

## ABSTRACT

Same-Sex Marriage: A Constitutional and Social Debate

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The debate about same-sex marriage is fraught with emotion, often making fruitful discussion of the issue virtually impossible. In this project, I distill the important points of contention both for and against same-sex marriage as well as the legal issues involved. There are important points to consider in the debate and in the effort to secure equality and protections for all Americans, and, on the other hand, to preserve certain moral norms. I hope to familiarize readers with the legal and social issues that surround this debate in order that they will understand better what has made this such a divisive issue and be able to evaluate where the debate stands given the predominant arguments.

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SAME-SEX MARRIAGE: A CONSTITUTIONAL AND SOCIAL DEBATE

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## CHAPTER ONE

### Introduction

As of February 2013, same-sex marriage has been legalized in nine states and the District of Columbia. At the same time thirty-seven states have constitutional amendments or statutory provisions defining marriage as a union between one man and one woman.<sup>1</sup> The debate surrounding same-sex marriage continues to rage, with emotion frequently fueling vicious arguments. This year the Supreme Court will consider this issue, providing an authoritative opinion on the legality of same-sex marriage bans. The Court will have to decide how to evaluate these laws and which arguments are the most relevant at the federal level.

In this project, I distill the important points of contention both for and against same-sex marriage as well as the legal issues involved. There are important points to consider in the debate and in the effort to secure equality and protections for all Americans, and, on the other hand, to preserve certain moral norms. As I have already noted, the Supreme Court will consider the legality of same-sex marriage bans, taking into account the context of particular laws and the ways in which they are written. However, there are other issues to examine when state and local governments consider the wisdom of banning or allowing same-sex marriage. These issues are matters of local control and state power – including both the morality and practical implications of

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<sup>1</sup> National Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, February 2013, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (accessed March 5, 2013).

defining marriage in restrictive or expansive ways. The constitutionality of state marriage laws is subject to federal judicial review while the wisdom of those laws is not.

This project is intended to be a guide for people who are not particularly familiar either with the technical aspects of the law or how courts typically evaluate constitutionality. I will not assume an extensive knowledge of Supreme Court cases or statutory law. Instead I will provide an overview of the relevant principles involved in the major aspects of the debate and give appropriate information regarding the background and framework of current jurisprudence. I hope to familiarize readers with the legal and social issues that surround this debate in order that they will understand better what has made this such a divisive issue.

I use the language of “same-sex” marriage rather than “gay” marriage because of the technical issues related to the phrasing of the right to marry. There are no laws in the United States that ban marriage based strictly on the sexual orientation of a marriage applicant. Rather, the laws ban marriages based on the *combined* gender makeup of the couple applying for marriage. This does almost exclusively affect homosexual people, but the laws are not phrased in terms of sexual orientation.

There are multiple levels to this debate, the first of which is the state. It is here that the legal institution of marriage is codified. The wisdom and value of marriage rules and procedures can be debated here. The definitions and rules written by the state are then subject to constitutional review by the federal government. At the federal level, the legal aspects of marriage laws can be challenged. Through the federal judiciary system, and ultimately in the Supreme Court, the federal government is able to review marriage laws based on the legal protections of the Constitution. The application of this review is

complicated, though, due to the evolution of the institution of marriage, the current social and political context of the debate, and the lack of a widely accepted, codified outline – and justification for that outline – of what marriage is and what it does.

To make sense of the debate, I begin Chapter One with an examination of the legal issues at hand. In particular, I look carefully at the Fourteenth Amendment and the equal protection clause, giving an overview of the levels of scrutiny afforded to different types of laws. I then evaluate same-sex marriage laws and bans in reference to these levels of scrutiny. Much of the debate’s contentiousness comes from disagreements about which level of scrutiny marriage laws merit.

Many people believe that the level of scrutiny a court uses to evaluate the constitutionality of same-sex marriage laws can determine the holding of the case. Thus, rational basis review (the lowest level of scrutiny) would lead to upholding same-sex marriage bans whereas under strict scrutiny (the highest level of scrutiny) a court would strike down such laws. In Chapter Two, I will consider arguments that the level of scrutiny used would affect the outcome of challenges to same-sex marriage bans as well as arguments that the outcome of challenges would be the same under all levels of scrutiny.

In Chapter Three I address is how fundamental rights play into the debate and how we should understand the right to marry, given the current jurisprudence. Fundamental rights are important to all Americans and are protected under the highest level of scrutiny. Whereas the Supreme Court has established that marriage is a fundamental right, it has not defined exactly what that right entails. If the fundamental right to marry means the right to marry *whomever* one wishes, then this could include the

right to marry more than one person; however, if it is the right to marry one person of one's own choosing, there could be a right to marry within families. The definition of the right to marry is important because that definition determines whether a state is actually infringing upon the right to marry or whether it is simply regulating marriage as states are permitted to do.

After examining the role of the equal protection clause in the debate I turn to the arguments for same-sex marriage on the basis of 'social' goods in Chapter Four. These are the sorts of arguments propounded by people such as Andrew Sullivan and Jonathan Rauch. They are based on the social goods that marriage bestows upon people as individuals and upon society in general. These 'social goods' arguments often focus on the humanizing effects of allowing same-sex marriage. They emphasize that by not allowing same-sex marriage, society condemns individuals in same-sex relationships as second-class citizens unable to enter into the "gold standard" of marriage.

Though many social arguments for same-sex marriage discuss the goods that same-sex marriage would have for children, they do not usually rely on this aspect of the debate. I will explore the extent to which we can take children into account when debating the issue. Although we should always ensure that we protect children and seek their best interests, which might seem to support only opposite-sex marriage, there are strong arguments that there are better ways to do so without denying the privilege of marriage to same-sex couples. Child protection would still be an important issue, but would be handled through existing mechanisms.

Social arguments often assume that marriage can and should be changed; they do not hold that the fundamental right to marry already includes the right to marry a person



of either sex. This is the main difference between strictly legal arguments and social good arguments. If one assumes a social goods standpoint such as those I will discuss, then many of the points in legal arguments do not make sense. Because of this, there are points of contention between social and legal arguments for allowing same-sex marriage. One cannot coherently make all of the possible arguments for same-sex marriage at the same time.

For example, the argument that we *should* as a society change the definition of marriage in response to an enlightened, accepting culture contradicts the argument that our laws must reflect that the fundamental right to marry does and *has always* included the right to marry a person of the same sex. The former assumes that same-sex marriage bans are unwise or stifle certain social goods. The continuation of such bans promotes a less healthy or even a repressive, hate-filled culture. The latter argument assumes that same-sex marriage bans are violations of constitutionally protected rights, which have always been there even if they were not used, and the continuation of those bans is an assault on ordered liberty. Though it is coherent to argue that defining marriage one way or the other is both a moral and legal imperative, it is not coherent to argue that doing so is both a response to the changing nature of marriage and a correction of a historical miscarriage of justice.

Social arguments are fraught with emotional appeals and personal attacks on those who disagree. I attempt to distill the important information and solid arguments from this literature and engage with the facts. I address some aspects of emotional appeals in this type of argument, but will do so with the aim of addressing the underlying issues and possible ramifications of taking these arguments at face value. Labeling all

opponents of same-sex marriage “bigots” has great consequences. If this sort of rhetoric is accepted without consideration of the actual arguments being put forth, then any resolution to this debate will solidify it within our culture. Although we should fight bigotry, we should not recklessly assume that everyone who disagrees with a particular standpoint does so out of hatred or disgust. Not only is this debate about the right to marry, but also it has an effect on the freedoms of religion, speech, and conscience for people on both sides.

The next arguments I discuss are those against same-sex marriage. Most of these come from a Catholic natural law perspective, which I take up in Chapter Five. These arguments attempt to discover what the true meaning of marriage is outside of any particular society. They defend the understanding of marriage as the union of one man and one woman regardless of the historical or social context and take into account the biological orientation of the body. These arguments are most relevant in engaging with the legal arguments for same-sex marriage.

Arguments stemming from the Catholic natural law perspective attempt to give a definition or outline to the word 'marriage.' These arguments defend the stance that it does not make sense to say that two people of the same sex are married because they are biologically unable to form the type of union that marriage requires. With this definition of marriage, arguments that not allowing same-sex marriage violates equal protection rights are analogous to arguments that not allowing men to be deemed 'mothers' violates equal protection rights. If marriage fundamentally requires both genders, then granting two men or two women the designation of marriage would be analogous to calling a carnation a rose.

At this point in the debate, it is important to note the importance of the word 'marriage.' The arguments I analyze do not focus on the legal issues involved in the bestowal of legal rights and benefits to all couples. Instead, I consider only arguments about whether same-sex couples would be eligible for marriage - not for civil unions or other types of non-marriage recognitions of couples. Some of these are addressed in the section on social arguments for same-sex marriage in Chapter Four. As I explain, these alternatives are secondary in the debate over the word 'marriage' itself and the social import that it brings. Alternatives to marriage such as civil unions do not have social or historical contexts that could be approached through any sort of definitional standpoint. These are defined by the jurisdictions that create them for specific purposes, whereas marriage has a long history and many customs associated with it. The social import and history of marriage make this debate much more heated and emotional than debates over civil unions and other alternatives to marriage. There is a general understanding that marriage is important because it is in some vague way a natural pairing of people. What marriage entails precisely is not clear, and this is at the heart of the debate.

I examine these arguments and then conclude with a chapter that takes all of them into account. I highlight the points from each argument I believe are most relevant in the debate and evaluate the relative weight of each component. I conclude with remarks on where I believe the debate stands. There are several points on both sides that deserve emphasis and others that are peripheral or ultimately irrelevant. This project is intended to treat all of these aspects and to bring them into one coherent vision. The definition and meaning of marriage will affect what the right to marry means and how that right should be rightly extended to all people.

This project should familiarize the reader with the major arguments both for and against same-sex marriage as well as the legal and social principles and court rulings that affect marriage laws throughout the country. In the midst of a heated national debate and as more states put the issue to votes, the debate over what justice requires of marriage laws does not appear to be fruitful. Rather, states and factions continue to accuse each other of bigotry or sinfulness. I will engage the different arguments on both sides of the debate with the hope of reaching a conclusion about the right to marry and the role of legal, social, and definitional perspectives.

## CHAPTER TWO

### The Equal Protection Clause

#### *The 14<sup>th</sup> Amendment*

The same-sex marriage debate involves both legal and moral questions. Whether we should and whether we must define marriage in a particular way may ultimately have the same answers. However, these questions are distinct. Whether same-sex marriage bans are legal is question under the purview of the federal government and the Constitution of the United States. While there are no provisions of the Constitution that explicitly refer to marriage, multiple amendments protect the liberties of the people and the powers of the states. It is these amendments that have been invoked by proponents and opponents of same-sex marriage bans. Civil rights advocates often call upon the 14<sup>th</sup> Amendment in particular to protect the rights and liberties of individuals from encroachments by local, state, and federal laws.

The 14<sup>th</sup> Amendment of the Constitution contains the equal protection clause, which stipulates that “No State shall [...] deny to any person within its jurisdiction the equal protection of the laws.”<sup>1</sup> From this clause comes the requirement that states treat all persons equally, extending the full set of the rights of citizenship and personhood guaranteed both explicitly and implicitly in the Constitution and in all laws and statutes.

The application of the principle of equal protection of the laws requires not that every person is treated exactly the same way in every instance, for that would make separate male and female restrooms unconstitutional. Rather, like cases must be treated

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<sup>1</sup> U.S. Const., amend. XIV., sec. 1.

alike. For any law to make a distinction between citizens there must at least be a legitimate government interest at stake and the distinction must be rationally related to that purpose.<sup>2</sup> Thus, a law could identify the prevention of sexual harassment as one of the legitimate governmental interests at stake in gender-separated restrooms. Such a law could distinguish between the sexes because of the potential for sexual harassment. Here it is obvious that like cases are being treated alike: each sex gets equal facilities. However, the legitimacy of the governmental interest and the basis upon which distinctions are made are not always so clear.

Cases that restrict fundamental rights, however, such as the freedom of speech, or that draw distinctions based on “suspect classifications,” such as race or gender, require a different level of scrutiny. In all cases that arise from questions of equal protection, the Court applies one of three levels of scrutiny to determine whether the law in question is constitutional. These levels are rational basis review, intermediate scrutiny, and strict scrutiny. Rational basis review is the most lenient of the three levels of scrutiny, and the Court usually upholds laws coming under such review.<sup>3</sup> Heightened scrutiny, including both strict scrutiny and intermediate scrutiny, is used when there is a fundamental right at stake or when the distinction made between citizens is *not* obviously related to the legitimate governmental interest and involves a suspect or quasi-suspect classification. Under this system of scrutiny, the Court would apply rational basis review to a law that denied driver’s licenses to the blind, but heightened scrutiny to one that denied driver’s licenses to women or those of Canadian descent.

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<sup>2</sup> *City of Cleburne*, 473 U.S. (1985) at 446.

<sup>3</sup> Colin Callahan and Amelia Kaufman, "Constitutional Law Chapter: Equal Protection," *The Georgetown Journal of Gender and the Law*, 2004: 18-62 at 26-7.

Determining which level of scrutiny the Court will apply in any given case is the first step in the determination of whether a law will be upheld. Because of the nature of the levels of scrutiny, the Court rarely strikes down laws under rational basis review, but almost always strikes down laws that come under strict scrutiny.<sup>4</sup> The requirements for a law to pass under strict scrutiny or intermediate scrutiny will be examined later. Using rational basis review, the Court upholds any law that is “rationally related to a legitimate state interest.”<sup>5</sup> In determining whether a law passes, the Court not only defers to reasons given in defense of the law, but may also hypothesize possible, rational justifications not offered in the defense.<sup>6</sup> Thus it is not necessary that the basis for the law actually *was* rational, only that one could argue that a rational basis for such a law might exist.<sup>7</sup> Because of this extreme deference to the democratic process even in the face of foolish laws, the rational basis test has been called “minimal scrutiny in theory and virtually none in fact.”<sup>8</sup>

#### *Rational Basis Review*

The application of the rational basis test involves (1) identifying the classification or distinction being made, (2) the purpose of that distinction, and (3) whether that

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<sup>4</sup> Kenji Yoshino, "The New Equal Protection," *Harvard Law Review*, 2011: 747 at 4 and 5.

<sup>5</sup> *City of Cleburne*, 473 U.S. at 446.

<sup>6</sup> Yoshino, 5.

<sup>7</sup> Robert Farrell, "The Two Versions of Rational-Basis Review and Same-Sex Relationships," *Washington Law Review*, 2011: 282-329 at 288.

<sup>8</sup> Gerald Gunther, "Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," *Harvard Law Review*, 1972: 1-48 at 8.

distinction is adequately related to that purpose.<sup>9</sup> Identifying the classification of the law is usually the easiest of the three aspects of rational basis review. For example, drinking laws distinguish between those who are younger than twenty-one years of age and those who are twenty-one and older. This is an explicit exclusion of one age-based class of people from the legal right to consume alcohol.

The next element is the purpose of the law defined as the “end at which a law is directed.”<sup>10</sup> The purpose of drinking laws might be the health and safety of all people and especially those under twenty-one years of age. And the final task is to determine whether the classification relates to the purpose enough to justify the exclusion of one group of people. This involves little more than the belief of those who passed the law that the classification was related to the purpose of the law, whether or not it actually is related.<sup>11</sup> The age restriction to twenty-one and older could be justified with a plausible explanation of the development of the brain and the effects of alcohol on it at different ages or a commonsense explanation of social conditions that would change near the age of twenty-one, such as being college age rather than high school age. If a Court can find that these three parts are satisfied, then a law will pass under rational basis review.

The determination is more difficult, however, in the case of same-sex marriage bans. Although the Court has consistently ruled that there is a fundamental right to marry, it has not given a specific definition of what this right entails, where it comes from, or

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<sup>9</sup> Farrell, 285.

<sup>10</sup> Ibid, 287.

<sup>11</sup> Ibid, 290.



what reasonable restrictions of the right might include.<sup>12</sup> Because of this, same-sex marriage bans have met rational basis review.<sup>13</sup> Under this review, the burden of proof rests on those opposing such legislation to show that a state's definition of marriage as dual-gendered could not have any conceivable rational basis.<sup>14</sup> Furthermore, it has been relatively easy for states to justify these bans since marriage is traditionally left to the states and is restricted to preserve societal norms, such as those against incest and polygamy.

But there is a particular difficulty regarding marriage, because marriage is between two people. Marriage does not apply to individuals by themselves, and the class of people excluded from marriage is difficult to define. It is not that sexual orientation by itself excludes a person from marriage, for a gay man is not denied marriage to a woman, nor is a lesbian woman denied marriage to a man. Moreover, two straight men would be denied marriage in the same way as two gay men would be. It is also not the case that gender alone is the classification made, for both men and women have the right to marry a person of the opposite gender. However, it is the case that a man would be denied marriage to Stephen even while a woman would not be denied marriage to Stephen. If phrased in this way, one could make the argument that same-sex marriage bans draw distinctions based on gender. But this is difficult because, as shown above, neither men nor women are denied the right to marry as defined by the laws in question.

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<sup>12</sup> Evan Gerstmann, *Same-Sex Marriage and the Constitution* (New York: Cambridge University Press, 2008), 74.

<sup>13</sup> *Ibid*, 17.

