Notes

GOING TO THE CHAPEL AND WE'RE GOING TO GET MARRIED;[1] BUT WILL THE STATE RECOGNIZE THE MARRIAGE?[2] THE CONSTITUTIONALITY OF STATE MARRIAGE LAWS AFTER *LAWRENCE V. TEXAS*[3]

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I. LOVE AND MARRIAGE: INTRODUCTION

In the summer of 2003, the U.S. Supreme Court handed down its long-awaited opinion in *Lawrence v. Texas*,[4] which explicitly overruled *Bowers v. Hardwick*.[5] In *Lawrence*, the Court announced

1. THE DIXIE CUPS, *Goin' to the Chapel and We're Gonna Get Married*, *on* CHAPEL OF LOVE (Red Bird Records 1964).

2. "We can be married in our churches, and our marriages can be recognized and supported by our family and community, . . . [b]ut the state will refuse to give us the same dignity as it does a heterosexual couple." Ron Nissimov, *Ruling Gives Local Gays Hope for Marital Rights*, HOUSTON CHRON., Feb. 5, 2004, at 10A (quoting Jerry Simoneaux, a Houston lawyer active in the local gay community).

3. Lawrence v. Texas, 539 U.S. 558 (2003) (holding the Texas statute criminalizing homosexual sodomy unconstitutional).

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4. *Lawrence*, 539 U.S. 558. One journalist who covers the U.S. Supreme Court described this opinion as "a strikingly inclusive decision that both apologized for the past and, looking to the future, anchored the gay-rights claim at issue in the case firmly in the tradition of human rights *at the broadest level*." Linda Greenhouse, *Supreme Court Paved Way for Marriage Ruling With Sodomy Law Decision*, N.Y. TIMES, Nov. 19, 2003, at A24 (emphasis added).

5. 478 U.S. 186 (1986) (holding that the Georgia statute criminalizing homosexual sodomy between consenting adults did not violate a constitutional right to privacy). One commentator described the *Bowers* decision as:

> [a] dreadful ruling that easily earned its place in the pantheon of the all-time worst Supreme Court decisions, along with such other notable cases as *Dred Scott v. Sanford*, holding that no Negro, free or slave, could be a "citizen" of the United States for purposes of asserting diversity jurisdiction; *Plessy v. Ferguson*, upholding racial segregation so long as accommodations were separate but equal; and *Lochner v. New York*, striking down New York's 60-hour limit on bakery employees' work week . . . .

that "[t]he State cannot demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty . . . gives them the full right to engage in [a homosexual lifestyle] without intervention of the government."[6] Although the Court's holding striking down the Texas statute was not unexpected, the broad and far-reaching rationale was.[7] Justice Kennedy, writing for the majority, said that gays and lesbians "are entitled to respect for their private lives."[8] This simple statement may be the beginning of a seismic shift in the way the American legal system treats a class of citizens that traditionally has not received the full protection of the law.

This Note will consider the constitutionality of marriage laws forbidding marriage for same-sex couples and will focus on the likely effect of *Lawrence* on those laws. Part II discusses same-sex marriage case history. It is subdivided into sections devoted to the early cases, the recent cases, and a brief review of the changing legal landscape that contributed to the differing results between the two. Part III examines the *Lawrence* opinion and the ways in which it contributes to the arguments of same-sex marriage proponents. Specifically, Part III discusses the substantive due process argument, the equal protection argument, and the Court's willingness to look to cases from foreign jurisdictions as persuasive authority. Part IV presents the holdings of the two same-sex marriage state cases decided after *Lawrence* and considers the way the two courts have interpreted *Lawrence*. Part V agrees with Justice Scalia's prediction in concluding that *Lawrence* "dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."[9]

II. *WHO WROTE THE BOOK OF LOVE?* SAME-SEX MARRIAGE CASES BEFORE *LAWRENCE*

This section examines state court responses (and in the case of one suit filed in the District of Columbia, the holding of a federal

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Jerry Elmer, *A Victory for Gay Rights in* Lawrence v. Texas, 52 R.I. B.J. 5, 5 (2003).

6. *Lawrence*, 539 U.S. at 578.

7. *See* Evan Thomas, *The War Over Gay Marriage*, NEWSWEEK, July 7, 2003, at 38 (quoting legal scholar David Garrow). Garrow commented that the *Lawrence* decision "may be one of the two most important opinions of the last 100 years. It's the most libertarian opinion ever issued by the Supreme Court. It's arguably bigger than *Roe v. Wade*." *Id.* According to Thomas, "there is no question that the *Lawrence* case represents a sea change, not just in the Supreme Court, a normally cautious institution, but also in society as a whole." *Id.*

8. *Lawrence*, 539 U.S. at 578.

9. *Id.* at 604 (Scalia, J., dissenting).

circuit court[10]) to the issue of same-sex marriage and how the analyses and opinions have changed over time. Section A describes the first round of cases decided in the 1970s, all of which resulted in a denial of the plaintiffs' claims. Section B provides a summary of some U.S. Supreme Court cases decided during the last part of the twentieth century that, while not directly addressing same-sex marriage, bear heavily on this issue. Section C discusses the burgeoning Fourteenth Amendment[11] jurisprudence, which both reflected and contributed to changing societal mores and served as a foundation for the courts' decisions in the 1990s.

