepting a few failed natural law

the slavery mentioned in the Torah from modern notions of the concepts, particularly “black slavery”).

³¹⁶ See MCNEILL, *supra* note 311, at 188-89 (supporting same-sex communities and relationships); Bishop John Shelby Spong, *Blessing Gay and Lesbian Commitments*, in PRO AND CON, *supra* note 5, at 67-68 (urging the church to “state its willingness and eager desire to bless and affirm the love that binds two persons of the same gender into a life-giving relationship of mutual commitment”).

³¹⁷ One occasionally sees the assertion that same-sex marriage would violate the freedom of religion of those who oppose it on religious grounds, as “more and more devout [believers] are told that they must accept as ‘moral’ what their faiths teach them is immoral.” Knight, *supra* note 307, at 108. First, the faiths are not monolithic in this belief. See *supra* notes 310-11 and accompanying text. Second, no one is telling anyone what they *morally* must accept; that is a matter of individual decision, religion aside. Third, and most disturbing, Knight’s comment deeply devalues gay and lesbian lives by elevating the morality of those *indirectly* affected by same-sex marriage—the intolerant portion of the heterosexual population—over the legal rights and spiritual lives of those *directly* affected—gay men and women who would choose to marry.

³¹⁸ See U.S. CONST. amend. I.

³¹⁹ See *id.*

³²⁰ That said, it is also arguable that the same impulse toward rule and conformity that produced the Bible contributed to the subjugation of women, as well as “artists, . . . rape victims, [and] the sexually adventurous.” Leonard Shlain, *The Curse of Literacy*, UTNE READER, Oct. 1998, at 71, 73. The thesis is that the left-brain dominance evidenced by the centrality of “alphabet literacy” is further nurtured by the prevalence of reading over other forms of communication and understanding. See *id.* The more one reads, the more the left brain, which compartmentalizes and categorizes, is activated. Thus, until quite recently, literacy went hand in hand with the subjugation of the “feminine.” As Shlain recognized, this insight from neurobiology was augured by Marshall McLuhan’s famous dictum: “The medium is the message.” See generally LEONARD SHLAIN, *THE ALPHABET VERSUS THE GODDESS: THE CONFLICT BETWEEN WORD AND IMAGE* (1998).

arguments,³²¹ most defenders rush from the Bible to the practical reasons for their opposition.³²² Little if any effort is made to offer a non-consequentialist defense of their position *beyond* the Bible. This strange omission has two sources. First, the shift from the Bible to the practical is natural, because, as honest scholars have recognized, its rules were designed for practical purposes³²³ and reflect the concerns of the society in which they were devised.³²⁴ Thus, as Father McNeill has pointed out, consensual homosexual acts represented a challenge to certain ritualistic practices—for example, the sodomization of the loser of a military campaign by the victor³²⁵—and to the rigid patriarchy that saw women as necessary both to domesticate men, and to “issue” a sufficient number of children to sustain the population in an age of high infant mortality and short life expectancies.³²⁶ As I demonstrate in the following remarks, these arguments are not persuasive today, whatever the case may have been when the Bible was written.

The second reason for the telling lacuna in the effort to convert Biblical proscription into moral imperative is simple: focusing on secular, moral justifications for banning same-sex marriage would prove a losing argument.³²⁷ Reserving discussion on this point for the final section, I turn now to an assessment of the position that same-sex marriage would somehow wound the society.

a. *The Institution of Marriage Would Be Destabilized by Extending It to Include Same-Sex Couples*

A somewhat untidy argument has been made that recognizing same-sex marriage would somehow contribute to the undermining of the whole *system* of marriage.³²⁸ This point often relies on the ancient theory that women domesticate men,³²⁹ so that recognizing

³²¹ See *infra* Part IV.B.3.

³²² Cf. Maguire, *supra* note 95, at 57, 60 (noting that those arguing that homosexuality is immoral offer “poor exegesis of religious texts, biologisms, and warmed-over biases in place of argument”).

³²³ See generally MCNEILL, *supra* note 311, at 56-66.

³²⁴ See *id.*

³²⁵ See MCNEILL, *supra* note 311, at 58.

³²⁶ Cf. Martha C. Nussbaum, *Constructing Love, Desire and Care, in* SEX, PREFERENCE AND FAMILY, *supra* note 5, at 17, 28. This point is still being voiced today.

³²⁷ See discussion *infra* Part IV.B.3.

³²⁸ See, e.g., Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *4-10 (Haw. Cir. Ct. Dec. 3, 1996).

³²⁹ See, e.g., Arkes, *supra* note 303, at 155 (“[I]t is not marriage that domesticates men; it is women.”).

same-sex unions would not serve the function of marriage.³³⁰ This creates a general sense of discomfort, which might be stated roughly as follows: Since the institution of marriage is endangered,³³¹ allowing it to be “warped” by permitting gay men and lesbians to join the “club” is simply the wrong move at the wrong time. These two points reduce to the perception that same-sex marriage would undermine the family, a popular view that has been expressed in politics and media.³³²

At the outset, it is worth recalling the demanding standard articulated by the Supreme Court in the marriage cases,³³³ this kind of “fuzzy” (which is to say unsupported) objection should hardly be sufficient to defeat the fundamental right to marry. More centrally, it is not at all clear how allowing same-sex couples who are willing to announce publicly their commitments to each other, and to accept the still daunting responsibilities imported into one’s life by marriage, would in any way “undermine” the institution. In fact, just the opposite appears true to me: Allowing same-sex couples into the “club” would reinforce that principles of commitment, and deep and forsaking love are the truly indispensable assets of marriage.³³⁴ Marriage might actually receive a boost from the infusion of same-sex couples. Indeed, many of the most eloquent writings on behalf of same-sex marriage have emphasized the celebration of commitment that would be occasioned were gay men and lesbians permitted to marry. As William Eskridge has stated, same-sex marriage is “conducted within a mutual understanding of lasting commitment.”³³⁵ Since such commitment “is valuable, it ought to be available to lesbian and gay couples on the same terms it is offered to heterosexual ones.”³³⁶

³³⁰ See *infra* Part IV.B.2.b for a discussion of this contention.

³³¹ Agreement with this conclusion depends on one’s definition of “endangered.” On the one hand, it is true that for more than a generation, divorce rates have been high and that, as a result, large numbers of children have been raised by single parents. On the other hand, the reality of the marital institution never matched its image; thus problems with marriage may have more to do with other social changes than with marriage itself.

³³² See, e.g., Knight, *supra* note 307; Elizabeth Kristol, *The Marrying Kind*, in MORAL AND LEGAL DEBATE, *supra* note 5, at 132, 135-36 (marriage would be “stretched” by allowing the inclusion of same-sex couples).

³³³ See *supra* Part II.A.

³³⁴ See Maguire, *supra* note 95, at 63.

³³⁵ Eskridge, *supra* note 286, at 286-87.