<sup>14</sup> Callahan and Kaufman, 27.

If we assume that a relevant classification can be found, as many argue there can be, we must then determine the purpose of bans on same-sex marriage. Many arguments are offered to explain why we define marriage as a union of one man and one woman. These are examined in Chapter Five. It suffices here to say that there are many possible purposes that these bans might serve, and that we can move on to consider the final component of rational basis review.

In our consideration of same-sex marriage bans, whether the classification made is adequately related to the purpose of the laws depends on which classification the Court determines is made and which purpose or purposes are legitimate. Under simple rational basis review, the Court would uphold the bans if a lawmaking body could have *believed* the classification to be related to the purpose even if it was not in fact.<sup>15</sup> Here the legality of same-sex marriage bans would hinge on whether the purposes offered or hypothesized were legitimate governmental interests. The Court would not uphold a law if the only possibly purpose were to propagate a particular religious view or way of life among all citizens, though it might uphold a law the purpose of which was to promote the health and wellbeing of all citizens. Again, the correlation between the classification and the purpose need not be actually, but only plausibly, perceived under straightforward rational basis review.

This level of scrutiny is the most lenient that could be applied to same-sex marriage bans, and under this review, most if not all would stand due to the great deference the Court grants to legislative bodies. Recently, though, the Court has applied a heightened rational basis test in some cases that has been named “rational basis with

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<sup>15</sup> Farrell, 290.

bite.” Under this level of review, the Court considers the “actual legislative purposes behind the discriminatory measure and the means by which the purposes were accomplished.”<sup>16</sup> When it is clear that hostility or animus toward a certain group motivates the law in question, the Court will use this heightened rational basis test to strike it down even if they might be able to hypothesize a rational basis. This heightened rational basis review is still distinct from intermediate scrutiny, but allows the Court to strike down laws that fall under rational basis review more easily.

The process of determining what classification a law under heightened rational basis review creates does not differ from that in the traditional, deferential rational basis review previously described. Indeed, a determination of what class of people is being denied marriage is a necessary step in any review of the law under the equal protection clause. With respect to same-sex marriage bans, the classification of persons denied marriage would still need to be defined.

The most important difference between deferential rational basis review and heightened rational basis review is the treatment of the purpose of a law. In heightened rational basis review, the Court must consider the *actual* purpose of the law rather than any possible purpose, and it must determine whether that purpose is legitimate.<sup>17</sup> There are many difficulties in establishing what the actual purpose of a law is, and the Court has used several types of evidence in its determination. It might consider an explicit statement in the law, legislative history or effects of the law, historical background, or a

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<sup>16</sup> Callahan and Kaufman, 29.

<sup>17</sup> Farrell, 289.

specific sequence of events leading up to the adoption of a law.<sup>18</sup> Once the Court has established through an examination of any of these aspects what the purpose of the law is, it can move on to consider whether that purpose is legitimate.

Though there is not a definitive explanation of what is or is not a legitimate governmental interest, the Court has held that hostility or animus toward a group is an illegitimate motivation, and any purpose based on such animus is impermissible.<sup>19</sup> Under this level of scrutiny, if the Court determined that the actual purpose of a same-sex marriage ban was to disadvantage a class of people based on animus toward them – whichever class was determined to be disadvantaged in the first step of this review – then the Court would strike it down no matter what purpose was offered in defense of the ban.

Because many arguments surrounding the same-sex marriage debate focus on the expressive function of the law and the fact that marriage laws are often seen as defining social norms or ideals, the Court would probably have to address the question of whether the encouragement of a particular family structure is a legitimate governmental interest. Though I will examine the arguments both for and against this judgment later, it is important to understand how complex this component of heightened rational basis review can be.

If the Court determines that the purpose of a same-sex marriage ban in a particular area were motivated by a desire to promote traditional, stable families, it would be necessary to define both the limits of all governmental power and the limits of state power with regard to the health, welfare, and morals of some population. Whether the

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<sup>18</sup> Ibid, 288-9.

<sup>19</sup> Ibid, 289.

state can legitimately endorse a particular family structure, even if it extended legal rights and benefits through some other provision to all family units, would be an important aspect of this level of review. Especially when dealing with family issues that have traditionally been subject to heightened judicial scrutiny, the Court would have to be very cautious in its treatment of the fundamental right to marry.<sup>20</sup>

In the final component of heightened rational basis review, same-sex marriage opponents would have to show that the distinction – outlined in the first step of review – is in reality adequately related to the legitimate purpose of the law that was outlined in the second step. Whereas in deferential rational basis review, the legislative body must only have reasonably believed that the classification was related to the purpose, in the heightened version, the two must *actually* be related. With regard to same-sex marriage, it is often argued, for example, that the purpose of securing children’s welfare justifies the ban on same-sex marriage because it reduces the occurrence of same-sex parenting (which they argue has a negative effect on the welfare of children). However, if the Court accepted this purpose, it would have to determine whether there was sufficient evidence that same-sex parenting actually has a negative impact on children to justify such a restriction on marriage.

Although the Court rarely upholds a law in heightened rational basis review, it is nevertheless not equivalent to formal heightened scrutiny.<sup>21</sup> Formal heightened scrutiny only applies when a suspect classification, quasi-suspect classification, or fundamental

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<sup>20</sup> Gerstmann, 74.

<sup>21</sup> Yoshino, 6.

right is involved. The application of the rational basis standard applies in all other cases.<sup>22</sup> Same-sex marriage bans will receive rational basis review unless it can be shown that the distinction made in such bans discriminate against suspect or quasi-suspect classes, or if the fundamental right to marry is defined to include same-sex couples. As it stands now, the Court would probably treat same-sex marriage bans with the heightened rational basis ‘with bite’ review that would require a real and legitimate governmental interest in the ban as well as proof that any classifications created by the ban are rationally related to that governmental interest.

The appeal to the equal protection clause and rational basis review by same-sex marriage advocates does not make use of “gay rights” language. Instead, opponents of bans on same-sex marriage argue that the bans unjustly disadvantage a group of people that would otherwise enjoy all the same rights as other citizens. They argue that it is not “gay rights,” not *different* rights, that they want, but equal rights.<sup>23</sup> The right to marry, they argue, cannot legitimately be restricted to opposite-sex couples, and fundamentally includes a right to marry someone of either sex. The bans on same-sex marriage, then, violate this right and should be struck down.

Furthermore, they argue that the motivation for these bans is animus toward homosexuals and the lifestyle of potentially married same-sex couples. Because animus is never enough to sustain a piece of legislation, the bans cannot be sustained under the more demanding version of rational basis review if indeed animus is the only reason for

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<sup>22</sup> Ibid, 5.

<sup>23</sup> Gerstmann, 131-2.

same-sex marriage bans.<sup>24</sup> However, if proponents of the bans can show that marriage is inherently dual-gendered and that because of this no class of people is actually the target of discrimination, then objections to bans on same-sex marriage will not be subject to review under the equal protection clause.

The 14<sup>th</sup> Amendment's guarantee of equal protection of the laws requires that the Court treat like cases alike. To determine whether same-sex marriage bans do in fact adhere to this principle or unjustly disadvantage a particular class of people the Court must first establish what, if any classification is made. Then, the Court must establish the purpose of the bans – either the actual purpose if applying heightened rational basis, or any possible purpose if applying traditional rational basis – and whether this purpose is in service of some legitimate governmental interest. Finally, the Court must determine whether there exists an adequate relationship between the classification and the purpose to justify restricting the right to marry to particular types of couples.

This rational basis review is the most lenient of the standards of equal protection review that has been articulated by the Court, and yet it still requires definitive answers to complex issues arising around the debate. The nature of marriage and the nature of state power are both called into question in this debate and present unique challenges to the traditions and development of social and political discourse. The arguments put forward regarding such issues will be taken up in a later chapter.

### *Intermediate Scrutiny*

If the Court finds that a particular case requires more scrutiny than rational basis, then it will use heightened scrutiny, which could mean either intermediate or strict

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<sup>24</sup> Yoshino, 6.

scrutiny. Intermediate scrutiny applies when a group of people is unfairly disadvantaged by a law that creates a distinction between groups. Sometimes the distinction creates a “suspect classification,” which is a classification that immediately triggers suspicion that it is based on unconstitutional discrimination. When the classification of people is *not* one of the suspect classifications designated by the Court and no fundamental right is at stake, then intermediate scrutiny applies; these groups are usually designated as quasi-suspect classes. Gender is a quasi-suspect classification because distinctions based on gender are sometimes motivated by legitimate governmental interests (for example, the gender separated bathrooms) and sometimes by unconstitutional discrimination, such as laws prohibiting women from voting. Unlike rational basis and strict scrutiny, there is not an obvious trend toward striking down or upholding laws in judicial decisions that apply this standard of scrutiny.

A law will be upheld under the intermediate scrutiny test if the Court finds that the distinction created by the law “serve[s] important governmental objectives and [is] substantially related to achievement of those objectives.”<sup>25</sup> This goes above rational basis with bite review in the increased importance of the interests targeted by the law and the requirement that the relation of the distinction to that interest be not only real but also substantial. Although these are vague terms, they still require more attention to the importance of the law in question than does rational basis review. The Court must provide some *substantial* justification for the law and for its distinctions between groups.

Furthermore, a facially neutral law – a law that does not appear to be discriminatory – does not fall under intermediate scrutiny only if it has a disparate effect

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<sup>25</sup> Craig v. Boren, 429 U.S. 190, (1976).



on one group of people; the actual intent of that law and reason for its enactment must be *to disadvantage* a protected group.<sup>26</sup> If the law does not explicitly create a kind of distinction between groups but does incidentally disadvantage a group of people, then it will draw rational basis review unless a discriminatory intent is found.<sup>27</sup> This discriminatory intent is not the same as animus, which is the desire to disadvantage a particular group of people. Under rational basis review, the discovery of animus invalidates a law; the discovery of discriminatory intent draws a higher level of review if other reasons for the law are also offered.

For example, some city ordinances prohibit residents from keeping certain “potentially dangerous” breeds of dogs, such as pit bulls, within city limits. Pit bulls are not persons with rights, but they are the property of persons with rights. We can say that these ordinances are facially neutral because they apply to all citizens equally, but they also create two groups – pit bull owners and non-pit bull owners. These classifications do not appear to be suspect in any way, and the protection of citizens from dangerous animals is a legitimate governmental interest. Without any other information, there is no reason to challenge the constitutionality of these city ordinances.

But let us now consider how a new piece of information might change the situation. We learn that Fred, a member of the Miamiview city council, was wronged by an ex-coworker, Joe, who owned a pit bull. Fred proposes an ordinance to ban pit bulls from Miamiland in an attempt to disadvantage Joe who is looking to move there to be closer to his job. In his discussions with other members of the city council, Fred

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<sup>26</sup> Washington v. Davis, 426 U.S. 229 (1976)

<sup>27</sup> Ibid.

convinces each of them to hate people who like pit bulls. Because of this prejudice against pit bull owners rather than a desire to protect citizens from the dogs, the city council passes the ban on pit bulls. Now we find a discriminatory intent.

Upon a challenge by Joe, MiamiLand defends the ordinance by offering the legitimate interest of protecting citizens from dangerous animals. If animus against people who own pit bulls were the only justification for the ordinance, it would fail to pass under rational basis review. However, because there is a legitimate governmental interest at stake as well, the court must determine if the law should stand. If, during the proceedings, the court finds out that the law makes an exception for female pit bull owners because Fred's girlfriend owns a pitbull, for example, then the court would use a heightened level of scrutiny. Intermediate scrutiny would be used because gender is a quasi-suspect classification. There is more reason to be skeptical of distinctions based on gender than there would be for other distinctions, such as simply owning a pit bull in this situation.

Intermediate scrutiny is designed to protect groups of people whose identifying characteristics are probably not related to legitimate governmental interests – such as men versus women. Under intermediate scrutiny, the court would have to determine whether the legitimate interest in the law justifies the disadvantages suffered by the people of the particular group distinguished in the law.

Quasi-suspect classifications, such as gender and marital status of parents, automatically receive intermediate scrutiny. These classifications designate groups of people that fulfill some but not all of the criteria of suspect classifications. These are historical discrimination, a defining and unchangeable trait, and present political

powerlessness.<sup>28</sup> These classifications have to do with the identity of the group itself rather than the effects of the law in question on the group.<sup>29</sup> If a classification of a law distinguishes between groups that have some or all of the above characteristics, it inherently requires more judicial scrutiny because the denial of the protection of the laws to these groups of people is likely to be arbitrary or motivated by animus. For example, if the law banning pit bulls has a disproportionate effect on male pit bull owners, then it would receive intermediate scrutiny solely because it distinguishes based on gender.

In order to apply intermediate scrutiny, the Court must first determine what the distinction created by the law in question actually is. The law could state the distinction explicitly, or the distinction could be seen only in the actual effects of the law.<sup>30</sup> This leaves open the possibility that one group might be targeted in the law while another is discriminated against only in effect. If an exception for women were not stated in the law, but men were disparately disadvantaged by it anyway, the court would still apply intermediate scrutiny. Or, if the pit bull ban stated the exception for women, but also created a disadvantage for people with single parents rather than married parents, there would be two quasi-suspect classifications to consider. The effects on both classes would require evaluation in such a case. The difficulties in applying this step of any level of scrutiny are many in the case of same-sex marriage. These will be examined later.

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<sup>28</sup> *Massachusetts Board of Regents. v. Murgia*, 427 U.S. 307, 313 (1976); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).

<sup>29</sup> Daniel Dunson, "A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage," *Albany Government Law Review*, 2012: 554-612, 575.

<sup>30</sup> Yoshino, 6.

Next, if a law is to pass under intermediate scrutiny, it must not have a discriminatory purpose. This is especially important in evaluating laws that are neutral on their faces.<sup>31</sup> There are several ways that the Court might establish purposeful discrimination.<sup>32</sup> That one group is disparately impacted by the law would provide evidence of purposeful discrimination but would not be enough to prove such a purpose.<sup>33</sup> If a discriminatory purpose is found, the law is presumed to fail under intermediate scrutiny. However, this might be overcome if other factors in the case, such as sufficient governmental interests, are found to justify this purpose.<sup>34</sup> In the example, Fred's personal vendetta against Joe could be overcome in law because of the governmental interest in protecting citizens. However, the distinction for women would not be upheld because this provision of the law does not promote a legitimate governmental interest. This is similar to the substantive aspect of rational basis with bite review, because the motivation for a law can never be animus toward a group even if it would otherwise be considered constitutional.

The next step is to determine whether there is an important governmental interest in making the law. If there is not an important governmental interest, then the law fails to pass. Because the meaning of "important" is subjective, many cases have resulted in disagreements between judges about whether the interest qualifies as important.<sup>35</sup> Adding

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<sup>31</sup> Callahan and Kaufman, 33.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid, 34.

<sup>34</sup> Ibid, 33-5.

<sup>35</sup> Ibid.

to the confusion, and just as in rational basis review, the Court can “imagine” what governmental interests are at stake in the case rather than adhering to only those interests offered by the government.<sup>36</sup> This implies that lawmakers need not be aware of the actual, important governmental interest at stake, but only that the Court be able to find one upon close examination. However, judicial determination of the purpose of the law in such a case would present difficulties. It seems that if the makers of the law cannot articulate the important governmental interest that motivated their action, then their purpose is suspect. If the makers of the law are not themselves able to justify constitutionally the law they passed, then it seems wrong to suppose that their actual interest in passing the law was not discriminatory.

Once an important governmental interest is found, the Court must determine whether the means employed by the law and the distinction created by it are substantially related to the interest. The Court has not set out clear guidelines or used a consistent rule to make this determination, sometimes employing empirical data and other times relying on legislative judgments.<sup>37</sup> Some of this apparent lack of rigor might be attributed to the complexities in determining the preceding aspects of laws coming under intermediate scrutiny. Once it is clear that there is an important governmental interest at stake and how the groups in question are affected, this last consideration can be significantly more intuitive than it would be without those preceding steps. Especially if the law is facially neutral, the determination of which groups are being disadvantaged can make the relationship, or lack thereof, much more straightforward without technical investigation

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<sup>36</sup> Ibid.

<sup>37</sup> Ibid, 37.

at this stage. It is intuitive that the governmental interest in protecting citizens from dangerous dogs is not related to a distinction between men and women. Even if the law is facially neutral and only inadvertently has a negative affect on men, the relationship between that group and the governmental interest must be examined.

The Court has been hesitant to identify many groups as quasi-suspect classes deserving at least intermediate scrutiny in all cases. The only quasi-suspect classes that have been identified are gender and marital status of parents.<sup>38</sup> The Court has determined that there has been significant historical discrimination against these groups as well as other reasons to suspect that any law that so categorizes people should be subject to heightened scrutiny. Because quasi-suspect classes are actually different from one another in some respects, they are not afforded the same level of protection against all types of discrimination, as are suspect classifications such as race and national origin. Though the groups may fulfill some of the criteria for suspect classifications, lawmakers may more often find a legitimate interest in distinguishing between quasi-suspect classes than between suspect classes.

Sex or gender was established as a quasi-suspect classification rather than a suspect classification because “real differences” exist between men and women that can justify legal distinctions that do not exist between people of different races or national origins.<sup>39</sup> If a law fails, it shows a preference for one gender over another that is *not* outweighed by the important governmental interests at stake or justified by relevant

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<sup>38</sup> Craig v. Boren, 429 U.S. 190 (1976); Lehr v. Robertson, 463 U.S. 248, 266-67 (1983).