A. THE EARLY CASES (FROM THE 1970S)

Bolstered by the U.S. Supreme Court decision in *Loving v. Virginia*[12] and the gay liberation movement born of the Stonewall riots[13] in 1969, a number of gay and lesbian couples filed suits seeking the right to marry.[14] All of the early cases were filed in jurisdictions where the marriage statutes did not expressly limit marriage to heterosexual couples.[15] In each case, the plaintiff couples were denied the right to marry. Although the cases were decided in

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10. Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995). *See infra* note 111 and accompanying text.

11. The Fourteenth Amendment provides, in relevant part, "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The important words in this passage, "liberty" and "equal protection," have formed the basis for many landmark Supreme Court decisions. *See* discussion *infra* Part II.B.1–2. It was the Fourteenth Amendment that provided the foundation for the majority and concurring opinions in *Lawrence* and it will likely provide the foundation for a decision on the issue of same-sex marriage if and when it reaches the U.S. Supreme Court. *See* discussion *infra* Part III.A–B.

12. 388 U.S. 1, 12 (1967) (invalidating Virginia's anti-miscegenation statutes as "subversive of the principle of equality at the heart of the Fourteenth Amendment"). "Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id.*

13. WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 44 (1996).

> The June 1969 riots triggered by a police raid on the Stonewall Bar in Greenwich Village did for homosexual citizens what lunch counter sit-ins did for African Americans: they galvanized an excluded community and alerted mainstream society that the excluded were prepared to resist oppressive social practices. People came out of the closet in droves and organized in hundreds of social and legal action groups.

Id.

14. *See* Adams v. Howerton, 673 F.2d 1036, 1036 (9th Cir. 1982); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

15. For example, it was only in 1997 that the Minnesota marriage statute was amended to include the following: "Lawful marriage may be contracted only between persons of the opposite sex . . . ." MINN. STAT. ANN. § 517.01 (West 2003).

different states, the underlying reasoning relied on in the decisions was consistent.[16] The courts relied on dictionaries defining marriage as the union of one man and one woman, and found that, by definition, same-sex marriage was a legal impossibility.[17] Having so ruled, some courts found it unnecessary to reach the constitutional claims presented.[18] Those that did reach the constitutional claims found them to be without merit.[19] This section describes some of the early same-sex marriage cases.

1. *ANONYMOUS V. ANONYMOUS*[20]

Ironically, the first case in the United States to address same-sex marriage, a New York decision, was not a challenge to marriage as a heterosexual institution; one of the two men involved believed he was marrying a woman.[21] The plaintiff met the defendant, a cross-dressing male who appeared to be a female prostitute, on the street, and it was only after they were married that the plaintiff realized his blunder.[22] When the plaintiff filed for divorce, the court disregarded the defendant's post-ceremony surgery to remove his male organs and found that the defendant was a male at the time of the ceremony.[23] Citing Black's Law Dictionary, the court declared the marriage a nullity.[24]

2. *BAKER V. NELSON*[25]

Later that year, the Minnesota Supreme Court decided *Baker v. Nelson*,[26] the first case brought by a same-sex couple seeking to marry, and the only such case to reach the U.S. Supreme Court to date.[27] Having been denied a marriage license on the sole ground

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16. *See Adams*, 673 F.2d at 1040; *accord Baker*, 191 N.W.2d at 186–87; *Jones*, 501 S.W.2d at 589; *Singer*, 522 P.2d at 1197.

17. *See, e.g.*, *Baker*, 191 N.W.2d at 186.

18. *See, e.g.*, *Adams*, 673 F.2d at 1041 (responding to the equal protection claim: "We need not and do not reach the question of the nature of the claimed right or whether such a right is implicated in this case.").

19. *See, e.g.*, *Jones*, 501 S.W.2d at 590 (finding no constitutional issue involved because "[w]e find no constitutional sanction or protection of the right of marriage between persons of the same sex.").

20. 325 N.Y.S.2d 499 (1971).

21. *Id.* at 499.

22. *Id.*

23. *Id.* at 500.

24. *Id.* at 500–01 (citing Black's Law Dictionary and defining marriage as "a union or contract between a man and a woman").

25. 191 N.W.2d 185 (Minn. 1971).

26. *Id.*

27. JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 63 (2001).

that they were both men,[28] the petitioners argued that "the absence of an express statutory prohibition against same-sex marriages evince[d] a legislative intent to authorize such marriages."[29] They also asserted a breach of their constitutional rights under the First, Eighth, Ninth, and Fourteenth Amendments.[30]

Like the New York Superior Court, the Minnesota court looked to the dictionary definition of marriage[31] and established the pattern that made the dismissal of challenges to otherwise ambiguous marriage statutes a clean, easy, and almost automatic response. Without discussion, the court denied the claims under the First and Eighth Amendments, and it rebuffed the claims under the Ninth and Fourteenth Amendments, stating that the primary purpose of marriage was "the procreation and rearing of children within a family."[32] Because the petitioners were incapable of procreating, the court found no irrational or invidious discrimination, and consequently found that neither the Equal Protection Clause nor the Due Process Clause was offended.[33] The United States Supreme Court dismissed the appeal for want of a substantial federal question.[34]

3. *JONES V. HALLAHAN*[35]

In the next same-sex marriage case, the plaintiffs asserted claims on other grounds, including freedom of association and free exercise of religion.[36] In *Jones v. Hallahan*, the court ignored the

28. *Baker*, 191 N.W.2d at 185.