³³⁶ *Id.*; see also Ball, *supra* note 34, at 1939-40 (noting that since marriage sets attitudes and expectations, as well as rights and duties, for the kind of human relationship that has as its hallmark deep and long-term commitment, excluding gay men and lesbians from “same-sex marriage deprives [them] of a highly exalted form . . . of human association, namely, the committed relationship between two adults who *choose* each other as life

In furtherance of this discussion, one should call attention to the box that conservative opposition to same-sex marriage has created for itself. Other than disputing the notion that sexual orientation is deep-seated, conservatives are left in a quandary. Much of their fire has been directed against the destabilization of families as a result of an increased divorce rate, more children born out-of-wedlock, and a queasy sense that the marital institution no longer means what it once did.³³⁷ Not only can these problems with marriage not be the fault of gay men and lesbians—who have been excluded from the institution—but allowing same-sex couples to marry would be encouraging them to engage in the same sort of monogamous, committed, and long-term relationships that conservatives otherwise support.³³⁸

Although this point seems obvious enough, it is often missed. The reason, I submit, is that “commitment” is not understood by the dominant society in the same way when it comes to gay people. Consider that the commitment under discussion is one between two people who are not valued members of society in the first place. Because of the devaluation of the lives of same-sex couples, opponents of same-sex marriage are able to utter facially ridiculous statements that such unions would trivialize marriage or constitute a “slap in the face.” An emphasis on the commitment of same-sex couples will only succeed if preceded, or at least paralleled, by efforts to topple crippling assumptions about gay people. In short, the commitments of demons, or those who engage in demonic behavior, are the *last* things likely to be valued.

Unfortunately, the project of heightening society’s acceptance of same-sex marriage is even more difficult than the foregoing remarks suggest, for there is some truth to the point that gay people are different from the mainstream; by extension, their commitments might appear different as well.³³⁹ Even excepting

partners” (emphasis added)).

³³⁷ See Kristol, *supra* note 332, at 136 (“[S]ome would argue that the definition [of marriage] has already been stretched to the breaking point.”).

³³⁸ Andrew Sullivan compellingly made this point in VIRTUALLY NORMAL, *supra* note 5, at 181-87. See also Loralyn Cramer, *Same Sex Marriage*, HAW. B.J. 7, 8 (1994) (“The promotion of stability within th[e] basic unit of two people is a critical concern to society Inclusion of same-sex couples within the ambit of government sanctioned relationships is the most effective means of promoting society’s interest in maintaining stability.”). Because of this societal concern with the promotion of interrelational stability, the *Sturm und Drang* concerning whether married gay males would be “as monogamous” as their straight counterparts is an irritating distraction. The point is that they would be, in all likelihood, more monogamous than uncommitted gay males. It is striking how often this point is missed in arguments that call attention to the de-stabilizing effect of non-marital relationships. See, e.g., Knight, *supra* note 307, at 117-19.

³³⁹ SULLIVAN, VIRTUALLY NORMAL, *supra* note 5, at 202-04. These pages are written

their bedroom behavior, gay people are not “just the same” as straight people. There is no getting around the truth that, cast as outsiders by society, gay men and lesbians have a different orientation *to the world* than do straight people. As such, this outsider status enables gay men and lesbians to reconceptualize the world in which they live—to see it, in the fashion of the Hubble telescope: beyond the clouds that otherwise impair vision.³⁴⁰ Of course, no one is able to wrench free from the place in which they stand, but at least those who have this outsider status can look in on the heterosexist perspective that excludes them.³⁴¹

From this vantage point, gay people have been forcing the dominant heterosexual society to rethink the very nature of what it means to be gay, although great resistance and retrenchment are in evidence.³⁴² Once the paradox of the outsider who lives within the larger society can be reconciled, as must be done for members of many outsider groups—including women, immigrants, and people of color—it is inviting to imagine that difference will be valued, not vilified. In the end, such reconciliation would be as much a gift to the dominant society as to the outsiders themselves. This is true of the dominant society because the insider is itself a myth in need of deconstruction.³⁴³ As Highwater has pointed out, *the outsider is in everyone*, but discomfort with their own idiosyncrasies leads those who consider themselves “more alike” to cling to others of similar status, while rejecting those who are “more different.”³⁴⁴ Gay people, and others also excluded, can be the architects of conceptual structures that permit their differences to be celebrated. Only then can each person—once denominated as insider or outsider—carry on the kind of authentic existence that

with a rhetorical eloquence that transcends the author’s points.

³⁴⁰ For this example, and for the inspiration for this discussion, I am indebted to HIGHWATER, *supra* note 31, at 164.

³⁴¹ *See id.* at 17-20.

³⁴² *See id.*

³⁴³ *See id.*

³⁴⁴ *See id.* The “outsider” within each of us has been the subject of thoughtful writers of poetry and fiction. For a compelling example, see RUSSELL BANKS, *AFFLICTION* 164-65 (1989):

[H]e was feeling once again like a double exposure: everything the other people said and did was half a beat off the rhythm of everything he said and did, so that the others seemed almost to be members of a different species than he, as if their species had a slightly different metabolism than his and relied on a related but different means of communication than his, so that everyone else in the room seemed to be sharing knowledge and secrets that he was biologically incapable of experiencing.

Id. The description is of protagonist Wade Whitehouse, a resolutely heterosexual character.

allows the development of one's special, creative skills and gifts. Commitments, however defined by the couple, could be a part of that authentic life.

b. *Women Domesticate Men*

This claim has been supported by pointing to statistics about the higher rates of morbidity, mental illness, and mortality that single and divorced men may experience compared to their married counterparts.³⁴⁵ Thus, marrying women is supposed to be good for men by “stabiliz[ing] sexuality.”³⁴⁶ As Andrew Sullivan has pointed out, the conclusion of this argument might well be that lesbian marriage is the greatest good.³⁴⁷ Apart from calling the bluff of those who make this argument, though, the enterprise of assigning to women the role of the lion-tamer is seriously flawed.

First, it assumes that women are, by immutable nature, more domestic and hearth-bound than men. As noted earlier, at least some of the commonly held beliefs about such deep gender definitions are matters of convention.³⁴⁸ If statistics do suggest a domesticating role for women,³⁴⁹ this may just mean that many women (but not all) assume the roles scripted for them by the dominant male culture, which has a stake in keeping them tied to the home. A more fluid concept of identity—one recognizing the individual, rather than such dichotomizing categories as male/female, straight/gay, or black/white—would allow people, as opposed to classifications of people, to figure out for themselves whether they are best suited to a role of domestication, of the marketplace, or some mixture of the two that a true partnership would enable.³⁵⁰

Otherwise put, is not one of the “scary” possibilities of same-sex marriage its untapped potential to reveal the artificiality of the

³⁴⁵ This is Hadley Arkes's point, confronted in Andrew Sullivan's book. SULLIVAN, *VIRTUALLY NORMAL*, *supra* note 5, at 108-10.

³⁴⁶ See Knight, *supra* note 307, at 119.

³⁴⁷ See PRO AND CON, *supra* note 5, at 151; SULLIVAN, *VIRTUALLY NORMAL*, *supra* note 5, at 109-10.

³⁴⁸ See *supra* note 28.

³⁴⁹ This is a large assumption, because it relies on a doubtful causal inference: Men either become ill or die sooner because they fail to marry women. This inference does not account for the explanation that the men who fail to marry are those who are unhealthy to begin with. See PRO AND CON, *supra* note 5, at 150.

³⁵⁰ As the Supreme Court pointed out in the *VMI* case, the issue is whether general descriptions of one gender, even if true in the majority of cases (whether because of biology, social construction, or, as is likely, some mix of the two), can legally operate to deny opportunity to those falling outside of that description. See *United States v. Virginia*, 518 U.S. 515 (1996).

male/female role division? Would not two male parents serve as living proof that males can nurture, while simultaneously achieving in the workplace? I have chosen the example of males rather than females because it seems that feminism has already greatly deconstructed female-based gender-typing.³⁵¹ Another “frightening” element of same-sex marriage, as an outgrowth of the ultimate acceptance of gay men and lesbians, is that it challenges the myth created by empowered straight men that men belong in the workplace rather than the home. Nurturing men, and perhaps most pointedly gay men, unmask the conceit that everything is as ordained.