<sup>39</sup> Michael M. v. Superior Court, 450 U.S. 464, 470-71 (1981).

differences. The Court, though, has not specifically set out these differences or explained how they might justify various distinctions made by laws.<sup>40</sup>

The Court has been clear that lawmakers may not distinguish based on stereotyped gender roles of men and women, but has held that differences in physical ability may be used to distinguish between men and women so long as the distinction is not used to denigrate either sex.<sup>41</sup> The ambiguity in the jurisprudence concerning what the “real differences” are and how they relate to permissible distinctions creates more difficulty in trying to classify same-sex marriage laws. Though some will argue that same-sex marriage bans are a form of gender discrimination, it is not clear that these laws unfairly prefer one sex over the other.

Moreover, sexual orientation is neither a suspect classification nor a quasi-suspect classification. In order for same-sex marriage bans to come under intermediate scrutiny based on the quasi-suspect classification of sexual orientation, opponents of the bans would have to demonstrate that there is reason to believe that the distinction made between couples eligible for marriage and those that are not is arbitrary or motivated by animus toward the identity of the group. This would involve establishing that one or more of the criteria for suspect classifications apply to sexual orientation.

Some argue that sexual orientation should not be made into a quasi-suspect classification because of the implications of such a designation on people who identify themselves based on their sexual orientation. Since the Court has not provided any sort of test to determine how many of the criteria quasi-suspect classifications require and has

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<sup>40</sup> Callahan and Kaufman, 38.

<sup>41</sup> Ibid, 39.

been reluctant to grant the designation to new groups, it is unlikely that sexual orientation will meet the standards without going so far as to establish itself as a suspect class.

Many opponents to the bans argue that creating a suspect classification for sexual orientation would be detrimental to the pursuit of true social equality for homosexuals. If sexual orientation were a suspect classification, the practical implication would be to exacerbate the perception that homosexuals are seeking special rights rather than equality.<sup>42</sup> Martin Luther King Jr. did not fight for “black rights,” but civil rights – black equality. Similarly, most arguments today aim at marriage equality rather than a separate right to gay marriage. Practically, it is unlikely that the Court will create any new suspect or quasi-suspect classifications since it has not done so since the 1970s and has not been consistent in its application of the criteria for suspect classification since then either.<sup>43</sup> Thus, if a reasonable argument were made that sexual orientation qualifies as a quasi-suspect classification, the Court might or might not respond with the creation of a separate class.

Even if sexual orientation were a suspect classification, the case would not be easily won against same-sex marriage bans. We are still left with the determination of which, if any, group is discriminated against by facially neutral bans on same-sex marriage. Because these bans do not distinguish an individual’s orientation facially or in effect, but rather consider only the makeup of couples, opponents of the bans would have to show that the effect of such laws is to arbitrarily or with hostility deny marriage to a group based on sexual orientation.

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<sup>42</sup> Gerstmann, 69.

<sup>43</sup> Ibid.



Determining which groups are being distinguished by same-sex marriage laws hinge on how one describes the effects of these laws. As discussed previously, same-sex marriage bans do not take away the right of any individual to marry. Rather, these laws restrict the category of available partners to unrelated, consenting adults of the opposite sex. This applies to all people regardless of gender or sexual orientation. However, another articulation of the same law suggests that this might in fact be a form of gender discrimination: Patrick is denied the right to marry Adam while Patricia is not denied the right to marry Adam.<sup>44</sup> In this sense, the important distinction is made between those eligible to marry someone of one or the other gender and those who are ineligible to marry persons of that gender. This is a tricky argument to make, though, because it does not show that either gender is unfairly disadvantaged by such a distinction.

At this point, we have seen that same-sex marriage bans perhaps draw distinctions based on gender, but the group that is affected by such distinctions is identified by sexual orientation. This is the main point of tension in arguments centered on suspect and quasi-suspect classifications. The Court would have to determine that one or the other qualifies for heightened judicial review. But even if a group could be identified as that which is really being discriminated against, the Court would still have to move on to considerations of important state interests and substantial relation of the class to those interests. The case is not won simply by establishing a higher degree of scrutiny for these cases.

One persuasive argument is that what constitutes the disadvantaged group is sexual orientation. The burden of same-sex marriage bans falls on homosexual couples

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<sup>44</sup> Andrew Koppelman.

exclusively. This could be evidence of a discriminatory purpose as established earlier, but it might also be that state governments wish to clarify that marriage is inherently dual-gendered. It would be necessary to show that the motivation for legislative action was arbitrarily to prevent same-sex couples from getting married, rather than to clarify ambiguously written laws. Thus, these bans would be presumed to be unconstitutional unless a substantial relation to an important governmental interest could also be shown. Whether such an interest and relationship exists will be up to the Courts to decide.

Isolating motivations for same-sex marriage bans is equally – if not more – difficult to determine than which group is being harmed by the laws. The history of these bans is fraught with mixed motives and unclear definitions. Many arguments have been made on both sides of the argument over same-sex marriage that appeal to religious freedom, religious definitions, secular philosophy, social goods, and tradition for tradition's sake. These will be examined in a later section. From a survey of the nationwide debate on this issue, many different types of arguments emerge. Some have more democratic legitimacy than others. Some are based on bigotry but most, if not all, of the serious arguments being put forth by academics and serious political actors attempt justification for or against same-sex marriage bans that is accessible and acceptable to all individuals in a democracy.

With this degree of differentiation in the types of arguments available, determining what the particular motivation of a legislative body was in fact will be extremely difficult. Moreover, a ruling that strikes down a same-sex marriage ban based on the motivation of lawmakers would not strike down all same-sex marriage bans at once. In order for that to happen, the Court would have to find that these bans are

inherently unconstitutional. This might have to do with the history of discrimination against homosexuals and an inherent tendency of such bans to promote hostility toward that group, but the finding could not be based solely on the motivation of a single legislative body. If these bans were struck down on the motivation of legislative bodies, they would have to be struck down one by one. Same-sex marriage bans would be unconstitutional because of *why* they were enacted, not simply *that* they were enacted. This would make legislators more careful about articulating good intentions and opponents of the bans more careful about finding hidden discriminatory intent.

Same-sex marriage bans are not likely to be reviewed under straightforward intermediate scrutiny. Equal protection is a difficult case to make against the bans because of the convoluted nature of the distinctions created and the multitude of arguments being made in their favor. It would prove difficult to establish sexual orientation as a new suspect classification and tricky to firmly establish gender as the source of inequality of treatment. If same-sex marriage bans are reviewed under heightened scrutiny, it will most likely be under strict scrutiny due to the designation of marriage as a fundamental right.

If the Court did not want to use strict scrutiny or rational basis, it could use any variation of intermediate scrutiny that it could explain. The levels of scrutiny have become more and more muddled as cases become less well defined. Rational basis with bite review is greater than standard rational basis, but not quite intermediate scrutiny. It is conceivable that the Court would establish whatever test it deemed appropriate for the special set of circumstances that goes along with same-sex marriage bans. Certainly, the creation of alternatives to marriage that depend on state law makes determination of

substantial harm or lack of protection more difficult. Because of the highly emotional nature of the debate on both sides, motives can be mistaken and confused and perceived injustice can be exacerbated.

To sum up, the same-sex marriage debate is not easily solved by reviewing it with rational basis or intermediate scrutiny. In contrast to most cases that fall into this category, same-sex marriage bans do not create a singular distinction between easily defined groups of people. The articulation of alleged injustices can determine the intuitive response to whether a distinction is wrong, and arguments over motives, which are inherently tricky, are complicated by questions of definition and social goods. This highly divisive issue is even less clearly defined than others that have come before the Court that have failed to create intelligible precedent. Previous decisions of the Court do not provide a sufficient guide to how to answer the first question the Court must answer using either rational basis review or intermediate scrutiny. The determination of whether same-sex marriage bans disparately impact gender-based groups or sexual orientation-based groups could determine which level of scrutiny is applied to these laws and whether they are upheld.

## CHAPTER THREE

### The Fundamental Right to Marry

#### *Strict Scrutiny*

The highest level of judicial review a law can receive is strict scrutiny, which the Court will apply if the law in question either restricts a fundamental right or makes distinctions based on suspect classifications. Because the Court has found relatively few fundamental rights and suspect classes, most laws do not receive strict scrutiny. However, most laws that the Court does evaluate using strict scrutiny are struck down; it has even been referred to as “strict in theory, fatal in fact.”<sup>1</sup>

For a law to pass under strict scrutiny it must be “narrowly tailored to further a compelling interest.”<sup>2</sup> This two-prong test puts the burden of proof for constitutionality on the defense of the law as the Court begins their inquiry already highly skeptical of the legitimacy of it.<sup>3</sup> The lawmakers must be able to show not only that there is a governmental interest in making the law, but also that the governmental interest is sufficient enough to justify whatever restrictions or discrimination the law enforces. A law would fail to pass under strict scrutiny either if the governmental interest were not significant or if the classifications or discriminatory effects thereof came at too high a cost.

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<sup>1</sup> Yoshino, 4; Gunther 1972, 8.

<sup>2</sup> Gerstmann, 15.

<sup>3</sup> Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts," *Vanderbilt Law Review*, 2006: 793-871, 802 (citing *United States v. Carolene Products.*, 304 U.S. 144, 153 n.4 (1938)).

The compelling interest prong of strict scrutiny involves identifying what precise governmental interest is at stake with the passage of the law in question and explaining how great that interest is. Both the existence and the significance of the interest must be established before the law can be evaluated. This goes beyond both rational basis review and intermediate scrutiny in that the Court is required to justify its decision based on the relative importance of the effects of the law generally and with regard to the means employed by the law.

While under intermediate scrutiny, the Court would have to find that there is a significant governmental interest in the passing of a law, under strict scrutiny there must be an interest that *requires* the passing of a law. Thus, not only must there be a good reason for a law, that reason must be so important that not passing such a law would result in an injustice. Because of this, laws necessary to national security or those that protect certain rights might pass under strict scrutiny while laws that promote better eating habits among schoolchildren would not.

If a law requires strict scrutiny because it restricts fundamental rights significantly without making distinctions involving suspect classes, then the compelling interest prong will most likely be more important in the outcome of the case than the narrow tailoring prong. Restricting fundamental rights to a high degree requires more justification for why the law is needed in the first place. If such a law fails to have a compelling interest behind it, the means by which that interest is served do not matter. For example, a legislature could not pass a law that forbade wearing religious attire in a public park because of its interest in not offending non-religious park users. It could, however, pass a

law that restricts the wearing of clothes with words that incite violence in the interest of protecting park users from that violence.

Once the compelling governmental interest in a law is established, the Court can turn to whether the law is narrowly tailored. In this respect, a law could be over-inclusive or under-inclusive.<sup>4</sup> If a law is over-inclusive, then it achieves more than what the compelling interest demands. Put another way, the government does not have a compelling interest in restricting the rights of all the people whose rights they are in fact restricting. Thus, the law will not stand. If a law is under-inclusive, then it does not effectively achieve the compelling interest. This suggests that the lawmakers did not design the law with the success of that interest in mind, and so such a law will not stand either. Narrowly tailoring a law requires lawmakers to consider exactly what action will further their interests and to take only that action. Just as a tailor adjusts a suit exactly to fit an individual's body, lawmakers must make sure that their law fits exactly a unique set of circumstances.

Another aspect of the narrow tailoring test is whether the law employs the least restrictive means available to achieve the compelling interest.<sup>5</sup> If a law uses the least restrictive means, then there is no other, less restrictive way to further the compelling interest. This is only distinct from narrow tailoring in the way in which the Court articulates its inquiry, and is very similar to making sure that a law is not over-inclusive. In this respect, a tailor would ensure that when a jacket is buttoned, it is the loosest it

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<sup>4</sup> Ibid, 803.

<sup>5</sup> Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981)

could be while still fitting the wearer perfectly. The least restrictive means test requires that a law accomplish its goal without unduly burdening rights holders.

In evaluating whether a law is narrowly tailored, the Court must determine both what the effects of a law are and what they could and should be based on the previously established compelling governmental interest. The interest a state has can only go so far, but any restrictive action taken must completely cover that interest. If the law does not achieve this, then it either it goes too far, beyond the government's rightful use of power to restrict rights, or it does not go far enough, burdening some people with restrictions of rights while not actually furthering the compelling interest in a real way. Both of these situations would burden some people without any furtherance of governmental interests resulting from that burden.

One of the ways a law can come under strict scrutiny is if the burden of a law falls on one group of people disproportionately. If the group is a suspect classification, then it automatically requires strict scrutiny regardless of whether a fundamental right is infringed. The great majority of cases involving suspect classes have to do with race, although the Court has also recognized national origin and alienage as suspect classes as.<sup>6</sup> Though laws that set aside these groups for disparate treatment are presumed to be unconstitutional unless a compelling interest and narrow tailoring can be shown, they are not automatically unconstitutional. Suspect classification triggers a standard of review rather than a definite outcome.

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<sup>6</sup> Winkler, 833; *Graham v. Richardson*, 403 U.S. 365 (1971) at 371-72



As mentioned before, there are three requirements of suspect classifications: discrimination, immutability, and political powerlessness.<sup>7</sup> Justice Rehnquist articulated these in a famous footnote of *United States v. Carolene Products Co.*, which said that "prejudice against discrete and insular minorities' might 'call for a correspondingly more searching judicial inquiry' because such minorities would not be able to protect themselves in the political process."<sup>8</sup> Each one of these categories must be fulfilled for a group of people to be considered a suspect class. However, the inconsistency with which the Court has applied these criteria makes framing an argument based solely on them difficult at best.<sup>9</sup>

One of the common arguments against same-sex marriage bans utilizes the analogy of these bans and antimiscegenation laws and the case of *Loving v. Virginia*. This case held the right to marry to be a fundamental right and race to be a suspect classification. Those who make this argument rely on both of these facts and emphasize that same-sex marriage bans are a form of gender discrimination.<sup>10</sup> In *Loving*, marriage was not denied either to blacks or to whites, but to interracial couples just as same-sex marriage laws do not deny marriage either to men or women, but to same-sex couples.

The analogy to *Loving* fails, though, when we look at the circumstances of the laws that were struck down. The Court held that antimiscegenation laws were unconstitutional in part because they had "the highest place in the white man's rank order

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<sup>7</sup> Gerstmann, 68.

<sup>8</sup> Yoshino, 5.

<sup>9</sup> Gerstmann, 68.

<sup>10</sup> *Ibid*, 53.

of social segregation and discrimination.”<sup>11</sup> The laws were unconstitutional because they were pillars of racial oppression, designed to maintain white supremacy.<sup>12</sup> Unlike these laws, same-sex marriage bans are not foundational in a system that aims at oppressing a group of people in all aspects of life.

Furthermore, the analogy to *Loving* relies on gender-based discrimination as the defining injustice in same-sex marriage bans.<sup>13</sup> For the two cases to be truly analogous, we would have to see the separation of the two genders permeate society in a way that legally maintains the supremacy of one over the other. Although we do have gender segregation in some areas, mainly in separate male and female bathrooms and locker rooms, this is not aimed at the oppression of men or women. When there are gender gaps in society (for example, unequal pay for men and women working in the same position), these are not part of a system like that which Jim Crow Laws created.<sup>14</sup>

The antimiscegenation laws clearly disadvantaged one racial group over another, as they were aimed at maintaining white supremacy over blacks. In the case of same-sex marriage bans, though, it is unclear which group is receiving unfair treatment. The requirements and restrictions on both genders are the same, and there is not a historical prejudice against either gay or lesbian couples more than the other.<sup>15</sup>

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<sup>11</sup> Gunnar Myrdal, Richard Mauritz, Edvard Sterner and Arnold Marshall Rose, *An American Dilemma: The Negro Problem and Modern Democracy* (New York, 1972), 157.

<sup>12</sup> Gerstmann, 54.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid, 55.

<sup>15</sup> Ibid.

The rhetoric of same-sex marriage laws is much different than that of antimiscegenation laws. Much of the debate surrounding the same-sex marriage debate focuses on the definition and social and legal place of marriage while the debate over interracial marriage focused on proper race relations. Definitional arguments against same-sex marriage assert that same-sex couples *could not*, by definition, actually marry. Arguments against interracial marriage asserted that blacks and whites *should not* marry, many tending toward eugenic rhetoric.<sup>16</sup> This is yet another important difference in context that shows that the two cases are not legally analogous.

Other arguments asserting that same-sex marriage bans discriminate against groups that should be considered suspect classes are more difficult to establish for the reasons discussed in the previous section on intermediate scrutiny. Stronger versions of this type of argument might succeed in convincing the Court to evaluate same-sex marriage bans using strict scrutiny, especially after the recent decision by the Second Circuit Court of Appeals held that gays and lesbians do deserve protection.<sup>17</sup> The Supreme Court is expected to rule on this case, giving their opinion in June of 2013.<sup>18</sup> A decision such as this would change the conversation about same-sex marriage, validating or invalidating the legal claims to suspect classification of sexual orientation.

Beyond suspect classification, cases involving significant restriction of fundamental rights automatically receive strict scrutiny, regardless of the group of people

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<sup>16</sup> Ibid, 57.