29. *Id.*

30. *Id.* at 186. The First Amendment provides in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. CONST. amend. I. The Eighth Amendment provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Ninth Amendment provides, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. For the text of the Fourteenth Amendment, *see supra* note 11.

31. *Baker*, 191 N.W.2d at 185–86. According to Black's Law Dictionary, "[m]arriage is the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex." BLACK'S LAW DICTIONARY 1123 (4th ed. 1951).

32. *Baker*, 191 N.W.2d at 186 (citing the book of Genesis for support of the idea that, historically, marriage has been between a man and a woman for the purpose of procreation). "Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* (quoting Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942)).

33. *Id.* at 187.

34. Baker v. Nelson, 409 U.S. 810, 810 (1972) (dismissing the appeal in a single sentence).

35. 501 S.W.2d 588 (Ky. 1973).

36. *Id.* at 589.

plaintiffs' claim to freely associate.[37] It briefly considered the religious freedom claim and, citing *Reynolds v. United States*,[38] held that in exercising the right to freely practice a religion, "citizens are not above the law of the land."[39]

4. *SINGER V. HARA*[40]

In *Singer v. Hara*, the plaintiffs brought constitutional claims as well as a claim based on the guarantees of the Washington Equal Rights Amendment (ERA).[41] In response to the ERA claim, the state argued that prohibiting same-sex marriage was not an equal rights violation "so long as marriage licenses are denied equally to both male and female pairs."[42] The court speculated that a majority of those who voted in favor of the ERA were opposed to same-sex marriage[43] and announced that it "[did] not believe that approval of the ERA by the people of this state reflects any intention upon their part to offer couples involved in same-sex relationships the protection of our marriage laws."[44] As in *Baker*, the court in *Singer* noted that the purpose of marriage is procreation and that "the refusal of the state to authorize same-sex marriage results from . . . impossibility of reproduction rather than from an invidious discrimination 'on account of sex.'"[45] Turning its attention to the petitioners' constitutional claims, the court found no equal protection violation as the men were not being discriminated against because of their sex, but rather because of "the nature of marriage itself."[46]

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37. *Id.* at 589–90.

38. 98 U.S. 145 (1879) (upholding the right of the federal government to criminalize polygamy over the religious freedom claims of a Mormon who saw polygamy as a religious duty). The Court in *Reynolds* explained, "[to] permit [polygamy] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 167.

39. *Jones*, 501 S.W.2d at 590.

40. 522 P.2d 1187 (Wash. Ct. App. 1974).

41. *See id.* at 1187–88. The Washington Equal Rights Amendment provides, "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." WASH. CONST. art. XXXI, § 1.

42. *Singer*, 522 P.2d. at 1191.

43. "We are not persuaded that voter approval of the ERA necessarily included an intention to permit same-sex marriages." *Id.* at 1190 n.5. The court noted that newspaper accounts published at the time of the vote on the ERA reported that proponents of the amendment disagreed with those speculating that it would lead to legalized homosexual marriage. *See id.* "Proponents describe the foes' contentions as emotional, irresponsible fantasies, misleading, deceptive and incorrect." *Id.* (quoting *Election Preview*, SEATTLE POST-INTELLIGENCER, Nov. 5, 1972, at 10).

44. *Id.* at 1193–94.

45. *Id.* at 1196.

46. *Id.* at 1196. Years later, when the Hawaii Supreme Court considered the issue of same-sex marriage, it dismissed this reasoning as an "exercise in tortured and conclusory

5. *ADAMS V. HOWERTON*[47]

In another of the early same-sex marriage cases, the Boulder, Colorado county clerk issued a marriage license to Australian Anthony Sullivan and American Richard Adams.[48] After the marriage was solemnized, Mr. Adams petitioned the Immigration and Naturalization Service (INS) for "immediate relative"[49] status for Mr. Sullivan so he could obtain U.S. residency as the spouse of an American.[50] The INS sent Mr. Adams a letter denying the classification because he "failed to establish that a bona fide marital relationship can exist between two faggots."[51]

The couple appealed the administrative denial on statutory and constitutional grounds to the Ninth Circuit Court of Appeals.[52] Once again, the court followed the *Baker* methodology and determined that there was no marriage in the ordinary and common meaning of the term. The court concluded that Mr. Sullivan was not a "spouse" as contemplated by the Immigration and Nationality Act.[53] Having found that the parties were not legally married, the court did not reach the constitutional claims, but noted that the U.S. Supreme Court has upheld Congress's plenary power to enact statutes excluding aliens who possess characteristics it deems undesirable.[54]

In sum, all courts faced with the issue of same-sex marriage in the 1970s based their findings on statutory interpretations that rested heavily on dictionary definitions and the commonly accepted

sophistry" and recognized that the miscegenation cases had already disposed of such claims. Baehr v. Lewin, 852 P.2d 44, 63 (Haw. 1993).

47. 673 F.2d 1036 (9th Cir. 1982).

48. *Id.* at 1038.

49. "Immediate relatives" include the spouses of U.S. citizens. 8 U.S.C. § 1151(b)(2)(A)(i) (2005).

50. *Adams*, 673 F.2d at 1038.