A second flaw of the argument that women serve to tame and domesticate men is that its conclusion—that heterosexual union is good for men—depends on the supposition that, denied same-sex marriage, gay men will marry women. To the extent that this is true, it leads only to unhappiness and broken marriage when the husband can no longer bear the deceit and self-abnegation attending such a union. *If* supporters of this view intend to encourage gay men to marry women, they are either naïve or deliberately cruel, and not just to gay men (the usual targets). For the wives and children resulting from such union may, and often do, suffer too. Further, if their belief is that marriage between two men will not result in domestication, and is therefore not worth having,³⁵² one need only reply that monogamy will, to some extent,

³⁵¹ The literature reflecting this is too vast to catalogue, but certainly credit must be given to the pioneering work of BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963). If Friedan’s points seem obvious to today’s reader, that is only because her central arguments concerning the oppression of women and the uncritical assumptions regarding the “proper” roles of the sexes have, with time, worked their way into popular consciousness. For a useful contemporary look at the need for an end to gender stereotyping of men, see Phyllis T. Bookspan, *A Delicate Imbalance—Family and Work*, 5 *TEX. J. WOMEN & L.* 37, 74 (1995):

We can, and must, prune out stereotypes about who can nurse . . . , create and embroider a bedtime ritual or a quilt, play particular games or model particular behaviours. We should, above all, dig out the old idea that no man can take full care of a child and that every woman can.

³⁵² One commentator has expressed this view by remarking that “societies can get along quite well without homosexual relationships.” Knight, *supra* note 307, at 114. In addition to the utilitarian argument advanced in this text, it should be noted that what society “needs” should not be defining of individual rights. If it were, one could have expected the Supreme Court to have held that neither prisoners, *see* *Turner v. Safley*, 482 U.S. 78 (1987), nor debtors, *see* *Zablocki v. Redhail*, 434 U.S. 374 (1978), are entitled to marry, since society can function quite well without such unions. The same might even be said of interracial marriages. *See* *Loving v. Virginia*, 388 U.S. 1 (1967). The issue is one of fundamental rights; thus, dissenters must provide a compelling reason as to why such marriages would be dispositively harmful.

stabilize *any* relationship.³⁵³ In short, the choice is between remaining single and entering into a committed, monogamous relationship that will achieve most of the goods of marriage. This objection, moreover, contains the hidden seed of arguments from gender role that we have already exposed as flawed: It is simply difficult for many to believe that two *people*, be they men or women, might have a domesticating influence on each other.³⁵⁴

c. *Marriage Is for Procreation and Child Rearing*

The biological fact that two members of the same sex cannot by themselves give birth is often asserted as the trump card of arguments opposing same-sex marriage: Since marriage is for procreation and the related goals of supporting “the crucial kinship structure, which . . . imparts continuity, community, and stability to *societies*[,]”³⁵⁵ same-sex couples have been properly

³⁵³ Not every relationship *wants* the kind of stability that is typically associated with marriage. My remarks should not be read to suggest, nor do I believe, that marriage should be the desired state for all gay people. It certainly is not the ultimate goal of all straight people. Furthermore, the rich diversity of gay and lesbian lives—in part chosen, in part compelled by the dominant culture—probably makes the institution less appealing to many gay and lesbian people than it is to straight people. Those who wish to enter into the marital state, however, may find the domestic partnership “alternative” less desirable. Charles Pouncy has argued that domestic partnership should be favored by gay and lesbian people because, even though it provides fewer benefits, it is a recent innovation that could be defined in large part by gay unions. Marriage, he believes, has too evil a history of patriarchy and oppression and is too closely associated with religion to be attractive to gay people. As such, the institution is unlikely to be transformed by the gay and lesbian culture. See Charles R.P. Pouncy, *Marriage and Domestic Partnership: Rationality and Inequality*, 2 TEMP. POL. & CIV. RIGHTS L. REV. 363, 376-77 (1998). I believe, however, that the domestic partnership alternative simply reinforces the notion of second-class citizenship for gay people, and I am somewhat more optimistic than is Pouncy about the transformative power of gay unions on the institution of marriage.

³⁵⁴ One additional caveat seems appropriate here: marriage is legally a bare-bones sort of institution that, in itself, imposes few limitations on a couple. Some couples are not at all domesticated by marriage. To the extent that such domestication is desirable, though, the crucial theme of this Part is that such a result does not depend on the one man, one woman model.

³⁵⁵ Knight, *supra* note 307, at 108 (emphasis added). The idea that only traditional marriage can create and nurture kinship is absurd. The traditional family—two heterosexual parents living together with one or more children, and no other cohabitants—represents a small minority of households. Often, grandparents, other relatives, and close friends considered family members are involved in the raising of children. See Hutchinson, *supra* note 282, at 592 (“[S]ubstantial sociological, historical, and anthropological research demonstrates that Africans, American blacks, and other non-white cultures place tremendous importance on ‘extended families.’” (citation omitted)). Same-sex parents can provide the “structures of kinship” as effectively as those of the opposite sex, as great numbers of lesbian households, in particular, have shown. See Kathryn Kendell, *Lesbian Couples Creating Families*, in ON THE ROAD TO SAME-SEX MARRIAGE, *supra* note 5, at 41, 46-48 (drawing on a substantial body of research refuting the myths that lesbian households are unhealthy environments for children).

excluded. This objection to same-sex marriage would have force if its conclusion that such unions would be inimical to marital goals could actually be supported.

The biological procreation argument has been pitched at two levels. The first is literal and is addressed in this section: Since opposite-sex couples can (and usually do) procreate, but same-sex couples do not, one of the crucial constituents of marriage is missing from the latter. The second, realizing the weakness of the surface claim, climbs to a level of natural law abstraction, failing as well. This latter point is deferred until the final subpart, because the assumptions it embodies deserve separate treatment.³⁵⁶

The distinction between the practical and the natural law arguments might be captured in this way: For the pragmatist, marriage is *for* procreation; for the natural law theorist, marriage in some fundamental sense *means* the sexual complementarity of man and woman which finds expression in (and, for some, *only* in) either procreation or attempts to procreate. The practical argument has both an apparent and a real weakness. Here, I do its advocates the favor of showing why the apparent argument fails before addressing its dispositive flaw.

In response to the point that marriage is about procreation, it is often observed that sterile couples, or those who do not wish to have children, are not excluded from the institution.³⁵⁷ Such acceptance indicates that marriage is not solely for procreation.³⁵⁸ Consider, though, the intrusion required to discover infertility and the residual indeterminacy of any such findings. The state wishing to exclude the sterile couple of childbearing years would need to have some way of determining sterility that would not be unduly intrusive given the limited societal interest served by excluding such a couple from the institution of marriage. Further, the status of at least some currently sterile couples could be changed in the future. As to couples who do not wish to have children, this decision, too, could change. Should the state be required to establish a mechanism for reconsidering requests for marriage licenses or to monitor a couple for good faith efforts to carry out its procreative promise? No. So if the state really *were* interested

³⁵⁶ See *supra* Part IV.B.2.b.

³⁵⁷ It should be appreciated that rejection of restrictions on the marriage of such couples is long-standing. See, e.g., *Martin v. Otis*, 124 N.E. 294, 296 (Mass. 1919) (asserting that in a will contest, the marriage would not be declared void because wife could not have sexual relations, much less reproduce); *In re Peterson*, 12 I. & N. DEC. 663, 665 (1968) (recognizing marriage even though chronic illness disabled the couple from having sexual relations).