<sup>17</sup> David Savage, "Court Rules Gays are a Protected Minority," *Tribune Washington Bureau*, October 19, 2012.

<sup>18</sup> Ibid.

affected.<sup>19</sup> These rights are important enough to garner special judicial protection. They are those rights that are central to the pursuit of happiness and to life, liberty, and property. The Court has held that there are several fundamental rights listed in the Constitution and emanating from it. Fundamental rights include “general reproductive freedom, the freedom to marry (heterosexually), the right to file for divorce, obtain contraception, raise and educate children, and maintain privacy in familial relationships.”<sup>20</sup>

That marriage is a fundamental liberty is hardly disputed on either side of the debate over same-sex marriage.<sup>21</sup> The controversy focuses on what the right to marry entails. The Supreme Court has failed to provide a useful definition of the right to marry, but has consistently protected the right to marry in several cases. The right to marry has been upheld for those unable to consummate the marriage, those who are delinquent in child support payments, and those of different races, among others.<sup>22</sup> The purpose of marriage is not to fulfill certain duties toward society by raising children in a traditional home, but is, rather, part of the pursuit of happiness and a way of validating the most

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<sup>19</sup> Callahan and Kaufman, 29.

<sup>20</sup> Ibid, 29-30 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972), *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971), *Carey*, 431 U.S. at 685, *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), *Troxel v. Granville*, U.S. 520 U.S. 57, 87 (2000), *Washington v. Glucksberg*, 521 U.S. 702, 771 (1997).

<sup>21</sup> Kosbie does assert that the case should not be made on this basis, but he does not refute that the right to marriage exists.

<sup>22</sup> Gerstmann, 75; *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

important of human relationships.<sup>23</sup> The equal protection clause protects the right to marry as one of the rights guaranteed by the Constitution. Coming under strict scrutiny, these rights cannot be denied without a compelling governmental interest in doing so in the exact way that the laws set out.

If there truly is a right to marry someone of one's own choosing, within some but not all of the traditional boundaries, then we must not hesitate to legislate at the federal level against the denial of marriage licenses to those who wish to marry someone of the same gender. Because the Supreme Court has held, in *Loving v. Virginia*, that the right to marry is a fundamental right, we must be careful to ensure equal access to marriage. The exact meaning of the right to marry must be determined, however, if we are to properly ensure this right.

The Court's fundamental rights jurisprudence does not provide a clear guide as to the origin of fundamental rights, going between four different tests to determine whether a right is fundamental.<sup>24</sup> These tests determine that a right is fundamental if it is "deeply rooted in the nation's traditions and history," "explicitly or implicitly protected by the Constitution," "implicit in the concept of ordered liberty," or a matter of "reasoned judgment."<sup>25</sup> These tests have not consistently been applied and have been criticized for

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<sup>23</sup> Gerstmann, 98; David A.J. Richards, *The Case for Gay Rights: From Bowers to Lawrence and Beyond* (Lawrence, Kansas: University Press of Kansas, 2005), 137.

<sup>24</sup> Gerstmann, 120.

<sup>25</sup> *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

being must too subjective to provide any real constitutional framework for fundamental rights.<sup>26</sup>

The history and traditions of this country do not show that marriage has been understood as the right to marry whomever one wants, since we have always imposed various restrictions on who is permitted to marry. However, it is important to note that there have been changes in marriage laws throughout that history. It is indeed possible that the history and traditions of the United States have been unfairly discriminatory. If this is the case, we must act quickly, and at the state level, to rectify these injustices. No state can be allowed to infringe upon the rights of some of its citizens without a justifiable reason.

If marriage is a fundamental right and the Court agrees that same-sex marriage bans significantly restrict this right, strict scrutiny would be applied. However, if the right to marry does not include the right to marry a person of either gender, then it does not make sense to argue that same-sex marriage bans restrict the right to marry at all. One could not restrict the right of a man to become pregnant even though he has just as much legal protection for reproductive freedom as a woman. Through no fault of his or the law's, he is simply incapable of becoming pregnant. Many argue that two men or two women are simply unable to marry one another in the real sense of the word. However, if the right to marry does include the right to marry someone of either gender, then lawmaking bodies will have to come up with compelling interests in restricting marriage beyond its definition to show that same-sex marriage would significantly harm society.

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<sup>26</sup> Gerstmann, 120-1.

The exact nature of the right to marry must be set out if we are to make any headway in this discussion. If the government is going to equally protect each citizen, then it must understand what its laws are and how they are being applied. With the understanding that states are denying marriage licenses to couples based on sex discrimination, the federal government would have to set out exactly what the right to marry means and what the permissible restrictions on it are. As the Court has done in the past regarding marriage, the powers of the states must be such that the fundamental liberties of its citizens are not violated. The federal government must ensure equal access to all social institutions, including equal access to marriage, if the rights guaranteed by the Constitution mean anything at all.

#### *The Fundamental Right to Marry*

Fundamental rights are not explicitly protected or identified by the Constitution; rather, they are those rights that the Court has held that the Fourteenth Amendment implicitly protects.<sup>27</sup> These rights are on par with the rights that are explicitly protected by the First Amendment, though, and so restrictions of fundamental rights are subject to strict scrutiny in the courts. Such rights include the right to travel, the right to vote for and run for office, the right to abortion and contraception, and the right of genetically related people to live in single-family housing.<sup>28</sup> Because these rights are not found in the Constitution, the Court must justify the existence and importance of each right it declares

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<sup>27</sup> Gerstmann, 15.

<sup>28</sup> Winkler, 363; Gerstmann, 75.

fundamental. However, there is no general, clear articulation of what the basis for fundamental rights is or how to determine whether something is a fundamental right.<sup>29</sup>

Though the jurisprudence regarding fundamental rights generally is unclear, the Court has consistently found that marriage is a fundamental right. However, the contours and limits of the right to marry remain to be set out.<sup>30</sup> Until the Court gives an authoritative opinion on the nature of marriage, it will be unclear whether same-sex marriage is part of the right to marry or whether same-sex unions do not necessarily constitute marriages in the legal sense at all. If the right to marry includes same-sex marriage, then any bans or restrictions on same-sex marriage will be subject to strict scrutiny and states will have to prove a compelling governmental interest in order for these laws to be upheld. If the right to marry does not include the right to marry a person of the same gender, then same-sex marriage bans are only subject to rational basis review.

In order to understand the right to marry as it now stands, one must understand how the Court has understood it throughout several cases. Balancing the claims of protection from the federal government and state police powers, the Court has sketched some of the features of the legal right to marry even if it has not established specific limits.

In 1877 with *Pennoyer v. Neff*, the Court stated what it had regarded as true of the institution of marriage throughout its jurisprudence up to that time: “the State...has an absolute right to prescribe the condition upon which the marriage relation between its

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid, 147.



own citizens shall be created, and the cause for which it may be dissolved.”<sup>31</sup> Marriage here is not a right held by citizens, but an institution created and defined by the state governments that were its sole executors. Without further explication of marriage in subsequent cases, there would not be much room for challenging any sort of restrictions on marriage.

In *Reynolds v. US* the next year, the Court held that marriage is a civil contract to be regulated by the state more than anything else, at least with regard to the reaches of the courts and the legal system.<sup>32</sup> Then, with *Maynard v. Hill* in 1888, the Court held that marriage, having the central role in the morals and civilization of a people, is subject to legislative control.<sup>33</sup> With these decisions, the Court establishes marriage not as a right, but as a power of the state. As in *Pennoyer*, in *Reynolds* and *Maynard* the Court asserts the importance of *regulation* of marriage over the right to marriage. In their historical contexts though, this is not surprising; the concept of unenumerated rights, including fundamental rights, had not entered into the Court’s jurisprudence.<sup>34</sup> The Court deferred to the States and their Tenth Amendment powers. Because marriage was not a right, states could define and regulate it without interference from the federal government.

By the end of the nineteenth century, though, the idea of fundamental rights had entered into the Court’s decisions. In *Allgeyer v. Meyer* in 1897, the Court struck down

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<sup>31</sup> Ibid, 79; *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877) as quoted in Gerstmann at 80.

<sup>32</sup> *Reynolds v. United States*, 98 U.S. 145 at 165 as quoted in Gerstmann at 80.

<sup>33</sup> *Maynard v. Hill*, 125 U.S. at 190,205 (1888) as quoted in Gerstmann at 80.

<sup>34</sup> Gerstmann, 80.

state interference with the effectuation of out-of-state insurance policies.<sup>35</sup> Though seemingly innocuous, this decision contained the necessary components to usher in the era of substantive due process.<sup>36</sup> The Court showed that it would protect individual rights, even those not specifically mentioned in the Constitution, from state intrusion. The Fourteenth Amendment's guarantee of "due process of law" allowed the Court to protect contract rights of individuals.

The influential case of *Lochner v. New York* in 1905 established beyond a doubt that the Court was now prepared to defend unenumerated individual rights against interference by the states, even if that interference was legally passed in the state legislature.<sup>37</sup> In *Lochner*, the Court upheld the right of individuals to contract with employers as they see fit and struck down maximum hour laws for bakers.<sup>38</sup> Though the "Lochner era" is defined mostly by the protection of economic rights of individuals and employers, the protection of rights of this sort invited the protection of other individual rights not previously protected.

*Meyer v. Nebraska*, in 1923 was the first case in which the Court upheld non-economic, unenumerated rights under the due process clause of the Fourteenth Amendment.<sup>39</sup> Though the case did not involve marriage, the Court listed some rights and liberties that it deemed essential to the "ordered pursuit of happiness by free men,"

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<sup>35</sup> Ibid, 81.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> *Lochner v. New York*, 198 U.S. 45, 53 (1905) as quoted in Gerstmann at 81.

<sup>39</sup> Gerstmann, 81.

and marriage was one of those liberties.<sup>40</sup> The Court still had not articulated the idea of fundamental rights with its notion of protecting substantive due process rights.

Furthermore, the economic rights that had been protected by substantive due process claims were about to be challenged. After the *Lochner* era, the Court would revoke many of these rights because of political pressures.<sup>41</sup> The economic system that the jurisprudence supported was unpopular, and the defense of such a system would not stand the test of time. Until the 1950s, the Court was reluctant to identify any rights that were not set out explicitly in the Constitution.<sup>42</sup>

With *Skinner v. Oklahoma* in 1942, the Court protected unenumerated rights, but it did so on the basis of the equal protection clause of the Fourteenth Amendment rather than the due process clause.<sup>43</sup> The Oklahoma law that the Court struck down in this case, the Habitual Criminal Sterilization Act, mandated the sterilization of criminals who had more than two convictions of “moral turpitude.”<sup>44</sup> The act was declared unconstitutional based on the arbitrary distinction it made between white-collar criminals and others.<sup>45</sup> This classification was not suspect, but it did provide the basis for declaring that the law unfairly disadvantaged one group more than another. The classification did not relate

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<sup>40</sup> *Meyer v. Nebraska*, 262 U.S. 399 (1923) as quoted in *Gerstmann* at 81.

<sup>41</sup> *Gerstmann*, 82.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, 83.

<sup>45</sup> *Ibid.*

closely enough to a governmental purpose to justify the unequal burden on the different groups of people.

Marriage was not directly implicated in *Skinner*, but the Court did assert that “marriage and procreation are fundamental to the very existence and survival of the race.”<sup>46</sup> This is one of the first articulations of the idea of fundamental rights, even though the Court did not acknowledge the creation of such rights explicitly. This turn away from reliance on substantive due process and toward reliance on equal protection is one of the ways the Court moved into its next generation of rights protection.<sup>47</sup>

Another important development in the way the Court articulated fundamental rights and the right to marry came in 1965 with *Griswold v. Connecticut*.<sup>48</sup> In this case, the Court found that a Connecticut law forbidding the use of contraception violated the right to privacy, particularly marital privacy. Justice Douglas did not rely on either the due process clause or the equal protection clause of the Fourteenth Amendment. Instead, he found that the Constitution’s protection of some rights along with the various amendments implicitly protect other rights in penumbras.<sup>49</sup> He found that the ways in which the Constitution explicitly protects some rights implicitly entails the protection of other, related rights.<sup>50</sup>

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<sup>46</sup> *Skinner v. Oklahoma*, 316 U.S. at 541 as quoted by Gerstmann at 83.

<sup>47</sup> Gerstmann, 83.

<sup>48</sup> *Skinner v. Oklahoma*, 381 U.S. 479 (1965).

<sup>49</sup> Gerstmann, 84.

<sup>50</sup> *Ibid.*

This idea of penumbras, and the protection of rights that are substantively related to explicitly protected rights, is important for a number of reasons. It is the protection of related rights that enables the Court to protect the freedom of association along with the freedoms guaranteed in the First Amendment.<sup>51</sup> The freedom of association is closer to the explicitly protected rights in the Constitution than the right to privacy, but the idea is the same. If people are really to be protected by the First Amendment and the rights therein, then other rights must also be protected. Otherwise, the meaningful exercise of constitutional rights is not guaranteed. For fundamental rights generally, this is similar to the necessary and proper clause for Congressional action. The Court, though, has articulated a scheme that allows it to protect any rights that are necessary and proper to protect given explicitly protected constitutional rights.

The Court in *Griswold* provided the justification for a set of rights created by the penumbra of the First Amendment and others: privacy rights.<sup>52</sup> The sacredness of marital privacy is one of the defining features of the way the institution of marriage has been discussed within the Court. It is no longer only a civil contract to be regulated by the states that administer it, but an institution that demands certain protections from the states regardless of how those states wish to define it. This shift is important in understanding how we can properly interpret the legal right to marry today. The institution of marriage is now understood to stand on its own merits, without the state to administer and regulate it.

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

The next case having to do with marriage is one of the most highly cited cases in the same-sex marriage debate: *Loving v. Virginia* (1967).<sup>53</sup> In this case the Court overturned Virginia's antimiscegenation laws – laws that prohibited marriage between people of different races. The decision of the Court focused mainly on equal protection claims, against Virginia's claims that the law treated all races equally in that no one could marry outside of his or her own race though the decision also mentions the right to marry and substantive due process claims.<sup>54</sup> The Court cited *Skinner* and *Maynard* in its decision declaring marriage to be fundamental to the human experience.<sup>55</sup>

Interpretations of *Loving* are many and varied. The case could be read “as a ‘race’ case, a ‘eugenics’ case, a ‘marriage’ case, or a ‘substantive due process’ case.”<sup>56</sup> The problems with interpretation often come from the perspective of the reader and what that reader hopes to prove using the case. For the purposes of the same-sex marriage debate, though, *Loving* should not be read as the final authority. For the reasons previously set out, the *Loving* analogy is insufficient in proving the case for same-sex marriage. However, the many different components of *Loving* are important for the debate. At the very least, *Loving* establishes that the infringements on the right to marry are of a very serious nature, and that the right to marry is indeed fundamental to the pursuit of happiness.<sup>57</sup> Thus, the Court rejected the idea set forth in *Maynard* that the state had

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<sup>53</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>54</sup> Gerstmann, 85.

<sup>55</sup> *Loving v. Virginia*, 388 U.S. at 17-19 as quoted in Gerstmann at 85-86.

<sup>56</sup> Robert A. Destro, "Law and the Politics of Marriage: *Loving v. Virginia* After 30 Years Introduction," 1998: 1207-21, 1209 as quoted in Gerstmann at 84-85.

exclusive control over marriage. In fact, given the more recent cases of *Meyer* and *Skinner*, the Court held that marriage deserves protection beyond protection from racial discrimination, though the limits of these protections have not been defined.<sup>58</sup>

It is important to note that the arguments presented in *Loving* did not challenge the definition of marriage. Indeed, the Virginia law prohibited what it saw as undesirable marriages rather than defining marriage as fundamentally mono-racial. Proponents of bans on interracial marriage believed marriage between the races to be contrary to the goals of society, but did not see it as impossible. In the same-sex marriage debate, many arguments against granting marriage licenses to same-sex couples contend that marriage is fundamentally dual-gendered, and so same-sex marriage is indeed not possible by definition. This distinction is significant in the debate, as many pieces of legislation have to do with challenging the definition and limits of the right to marry as opposed to explicitly denying the right to marry to some but not to all citizens.

The next case to have an effect on right to marry jurisprudence was *Zablocki v. Redhail* in 1978.<sup>59</sup> In this case, the Court found that Wisconsin could not require judicial permission for the marriage of a person who owed child support for minor children.<sup>60</sup> Though Wisconsin had “legitimate and substantial interests” in ensuring that child support is paid, it could not use the denial of marriage to persons in arrears of child

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<sup>57</sup> Gerstmann, 86.

<sup>58</sup> *Ibid*, 87.

<sup>59</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978).

<sup>60</sup> Gerstmann, 87.

support to achieve such ends.<sup>61</sup> The opinion of the Court outlined that *Loving* should be interpreted as upholding racial equality in addition to an independent right to marry coming from the Constitution.<sup>62</sup> In *Zablocki*, the Court holds that though the state has the right to define the institution of marriage, it cannot thereby exclude people from that institution.<sup>63</sup> Though Wisconsin could regulate marriage, it could not use the denial of marriage to achieve ends that were not significantly related to the institution of marriage itself. The collection of child support would be a significant interest of the government regardless of whether those people who owe child support remarry or not. Thus, the denial of marriage to such persons is not a legitimate use of the laws given the importance of the right to marry.