51. Letter from the Immigration and Naturalization Service (INS), to Richard Adams (Nov. 24, 1975) (on file with author). For a discussion of the United States' legacy of discrimination against and hostility toward homosexuals (unrelated to marriage), see Scott Kelly, Note, *Scouts' (Dis)honor: The Supreme Court Allows the Boy Scouts of America to Discriminate against Homosexuals in* Boy Scouts of America v. Dale, 39 HOUS. L. REV. 243, 265–69 (2002); *see also* MURDOCH & PRICE, *supra* note 27.

52. *Adams*, 673 F.2d at 1038.

53. *Id.* at 1040.

54. The court referenced some vague statutory language excluding homosexuals and cited *Boutilier v. INS*, 387 U.S. 118, 123 (1967) (upholding an INS deportation order based on a finding that the petitioner was a homosexual prior to and at the time of his entry into the U.S.). *Adams*, 673 F.2d at 1040–42. *See* MURDOCH & PRICE, *supra* note 27, at 134 (noting that with *Boutilier*, "the nation's highest court signaled lower courts that it was open season on homosexuals: Feel free to rule against homosexuals because the Supreme Court will not rise to their defense").

meaning of marriage.[55] They also relied on their understanding of legislative intent[56] and their conclusion that procreation is a primary purpose of marriage.[57] The courts adopted the circular reasoning that homosexuals cannot marry because marriage is for heterosexuals.[58] Throughout the 1970s, the courts dismissed[59] or simply ignored[60] all constitutional claims for same-sex marriage having found marriage to be an impossibility for same-sex couples.

B. THE CHANGING LEGAL LANDSCAPE

The experience of the 1970s taught future plaintiff couples that ambiguity in state marriage statutes and the absence of an explicit exclusion pertaining to them were of no help in achieving their goal in the judicial arena. The courts made clear that they would employ any number of interpretation mechanisms to construe the meaning of marriage to be limited to "one man and one woman." Several scholars suggest that the definitional foreclosure was not based on sound reasoning.[61] This suggestion allows one to conclude that gay and lesbian couples conceivably could have continued the struggle by attacking the rationale of the decisions that relied on that foreclosure. However, the legal landscape changed markedly during

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55. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973) (holding that "the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage").

56. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (noting that although homosexuals are not explicitly excluded, "the . . . statute is replete with words of heterosexual import such as 'husband and wife' and 'bride and groom'").

57. *See, e.g.*, Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (declaring that the state's refusal to permit same-sex marriage was "based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children").

58. *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1432 (1993) (observing that the definitional argument is circular and suggesting that states prohibiting same-sex marriages should be required "to provide an independent reason, one grounded upon third-party harms and not just moral disapproval or a sectarian understanding of marriage"); *see also* Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering* Baehr*: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921, 923 (1995) (observing that courts have used definitional foreclosure in a number of ways to preclude gays and lesbians from marrying and admonishing the courts to "stop offering casuistic reasoning to avoid substantive issues").

59. *See Baker*, 191 N.W.2d at 186 n.2 (stating, in a footnote, "We dismiss without discussion petitioners' . . . contentions that the statute contravenes the First Amendment and the Eighth Amendment of the United States Constitution."); *see also Singer*, 522 P.2d at 1195 n.11 (commenting, in a footnote, that it was "unnecessary to discuss appellants' contentions with regard to the right to privacy under the Ninth Amendment and the right to due process under the Fourteenth Amendment").

60. *See Jones*, 501 S.W.2d at 589 (acknowledging the appellants' claim of deprivation of the constitutional right of association, but failing to address it).

61. *See, e.g.*, Strasser, *supra* note 58, at 925. Strasser explains, "[T]hose legislatures that explicitly reject same-sex marriage are themselves implicitly indicating that they do not believe that same-sex marriages are definitionally precluded—if such unions were definitionally precluded, pronouncements declaring them void would be unnecessary." *Id.*

the 1970s, 1980s, and into the 1990s when the fight for same-sex marriage regained its vigor.

The legal landscape changed in several areas of the law affecting homosexuals in their quest for the right to marry. Four such areas, all of which are grounded in the Fourteenth Amendment, are discussed in this section. First, several cases focused on the rights of individuals, regardless of their gender, based on guarantees of equal protection. A second line of cases discussed the "zone of privacy"[62] found in the liberty interest protected by substantive due process. Third, there were important Supreme Court decisions discussing the fundamental right to marry. Finally, two major decisions related to homosexual rights were handed down, one in 1986, and one a decade later in 1996.

This flurry of Equal Protection Clause and Due Process Clause jurisprudence profoundly affected the courts when same-sex couples again began filing suits in the 1990s seeking the right to marry. Before proceeding to those cases, this section provides a brief review of the developing Fourteenth Amendment law in four different areas.

1. SEX DISCRIMINATION

A breach of equal protection limits the rights of members of an identifiable group.[63] "The Equal Protection Clause . . . has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding."[64] With regard to discrimination based on sex, the Court displayed a willingness to depart from rational basis review[65] and indicated that men as well as women could file claims for sex

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62. Although privacy is protected by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments, as privacy jurisprudence developed, the "zone of privacy" found its greatest support in the Fourteenth Amendment. *See* Griswold v. Connecticut, 381 U.S. 479, 481–86 (1965). A discussion of the privacy protected by the First, Third, Fourth, Fifth, and Ninth Amendments is beyond the scope of this paper.