³⁵⁸ See, e.g., SULLIVAN, VIRTUALLY NORMAL, *supra* note 5, at 179.

in the procreative "goal" of marriage, excluding same-sex couples might be justified on the observation that such couples can never bear children, at least not without outside help.³⁵⁹

But now to the real problem with the procreation argument: The state's principal reason for allowing opposite-sex couples to marry without regard to sterility has nothing to do with the practical procreative concerns noted above. The example of an older male/female couple, in which the woman is obviously post-menopausal (say, age 75) is illustrative. In such a case no intrusion by the state would be necessary to demonstrate the inability of that couple to bear a child;³⁶⁰ an attestation of age would suffice. Why, then, is such a couple permitted to marry? Because the two celebrants wish to enter into a committed union, one that carries and enforces certain legal, social, and moral expectations. The couple often wants the world, especially their close friends and family, to understand and to help them celebrate the depth of their love and commitment. They may wish to care for each other and to keep each other company.

Note that these reasons for commitment are identical for same-sex couples. So why allow marriage in the one case and not in the other? Well, only "to exclude homosexuals,"³⁶¹ as one commentator has noted. Stark is the contrast between the treatment of these two couples; the older couple's marriage is celebrated, while the same-sex couple is precluded from wedding and often becomes an object of derision and scorn. And this disparate treatment exists despite the much greater likelihood of the same-sex couple to raise a family. Why this difference, which is impervious to logic?

I suspect the distinction derives from a couple of sources. First, the couple in its "golden years" may remind most adults of their own parents, for whom they wish happiness, companionship,

³⁵⁹ Ultimately, this argument against same-sex marriage would also fail because one need only expand the procreative purpose of marriage to encompass and focus on the institution's unique aptitude to nurture and raise children, *however* they happen to be born. One possible counterargument here is that "a child needs both a mother and a father." This assertion is indirectly treated in Part IV.B.3, *infra*, since it stems from the same impulse to categorical rigidity that dooms the natural law argument.

³⁶⁰ If the argument were made that current technological advances may make possible procreation among post-menopausal women, the obvious response is that, when factoring technological enhancements, there is nothing in principle preventing a same-sex couple (especially two women) from procreating either. Having to leave the marriage to obtain sperm cannot be important here, for that necessity can arise in any marriage.

³⁶¹ Jonathan Rauch, *For Better or Worse*, NEW REPUBLIC, May 6, 1996, *reprinted in* PRO AND CON, *supra* note 5, at 169, 176. Rauch notes that "[a]ny rationale that justifies sterile heterosexual marriages can also apply to homosexual ones." *Id.*

and some measure of financial support and security—in short, the “goods of marriage” without procreation. However, the same-sex couple conjures no familiar images for many people, who may not know any readily available model of comparison. Without this familiarity, that segment of society may fall back on the deeply embedded theories of gender identity and role described throughout this Article. In short, the marital image transforms from a glowing portrait of old age to an unsavory picture of two members of the same-sex engaging in taboo sexual practices that flout gender classifications. These embedded ways of thinking, not truly concerned with procreation, thus stand revealed as the true objections to same-sex marriage. As the Supreme Court has stated, “a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.”³⁶² Indeed, as the following subsection shows, tracing the arguments against same-sex marriage to their deepest level cinches the point that the reasons given are not the reasons meant.³⁶³

Finally, the unsupported proposition that being raised by same-sex couples is detrimental to children does not deserve more than a brief reply. The social science literature simply does not support such a conclusion.³⁶⁴ And the dissenting literature seems limited to the observation that some daughters of lesbian couples are more likely to engage in activities typically thought of as male, and vice versa for sons of such couples.³⁶⁵ This challenge to gender-defined activity should be welcomed, rather than condemned, given that established yet unchallenged gender roles have stifled creative possibility and fed the oppression of both men and (particularly) women. In any event, given the fundamental nature of the right to marry, a strong showing of harm to children would need to be shown to justify state opposition to same-sex marriage (even then, one could argue that marriage could be separated from the raising of children), yet no such harm has been demonstrated.³⁶⁶ Additionally, the related argument that children

³⁶² *United States v. Virginia*, 518 U.S. 515, 535-36 (1996).

³⁶³ *See infra* Part IV.B.3.

³⁶⁴ *See* Charlotte Patterson, *Children of Lesbian and Gay Parents: Summary of Research Findings*, in *LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS* (Am. Psychological Assoc. 1995), reprinted in *PRO AND CON*, *supra* note 5, at 240.

³⁶⁵ *See* Philip A. Belcastro et al., *A Review of Data Based Studies Addressing the Effects of Homosexual Parenting on Children's Sexual and Social Functioning*, 20 *J. DIVORCE & REMARRIAGE* 105 (1993).

³⁶⁶ In *Evans v. Romer*, 882 P.2d 1335, 1340 n.2 (Colo. 1994), the Colorado Supreme Court noted that the state had, on appeal, withdrawn its argument that Amendment 2 was somehow justified by the need to protect children.

of a same-sex couple will be likely victims of intolerance, even if true, cannot be used to support an argument against same-sex marriage. As the Supreme Court has stated, although these problems can be acknowledged, they cannot be “give[n] . . . effect.”³⁶⁷

3. Natural Law Opposes Homosexuality, and Therefore Same-Sex Marriage

Faced with the collapse of the pragmatic argument that the sole purpose of marriage is procreation, some of the more thoughtful opponents of same-sex marriage have sought higher ground in the more abstract proposition that principles of natural law are obeyed in the sexual union of a man and woman, but defied by the union of members of the same sex. The argument concludes that since such same-sex couplings violate natural law, any marriage based on such relationships should be resisted.

Natural law arguments serve an important and useful function, by clarifying the deep objections to same-sex marriage that inhabit the soil beneath the visible judicial and popular opposition to such marriage.³⁶⁸ Nonetheless, these arguments fail at every level. By seriously addressing these elements in their most sympathetic form, this final Part reveals that efforts to rely on natural law only underscore the bankruptcy of opposition to same-sex marriage. In fact, this Part shows that same-sex marriage has the potential to unleash a great positive force, by encouraging the creative reconsideration of the true goods of the marital relationship.³⁶⁹

Before doing so, however, it is necessary to place the natural law argument in context; the remarks that follow establish the constraints that bind a politically liberal democracy in denying

³⁶⁷ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). There, the Court noted that a custody change could not be based upon the decision of the child's white mother to cohabitate with a black man whom she later married. The Court noted that the pressures to which the child might be subjected on account of the racial differences between his parents could not even be considered in deciding custody. *See id.* at 433-34.

³⁶⁸ *See* Andrew S. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 *HOW. L.J.* 173, 177 (1992) (“When modern courts decide cases involving sexual behavior and marriage, they are bound by a conceptual framework of scripture, canon law, ‘nature’ and ‘natural law’ so powerful that they are unable to break from it.”).

³⁶⁹ Carlos Ball has recently argued that a dialogue is long overdue regarding the goods of same-sex marriage beyond those capable of incorporation within an argument from political liberalism. *See* Ball, *supra* note 34, at 1930-42, for a discussion and expansion on the works of Eskridge and Sullivan, in support of marriage. I agree and hope to further this dialogue with the remarks herein.

fundamental rights to any person or class of persons. Although these constraints should be decisive from a legal point of view, I agree with Carlos Ball's observation that what gays and lesbians really want to result from the marriage debate is full *acceptance* of the value of their commitments, not merely a legal simulacrum that would afford the tangible benefits without the heft of approbation that opposite sex couples take for granted.³⁷⁰ Thus, I take the natural law argument seriously; if successful it would at least provide ammunition for the position that same-sex couples were somehow "less" than opposite sex unions. However, these arguments suffer from unexamined assumptions about gender identity that, once challenged, lead to the conclusion that membership in one biologically defined sex or the other should not be considered decisive.³⁷¹

a. *The Politically Liberal State Has No Sufficient Reason for Refusing to Recognize Same-Sex Marriage*

Natural law—even if we could all agree as to what it says—should not govern legal issues. While homosexuality and same-sex marriage are consonant with sound moral principles,³⁷² there is a danger in relying exclusively on some comprehensive doctrine of morality in the first place. For one explanation as to why this is so, consider the recent work of John Rawls, who has lately expanded upon his pioneering efforts in moral and political philosophy.³⁷³ In

³⁷⁰ See *id.* at 1877.