The right to marry was established firmly as a fundamental right in *Turner v. Safely* in 1987.<sup>64</sup> This case involved the right to marry for prison inmates. The Missouri state prison regulations stipulated that inmates would only be granted permission to marry in the presence of compelling reasons.<sup>65</sup> Both sides in the case conceded that marriage was a fundamental right. The case turned on whether this right could be restricted based on security concerns in prisons. The Court found that the fundamental right to marry applied to prison inmates as much as any other citizen and that the

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<sup>61</sup> *Zablocki v. Redhail*, 434 U.S. at 388 as cited in Gerstmann, 87.

<sup>62</sup> Gerstmann, 87.

<sup>63</sup> William M. Hohengarten, "Note: Same-Sex Marriage and the Right to Privacy," *Yale Law Journal*, April 1994: 1495-1531, 1507 as cited in Gerstmann at 88.

<sup>64</sup> *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>65</sup> *Ibid*, as cited in Gerstmann at 88.



response to security concerns by Missouri was exaggerated.<sup>66</sup> With this case, the right to marry would be almost impossible to contest.<sup>67</sup>

Though the Court has recognized the right to marry, it has not set out what this right entails or what its limits are beyond the specific situations presented in cases. For instance, the Supreme Court of Hawaii found that the right to marry was the logical predicate to the right to procreate and raise children.<sup>68</sup> Similar cases link the right to marry with the related rights of procreation and child rearing; the right to marry is a primary right rather than a fundamental right in itself.<sup>69</sup> Because marriage cases usually involved rights related to marriage, it is not perfectly clear whether the nature of marriage as a fundamental right comes from related rights or is independent of them. Indeed, important rights are often related to each other even if they might be protected independently of one another.

One of the important arguments against allowing same-sex marriage is that marriage is directly linked to procreation and so should stay between couples that could beget children ‘naturally.’<sup>70</sup> However, the right to marry is important beyond its function as a precursor to having legitimate children.<sup>71</sup> *Zablocki* holds that marriage is a fundamental right even in the context of prison inmates who cannot raise children.

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<sup>66</sup> Ibid, 89.

<sup>67</sup> Lynn Wardle, "Loving v. Virginia and the Constitutional Right to Marry, 1790-1990," *Howard Law Journal*, 1998: 289-347, 332 as cited in Gerstmann at 89.

<sup>68</sup> Gerstmann, 93.

<sup>69</sup> Ibid, 92.

<sup>70</sup> Ibid, 92-98.

Furthermore, arguments that rely upon children as the defining feature of marriage ignore the fact that this standard is not used to justify marriage as we know it today.<sup>72</sup> It does not matter much for couples seeking marriage licenses whether they can conceive children or whether they wish to do so. They are allowed to marry each other no matter what their intentions may be, and their unions are considered marriages in the presence or the absence of children. Applying the standard of children to same-sex couples would be unfair.

Even if there is a legitimate reason to believe that marriage is fundamentally dual-gendered, the definition of marriage is not beyond the reach of judicial review.<sup>73</sup> The Court has probed the definitions and limits of the right of free speech and the freedom from unreasonable search and seizure.<sup>74</sup> These rights narrowly defined would not provide the protections we have come to know. In the same way, the right to marry can be assessed by the Court, though this assessment would not guarantee any particular outcome with regard to same-sex marriage bans. The Court would have to take into consideration the role of states in defining the institution of marriage as well as the claims of equal protection and fundamental rights.

The development of the right to marry into one of the fundamental rights protected implicitly by the Constitution has provided vague standards by which the right can be measured. However, since the Court has never fully outlined the right to marry,

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<sup>71</sup> Ibid, 97.

<sup>72</sup> Ibid, 98-102.

<sup>73</sup> Ibid, 102.

<sup>74</sup> Ibid, 102-3.

nor provided any practical criteria for determining its limits, it remains to be seen which arguments in the same-sex marriage debate will prevail in the Courts. Whether states will win the power to define marriage as fundamentally dual-gendered or not depends largely upon how the definitions are articulated. It also depends upon whether they stem from legitimate state interests or whether it is clear that the purpose is to disadvantage one group of people unfairly. We have seen that there are many different interests and rights at stake in defining the right to marry. The Court will have to determine whether marriage remains within a state's power to define or whether the definition of marriage is something independent of legislation. Either way, the definition of marriage is crucial to the discussion of marriage rights.

## CHAPTER FOUR

### Social Goods Arguments for Same-Sex Marriage

Beyond the legal arguments for allowing same-sex marriage are those that focus on the social goods that would come from permitting same-sex couples to marry. According to this argument, same-sex marriage would benefit not only homosexuals, but also opposite-sex couples, children, and society as a whole. Additionally, it would bolster the institution of marriage. These arguments emphasize the notion, recognized by the Supreme Court, that marriage is fundamental to a person's pursuit of happiness.<sup>1</sup> Without access to the institution of marriage, same-sex couples do not have the opportunity to have their loving, committed relationships recognized by the law and society and are denied the legal rights and benefits that accompany such recognition.

Most of the writers who make these sorts of arguments hold that marriage as a social institution is itself *desirable*. This institution should be promoted as the best type of romantic relationship, and it should be available to everyone. Not only does the existence of marriage benefit society, but marriage also benefits each individual who enters into it. Marriage thus serves to strengthen society by creating both legal responsibilities and social expectations. It is these expectations that make marriage, rather than non-marriage alternatives, the most stabilizing institution in society. Married couples stay together longer, and their married homes better provide for the children they choose to raise within them.

The functions and roles that married couples perform are beneficial to society and to individuals. Social goods arguments hold that these functions can be fulfilled by any

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<sup>1</sup> Meyer v. Nebraska, 262 U.S. 399 (1923).

two people who are committed to a lasting relationship, regardless of gender. Though there might be good reasons for limiting marriage to people who are not closely related or to two and only two people, there is not a good reason for limiting access to marriage to only couples of opposite sexes. The goods that marriage bestows come from the commitment and love of two people, not the ways in which their reproductive organs function together.

That same-sex couples deserve to be given the same legal recognition as opposite-sex couples derives from their ability to perform the same functions within marriage and to benefit equally from the results of marriage. For these arguments, the essence of marriage can only be understood in terms of what marriage does and how married people interact with each other and with society. The designation of marriage should go to those relationships whose partners are able to fulfill the responsibilities and receive the rights of marriage. Since there is no logical reason to believe that two people of the same sex could not commit to the same type of relationship as two people of opposite sexes, same-sex relationships should receive the same legal title in addition to receiving the same rights and benefits as opposite-sex relationships.

There are many ways to approach the extension of marriage rights to same-sex couples. Andrew Sullivan makes the “conservative” case for the benefits of same-sex marriage. Sullivan argues that the definition of marriage as it currently stands does not need to change to include same-sex couples, but should be properly understood and applied to *all* couples. Jonathan Rauch, on the other hand, believes that society should accept a beneficial change in the definition of marriage to include same-sex couples. Rauch argues for a more progressive, state-by-state extension of the right to marry to

same-sex couples. His argument is based on the social and personal goods that same-sex marriage will bring as well as the realities of the state of marriage as it is currently. These are the broadest arguments made for same-sex marriage.

Though Rauch and Sullivan do not always discuss children in their arguments, many people emphasize the benefits that same-sex marriage would extend to children. They argue that more marriages, including those of same-sex couples, would create more stability for children and increase the social acceptability of their parents' relationship.<sup>2</sup> These arguments are not necessary in the progressive or the conservative case for same-sex marriage, but they do serve as a preemption of objections to same-sex marriage based on the welfare of children.

There are also several social arguments that seek to reestablish what marriage means in society. Some of these hold that the way marriage is understood today is antiquated and oppressive. Others simply hold that we should change our understanding of marriage in order to stop promoting traditional gender roles that tend to subjugate women.<sup>3</sup> People who argue from these standpoints recognize that marriage as it stands now does not include same-sex couples. This is an important distinction because most of the popular social arguments in favor of same-sex marriage emphasize that same-sex couples are unfairly being deprived of access to an institution. Revisionists, though, argue that marriage properly understood in today's society is not socially beneficial in itself, and they want to reform marriage to promote the new goods they identify.

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<sup>2</sup> In this chapter, "parents" will refer to the primary caregivers in the home of a child rather than to the biological mother and father.

<sup>3</sup> Koppelman.

*The Conservative Case: Andrew Sullivan*

Andrew Sullivan makes his case for same-sex marriage in a body of writings that include scholarly essays and blog articles. His arguments tend to focus on the ability of homosexual couples to fulfill certain aspects of marriage. He points out that gay couples raise children, care for one another, own homes together, etc., thus participating in a sort of common-law marriage. Sullivan describes the type of relationship that can qualify as a marriage broadly in order to account for the various types of people who may seek one. He is careful not to include incestuous or polygamous relationships.

Sullivan's argument relies on the fact that same-sex relationships often mimic marriage and may be healthier and more stable than many existing marriages. The denial of the designation of 'marriage,' then, is only a result of bigotry. Sullivan does not consider the fact that marriage is limited to opposite sex couples because that is traditional in the United States (whether or not it has been exclusively the case throughout all of human history) or because it is fundamentally an institution limited to fully complementary couples. The simple observation that certain relationships have the same or similar qualities is enough to justify those relationships having the same designation.

Sullivan has defined the requirements of being allowed to receive a marriage license as the ability to act like a married couple as traditionally understood. Because men and women in same-sex relationships are able to play the same roles in each other's lives as those in opposite-sex relationships, they should be allowed the same terminology and legal recognition. By Sullivan's definition, marriage is what it does – for individuals, for couples, and for society. Defining marriage by who is involved unjustly discriminates

against many ‘abnormal’ groups in society, and this and any other form of blatant discrimination or bigotry should be opposed by a just society.

He points out that marriage has changed many times throughout history, and should as a social institution, change as social standards and expectations change. However, this statement seems to undermine his assertion that this is a debate about marriage equality. If this is about equality under the law, the argument is not only whether to respond to social change or not, the argument is about whether to correct an historic injustice in the social expectations of marriage. Interracial marriage, for example, is not an important shift in marriage laws because it was a response to social changes, but rather because it was the correction of an injustice in the legal system that allowed states to ban marriages it deemed undesirable based on the race of the married people. This was not a debate about whether a black person and a white person could actually get married, but whether they should be allowed to do so. In contrast, many opponents of same-sex marriage argue that two men or two women are fundamentally unable to be actually married; this is a question of the definition of marriage rather than a question of who is permitted to get married.

Sullivan also argues from a conservative perspective that marriage is socially desirable and should be encouraged throughout society. While Sullivan does point out that allowing same-sex marriage would not necessarily lead to allowing polygamous or incestuous marriages, he does not show why these relationships could not be allowed given his reasoning for same-sex marriage. If social conditions changed significantly and the allowance of polygamous marriages seemed to be part of an inevitable social change, nothing in his argument would prevent this “reform,” or any other, for that matter.



Though he might readily accept this, there appears to be a tension in his argument between his conservative concern for the high value of marriage as a stabilizing institution and the idea that marriage can and should be reformed to accommodate whatever social changes occur.

The social desirability of more committed, stable relationships has not been at issue in the gay marriage debate. However, Sullivan focuses his argument on the social justice aspect of denying gay couples the social support of the actual designation of marriage. In his view, marriage is a necessary component in affirming the value of committed relationships, and indeed, constitutive of full humanity. It confers social status, whether or not particular marriages are accepted in some communities. The legal recognition of marriage is at least a symbol of the rightness of ‘marriage equality’ whereas denying marriage licenses to same-sex couples is a symbol of bigotry. Within those communities that already accept same-sex marriages, the additional support that the designation marriage would confer is a right that all couples have. Society has the obligation, then, to legally recognize those relationships that act like marriages.

It is important that we keep marriage alive and healthy, but according to Sullivan’s argument, what is healthy for marriage can change. The tension here represents only one of the many difficult points in the broader debate. Not only must we take into account what marriage is, but we must also decide which of the many aspects of marriage matter today. Given that procreation has been removed from the strict context of marriage, the child-rearing aspects of marriage may or may not matter any longer. While the welfare of children is always important, this only stands to improve with the increase

of legally committed relationships. Furthermore, the number of children whose parental situations will change due to marriage reform is relatively quite small.

Additionally, developments in science and the widespread use of birth control have separated procreation from marriage significantly enough for the reproductive nature of marriage to be called into question. Today it is not only the case that parents are not definitely assumed to be married, but also that married couples are not assumed to have or to be planning to have children. Because of changes like this, irreversible for better or worse, the nature of marriage has changed. As such, marriage laws should also change. Though Sullivan consistently argues that the welfare of children stands only to benefit from acceptance of same-sex marriage, his rhetoric also suggests that this issue is mostly irrelevant anyway.

Sullivan also points out that whether and how children are raised has never been considered in the arguments or discussions about heterosexual marriages (though we might attribute this to the naturalness of procreation within heterosexual marriages), and thus should not be a factor in laws concerning same-sex marriages. Children would be protected from harmful homes by the same laws and agencies that protect them now. The existence of some unfit parents does not affect the right of those people to get married, nor should it. In the same way we really do not consider the welfare of children in ‘traditional’ marriage laws, we should not consider it in discussions of marriage reform; it is simply not relevant.

Same-sex couples should be allowed to be married because there is no reason other than bigotry to deny access to this social institution. The love and commitment required and expected of married couples is not limited to opposite sex couples. The

humanizing aspects of marriage would greatly benefit same-sex couples. However persuasive the anecdotes Sullivan uses may be that same-sex couples are capable of having loving and committed relationships, they do not answer the objection that marriage is something more than a loving and committed relationship. If marriage is something that fundamentally requires the complementarity of the sexes, then Sullivan should shift to a revisionist argument. Nonetheless, Sullivan's argument is that not to extend access to marriage is to deny social justice to many citizens who should be allowed the same opportunities as their peers to pursue happiness.

*The Progressive Case: Jonathan Rauch*

In *Gay Marriage: Why it is Good for Gays, Good for Straights, and Good for Marriage*, Jonathan Rauch presents his case for same-sex marriage by arguing that it is socially desirable to extend marriage to more couples.<sup>4</sup> The real threat to marriage as we understand it is not the inclusion of same-sex couples, but the decline of marriage as the norm of committed relationships in America. Though Rauch makes a somewhat conservative argument for gay marriage, arguing first and foremost for the goodness of the institution of marriage, his argument diverges from the common conservative argument by emphasizing the need to change the traditional marriage norms to include same-sex couples (though within otherwise unchanged boundaries).<sup>5</sup>

Rauch differs from many gay marriage advocates, such as Andrew Sullivan, in his emphasis on a gradual, state-by-state reform of marriage rather than an insistence that

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<sup>4</sup> Jonathan Rauch, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America* (New York: Times Books, 2004).

<sup>5</sup> *Ibid*, 7

heterosexual exclusive marriage laws violate equal protection of the laws.<sup>6</sup> He insists that the right to marry someone a person loves is a right that laws should promote, though it is not a constitutional right. Although what gays want is equal protection of the laws, the way to secure this right is through state-by-state experimentation with reform in order to maintain the social legitimacy of such necessary and beneficial changes to marriage as a stable institution. If marriage laws are too far ahead of or behind the times with regard to how society views marriage, then those laws will lose meaning and cease to confer the social expectations necessary to the institution in the first place.<sup>7</sup> If this were to happen, then marriage would lose its legitimacy and thus its meaning and value in society.

The “magic of marriage” rests in the social expectations that accompany that designation, whereas civil unions and other gay marriage alternatives do not entail the expectations that would be beneficial for couples in such arrangements, and therefore do not operate in the same way as actual same-sex marriage would. The legitimacy of the institution of marriage lies in the tradition itself that has changed, but has also persisted in some of its most basic purposes, which are fundamentally the commitment to care giving. In times of hardship, one spouse supports the other with care, including giving time and money. Without the title of marriage, this support is not expected by society. Being married transforms relationships into those that are expected to endure in hardship, and society gives support to married couples to do so by expecting the marriage to last.

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<sup>6</sup> Ibid, 6.

<sup>7</sup> Ruth Bader Ginsburg, "The Burger Court's Grapplings with Sex Discrimination," in *The Burger Court: The Counter-Revolution That Wasn't*, ed. V. Blasi (New Haven, CT: Yale University Press, 1983); J.F. Orlando, "Gay Marriage and Abortion: A hard Roe to hoe," *The Economist*, March 22, 2013, <http://www.economist.com/blogs/democracyinamerica/2013/03/gay-marriage-and-abortion> (accessed April 8, 2013).

Married persons do not have to rely on strangers, friends, or family members who may not be able or willing to devote themselves wholly to this kind of care and love that many people require when they become seriously ill or suffer a major loss. Spouses are expected to take care of each other, and this creates not only a more stable society, but a happier and healthier one as well.

The good of marriage for gays, straights, and marriage itself comes down most essentially to the care-giving commitment entailed in marriage as Rauch understands it. This aspect of marriage is the most important, and all groups within society stand to benefit by upholding the high value of marriage as the norm of all committed relationships. Whereas the gay culture may be seen as a party culture, devoid of commitment, marriage would allow same-sex couples to settle down. They would be able to see their relationships as marriages – for a lifetime, rather than relationships without potential. As the lack of marriage would change society generally, the extension of marriage to the gay community would change it as well, for the better. At first, many or even most gays might not see marriage as a norm, but as it gained wider acceptance, it would become something that the next generation would seek. This would make marriage a part of the culture, Rauch argues, and would serve to help settle gay men as it helps settle straight men.