63. "The Equal Protection Clause is violated when the government intentionally treats persons who are similarly situated differently . . . ." Nicole Richter, *A Standard for "Class of One" Claims Under the Equal Protection Clause of the Fourteenth Amendment: Protecting Victims of Non-Class Based Discrimination from Vindictive State Action*, 35 VAL. U. L. REV. 197, 254 (2000).

64. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988) (explaining that "the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure").

65. *See* Reed v. Reed, 404 U.S. 71, 75 (1971) (finding a preference for men over women in the appointment of administrators of estates to be an unconstitutional arbitrary legislative choice); *see also* Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (suggesting that gender is a suspect classification and using a strict scrutiny standard to strike down a federal law that granted automatic dependency benefits to wives of male soldiers but required female soldiers to prove the dependency of their husbands).

discrimination.[66] It established a new level of scrutiny, mid-tier or heightened scrutiny,[67] and identified the tests for review under this standard.[68] To be upheld, restrictions related to gender must have an "exceedingly persuasive justification" for the classification;[69] the classification must be substantially related to an important government objective;[70] and the justification may not be based on stereotypes.[71]

2. PRIVACY

During this time, the Court was also active in another area protected by the Fourteenth Amendment: substantive due process. The Court's statement in *Griswold v. Connecticut* that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance,"[72] ushered in a new era of individual rights. Within those penumbras, the Court found a "zone of privacy,"[73] which it expanded in *Eisenstadt v. Baird.*[74] That same "zone of privacy" undergirds the core holdings in *Roe v. Wade*[75] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[76] that recognized women's right to abortion. From these cases, contemporary understanding of liberty has come to include the concept of privacy as described in *Casey*: "Throughout this century, this Court also has held that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as

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66. *See* Craig v. Boren, 429 U.S. 190, 210 (1976) (invalidating an Oklahoma statute requiring males to be twenty-one to purchase beer while females were allowed to do so at the age of eighteen).

67. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723–24, (1982) (sustaining a male applicant's challenge to the state's policy of limiting admission to women).

68. *Id.*

69. *Id.* at 724.

70. *Id.*

71. J.E.B. v. Alabama ex rel. T. B., 511 U.S. 127, 141–42 (1994) (holding that gender-based discrimination regarding peremptory challenges violates the Equal Protection Clause, particularly where the discrimination perpetuates gender-based stereotypes).

72. 381 U.S. 479, 484–86 (1965) (announcing a right to privacy for married couples for certain intimate life decisions).

73. *Id.* at 485.

74. 405 U.S. 438, 453 (1972) (invalidating a statute allowing the distribution of contraceptives only to married individuals and announcing that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

75. 410 U.S. 113, 153 (1973) (upholding a challenge to the Texas statute making it a crime to procure an abortion and describing the liberty protected by the Fourteenth Amendment as "broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

76. 505 U.S. 833, 869 (1992) (upholding abortion's status as a fundamental right and reaffirming the fundamental right of privacy).

procreation, child-rearing, *marriage*, and contraceptive choice."[77]

3. MARRIAGE

The Court also resolved important issues regarding the right of states to regulate marriage. In *Loving v. Virginia*,[78] the Court regarded marriage as "one of the 'basic civil rights of man,' fundamental to our very existence and survival."[79] Later, in accordance with the core holding in *Loving*, the Court found a Wisconsin statute that required any resident owing child support to obtain court approval before marrying to be unconstitutional.[80] It hailed marriage as the "foundation of the family and of society."[81] The Court elaborated, "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for *all* individuals."[82] One scholar has posited that "*Zablocki* defines the right to enter marriage as fundamental only in relation to a traditional opposite-sex marriage";[83] however, the Court did not identify any class or group to whom the fundamental importance of marriage did not apply.[84]

In another important U.S. Supreme Court decision on the topic of marriage, the court did not apply strict scrutiny in striking down a Missouri marriage statute that prohibited marriage for inmates unless the prison superintendent determined that there were

77. *Id.* at 926–27 (Blackmun, J., concurring in part and dissenting in part) (emphasis added).

78. 388 U.S. 1 (1967).

79. *Id.* at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

80. Zablocki v. Redhail, 434 U.S. 374, 375–76, 384 (1978).

81. *Id.* at 384 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

82. *Id.* (emphasis added).

83. G. Sidney Buchanan, *Sexual Orientation Classifications and the Ravages of Bowers v. Hardwick*, 43 WAYNE L. REV. 11, 79 (1996). Professor Buchanan interpreted the Court's language "traditional family setting" as referring to opposite-sex couples. *Id.* (citing *Zablocki*, 434 U.S. at 386). However, by "traditional family setting," the *Zablocki* Court may have been referring to children born to or adopted by a married couple as opposed to children born out of wedlock. This interpretation is supported by the Court's explication that if the "right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place." *Zablocki*, 434 U.S. at 386. In a footnote, the Court clarified that Wisconsin criminalized fornication: "Whoever has sexual intercourse with a person not his spouse may be fined . . . ." *Id.* at 386 n.11 (quoting WIS. STAT. §944.15 (1973)). Moreover, there is not a single reference in the 1978 *Zablocki* opinion to homosexuality or same-sex marriage.