³⁷¹ See *supra* Part IV.B.3.

³⁷² Maguire offers the sensible proposition that acts are immoral only if they harm the self, or others. See Maguire, *supra* note 95. A pure libertarian, such as Richard Epstein, would declare an action immoral only if it harms others, since one should have the right to harm oneself. Therefore, it is not surprising that he favors the right of same-sex couples to marry. See Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456 (1994). But, as the painful debate about the right to die reminds us, there is no agreement as to whether one should have the right to harm oneself. Yet one need not take a side in this debate, for same-sex marriage harms no one, *certainly* not the couple entering into the union. Of course, it is precisely this issue on which natural law defenders such as John Finnis disagree, finding that same-sex conduct is destructive of the self.

³⁷³ In JOHN RAWLS, *A THEORY OF JUSTICE* (1971), we were invited to imagine ourselves in an "original position"; that is, situated behind a "veil of ignorance," so that "no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and liabilities, his intelligence, strength, and the like." *Id.* at 12. From that position, the parties are first, to choose a conception of justice and, second, to construct a constitution and legislation that accord with those first principles of justice. See *id.* at 13. We can then assess a particular society's proximity to fairness by how closely its rules mirror those that would have been selected by those in the "original position." Given the persistence of homosexual orientation throughout history, it is difficult to imagine a society constructed according to Rawlsian

The Idea of Public Reason Revisited,³⁷⁴ Rawls sets forth a workable and plausible model of how a democratic society should decide difficult political issues. The terms of public reason require adherence to a basic principle of reciprocity: "Citizens are reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they . . . offer one another fair terms of cooperation according to what they consider the most reasonable conception of political justice."³⁷⁵ Reciprocity further requires that those proposing reasonable terms of fair cooperation "must also think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position."³⁷⁶

Importantly, this approach demands a certain modesty. One's own religious or secular moral views, while relevant to deciding issues of political rights and justice, cannot be wholly relied upon, because they are too broad.³⁷⁷ The narrower issue is whether the outcome considered is true to "the principles and values of the family of liberal political conceptions of justice."³⁷⁸ These are peculiarly public matters, so that the comprehensive moral or religious doctrine to which one subscribes should be invoked only if supported by "properly public reasons."³⁷⁹

Rawls then expressly, though fleetingly, addresses the issue of same-sex marriage within its properly public context.³⁸⁰ In such a setting, the state's interest is seen as maintaining the family "in a form that is just," as well as "arrang[ing] for rearing and educating children, and . . . public health generally."³⁸¹ These interests, of course, are in thrall to the political society's overall imperative of "maintaining itself and its institutions and culture over generations."³⁸² Thus, any restriction on the form of the family would have to be justified by its negative impact on "the orderly

principles that would allow the current treatment of gay men and lesbians. The conditions of such disparate treatment are discussed in Rawls's later work. *See infra* notes 374-87 and accompanying text.

³⁷⁴ John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997) [hereinafter Rawls, *Public Reason*]. This work, in turn, elaborates upon the ideas expressed in JOHN RAWLS, *POLITICAL LIBERALISM* (Columbia paperback ed. 1996).

³⁷⁵ Rawls, *Public Reason*, *supra* note 374, at 770.

³⁷⁶ *Id.* (footnote omitted).

³⁷⁷ *See id.* at 775.

³⁷⁸ *Id.* at 776.

³⁷⁹ *Id.*

³⁸⁰ *See generally id.* at 777-79.

³⁸¹ *Id.* at 779.

³⁸² *Id.*

reproduction of society over time[,]” and not by “religious or comprehensive moral doctrines” which are “improperly specified.”³⁸³

As examples of political values that could justify restricting marriage to opposite-sex couples, Rawls offers possible negative effects on children, or disrespect for the equality of women.³⁸⁴ He hastens to add that he is not deciding the question,³⁸⁵ but only listing the kinds of reasons that would be relevant. As I have pointed out,³⁸⁶ the formally proper public reasons given for opposing same-sex marriage do not pass muster. No study shows any detriment to children or to society caused by same-sex marriage.

In addressing whether same-sex marriage could properly be banned in our theoretically deliberative democracy, one should further stress that a *powerful* showing of harm to the goal of “the orderly reproduction of society over time”³⁸⁷ is required. To understand why this is so, consider Mark Strasser’s point about the incidence of sexual abuse of children by heterosexual men, gay

³⁸³ *Id.* Such an unspecified moral objection in fact undergirds many of the arguments against same-sex marriage. For example, as evidence continues to mount that same-sex orientation “occupies a deep[] level of human consciousness,” Andrew Sullivan, *Three’s a Crowd*, NEW REPUBLIC, June 17, 1996, reprinted in PRO AND CON, *supra* note 5, at 279, those on the right have attempted to counter with this flawed syllogism: since there indisputably are people who have moved from engaging in same-sex relations to having heterosexual relations (sometimes after therapy), change in sexual orientation is possible and therefore desirable. The conclusion is then supposed to follow that gay people are not a class to whom the right of marriage should extend. Cal Thomas has gone so far as to state, without apparent irony, that this possibility of change “is the greatest legal argument against granting the right of marriage to same-sex couples.” Thomas, *supra* note 307, at 43. Because this strategy has been much in use lately, I cannot let it pass without the refutation it deserves. Note the underlying assumption, unexamined, that heterosexuality is somehow morally superior to homosexuality. On its face, the argument contains two additional flaws, each independently fatal. First, anyone with training in science, statistics, or simple logic knows that one cannot shift from the anecdotal observation that some can change orientation—my files are “bulging” with such cases, says Thomas, *see id.*—to a generalization that all, or even any significant percentage, of people who identify as of same-sex orientation can do so. Further, what if (as I know to be the case) many gay people are fulfilled *as gay people*? Those who existentially *are* gay or lesbian should not be re-pathologized, especially since the American Psychiatric Association and the stories of hundreds of thousands of lives have demonstrated that homosexual orientation is *not* a disease. One might as well ask whether the observation that many once heterosexually oriented people move to a gay identity means that straight people should not be entitled to marry. The underlying assumption of a caste-like hierarchy, and the inferiority of gay people, should not be missed.

³⁸⁴ See Rawls, *Public Reason*, *supra* note 374, at 779.

³⁸⁵ See *id.* at 779 n.38.

³⁸⁶ See *supra* Part IV.B.2.

³⁸⁷ Rawls, *Public Reason*, *supra* note 374, at 779.

men, and women.³⁸⁸ In response to the assertion that gay men could abuse children in their home, Strasser notes that straight men are in fact more likely to abuse children than gay men.³⁸⁹ And women, straight or lesbian, are far less likely than men to abuse children.³⁹⁰ Based on these statistics, Strasser notes, the better strategy would be to remove straight men from the childraising equation.³⁹¹ Of course, no one would suggest such a remedy, given both the fundamental right to marry—not questioned except when same-sex couples are seeking it—and the reality that most straight men do *not* sexually abuse children.