Rauch shows that the objection to marriage that gay male couples do not uphold the standards of exclusivity expected of married couples to be untenable. He argues that society should not expect gay couples to show that they already act like model married couples while they are being denied the right to marry. Furthermore, the right to marry of all homosexuals should not be dependent upon the culture of a subset of gay males who,

Rauch argues, will probably not want to get married anyway. At this point in the argument, Rauch's insistence upon experimentation in marriage laws at the state level is important in order to mitigate the possible effects of this culture upon the institution of marriage, though Rauch believes the right to marry will influence gay culture more than gay culture will influence the institution of marriage.

Rauch argues from the standpoint that marriage today is changing whether gay marriage opponents like it or not. There is no option to maintain it the way it is and still preserve its importance within society. As cohabitation among gay couples increases, and as official alternatives to gay marriage creep into the culture, marriage will become a relic, and couples of all types will cease to uphold marriage as the expected culmination of committed relationships. All couples capable and desirous of living together and committing themselves to one another should be encouraged to accept the legal and social responsibilities of marriage as they receive the legal and social benefits of marriage, which are the tools to take on such responsibilities. The increased availability of alternatives to marriage for all couples, not just for those unable to get marriage licenses, and the increased visibility and success of those institutions would only serve to deter straight couples from getting married, at least right away. This sort of system hardly protects marriage, and more, it risks losing marriage as a societal norm.

In the decisions regarding whether and how to go about reforming marriage to include the possibility of same-sex couples, Rauch urges both sides to consider the actual benefits of such a change and how those benefits can be seen in light of the real people who will be affected. The balance of benefits and negative consequences should be the deciding factor in whether and how marriage is reformed to include same-sex couples. As

it stands, the opposition to gay marriage holds that any negative effect on marriage and society is enough to outweigh all the benefits marriage reform stands to bring to gays, straights, and marriage. Rather than hold onto some outdated definition of marriage, we should analyze how we can best preserve the great institution of marriage and the increased quality of life for all people that it gives. Those who get married live happier, healthier, and more stable lives. This is a good for all people, and it is good for society to encourage the formation of these types of relationships. When we consider that there are real people at stake, we can see that perhaps we should let go of the old definition in favor of a new and better alternative.

Rauch does not discuss the place of children in this debate other than to say that the arguments against allowing same-sex marriage based on any of a number of definitions of marriage based on procreation and child-rearing are not really about children at all. These arguments actually stem from an understanding of marriage as the union of a man and woman, and are a rationalized way of begging the question of whether same-sex marriage is a permissible reform of marriage as we understand it. Asserting that marriage cannot be changed because it is does not already conform to that change is circular reasoning and does not respond to arguments like Rauch's that seek a reform of marriage.

Furthermore, it has not been shown that the welfare of children would suffer in any way, and would probably be benefitted by a more inclusive definition of marriage and the resulting greater encouragement of marriage for all committed relationships, especially those involving children. Many same-sex couples will raise children whether or not they are married. These children would undoubtedly benefit from their caregivers'

being married, as that relationship would be held up as a model to learn from and aspire to and would be more stable.

At its core, Rauch's argument is that society would benefit from more marriages, not fewer, and that any potential negative consequences can be mitigated by a gradual adoption of same-sex marriage laws. The institution of marriage has changed throughout history, adapting to the social context of the times, maintaining only a particular few essential characteristics, primarily commitment to care giving. Thus, in today's modern world in which the gay lifestyle is becoming increasingly visible and accepted, marriage should be reformed in order to encourage the preservation of marriage itself throughout society. The alternatives to allowing gay marriage do not include returning to the traditional, heterosexual exclusive definition of marriage. Marriage increases the stability of society, and as more and more committed couples are denied the social support given to married couples, their relationships are more volatile. The models of marriage should be promoted rather than restricted. In order to preserve marriage, we must change it.

#### *From the Welfare of Children*

Many arguments about same-sex marriage focus on how a change in marriage laws will affect children. Because the legalization of same-sex marriage has been attacked with several arguments based on the welfare of children, arguments supporting same-sex marriage often directly respond to those attacks. Some such responses point out that children will be protected by the same laws that protect them today regardless of the sexes of their parents while others reason that the fitness of a couple for child-rearing has not been determinative in that couple's eligibility for marriage.



In fact, if some or all same-sex couples were found to be unfit parents, their right to raise children in the home could be revoked by the state without revoking marriage rights and privileges in the same way that other couples' parenting rights can be revoked. This is not to say that any person in favor of allowing same-sex marriage has argued that this would be the case. Most such people argue that same-sex parenting is at least as good as opposite-sex parenting. I only observe here that the worth of any particular type of parenting is not really at issue in the fight for the acceptance and legalization of same-sex marriage.

That same-sex parenting is at least as good as 'traditional' parenting is independent of the right of same-sex couples to marry. If it were proved that there is a danger to children inherent in same-sex parenting, it would also be necessary to prove that this danger outweighs a biological parent's right to raise his or her own child before any laws could be established that would keep children from being raised by same-sex couples. Such prohibitions would not need to bar same-sex marriage, and similar protections would have to extend to unmarried same-sex couples as well to protect from other possible dangers of non-traditional parenting situations. Children raised by same-sex couples would have just as many rights and protections as other children. The welfare of children would be protected whether or not same-sex couples were allowed to marry, and so the tie between the welfare of children and the permissibility of same-sex marriage is questionable at best.

Other arguments show that the legalization of same-sex relationships as marriages will improve the welfare of children. The benefit to children is primarily to those who will be raised by same-sex parents with or without the legalization of same-sex marriage.

It is doubtful that many same-sex couples who currently do not have the option to marry will decide not to raise children for that reason alone. Similarly, the number of couples that would decide to raise children only because they have the option to get married is probably quite small. One of the few differences in the children who would be raised by same-sex parents is that those children who could be adopted who would otherwise be raised in orphanages or foster homes. If same-sex couples were able to marry and then adopt children, it is likely that at least some of them would choose to adopt children rather than going to the expense of other means of conceiving a child (surrogacy or artificial insemination, for example).

Furthermore, some people have argued that the legal recognition of same-sex couples will legitimize these children in a sense because the ridicule that could go along with having same-sex parents would be diminished by the legal recognition of that relationship.<sup>8</sup> Having married parents diminishes, though would not necessarily extinguish, the stigma that would come with growing up in a non-traditional home. It has also been argued that children can be made fun of by other children for any number of reasons regardless of whether their parents are gay or married.<sup>9</sup> If other children want to bully a particular classmate, they will find a reason. When gay parents are married, at least the other kids would not be able to manipulate that specific fact into ridicule.

Yet another reason that marriage generally is good for children is because it stabilizes the relationship of parents. Allowing same-sex couples to marry would

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<sup>8</sup> Fredrick Elliston, "Gay Marriage," in *Philosophy and Sex*, ed. Baker Robert and Fredrick Elliston, 146-66 (New York: Prometheus Books, 1984), 154.

<sup>9</sup> Angela Bolte, "Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage," *Social Theory and Practice*, Vol. 24, No. 1 (Spring 1998), 111-131.

encourage them to get married before having children. Marriage brings social expectations and legal obligations to the relationship and more permanency to the home. When there are legal procedures to undergo before the parents' relationship is dissolved, the children of those parents enjoy more security in their lives. It is less likely that the parents will split up if they are married than if they are not married. With the added level of social and legal expectations that the parents will raise the child into adulthood, the child has a more stable and therefore better home life.

The marriage of same-sex parents also allows any children they are raising entitlement to legal obligations on the part of both parents. As it stands now, there are significant legal barriers to same-sex parents who both wish to be legally bound to their children, and most states do not allow second-parent adoptions in these cases.<sup>10</sup> It is widely believed that two parents are better than one, and one aspect of this must be that it is better if, when two people equally share in the life and care of a child, those two people are legally bound to that child. When a child recognizes two men or two women as his or her parents and those two people share equally in his or her financial and social welfare, then those two people should both be recognized as the people legally responsible for that child. Medical decision-making and financial responsibility would be two important aspects of legal guardianship that come into play in such situations. If the parent who has legal guardianship is unable to make those types of decisions or is unable to fulfill other responsibilities for some other reason, then it would be better for the child to have the other person that child recognizes as a parent to be able to play the same role rather than

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<sup>10</sup> Bolte, 113.

relying on a biological grandparent or other person not directly involved in raising the child.

In addition to conferring rights and responsibilities for children, allowing same-sex couples to marry would require the state to ensure the welfare of children raised by those couples in the case of the end of the relationship. Especially in the case of the death of one parent, it is important that children are given social and legal support when the marriage of parents ends. If it is the biological parent, or legal guardian, of the child that dies, then that child could be removed from the home in which he or she grew up. Rather than keeping the child in a relatively stable environment, that child might be taken away from the other parent because that parent does not have legal guardianship of that child or next of kin status. This at least disrupts the child's life more than keeping him or her in the same home with the surviving parent.

In the case of a divorce of a child-rearing same-sex couple, the state would be involved in the division of property and the custody arrangements for the children involved. This could mean anything from ensuring proper child support to ensuring that the child is not deprived of seeing one of the people he or she has come to know as a parent. Without a legal marriage, these rights are not guaranteed, and the child could abruptly be put into a completely new environment. Without marriage, the state does not automatically become involved to ensure a stable environment for the children being raised by unmarried same-sex couples. If we regard stability as beneficial to children, then state intervention into the affairs of children during the breakup of parents is beneficial to children as well.

Though this stability is beneficial, opponents of same-sex marriage might argue that second parent adoption could be legalized without allowing some same-sex relationships to be called marriages. If for the sake of children there were a legal avenue for same-sex couples both to be legally responsible for children, some might argue, then same-sex marriage for these parents would not serve the same benefit for children. Though this might be true, it is also true that the ending of a marriage has more legal procedures already established to ensure the continued care and well being of all parties, including children.

One thing is for sure: that child rearing between same-sex couples is on the rise. These couples are sometimes married. The ones who are not are at a disadvantage when it comes to the protection of the child in the event that the relationship ends, whether in the death of one of the partners or in the dissolution of the relationship. Because there is not always an officially sanctioned relationship between the parents, or even between each parent and the child, there is not always an automatic legal procedure in place to ensure the well being of the child or the stability of the child's home after the split. Whereas married couples go through a legal process to agree upon the terms of custody of the child or children, unmarried couples do not. This creates the potential problem for those couples who have raised the child as their own, but whose legal custody during the relationship was isolated to one parent only.

Without a legal avenue for the protection of children, same-sex parenting without the option for legal guardianship by both parents poses a threat to the welfare of children who will be raised in the same homes whether or not both parents have legal privileges and obligations for those children. Whether same-sex couples are recognized as married

or given legal recognition as couples at all, there should be some legal measures to ensure the well-being of the children raised in homes with two unmarried persons equally invested in the care of the child. There might be ways of doing this for all children being raised by unmarried parents of all sorts, but allowing marriage between same-sex couples is one way to help protect the welfare of children being raised by same-sex couples who wish to marry.

*The Revisionist Case: Nan Hunter and Angela Bolte*

The revisionist case for the legalization of same-sex marriage shows that the institution of marriage as it stands now formalizes a socially undesirable tradition and should be changed to include same-sex couples as a way to transform that tradition. Nan Hunter and Angela Bolte both make convincing arguments that the way marriage has functioned in society and the way courts have discussed marriage has led to an understanding of marriage between a male husband that is dominant and a female wife that is submissive. This understanding is not appropriate for the world we live in today and does not, in fact, live up to the gender equality that we, as a society, claim to value.

In her article, "Marriage, Law, and Gender- A Feminist Inquiry," Nan Hunter argues that the reasons many people understand marriage as a gendered relationship derive from the 'traditional' institution of marriage that reinforces sexism and oppressive gender roles.<sup>11</sup> By legalizing same-sex marriage, society would take one step in the process of establishing true gender equality and socially desirable changes in marriage. This legalization would destabilize traditional gender roles within marriage, and this

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<sup>11</sup> Nan D. Hunter. "Marriage, Law, and Gender: A Feminist Inquiry," 1 *Law & Sexuality* 9 (1991).

would encourage women's rights as well as gay rights.<sup>12</sup> In her view, when society has discarded gender roles, it will have achieved social and legal gender equality.

Hunter's argument rests on the assertion that marriage is solely a social institution. She says, beyond the social constructs of marriage laws and customs, "individuals may couple, but they do not 'marry.'"<sup>13</sup> This important aspect of her argument is what makes revisionist arguments viable. If marriage had some fundamental nature outside of the law, then revisionist arguments would be difficult to make. However, Hunter and other revisionists argue that marriage is what society says it is. Furthermore, they argue, what society says marriage is today is less desirable than what it would be if we allowed same-sex marriage.

Marriage as the Court has seen it, Hunter writes, is 'naturally' a relationship of male authority and female dependence.<sup>14</sup> This can be observed in laws that presume the man to be responsible for the financial well being of his family and the woman responsible for the upbringing of the children. Divorce proceedings and employer time-off arrangements reflect and perpetuate these gender roles. In the case of divorce, the man is expected to pay some sort of child support and alimony while the woman is expected to take care of children. That this is not always the case anymore reflects progress in society. Indeed, we have progressed to the point of the only legally enforced hierarchical

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<sup>12</sup> Ibid, 12.

<sup>13</sup> Ibid, 13.

<sup>14</sup> Ibid, 15.

indicators within marriage are the designations “husband” and “wife.”<sup>15</sup> These designations, however, do perpetuate the cultural norm of hierarchical relationships.

If same-sex marriage were legalized, then, it is likely that these gender roles would be undermined and replaced by the possibility for true equality between the sexes because it would allow for marriages between two people of the same social status.<sup>16</sup> Thus, all marriages would be less meaningful as relationships between husband and wife and more meaningful as relationships between equal partners. The sort of marriage reform that would lead to this social change should be based on arguments concerning gender roles rather than simply on equality.

Without a basis in changing the gender roles within marriage, gaining the right for same-sex couples to marry only represents the desire to enter the traditional institution that stifles equality.<sup>17</sup> It would still be valuable for society if this reform came about as a result of other arguments, but it would be most transformative if the conversation focused on how to fix marriage rather than to enter and preserve it. Though the legal rights and benefits that go along with the civil recognition of intimate relationships would serve equal rights, the social change will not be complete without a shift in the understanding of what it means for all couples to be married.

Angela Bolte makes a similar argument in “Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage.”<sup>18</sup> She argues that the

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<sup>15</sup> Ibid, 16.

<sup>16</sup> Ibid, 17.

<sup>17</sup> Ibid, 30.

<sup>18</sup> Bolte.



moral code of society does not currently include same-sex couples in the institution of marriage but that this is unjust.<sup>19</sup> The function of marriage in society is to create a stabilizing institution whereby couples can commit to taking care of one another. Allowing same-sex marriage would make this more of a norm in society rather than the alternatives to marriage that same-sex couples are forced to pursue.

Bolte's view of marriage aligns closely with Andrew Sullivan's and Jonathan Rauch's views of marriage. She looks more at what marriage does for couples and for society as she defines the institution. She systematically rejects as unjust the traditional ways of defining marriage because tradition and legal codes have never been the ultimate authorities on justice. Because marriage functions to create stability among couples and encourage committed relationships and child rearing, all couples able to fulfill this function should be allowed to marry. There is no reason that same-sex couples would not be able to do this.

Much of the article is devoted to dismantling arguments against the legalization of same-sex marriage. These arguments do not take into account the adverse effects of not allowing same-sex couples to marry and rely upon unjust formulations of how families ought to look. The most important element in marriage is the kin-creating element, in which same-sex couples are fully able to participate. Same-sex couples can participate in all the aspects of marriage that separate it from other types of relationships, and thus it is shown that same-sex marriage can, in fact exist.<sup>20</sup>

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<sup>19</sup> Ibid, 121.

<sup>20</sup> Ibid, 118.

These and other revisionist arguments highlight the idea that marriage is a purely constructed social institution subject to change when society is ready to change it. While not all arguments hold that traditional marriage is oppressive, as Nan Hunter argues, all revisionists hold that it is desirable to change the way marriage is formulated in society in order to include more couples, specifically same-sex couples. The social benefits of this would outweigh the possible negative effects of destabilizing a traditional institution. Furthermore, this destabilization in itself could be socially desirable in itself.

### *Civil Unions and Other Alternatives to Marriage*

Because the social arguments for gay marriage rely so much on the potential benefits that come from the extension of marriage to same-sex couples, they also discourage the move to non-marriage alternatives to recognition of committed relationships. Even if all the legal rights and benefits came with a certain formulation of a civil union, for example, there are social expectations that can come only with an institution that has established norms and boundaries. No one would know what to expect of a couple that was civilly united, for example.<sup>21</sup> The fight for equality and for the full package of benefits of marriage necessarily is a fight for the designation of marriage over any other arrangement.

Rauch and Sullivan in particular emphasize the need to encourage nothing less than marriage as the gold standard for all couples that wish to commit to each other for life. It is not the case that a civil union could become the same sort of highest end of romantic relationships as marriage has become in society. Moreover, encouraging same-sex couples to pursue civil unions will inevitably lead to all couples seeing civil unions as

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<sup>21</sup> Rauch.

an option that might be more desirable than a traditional marriage. By granting other forms of relationships, the state implicitly devalues marriage and encourages alternatives. The dangers of this have been illuminated by the discussion of the benefits to society and to same-sex couples that marriage would bring.