84. *Zablocki*, 434 at 383. The *Zablocki* Court explained that the *Loving* Court "could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause." *Id.* However, to emphasize that the right to marry is fundamental, the *Loving* Court went on to hold that the Virginia marriage statute violated the couple's liberty protected by the Fourteenth Amendment. *Id.* "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." Loving v. Virginia, 388 U.S. 1, 12 (1967) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

compelling reasons for the marriage.[85] In its analysis, the Court discussed several of the important attributes of marriage that have contributed to its status as a fundamental right.[86] In doing so, the Court "did not imply that marriage was only instrumentally important to facilitate the having and raising of children—on the contrary, it made clear that the right to marry is itself fundamental."[87] The cumulative effect of these cases is (1) the establishment of marriage as a fundamental right of all citizens, including the incarcerated and the impoverished, and (2) the establishment of strict scrutiny as the standard of review for any enactment that infringes the right to marry.

4. GAY RIGHTS

Of the Supreme Court cases discussing homosexuals' rights, *Bowers v. Hardwick* was one of the most significant, as well as one of the most damaging, to the Gay Rights Movement.[88] The Court announced its unwillingness to proclaim a fundamental right to engage in homosexual sodomy,[89] finding "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other."[90]

The decision was most damaging, perhaps, in that it defined all homosexuals as convicts or, at least convictable.[91] It became a tool available to courts seeking to deny protection to gay or lesbian Americans.[92] With *Bowers* as the law of the land, it is remarkable that so many of the cases decided in the 1990s in this area had the outcome that they did.[93]

Many consider the *Bowers* ruling to be the greatest legal setback for gay and lesbian Americans in the twentieth century.[94] Just ten years later, however, in a legal about-face, the Court

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85. Turner v. Safley, 482 U.S. 78, 99 (1987).

86. *Id.* at 95–96 (characterizing marriage in general as an expression of emotional support and public commitment, an exercise of religious faith, and the fulfillment of a prerequisite for many state and federal benefits).

87. Strasser, *supra* note 58, at 921.

88. 478 U.S. 186 (1986); *See supra* note 5.

89. *Bowers*, 478 U.S. at 190–92.

90. *Id.* at 191.

91. *See* Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (ruling against a lesbian trying to become an FBI agent). "If the [Supreme] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious." *Id.*

92. *See* MURDOCH & PRICE, *supra* note 27, at 330 (noting that "with *Hardwick*, the . . . court . . . was twisting Georgia's universal sodomy law into a weapon to bash a much-maligned minority group"); *see also* Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm.").

93. *See* discussion *supra* Part II.C.

94. *See* MURDOCH & PRICE, *supra* note 27, at 330.

extended the constitutional guarantee of equal protection to homosexuals in *Romer v. Evans*.[95] Colorado voters had approved a constitutional amendment which effectively deprived homosexuals of the protection of anti-discrimination laws.[96] Finding the amendment unconstitutional, Justice Kennedy writing for the majority declared, "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause . . . ."[97]

In summary, the Fourteenth Amendment jurisprudential development developed in this line of cases reflected and contributed to a new understanding of important and fundamental individual rights. This enlightened understanding, in turn, contributed to and is reflected in the same-sex marriage decisions of the 1990s.

C. The Recent Cases (from the 1990s)

Homosexuals, many thousands of whom had "come out of the closet" in the late 1960s," renewed their efforts in the courts to gain for themselves and their families the rights and respect that accompany marriage.[98] With the exception of the first case filed in the 1990s, plaintiff couples conceded that state legislatures intended to restrict marriage to intersex couples.[99] Accordingly, they dropped

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95. 517 U.S. 620 (1996).

96. The *Romer* Court noted that the amendment "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." *Id.* at 627. The approved amendment, Amendment 2, read:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination.

Id. at 624.

97. *Romer*, 517 U.S. at 635.

98. ESKRIDGE, *supra* note 13, at 44. "The 1990 Census reported that 157,400 same-sex couples identified themselves." *Id.* at 45. "As lesbians, gay men, and bisexuals became more open about their sexuality, more long-term same-sex relationships than ever before in human history were established." *Id.*

99. *Compare* Dean v. District of Columbia, 653 A.2d 307, 309, 318 (D.C. 1995) (denying appellants' claim that "they qualified for the [marriage] license because the marriage statute . . . is 'gender-neutral.'") *with* Baehr v. Lewin, 852 P.2d 44, 50 (Haw. 1993) (invalidating the marriage statute based on plaintiffs' complaint that "to deny same-sex couples access to marriage licenses violates the plaintiffs' right to privacy, as guaranteed by . . . the Hawaii Constitution, as well as to the equal protection of the laws and due process of law, as

their statutory claims and instead focused solely on the constitutionality of the statutes.

The same constitutional claims that had been ignored or denied in the 1970s found a much warmer reception in the 1990s. Although the first case of the decade followed the pattern of the earlier cases, the state courts in the remaining three cases found their respective marriage statutes to be unconstitutional.[100] Due to the states' legislative responses to these cases, none of these decisions led to legalized gay marriage, but the changed attitude of the courts was unmistakable.[101] This section examines the three state court decisions of the 1990s upholding the right of same-sex couples to marry.