If most straight men, or most gay men, did in fact abuse children, there would be strong, indeed compelling, reasons for the state to intervene. Thus, practical concerns stand revealed in approximately the place the Supreme Court has decreed for cases involving fundamental rights: Given the individual's strong claim, the state bears the burden of adducing powerfully compelling reasons for abridging or denying a fundamental right. Rawls's political philosophy appears to come out in roughly the same place.

b. *What's Natural About "Natural Law"?*

Natural law arguments, although today pitched to disguise their canonical origins, are largely inspired by them.³⁹² So we should be suspicious of these arguments, to the extent that they cannot be separated from their ecclesiastical sources.³⁹³ In fact, one of the interesting sideshows in the trial concerning Colorado's Amendment Two³⁹⁴ revolved around whether a separate natural law opposition to homosexuality could be found *outside* of the Judeo-Christian tradition from which so much of our natural law thought has grown.³⁹⁵

³⁸⁸ See generally STRASSER, *supra* note 5, at 85-90.

³⁸⁹ See *id.*

³⁹⁰ See *id.*

³⁹¹ See *id.*

³⁹² See Friedman, *supra* note 368, at 179-88. Friedman discusses a number of theological sources of natural law arguments, and, in so doing, clarifies the connection between scriptural, canonical and natural law. Additionally, Nicholas Bamforth has taken the time to analyze the arguments of John Finnis, which are thoroughly dependent upon his Catholic perspective. See BAMFORTH, *supra* note 130, at 161-67. Bamforth convincingly shows that without the ecclesiastical underpinnings, Finnis's arguments "lack any real analytical foundation." *Id.* at 167. Here, I do Finnis the favor of presenting his natural law arguments in secular guise.

³⁹³ See *supra* notes 378-80 and accompanying text.

³⁹⁴ COLO. CONST. art. II., § 30(b).

³⁹⁵ See Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 FORDHAM URB. L.J. 1057, 1070-71

Even if we assume, however, that extra-religious sources deem homosexual acts violative of natural law, such a finding does not free a society from the responsibility of determining whether a particular proscription should continue to be decisive. In fact, as Andrew Friedman has noted, many of the proscriptions against sexual activity believed to be compelled by natural law have today either been repealed outright or steadfastly unenforced.³⁹⁶ So demonstrating that natural law is offended by same-sex activity would not necessarily drive us to the conclusion that it should be illegal, at least absent some additional mechanism for then deciding *which* claims of natural law are worth obeying, and which are not.

I consider two versions of the natural law argument which represent what might be considered the mainstream. The first has been most publicly defended by, and associated with, Hadley Arkes, a professor at Amherst College. His position, made during the House debate over DOMA is as follows: “[T]here is finally no getting around the fact that the meaning of marriage must be connected to [the] ‘natural teleology of the body.’”³⁹⁷ That “teleology” is supposedly reflected in the natural sexual complementarity of men and women: “[O]ur engendered existence, as men and women, offers the most unmistakable, natural signs of the meaning and purpose of sexuality.”³⁹⁸ Further, this “natural” female/male sexual coupling means that there is “a natural correspondence between the notion of marriage and the sexual coupling, the merging of bodies, in the ‘unitive significance’ of marriage; and there is the plainest, natural connection between that act of coupling and the begetting of children.”³⁹⁹ What about the example of sterile parents? Arkes addresses this as follows:

(1994) (discussing disagreement at trial over what the classical Greeks of thought of natural law arguments opposing same-sex relationships); Interview with Martha Nussbaum, *Of Paederasty and Proposition Two*, 4 HARV. GAY & LESBIAN REV. 12, 14 (Fall 1998) (“I think that the Greek stuff was always a bit of a side show, that it never was going to have anything to do with the outcome of the case.”). Even Finnis, who provided his testimony for this trial via telephone, has acknowledged that “the ideology of homosexual love . . . continued to have philosophical defenders down to the end of classical Greek civilization.” Finnis, *supra* note 307, at 1062.

³⁹⁶ See Friedman, *supra* note 368, at 174-77. Some might argue that the difference between repealed and unenforced statutes is important, because retaining an unenforced statute sends a message that the conduct is at least disapproved, even if the state looks the other way. I agree that retaining such statutes does reflect ambivalence at some level, but this is hardly an argument for retaining them. Increased thereby are problems of notice (the law could be enforced again) and disrespect for the law.

³⁹⁷ *Hearing on H.R. 3396*, *supra* note 23 (statement of Hadley Arkes).

³⁹⁸ *Id.*

³⁹⁹ *Id.*

“These meanings are so evident, these natural correspondences so fixed, that nothing in them is impaired if a couple happens to be incapable of begetting children.”⁴⁰⁰

This argument is little more than a string of assertions, seemingly plausible only to the extent that its embodied assumptions about the connection between basic biological identity and gender role, and identity and expression remain unchallenged. Why “must” the meaning of marriage be connected to the biological—or, to be more specific, reproductive—differences between men and women? Further, if it is the unitive aspect of marriage that is its fullest expression, which seems at least initially plausible, why is that not also true for same-sex couples? Arkes’s reply is that same-sex couples cannot “beget” children; but his only rejoinder to the obvious observation that many opposite-sex couples cannot “beget” children seems based on his own idiosyncratic aesthetic view that members of the same sex at least have “the right parts.”⁴⁰¹ Otherwise, it is unclear what he intends by “meanings” and “natural consequences.” He is entitled to this position, which has appropriately been called “biologism,” but this aesthetic observation cannot be used to create a normative—let alone a legal—rule.⁴⁰²

Bluntly, the crux of Arkes’s argument—that natural law demands the intrinsic link between sexual unity and procreation—is defeated by the example of sterile opposite-sex couples, although he does not recognize the point.⁴⁰³ In fact, once the procreative element is dispensed with, what is left of Arkes’s argument about the ends of marriage—“the sexual coupling, the merging of bodies, in . . . ‘unitive significance’”⁴⁰⁴—applies with precisely equal force to same-sex couples. At the same time, the

⁴⁰⁰ *Id.*

⁴⁰¹ For an honest expression of this view, see James Q. Wilson, *Against Homosexual Marriage*, COMMENTARY, Mar. 1996, reprinted in MORAL AND LEGAL DEBATE, *supra* note 5, at 137, 140: “Yet people, I think, want the form observed even when the practice varies; a sterile marriage, whether from choice or necessity, remains a marriage of a man and a woman.” The shortcoming of Wilson’s argument is his failure to see that he is making an aesthetic point, while attempting to criticize Andrew Sullivan for doing the same, but reaching a different conclusion.

⁴⁰² See Maguire, *supra* note 95, at 58 (“In ethics, the term *biologism* refers to the fallacious effort to wring a moral mandate out of raw biological facts.” (emphasis added)).

⁴⁰³ Additionally, Maguire points out that, even between opposite-sex couples in the marital relationship, sex is seldom for procreation. *See id.*

⁴⁰⁴ *Hearing on H.R. 3396*, *supra* note 23. Arkes also fails to recognize that this “merging of bodies” and unitive function which he describes might be defended as applying most centrally to two people, as opposed to some larger group. Thus, his argument that removing the hold of “natural teleology” over the marital relation would admit of no logical stopping point is challenged by his own descriptive enterprise.

logic of the argument seems to require a result Arkes must not have considered: Marriage should be denied to physically disabled persons of the opposite sex who are unable even to enjoy sexual relations, since the “coupling” he finds essential would then be missing. I assume that this result would be unacceptable to Arkes, but why? Only because the couple was born of the opposite sexes?