Advancing civil unions or other similar alternatives to marriage does not create a “separate but equal” classification for same-sex couples. In fact, because of the social atmosphere and the widespread bias against homosexuals, such classifications create a second class of citizens that is not good enough for marriage. Their relationships would be seen as subordinate due to perceived inferiorities in lifestyle and nature. This would not advance equality or provide the same benefits to society. Though most same-sex marriage advocates agree that alternatives to marriage are insulting and fundamentally undesirable as a permanent solution, they do agree that it is better than no institution to recognize relationships at all. Some rights are better than none, though limited rights are not, then, just.

Ultimately, social arguments for the legalization of same-sex marriage emphasize that society should seek to encourage more marriage, not less. The type of marriage that would be encouraged is not the traditional form of marriage that involves a gendered hierarchy or one that perpetuates other unjust gender roles. The high value and potential for marriage should be clear for every individual who is inclined to seek a partner in life. This provides a stable foundation for the raising of children and for the care of the individuals in marriages. It normalizes and brings into the tradition of marriage more couples that can benefit while also bringing justice to that institution and granting equality in law and in society to all loving and committed couples.

## CHAPTER FIVE

### Catholic Natural Law

St. Thomas Aquinas most famously articulates Catholic natural law. According to Aquinas, the natural law is readily accessible to all people through the exercise of reason, regardless of religious beliefs. It is by reasoning properly and in accordance with the natural laws of human behavior that people have formed societies and governed them with moral principles that are evident throughout time and culture. One such law is that because human life is intrinsically valuable, arbitrary killing is prohibited. Those who argue against gay marriage based on such reasoning believe that though their argument aligns with a particular comprehensive view of the world, namely, Catholic doctrine, their reasoning should be acceptable to all people. These authors do not argue as Catholics or assume any religious belief on the part of the people they hope to convince.

The Catholic natural law argument against gay marriage is based on the belief that marriage is more than just a legal arrangement; it is a natural relationship between men and women that would arise with or without state legitimization. Moreover, it is morally obligatory not to change the legal definition of this institution without proving that the change would be in accordance with the true nature of marriage. Those who make this type of argument closely associate the social and legal institution of marriage with its biological connection to procreation and sexual union.

This type of argument properly fits into the debate at the social level. It is an argument about the fundamental nature of marriage rather than how the legal institution has been interpreted by the Court or the legal rights and benefits that go along with a marriage license. Catholic natural law arguments are definitional. As such, someone

defending a law prohibiting same-sex marriage would have to argue that the legal right to marry is rightly restricted to those couples who can actually be married in the “natural” sense of the word. It is not that the rights and benefits associated with marriage could not be used properly by merely legally married couples or even that those couples should be actively denied such legal rights, but that the word marriage means something particular, and that meaning is exclusive to opposite-sex couples.

There are multiple arguments based on Catholic natural law. John Finnis, for example, argues that marriage can only truly exist between two people who can express and experience their marriage through truly conjugal sexual intercourse.<sup>1</sup> Others, such as Sherif Girgis, Robert George, and Ryan Anderson, articulate the similar argument that marriage is fundamentally a “comprehensive union” between two people.<sup>2</sup> In both arguments, the biological features of a couple, comprising together exactly one human reproductive system, make them eligible to participate fully in a marriage.

If the Court decided to evaluate a ban on same-sex marriage using the rational basis test, a state would not have a difficult time making the case that it is rational to use the original definition of a social institution as the current definition of that institution. It is then rational to keep to original meaning, as it is not motivated by animus toward people who do not conform to that original meaning. Rather, the motivation is continuity and consistency between social norms and legal institutions arising from those norms.

At higher levels of scrutiny, the case is more difficult to make, though not impossible. A person defending a ban on same-sex marriage would have to show that

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<sup>1</sup> John Finnis, "Marriage: A Basic and Exigent Good," *The Monist* 91 (2008): 388-406.

<sup>2</sup> Sherif Girgis, Robert George and Ryan Anderson, "What is Marriage?," *Harvard Journal of Law & Public Policy* 34, no. 1 (2010): 245-87.

there is a significant or compelling reason for a state to keep the real, or “natural,” definition of marriage consistent with its state laws. This compelling reason could be one of several offered by Catholic natural law proponents, including but not limited to the encouragement of particular lifestyles as ideals and upholding the high value of a shared understanding of the unique human relationship that is marriage.

In several articles, John Finnis defends an understanding of sexual relations as moral only within the context of marriage and with an openness to procreation.<sup>3</sup> He asserts that states have the power to encourage moral activity through their police powers, though it is not defined only by its legal contours.<sup>4</sup>

The point of marriage is procreation and friendship of a particular kind that is expressed only within the context of certain types of sexual union.<sup>5</sup> “Truly conjugal sexual intercourse” is the physical expression of a couple’s marriage.<sup>6</sup> It is the expression of the marital union through the sexual experience that separates human sexuality from animalistic instinct. Finnis argues that sex within marriage is the only form of sexual activity that has moral worth. Without the expression of the morally good union between husband and wife through conjugal union, sexual activity does not promote distinctly human moral value. It also expresses the permanence of marriage in its potential to create human life.

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<sup>3</sup> See John M. Finnis, “Law, Morality, and Sexual Orientation,” 69 *Notre Dame L. Rev.* 1049, 1066 (1994); John Finnis, “Marriage: A Basic and Exigent Good,” *The Monist*, July–Oct. 2008, 388–406.

<sup>4</sup> “Marriage: A Basic and Exigent Good.”

<sup>5</sup> *Ibid.*

<sup>6</sup> “Law, Morality, and Sexual Orientation,” 31; “Marriage: A Basic and Exigent Good.”

Finnis includes the openness to procreation in his moral framework of marital relations. This is important because of his insistence not on the possibility of children or even the desire to have children, but rather on the couple's openness to it. So, if marriage is to make sense by Finnis' definition, marital unions do not include birth control of any sort. The good of marriage is realized only when openness to the extension of the marital union to the creation of new life through that union (procreation) is maintained. In societies in which contracepted sex is considered as valuable as truly conjugal sex, "marriage is in process of being replaced by scarcely committed cohabitation."<sup>7</sup> The cause of this problem is the cultural willingness to divorce sex from marriage and to put the same value on other forms of sexual activity as on truly conjugal marital intercourse. Outside of the context of marriage, and with the use of contraception, sex does not express the commitment and unique type of union that is marriage.

By divorcing openness to children from the marital union, the devotion and love of each person is devalued because it is less permanent and creative. It is a union that is intentionally limited to itself; it no longer has the ability to create new life. Marriage is the institution that is uniquely designed to create family units. It is a generative unit – spouses share their lives and their last name, and they grow into a single life as a couple, creating a family of their own. Without the openness to procreation, legally married couples cannot be said to be truly married.

The relationships of same-sex couples fundamentally do not produce children. Thus, Finnis argues, whatever the commitment and friendship experienced by these couples, there is no reason to say that their relationships are marriages even if they have a

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<sup>7</sup> Ibid.

marriage license.<sup>8</sup> Same-sex partners are biologically incapable of marital sex.<sup>9</sup> It is not because of a lack of commitment or a lack of human feelings that they are not capable of entering into a true marriage, but because of their basic sexual identity. Just as no man is able to become pregnant, neither are two men or two women able to participate in truly conjugal sexual intercourse or biological procreation. Their relationships might imitate true marriages, but they are unable to actually *be* marriages.

Furthermore, Finnis responds to the objection that in today's culture, few couples are truly married by this definition. He argues that although the ideal of marriage is rarely actualized today, the ideal should nevertheless be upheld. Though an understanding of the true nature of marriage today is impaired, it is still intelligible and valuable as an institution fundamentally oriented toward having and raising children and making the relationship between spouses exclusive and permanent.<sup>10</sup> The complementarity of the sexes is necessary in this union because it is only through this feature that both man and woman become complete and are able to generate new life.

Removing the requirement of a truly complementary couple from legal marriage strips the institution of its orientation toward children and the wholeness of persons within it. There is no longer any connection between the sexual relations between spouses and children. Moreover, it demotes marriage from a lofty and valuable moral ideal to an

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> "Marriage: A Basic and Exigent Good"



institution of arbitrary fancy, defined by whatever forms of convenient commitment each married couple defines for itself.<sup>11</sup>

If we include same-sex couples in the institution of marriage despite their inability to participate in truly marital union, we are treating sexual intercourse as a mere accompaniment to or compensation for the responsibilities of marriage.<sup>12</sup> The couples that already understand their relationship properly are not in immediate danger, though they would suffer as a result of a diluted social definition of marriage. The greatest danger comes from changing the social understanding of the marital relationship such that people will not be able to enter into true marriages as readily or receive the same social support as they would otherwise. Officially recognizing same-sex couples as married couples is a denial of the intrinsic value of sexual intercourse within marriage as actualizing the exclusivity and open-endedness (procreative possibility) of marriage.<sup>13</sup>

Sherif Girgis, Robert George, and Ryan Anderson similarly explore the nature of marriage and the legal ramifications of their analysis in their article, "What is Marriage," and in their book on the same subject.<sup>14</sup> They consider both the revisionist view, that marriage is a union of two people committed to loving each other romantically, caring for each other, and sharing rights and responsibilities, enhanced by sexual intimacy of whatever sort is mutually desirable, and the conjugal view, articulated as above, by John

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<sup>11</sup> Ibid.

<sup>12</sup> "Law, Morality, and "Sexual Orientation," 42.

<sup>13</sup> Ibid.

<sup>14</sup> Sherif Girgis, Anderson T. Ryan and Robert P. George, *What is Marriage: Man and Woman: A Defense* (New York: Encounter Books, 2012).

Finnis.<sup>15</sup> They argue that marriage rightly understood is a comprehensive union between one man and one woman as husband and wife, consistent with the conjugal view of marriage.

Girgis, George, and Anderson make clear that the true debate over same-sex marriage has to do with the discerning and defending the true definition of marriage. Not only does the revisionist argument that marriage is what society wants it to be not defensible, it is also dangerous to the institution.<sup>16</sup> Once that objection is defeated, it remains to be seen what marriage is. Without such an understanding, the discrimination between same-sex and opposite-sex couples might be seen as arbitrary or unfair. However, if marriage inherently involves one man and one woman only, it is this nature (or biology) and not animus that justifies the discrimination. Determining the definition of marriage would establish whether we should recognize same-sex relationships, or perhaps even polyamorous marriages, in the same way we recognize monogamous opposite-sex relationships.<sup>17</sup>

According to this view, marriage has three defining characteristics: comprehensive union between spouses, a special link with children, and norms of monogamy, exclusivity, and permanence.<sup>18</sup> The most important of these three criteria is the comprehensive union because it is the most disputed by advocates of legalizing same-sex marriage. Comprehensive unions are multifaceted, involving the sharing of lives,

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<sup>15</sup> “Marriage: A Basic and Exigent Good,” 246.

<sup>16</sup> Ibid, 248.

<sup>17</sup> Ibid, 251.

<sup>18</sup> Ibid, 252.

resources, friendship, and love of a particular kind. On the conjugal view, it also involves “organic bodily union,” or what John Finnis calls truly conjugal sexual intercourse.<sup>19</sup> It is this and only this particular sexual act that biologically completes human beings and makes them a couple, a unit.

Comprehensive unity requires not just emotional capacity to feel fully united through sexual acts, but the biological ability to be completed by the particular act of marital intercourse. This marital intercourse is distinct from non-marital intercourse in its expression of the permanent and exclusive commitment between husband and wife.<sup>20</sup> Because this expression is part of the interpersonal connection between spouses, which is intrinsically valuable, marital sexual intercourse is valuable to marriages whether or not conception is sought or achieved.<sup>21</sup> Through this act a couple participates in a union, exclusive to opposite-sex couples, that is truly comprehensive.

People like Jonathan Rauch and Andrew Sullivan particularly object to this aspect of the argument against same-sex marriage. The proposition that only two people of different sexes can share in such emotional and physical intimacy, they argue, is highly offensive and dehumanizing. As previously discussed, Rauch and Sullivan find it impossible to accept that only the physical action that naturally creates a complete reproductive system can express the full scope of the marital relationship.<sup>22</sup> It is not the way people think about their actions or their relationships, they argue, and so is only a

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<sup>19</sup> Ibid, 253.

<sup>20</sup> Ibid, 255.

<sup>21</sup> Ibid.

<sup>22</sup> Jonathan Rauch, *Gay Marriage*; Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality* (New York: Random House, 1995).

way to justify excluding homosexual conduct from the realm of morally acceptable sexual behavior. Furthermore, they argue, there is no evidence or sufficient argument to prove that legalizing same-sex marriages would be harmful to those who hold to the Catholic natural law understanding of marriage.

To this type of objection, Girgis, George, Anderson, and Finnis would all argue that it is not that each individual thinks about every marital action in such philosophical ways; rather, biological realities are physical manifestations of the natural order of human interactions. While truly comprehensive unions involve emotional capacities that same-sex relationships very well might fulfill, they also fundamentally involve the related physical manifestation of the emotional connection. Even if same-sex relationships imitated marriage in every other way, they would not be able to fully embody the comprehensive unity that husband and wife share.

The type of union that a husband and wife share through marital intercourse often results in procreation, though procreation is neither a necessary nor a sufficient condition of marriage. The article draws the analogy between marital intercourse and a baseball team: marital intercourse that does not or cannot result in procreation is like a baseball team that tries but does not win any games.<sup>23</sup> This does exclude birth control from the marriage relationship. It is the act of playing the game, so to speak, without intentional sabotage that makes such a team a real team. Same-sex relationships, though, are not structured in a way that ever could result in having children, like a baseball team that as a rule does not bat during a game.

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<sup>23</sup> “Marriage: A Basic and Exigent Good,” 257.

The other aspects of marriage are important, but have been adequately treated above or else have been adequately refuted by previous arguments. The social arguments made for same-sex marriage often effectively tackle objections based on the wellbeing of children and the norms of marriage. The nature of marriage as comprehensive and as oriented toward procreation, though, is unique to natural law arguments and have not, in my opinion, been definitively answered by opponents of such views, who often dismiss Catholic natural law arguments as irrelevant given today's political and social culture.

Another major objection to banning same-sex marriage is the idea that allowing same-sex marriage would not harm the marriages of those people who choose to understand their own relationship on the conjugal understanding. However, Girgis, George, and Anderson argue that by officially recognizing same-sex partnerships as marriages, eliminating the conjugal conception at the state level would weaken the ideal of marriage throughout society, turning it into an institution based on emotional unity rather than comprehensive unity.<sup>24</sup> This would change the social understanding of marriage and weaken the social expectations of married couples; this harms current marriages by taking away social pressures and support that come with entering into marriage.<sup>25</sup>

Girgis, George, and Anderson also argue that recognizing same-sex marriages would threaten the moral and religious freedom of people who oppose it. This would happen because of the forced recognition of the equivalent status (even if only equivalent

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<sup>24</sup> Ibid, 260.

<sup>25</sup> Ibid.

legal status) of same-sex “married” couples and truly married couples.<sup>26</sup> Those who oppose the changes would be legally seen as bigots who make invidious distinctions, and thus would be restricted in directing the education and upbringing of their children as they see morally fit.<sup>27</sup> A Court of Appeals in Massachusetts ruled that a school may teach children that homosexual relations are morally good even if parents object.<sup>28</sup> With the legal recognition of same-sex partnerships as marriages, holding to the conviction – religious or otherwise – that marriage fundamentally involves one man and one woman, will legally be bigotry, equivalent in law to racism and sexism.

### *Conclusion*

This line of reasoning justifies restricting marriage to one man and one woman because a same-sex partnership cannot truly constitute a marriage. To legally recognize it as such would be to alter the social meaning of marriage, lessening its social value and taking away its potential to promote the social and personal goods associated with comprehensive unions. The natural orientation of man and woman toward such unions is clear and uniquely beneficial to the couple, to children, and to society. Though marriage does have other features, which may or may not be present in same-sex partnerships, all must be present in order for a couple to be called husband and wife.

The central weakness of these and other Catholic natural law arguments against same-sex marriage is the focus on marriage as an institution defined at least in part by openness to children. In America today, there is not a single state that has any sort of test

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<sup>26</sup> Ibid, 263-4.

<sup>27</sup> Ibid.

<sup>28</sup> Parker v. Hurley, 514 F.3d 87 (1<sup>st</sup> Cir. 2008).

for the ability, willingness, or openness of any couple to have or raise children before granting that couple a marriage license. As many same-sex marriage advocates will point out, couples beyond childbearing years are allowed to marry, as are infertile couples or couples committed to childless marriages or those who use birth control for part or all of their marriages. It does not seem that this criterion has been used to determine suitability for marriage except as a justification for how and why the institution of marriage arose in the first place.