1. *BAEHR V. LEWIN*[102]

Baehr v. Lewin was filed in 1991 and reached final disposition in 1999.[103] The plaintiffs' claims for violation of privacy,[104] equal protection,[105] and due process[106] rights were based on guarantees of

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guaranteed by . . . the Hawaii Constitution"). Although the *Dean* majority upheld the D.C. marriage statute, interpreting it to be limited to opposite-sex couples, the dissent was based on an argument of constitutional protection for equal rights. *See Dean*, 653 A.2d 307 at 355 (Ferren, J., dissenting). In a passionate dissent, Judge Ferren argued that an equal protection analysis under an appropriate standard of review, heightened or strict scrutiny, would invalidate the statute. *Id.* He wrote:

> [I]f the government cannot cite actual prejudice to the public majority from a change in the law to allow same-sex marriages . . . then the public majority will not have a sound basis for claiming a compelling, or even a substantial, state interest in withholding the marriage statute from same-sex couples; a mere feeling of distaste or even revulsion at what someone else is or does, simply because it offends majority values without causing concrete harm, cannot justify inherently discriminatory legislation . . . .

Id.

100. *See Lewin*, 852 P.2d at 67 (finding based on equal protection); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *3–*5 (Alaska Feb. 27,1998) (finding based on privacy); Baker v. Vermont, 744 A.2d 864, 885–86 (Vt. 1999) (finding based on equal protection).

101. The implications of the shifting response of the courts was not lost on the U.S. Congress. *See* Diane M. Guillerman, *The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-sex Marriage*, 34 HOUS. L. REV. 425, 441 (1997) (noting that "the DOMA is the federal response to what many Representatives see as an attack upon the traditional institution of marriage").

102. 852 P.2d 44 (Haw. 1993).

103. *Id.*; Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999).

104. According to Hawaii's Constitution,"[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." HAW. CONST. of 1978, art.1, § 6.

105. "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." HAW. CONST. of 1978, art.1, § 5.

106. *Id.*

the Hawaii Constitution.[107] The Hawaii Supreme Court found that the right to privacy and the right to due process did not include a right for homosexuals to marry.[108]

It also found, however, that the state marriage statute[109] violated the state's constitutional guarantee of equal protection, unless the state, on remand, could show a compelling reason.[110] Noting that Hawaii had amended its constitution to include an Equal Rights Amendment, the court held that sex is a suspect category and reviewed the statute under strict scrutiny.[111]

On remand, the trial court rejected all of the state's arguments for limiting marriage to heterosexuals.[112] Notably, the trial court rejected the argument that traditional marriage is the best forum for the procreation and rearing of children.[113] Circuit Court Judge Kevin Chang then made history by being the first judge in the country to hold a state ban on same-sex marriage unconstitutional.[114]

The victory however was short-lived. In 1998, the citizens of Hawaii approved Section 23, a proposed amendment to the Hawaii Declaration of Rights.[115] Section 23 provides, "The legislature shall have the power to reserve marriage to opposite-sex couples."[116] In 1999, after the state constitution was amended, the Hawaii Supreme Court, in an unpublished opinion, reversed the circuit court's judgment that declared the Hawaii marriage statute unconstitutional.[117] Although same-sex marriage is not an option in Hawaii, the Hawaii Legislature passed the Hawaii Reciprocal Beneficiaries Act,[118] which "endows non-married couples, who register as 'reciprocal beneficiaries,' with many of the same rights and benefits married couples receive under Hawaii law."[119]

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107. *See Lewin*, 852 P.2d at 50.

108. *Id.* at 56–57. After discussing the important U.S. Supreme Court marriage cases, the Hawaii Supreme Court declared, "The . . . case law demonstrates that the federal construct of the fundamental right to marry—subsumed within the right to privacy implicitly protected by the United States Constitution—presently contemplates unions between men and women." *Id.* at 56.

109. "In order to make valid the marriage contract, which shall be only between a man and a woman . . . ." HAW. REV. STAT. § 572-1 (2003).

110. *Lewin*, 852 P.2d at 67.

111. *Id.*

112. *See* Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996).

113. See *id.* at *17 (finding that "[g]ay and lesbian parents and same-sex couples have the potential to raise children that are happy, healthy and well-adjusted").

114. *See id.* at *20–*21. Judge Chang quoted from Judge Ferren's dissent in *Dean*. *Id.*

115. *See* Paul Benjamin Linton, *Same-Sex "Marriage" Under State Equal Rights Amendments*, 46 ST. LOUIS U. L.J. 909, 917 (2002).

116. HAW. CONST. of 1978, art. I., § 23 (1998).

117. *See* Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (unpublished order entered Dec. 11, 1999).

118. HAW. REV. STAT § 572C-1–7 (1997).

119. W. Brian Burnette, Note, *Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same Sex Marriage*, 37 BRANDEIS L.J. 81, 81 (1998).