The strength of Arkes’s assertions is determined by the extent to which the reader accepts the underlying assumption that basic facts about reproductive difference can, without more, answer moral questions. It has been the project of this Article to challenge that assumption by emphasizing, in different contexts, how the raw material of biology has been molded into gender identities and roles that come to be seen as inevitable. To the extent that Arkes’s argument seduces, it does so by manipulating those identities and roles with skill sufficient to camouflage their contingent nature.

A yet more abstract effort to present as unquestionable what is open to debate is found in the influential work of John Finnis.⁴⁰⁵ Before engaging the argument directly, it is important to note that Finnis’s position is that far more than homosexuality is illicit; he also opposes not only abortion, but also voluntary sterilization and contraception, even by married couples.⁴⁰⁶ Further, he believes that states should go beyond blocking same-sex marriage to discourage homosexuality through all means “*proper*.”⁴⁰⁷ These for him include restrictions on “education and public media” and on “the maintenance of places of resort” where homosexuals might meet.⁴⁰⁸ Thus, to accept the premises of Finnis’s argument on same-sex behavior would also be to require either accepting his *other* views (which he believes should be enacted into law) or coming up with other arguments against such conclusions.

Finnis’s argument has been thoroughly dissected, given the benefit of a sympathetic reading, and then defeated, by Paul Weithman.⁴⁰⁹ Weithman’s article is essential reading for anyone

⁴⁰⁵ See Finnis, *supra* note 307.

⁴⁰⁶ See *id.* at 1067.

⁴⁰⁷ *Id.* at 1070 (emphasis added).

⁴⁰⁸ *Id.* at 1076.

⁴⁰⁹ See Paul J. Weithman, *Natural Law, Morality, and Sexual Complementarity*, in *SEX, PREFERENCE AND FAMILY*, *supra* note 5, at 227. Weithman reconstructs Finnis’s argument, “trying to bring its presuppositions and most interesting features to light.” *Id.* at 229. Carlos Ball’s treatment of Finnis’s arguments is equally effective. See Ball, *supra* note 34, at 1909-19. Both are worth reading, as their approaches are somewhat different. Weithman proceeds in the style of a philosopher, first reconstructing Finnis’s arguments into a logical sequence, and then showing where the false steps have been made. Ball’s

tempted by Finnis's position. My purpose here is to dwell on those aspects of Finnis's secularized theology that most clearly reveal his tacit dependence on the equation of reproduction and gender identity and role. We shall see that his arguments suffer from the same question-begging indeterminacy as Arkes's, and from an apparent inability to think creatively about the possibilities of human sexuality.⁴¹⁰

As Weithman has pointed out, central to Finnis's ontology is the notion of the sexually complementary union.⁴¹¹ Since Finnis maintains that only the male/female pair can be sexually complementary, only such a union can realize the true, unifying goods of marriage.⁴¹² Moreover, according to Finnis, heterosexual couples should engage only in uncontracepted sex, because procreation is one of the unique goods of sexual union.⁴¹³ Members of the same sex, by contrast, do not bring anything mutually complementary to sexual activity, so that their activity could just as well have been realized by either of the partners acting alone (i.e., masturbation).⁴¹⁴ Finnis then makes the final point of his argument: Since such conduct "can do no more than provide each partner with . . . individual gratification[,] . . . their choice to engage in such conduct . . . disintegrates each of them precisely as acting persons."⁴¹⁵

One might begin by questioning the final point: Why is individual gratification disintegrative of the self, or even to be condemned? Even if we were to grant that same-sex couples are not sexually complementary, does it follow that same-sex activity is wrong? Only if it is also wrong to use one's body for one's own pleasure, but what then are we to say about other athletic and aesthetic pleasures?⁴¹⁶ Finnis's objection to sexual activity—but

approach, no less logical, is more in the style of the law professor, drawing on persuasive analogies and girding his position with support from a wide range of sources.

⁴¹⁰ The comment in the text grossly understates the matter; the more fundamental truth is that Finnis's position is generally *sexphobic*. It is worth noting that sexphobia has a long lineage in Christianity, probably dating back to St. Augustine. See HIGHWATER, *supra* note 31, at 57-58. Highwater explained that Augustine revised the concept of divine law "to accommodate Christianity's political privilege" when Christianity became the official religion of the Roman world and "contended that Adam's sin had made sex irreversibly corrupt." See *id.* at 57-58. As Highwater argued, "[i]t is this sex-negative model that greatly impacts on the twentieth-century attitudes about homosexuality." *Id.* at 58.

⁴¹¹ See Weithman, *supra* note 409, at 230.

⁴¹² See Finnis, *supra* note 307, at 1066, 1070-71.

⁴¹³ See *id.* at 1062.

⁴¹⁴ See *id.* at 1062-63 (making this point explicitly).

⁴¹⁵ *Id.* at 1066-67.

⁴¹⁶ See Martha C. Nussbaum, *Preference and Family: Commentary on Parts III and IV*, in MORAL AND LEGAL DEBATE, *supra* note 5, at 319, 327. As Professor Nussbaum points

not to other forms of physical pleasure—betrays an inexplicable aversion to sex that can hardly be used to ground a “theory” of natural law.

If Finnis were correct, however, that two members of the same sex cannot achieve the goods of marriage—in his opinion, friendship, and parenthood⁴¹⁷—then there would be reason to hesitate on the question of same-sex marriage, even if he has failed to make the argument against same-sex activity. The problem is that Finnis cannot get past the same equation of biology and morality that doomed Arkes’s argument. He declares that “[t]he union of the reproductive organs of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of their *personal* reality)”; and that the reproductive organs of those who “are not and cannot be married” simply “cannot make them a biological (and therefore personal) unit.”⁴¹⁸ But should we accept Finnis’s fiat—that personal and biological reality are deeply connected? If not, the foundation for his conclusion that members of the same sex cannot be sexually complementary is removed.⁴¹⁹

For the sake of analysis, let us return one last time to the infertile couple. Finnis, like Arkes, takes the position that such a couple *can* achieve the goods of marriage, parenthood, and friendship, even if “independently of what the spouses will, their capacity for biological parenthood will not be fulfilled by . . . act[s] of genital union.”⁴²⁰ But such a couple, as he must and does recognize, cannot realize all of the goods of marriage, which *include* procreation.⁴²¹ The biological/personal connection, then, need not be the commonly realized capacity to procreate. So there must be something naturally complementary in the union of man and woman beyond the capacity for reproduction in order for Finnis’s argument to work.

Once the connection to reproduction is sundered, the flaw embedded in Finnis’s natural law argument shoots to the surface. The importance of biology left to Finnis is that it defines who is

out, Weithman chooses not to argue this point. *See id.* at 326 (citing Weithman, *supra* note 409, at 237).

⁴¹⁷ *See* Finnis, *supra* note 307, at 1066.

⁴¹⁸ *Id.* at 1066-67.

⁴¹⁹ A question imbedded within the one raised in the text is what is meant by “complementary” and whether an oppositional model provides the only, or even best, way of understanding the deep connection between two people. I maintain that its best role is as metaphor.

⁴²⁰ *Id.* at 1066.