The response available to this attack by those using Catholic natural law arguments is that the dual-gendered-ness of marriage as a tradition reflects the natural consequence of married acts. This arose before the advent or acceptability of birth control, the use of which, they argue, is morally problematic anyway. Though the true meaning, the origin, of marriage has been lost in contemporary society, it is not unimportant to examine this aspect. It is permissible to allow couples beyond their childbearing years to marry because of their openness to procreation even if they can no longer have children. There is no real difference, it could be argued, between two married couples beyond childbearing years both of which do not have children, one having entered into such union after the possibility of conceiving children has passed while the other initiated the marriage within the possibility of conceiving children.

Even a same-sex couple's desire to have and raise children does not qualify it for marriage because of the other requirements for marital union. The complementarity of the sexes included, two men or two women could not be able to fulfill the requirements of marriage because they are naturally unable to conceive legitimate children. Any children that the couple raises could not be the result of their union, and thus their union could not

be the type that would truly count as marital. The creation of children by the artificial union of egg and sperm one of which comes from outside the marriage is demeaning to the exclusivity of marriage.

One common feature of Catholic natural law arguments against same-sex marriage is their insistence that birth control violates the sanctity of the marital union. This aspect of the Catholic natural law argument makes it especially prone to questions of relevancy. Some same-sex couples would have children together if that were possible; in fact, some would be more open to it than opposite-sex couples using birth control. Moreover, adoption is a possibility for most couples and is a morally good thing to do. In the context of the ubiquitous use of birth control and the availability of alternate ways of conceiving children and great need for adoptive parents, the relevancy of the argument that marriage needs openness to procreation is questionable.

The position of those who argue from a Catholic natural law standpoint is that even if the ideal of marriage is rarely realized, the laws of society should promote such ideals and discourage alternatives. The institution of marriage as it really is should be upheld by law, encouraging that understanding as a social ideal, reflecting the real and natural human relationship that is unique to the full union between one man and one woman.



## CHAPTER SIX

### Conclusion

The arguments and counter-arguments I have presented on the topic of same-sex marriage tend not to engage each other directly. Instead, both sides offer reasons to accept their positions and try to discredit the other way of looking at the issue. However, this approach does not often convince anyone and only succeeds in affirming the values and arguments with which one begins. Pro-same-sex marriage thinkers already do not consider the traditional definition of marriage to be valid, so arguments based on that definition cannot make any headway in the debate. Similarly, revisionist and social arguments rarely convince those who believe that marriage is definitively between one man and one woman otherwise.

The social arguments for the legalization of same-sex marriage emphasize not only the potential good for society, but also the humanizing effect that such changes would have for homosexual men and women in America. People who are not convinced by these arguments are often called callous or homophobic, and their opinions are reduced to bigotry. Though there are no doubt many people who oppose same-sex marriage for those reasons, there are other people who merely believe that the traditional definition of marriage is the right one and worth protecting, without any animus toward homosexuals.

Passing emotionally charged legislation, such as any relating to same-sex marriage, is inherently dangerous because of the social effects such legislation has on individuals. Just as many homosexual men and women believe that their inability to get married is dehumanizing, many opponents of same-sex marriage fear that giving the legal

title of marriage to relationships that are not marriages will establish the idea that their views are not only legally invalid but also motivated by hate. Any time a legislature takes up an issue as heated as same-sex marriage, it cannot avoid making a social statement. It is not necessarily the reasoning behind the legislation that will be promulgated throughout society, but rather the effects of that legislation and the emotional reaction to those effects that will reverberate among people on both sides of the issue. There is a danger in not legalizing same-sex marriage, but there is a danger in legalizing it as well.

The heart of the debate over same-sex marriage concerns the word ‘marriage.’ As the California case dealing with Proposition 8 demonstrates, the most important issue is not the rights and benefits that come with marriage; it is the social status of “being married.” Couples in California were granted the same rights and benefits as married couples through civil unions, but they were denied the designation.

That the word ‘marriage’ is at the center of the debate illuminates the importance of the social status it confers. As a society, we have elevated marriage to such a height that the impossibility of marriage is dehumanizing. ‘Old maids’ and ‘hopeless bachelors’ are pitied in popular culture for their singleness, though it is assumed their only obstacle to getting married is their inability to find a partner. By contrast, there is also a legal obstacle for many homosexual men and women who are legally unable to get married. They are unable to achieve the social status that we are taught is the pinnacle of our human experience.

There are good reasons for believing that a successful marriage is a worthy ideal. However, that does not mean that everyone is naturally able to achieve it. Many women believe that bearing their own children is the ideal of their womanhood and personhood.

However, not all women are able to conceive children, and no men are able to do so. This has many effects on gender relations. Some men feel that their body's inability to nurture children in the same way as a mother's body is unfair. But this situation is not essentially unjust. It is the fault of nature that men are unable to bear children. If someone were to argue that men should not try through science to change this natural capacity of the body, that person would probably not be thought a bigot or a religious zealot (though that is certainly a possibility). This, though, is how opponents of same-sex marriage often view their position in the debate.

The argument that two men or two women are naturally unable to be married is, for them, analogous to the observation that a man is unable to become pregnant. It does not have to do with his emotional capacity to care for his child, with his intentions, or with disgust that he should want the sort of connection with a child that a mother would have. A man is simply not biologically able to bear a child, and he is not biologically able to marry a man.

The difference between the two cases is that marriage is a partially a social institution and pregnancy is solely a biological occurrence. Anderson, George, and Girgis point out that it does not make sense to say that marriage is solely a social institution: If marriage had no independent reality, there would be "no grounds at all for arguing that our view infringes same sex couples' natural and inviolable right to marriage, ... for marriage would be a mere fiction designed to efficiently promote social utility."<sup>1</sup> There must be some aspect of marriage that exists independently of the law, and what this consists of determines what is legally just. If marriage outside of the law is inherently

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<sup>1</sup> "Marriage: A Basic and Exigent Good," 275.

dual-gendered, then it is not unjust to ban same-sex marriage in the law. This determination, though, is not an easy one to make.

The contemporary approach to determining the nature of marriage is, as I have shown throughout this thesis, not uniform. Arguments, especially social arguments, for the legalization of same-sex marriage focus on what marriage *does* and how spouses interact with each other, with children, and with society. Arguments against same-sex marriage usually focus on what marriage *is*, giving definitions rather than descriptions. Furthermore, revisionist arguments for same-sex marriage argue that the definitions of marriage are not important in light of the social and human goods they argue would result from changing the meaning of marriage. But even if we accept that marriage should change, we must justify the changes we make and examine the effects of changing one of the most central institutions in our society. If we want to reduce legal marriage to something that is only defined by state legislatures, we must be ready to accept that the social aspects of marriage will take on this diminished meaning as well.

The centrality of the word ‘marriage’ also forces people who argue against same-sex marriage to confront the reality that they are promoting an ideal of marriage that some people simply cannot have, and by this action are also discouraging other lifestyles. This social discouragement has actual negative effects on real people, and as Jonathan Rauch says, “there is no ‘respectful’ way to do it.”<sup>2</sup> Part of the social argument for legalizing same-sex marriage is the humanizing effect it will have on homosexual men and women. But I am not convinced that affirming the homosexual lifestyle in society

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<sup>2</sup> Jonathan Rauch, "Response: Thirteen Theses on Marriage," *First Things*, October 2012.

and designating some homosexual relationships ‘marriages’ is more important than the continuity and loftiness that marriage has now.

Marriage is a kin-making institution. It binds together two families permanently. It protects children and solidifies relationships. It confers property rights and power of attorney. It is the basis of the socially ideal household and describes the relationship of parents. There is something atomic in the idea of families and marriage. It is both economic and human. It is more than a committed relationship because it essentially makes two lives one, and expects that children will be the manifestation of a single life from two. Communities and cities are organized around the idea of married couples and their offspring. Our laws and customs assume that families will be organized with the married couple and its family at the center of all relationships.

The relationship of the married couple is especially important because it is not just a romantic commitment. If marriage were defined by its romance, then arranged marriages would not be legitimate marriages. Nor would relationships based on sex and money be eligible for the title marriage. But we do recognize these as marriages (bad ones, certainly) but marriages nonetheless. Whether they love each other or not, married people are expected to have marital relations, raise children, and take care of each other – even if they do not actually do these things, and even when they are unable to do these things. Though we do lament the existence of unhappy marriages, we do not question the legitimacy of that marriage based on a lack of romantic love or satisfaction. Though most people seek marriages based on love, they do not believe that marriages based on other things are not in fact marriages.

If we recognize same-sex marriages because of the level of romantic love and commitment, we would have to change the way we think about marriage. We do not, in fact, think that marriage is dependent on love. Though as a society we think that love is preferable for marriage and that it makes marriages happier, we still recognize marriages for money or convenience. Furthermore, there is no test for love; there is no way to distinguish between couples that have the appropriate amount of love for one another and those that do not.

Moreover, the government does not have any legitimate interest in the institution of marriage if the sole defining aspect of it is romantic love without other expectations. There is no state interest in recognizing loving relationships unless there is another aspect of those relationships that makes them noteworthy. The unity of married couples is one of the most important factors. Married couples share their lives and their resources. Money and property are assumed to be shared, and next-of-kin status is granted to spouses. These rights and benefits are part of marriage, but they do not define it.

While same-sex couples can share their assets in essentially the same way, they cannot create life together. Their relationships are fundamentally not of a type that has the capacity to result in a single life from two. It is not only that they do not intend to fulfill this expectation or that they cannot by an unfortunate defect, but that there is not a way for two men or two women to have legitimate children. They can bring children into their relationship through other means, but they cannot together be the biological parents of any children. The couple is unable naturally to become a family.

If we connect children to marriage, as society intuitively does, then we must consider the inability to bear legitimate children. When a child is born to a married

woman, the husband is assumed to be the father of the child. This assumption of the law would have to be eliminated if same-sex marriage were adopted, and this harms all marriages. Taking away the assumption that children are biologically connected to both their parents strips marriage of its full kin-making powers. Though it can connect two people, it does not create family units naturally.

This is not to disparage adoption or single parenting; these are valuable to children and to society. However, they are not ideal. In the ideal society, all children would be raised by both of their biological parents who remain married throughout their lives. But even when this is not possible we can still hold up the ideal as an ideal. By maintaining the traditional legal definition of marriage, we advocate for a particular family structure – the family structure that includes children and their biological parents. It is unfortunate that some people will not be able to achieve it, and there are many reasons for this. Some couples are infertile because of a biological limitation; some people will not find someone to marry; some will choose not to have children; and some people are not fulfilled by the types of relationships that create children.

In limiting marriage to those relationships that would naturally create children if all systems worked correctly, society maintains the connection between marriage and family. Even though not all male-female relationships can or will result in children, the pairing is of the type that naturally would do so. Trying legally to determine the fertility of couples or of their intentions to raise children would not only be unnecessarily intrusive but also would undermine the intuitive expectation of married couples by forcing the requirement in law. Limiting marriage licenses to the types of couples who

can naturally create children does not intrude into the private affairs of anyone or force sets of expectations upon couples.

The legal framework of marriage affects the social understanding of marriage just as much as the social understanding of marriage informs the legal framework. The development of no-fault divorce, for example, has had an undesirable effect on the institution of marriage. No-fault divorce strips the legal expectation of permanency for marriages, and this has caused (or perpetuated, perhaps) the erosion of the social expectation of permanency. While couples were once expected to be together ‘for better or worse, till death do us part,’ they are now expected to be together so long as they both feel like it. Though someone could argue that the legal option of no-fault divorce does not have a negative effect on married couples that do not believe in it, that would be incorrect.

Some proponents of gay marriage observe that marriage is changing and becoming less relevant in today’s society. Couples are less faithful, are less open to having children or do not have any at all, and get divorced more often. Birth control and no-fault divorce are directly related to the decline of marriage as a lofty standard. Society should expect that unhappy married couples would go to great lengths to make their marriages functional. Instead, such an endeavor is often seen as silly or futile. We can see that a shift in the legal framework of marriage, in addition to advances in reproductive science, has had a dramatic effect on the social understanding of marriage.<sup>3</sup>

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<sup>3</sup> Damon Linker, "How gay marriage's fate was sealed more than 50 years ago," *Yahoo! News*, March 29, 2013, <http://news.yahoo.com/gay-marriages-fate-sealed-more-50-years-ago-073000037.html> (accessed April 8, 2013).



Permanency is one aspect of marriage to which both opponents and proponents of same-sex marriage point. It is not a choice of a particular married couple to be expected to stay together for life. That expectation is the result of society's understanding of their commitment. Once the expectation of permanency is stripped from marriage, marriages become mere instruments for happiness rather than commitments to people and arrangements. We all hope that people will find happiness in their decisions to marry, but we also expect them to try to make it work even if their marriage does not fulfill their dreams. Especially when children are involved, marriage is more about the stability of arrangements and the nurturing of family units rather than the day-to-day, easy contentment of any individual. Society expects families to take care of their own in hard times. However, no-fault divorce takes away this expectation and can encourage people to abandon their commitment when things get difficult, rather than to find ways to make it work.

Legalizing same-sex marriage would remove the connection between married couples and children. Not only would same-sex couples be unable to produce legitimate children, but they also could not be expected to go to the expense of adopting children or having them through surrogacy or artificial insemination. Though many same-sex couples want to have and raise children, the actions necessary are often quite costly and difficult, and are not the natural result of same-sex unions. Rather than wondering how many children a married couple will have, we could only presume to wonder if they will have children at all. Even now, with the social acceptability of no-fault divorce and the widespread use of birth control, it is not unusual for someone to ask whether a couple

desires children. The insistence that same-sex marriages would be equivalent to opposite-sex marriages would further separate marriage from procreation.

Changing the definition of marriage will alter the social understanding of marriage. When same-sex marriage is justified because of the affirmation of human emotional capacities, it affirms marriage as an instrument for human happiness above marriage as a social institution connected to children and family. Rather than creating permanent family units with children usually included, marriage is the commitment to live together with another person in such a way as is mutually agreeable and until such time as getting a divorce is easier than reconciling differences.

The recognition that no-fault divorce undermines what marriage really is does not mean that we can as a society throw out the true meaning altogether. Rather, we should seek ways to uphold the high value of marriage and to reaffirm the permanency of the commitment and the great value to children of their married, biological parents. We cannot abandon these aspects of marriage just because they have been undermined already. Marriage is still valuable even today, and it remains perhaps the most important social institution we recognize in law.

States that do recognize same-sex partnerships as marriages have taken away the natural function of marriage as the ideal basis of the family unit. We should be interested in marriage because it is a kin-making institution. It ties families together and legalizes the connections. This aspect of marriage, though, is not simply legal. Before the widespread acceptance of birth control, married couples created families of their own – families that were genetically tied to the families of both parents, who were genetically

tied to the families of both of their parents, and so on. The legal functions of marriage simply serve to reflect the real intertwining of family trees.

Marriage licenses do not create kin by themselves, and in reality, the families of divorced, childless couples have no moral or legal obligation to interact with each other or recognize any sort of relationship to one another. Only when children, the natural result of true marriages come about would the families of a divorced couple stay connected. It might be argued that marriage is a kin-making institution only because of its natural tendency to result in children – and in the absence of available birth control, this would happen eventually for most couples whether they intended it or not and whether they were fulfilled by the relationship or not.

Where marriage once affirmed the highest human capacity of participating in the creation of new life, it now affirms only the emotional capacity to love another person. Though same-sex partners often commit themselves in deeper ways than this, there is neither test for true love nor a legitimate governmental interest in regulating it. It may be the case that children are not currently tied to the social understanding of marriage, but if modern marriages were simply recognitions of emotional fulfillment, then we should not be so interested in who enters into them.

Modern marriages do more than recognize emotional fulfillment, though. They also bestow legal rights and benefits – extremely valuable legal rights and benefits. But as the debate over California's Proposition 8 illustrates, these rights and benefits are not at the heart of the matter. It is above all the social expectations that accompany a marriage license that same-sex couples desire.

Even conceding that the overall mental and physical health of citizens is an important function of state and local governments, it does not seem to follow that we should manipulate social institutions to ensure the self-actualization of individuals. We might be able to title any person “Father” on a birth certificate, but unless that person is genetically related to the child and is male, he is not the father of the child. He might be the husband of the mother, the caretaker of the child, and in every other aspect fulfill the obligations of the child’s father, but he is not the father. Moreover, adoptive parents fulfill the role of biological parents just as well as biological parents do, but that does not mean they become fully – that is practically and biologically – the parents of their adopted children.

Conservative cases in favor of same-sex marriage hold that the place of marriage in society is declining, and thus we should make it available to more types of couples. Though making marriage open to more people might appear to uphold its high value, it actually distorts the meaning of marriage, making it less valuable. Allowing couples to define for themselves what their marriage will mean to them privatizes what should be a social institution with public coherency. When we no longer understand marriage as the ideal foundation of a naturally occurring family, we no longer uphold the supreme value of the biologically connected family.

When we take into account both what marriage is and what it does, we can see that there is not an easy definition, especially today. The meaning and value of marriage has been obscured by the acceptance of no-fault divorce, and the connection with children has declined as birth control and science have advanced. These developments undermine marriage, and legalizing same-sex marriage would do so as well. The

commitment of marriage should be permanent and connected with children, even if they do not actually result. Same-sex unions fundamentally cannot result in children, and so are not connected with the natural creation of families. Romantic love is loosely connected with the true meaning of marriage only because it allows for individuals to be emotionally fulfilled, not because it defines marriage. Legalizing same-sex marriage would diminish the meaning of marriage and thereby effect an undesirable transformation in society.

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