⁴²¹ *See* Finnis, *supra* note 307, at 1066-69.

male and who is female, which, in turn, is supposed to lead inexorably to the notion of sexual complementarity.⁴²² Although Finnis is not explicit, he appears to imply that biological differentiation, both male and female, is supposed to ground “distinctions between the physical, intellectual, and emotional capacities of men and women.”⁴²³

As noted throughout this Article, assumptions about the connection between biology and gender identity and its proper expression have been impaled into the social structure so forcefully that they often go unnoticed. What other reason could there be for ignoring the complementary nature of sexual *activity*—as opposed to biological function—that any two people bring to a sexual relationship? “Activity” is creative, fluid, and open to possibility; in short, the word imagines none of the fixedness of identity that a biologically limited definition uncritically assumes. Once the centrality of activity is acknowledged, two members of the same sex can of course qualify as sexually complementary. In reading the following passage from Weithman, consider how much more intuitively plausible and compelling it is than Finnis’s argument:

[T]wo men or two women in an exclusive relationship could realize the goods of that relationship by and in the giving and receiving of sexual pleasure. Sexual activity might be occasions for partners to know one another with great emotional intimacy by showing their feelings to one another, by developing their feelings with one another, and by sharing their vulnerabilities.⁴²⁴

Does Weithman’s description reflect a notion of “complementarity” at all? The problem is that the word is freighted with implications of function that remain even when the concept is dislodged from its male/female moorings. Perhaps the word’s richer implications can be seized, so that it can be thought of more as metaphor: Two people engaged in sexual union comprise a creative sum that takes in mutually supporting—

⁴²² This notion of complementary roles for men and women found early expression in the work of French philosopher JEAN-JACQUES ROUSSEAU, EMILE [ON EDUCATION] (Allan Bloom trans., 1979). Rousseau, who was otherwise quite visionary in recognizing the importance of the societal construction of gender, believed that in sexual matters men and women were complementary, *see id.* at 357, and that sex, in turn, dictates many other differences between men and women, *see id.* at 357-58.

⁴²³ Strassberg, *supra* note 304, at 1604.

⁴²⁴ Weithman, *supra* note 409, at 239; *see also* Stephen Macedo, *Sexuality and Liberty: Making Room for Nature and Tradition?*, in *SEX, PREFERENCE AND FAMILY*, *supra* note 5, at 86, 92 (criticizing Finnis’s views on similar grounds, and asking rhetorically “why . . . loving sex between committed gay couples [cannot] also be a good?”).

complementary, if you prefer—elements. But it is important to recognize that the creative, sexually active couple will not be complementary in the literal way upon which Finnis insists.

Finally, the irony of Finnis's position should not be missed; his view of the potential of sexual activity to achieve the highest human goods ends up dehumanizing not only the entirety of the gay and lesbian population, but also the entire human race, by insisting on the centrality of reproductive *function*. Finnis believes this result is required by nature but tragically misses the point that we are—straight, gay, and bisexual alike—capable of so much more than roles restricted by functions.⁴²⁵ The same-sex marriage movement will have achieved much if it can unleash the creative impulses in our nature that have been tutored into dormancy. Further, releasing men and women from the notions of gender identity and role, which have too long and uncritically been accepted, can result in gains for both sexes.

CONCLUSION

The emergence of the issue of same-sex marriage has spawned a negative, and at times, borderline hysterical, reaction. The signs of distress are everywhere: from the predictable jeremiads of the political and religious right; to the rush by state legislatures to deny recognition of such marriages celebrated in other states; and to the unsettling congressional alacrity in throwing aside its long-standing, hands-off approach to the issue of interstate marriage recognition.

The arguments most often voiced against same-sex marriage are easily defeated, but their incurable deficiencies have not yet changed public opinion. Such a transformation will occur only after the common assumptions and fears fueling these opposing voices have been traced down to their roots. By exploring decisional law, legislative history, and academic and popular writing, this Article has assayed the kind of spade work needed to dig out, and then discard, those roots. Once these presuppositions have been rejected, the shift in attitude will be epic; same-sex marriage will be seen as *strengthening* the institution of marriage, by emphasizing the loving commitment of couples that has lately been obscured by sea changes in the society in which the marital couple abides.

⁴²⁵ To underscore this point, consider Finnis's clinical description of sexual activity: "The union of the reproductive organs of husband and wife really unites them biologically." Finnis, *supra* note 307, at 1066.

The stakes in this vital debate are high, in some measure for obvious reasons. Same-sex couples are understandably envious of the substantial economic perquisites of marriage. A less tangible, but no less important, goal of gay men and lesbians in loving relationships is to gain the approbation of the larger society for these relationships. The state's formal recognition of same-sex marriage would be an important catalyst in changing attitudes toward such marriages for the better, for both straight people and for gays and lesbians. While the straight majority would understand the importance of state approval and begin to become comfortable with the idea of same-sex marriage (as more and more same-sex couples would begin to marry), the gay minority could be expected to internalize the notion that their relationships are valid, durable, and worthy of constant nurturing and attention.

As vital as these reasons are, there is a less recognized but far more important reason that same-sex marriage must be sanctioned. Since the issue has been put into play, those in power are charged with a monumental responsibility, like it or not. If the arguments against same-sex marriage are honestly examined and rejected, the judicial and legislative machinery will be drawn inescapably toward recognition of same-sex unions on the same terms as those traditionally recognized. No other single issue has the potential to validate the lives of gay men and lesbians, because marriage is a revered fundamental right, the granting of which the state has reserved for itself.⁴²⁶

On the other side, refusal to recognize this most basic of rights, a right taken for granted by all other citizens, including prisoners, would unmistakably legitimize the second-class citizenship of gay men and lesbians. While it was possible not to dwell on the denial of marriage rights before, the opening of the question has removed this choice for thoughtful men and women of same-sex orientation. The emergence of this issue is but one part of a larger, and long-overdue, discussion of gay and lesbian lives. This debate has had both empowering and distressing results. On the one hand, our "coming out" to live as we are has unleashed potential that invisibility had suppressed. On the other, this breach of the perceived pact to remain silent in exchange for benign neglect has been met by expressions of fear and,

⁴²⁶ As Andrew Sullivan has pointed out, marriage is one of the few places where the state is directly involved in the creation of an institution. See SULLIVAN, VIRTUALLY NORMAL, *supra* note 5, at 178-79. Compare this to discrimination laws, where the state works on an existing institution, by restricting, for example, the employer's right to hire whomever he or she wishes. So for the state to expressly disallow same-sex unions is for it to expressly devalue the lives of its gay and lesbian citizens.

occasionally, hatred in the formerly silent precincts of power. As unsettling as this rhetoric has sometimes been, defeat on the same-sex marriage issue would cement the reality for gay men and lesbians that our lives are indeed considered less than those of our straight peers. Our very citizenship would be denied in a way that others take for granted.

Many in the gay and lesbian community disagree about the centrality of the marriage issue, noting that the institution is not exactly unblemished, and that it reinforces the patriarchal structure that has long oppressed women and children. But this argument suffers from the same kind of definitional thinking that leads courts to deny recognition to same-sex couples. Within the legal confines of marriage, the creative possibilities are limited only by the imagination of the couple, and we should expect that gay men and lesbians will bring to this institution a fresh perspective, and a rich assortment of useful models for meeting the hard challenges that modern marriage demands. In particular, such same-sex unions vitally defy patriarchy, by showing that two men and two women can flexibly define their lives and activities, assuming different roles as circumstances and personal inclinations dictate.

In important ways, we would not expect same-sex marriage to mirror opposite-sex marriage. But no two marriages are alike in any case. What all marriages do share, and what same-sex marriage can vitally reinfuse, is a powerful mutual commitment from the couple. That commitment, bounded by legal rules that strike a practical balance between the importance that it endure and the recognition that it will not always do so, constitutes the bedrock "good" of marriage. We should welcome the chance to celebrate such a commitment if we are lucky enough to find it.