2. *BRAUSE V. BUREAU OF VITAL STATISTICS*[120]

Diverging from the rationale in *Baehr*, the Superior Court of Alaska found the right to privacy protected by the state constitution broad enough to include permission for and recognition of same-sex marriage.[121] The court suggested that others had not reached the same conclusion because they framed the issue presented in terms of the history and traditions of the nation.[122] "It is self-evident that same-sex marriage is not 'accepted' or 'rooted in the traditions and collective conscience' of the people."[123] "The question presented by this case is whether the personal decision by those who choose a mate of the same gender will be recognized as the same fundamental right."[124] "Clearly, the right to choose one's life partner is quintessentially the kind of decision which our culture recognizes as personal and important."[125] As in Hawaii, it was a Pyrrhic victory; before the proceedings advanced any further, voters in Alaska (on the same day as the voters in Hawaii) approved a constitutional amendment limiting marriage to one man and one woman.[126]

3. *BAKER V. VERMONT*[127]

In 1999, the Vermont Supreme Court heard an appeal by petitioners who claimed that the state's denial of marriage licenses violated the Common Benefits Clause of the Vermont Constitution.[128] The state averred that its interest in "furthering the link between procreation and child rearing" was sufficiently important to warrant upholding the marriage statute.[129] Applying a standard of review requiring "that statutory exclusions from publicly-conferred benefits and protections must be premised on an

120. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

121. *See id.* at *4 (finding that "the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy").

122. *See id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Lyle Denniston, *Voters in Alaska, Hawaii Defeat Initiatives on Homosexual Marriage*, THE BALTIMORE SUN, Nov. 5, 1998, at 15A.

127. 744 A.2d 864 (Vt. 1999).

128. *See id.* at 867. The Common Benefits Clause of the Vermont Constitution provides, in relevant part: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . ." VT. CONST. of 1786, art. VII. The Common Benefits Clause is the counterpart of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. *See Baker*, 744 A.2d at 870.

129. *Baker*, 744 A.2d at 881.

appropriate and overriding public interest,"[130] the five justices unanimously found that the state's interest in marriage, that of promoting long-term commitment between married couples for the purpose of providing a secure upbringing for children, was no less applicable to homosexual couples than to heterosexual couples.[131] Rejecting the remaining arguments offered by the state for maintaining the status quo, the court held that the "plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples."[132]

The court left it to the Vermont Legislature to enact the appropriate measures to protect and benefit homosexual couples on the same level as heterosexual couples.[133] The legislature responded by creating a new institution called a "civil union."[134] It then endowed that institution with all the rights, benefits, protections, and obligations of marriage.[135]

The pattern of the 1990s is clear: in two of the three state cases, the issue reached the highest court in the state, and in all three cases, the courts held that state statutes limiting marriage to heterosexual couples were not permitted by the language and meaning of their respective constitutions. The Hawaii and Vermont courts based their decisions on equal protection, and the Alaska court based its decision on the right to privacy within the liberty protected by substantive due process.[136] None of the courts found any of the states' arguments convincing, including the argument made by all three states that marriage should be reserved for opposite-sex couples simply because same-sex couples are unable to procreate without intervention.

While none of these controversies resulted in legalized marriage for homosexual couples, they did pave the way for extending previously unavailable benefits to some gay and lesbian couples.

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130. *Id.* at 873 (internal citations omitted).

131. *See id.* at 882. The court found just the opposite to be true, explaining that, "[i]f anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the state argues the marriage laws are designed to secure against. In short, the marital exclusion treats persons who are *similarly* situated for purposes of the law, *differently*." *Id.* (emphasis added).

132. *Id.* at 886.

133. *See id.* at 887.

134. *See* David L. Chambers, *The* Baker *Case, Civil Unions, and the Recognition of our Common Humanity: An Introduction and a Speculation,* 25 VT. L. REV. 5, 7 (2000) (explaining that "civil unions" are a compromise between supporters who wanted to change the wording of the marriage statute to include gays and lesbians and those opposed who wanted an amendment to the Constitution similar to that of Hawaii and Alaska). The bill passed by a slim margin on April 26, 2000, and on April 27th, Governor Howard Dean signed it into law. *Id.*

135. *See id.*

136. *Id.*

More importantly, the reasoning supporting these state court opinions is echoed in *Lawrence.*[137] The rationale[138] and dicta[139] in *Lawrence* affirmed the soundness and validity of these state court opinions.

III. WHAT'S LOVE GOT TO DO WITH IT? THE IMPLICATIONS OF LAWRENCE

In the 1990s, same-sex couples seeking the right to marry based their constitutional claims on state constitutional rights. This Part discusses the likely response of the current U.S. Supreme Court in the event that a case involving same-sex marriage reaches it, which could happen in a number of ways. When same-sex marriage becomes legal in any state,[140] married same-sex couples may seek the rights and benefits available under federal law to other married couples[141] but denied to them by the Defense of Marriage Act (DOMA).[142] Alternatively, a legally married same-sex couple may move to a state where homosexual marriage is prohibited and seek to have its out of state marriage recognized so as to benefit from state

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137. *See infra* Part III.

138. For example, in finding that the Alaska marriage statute failed a due process analysis, the court stated that the Hawaii Supreme Court reached the opposite conclusion because it asked the wrong question. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *4 (Alaska Super. Ct. 1998). "The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions." *Id.* Similarly, in *Lawrence*, Justice Kennedy characterized the *Bowers* Court as having "misapprehended the claim of liberty there presented." Lawrence v. Texas, 539 U.S. 558, 567 (2003). The *Bowers* Court, according to Justice Kennedy, "stat[ed] the claim to be whether there is a fundamental right to engage in consensual sodomy." *Id.* The *Lawrence* Court, on the other hand, defined the issue presented as "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Id.* at 564.

139. For example, the Superior Court of Alaska stated, "[T]he choice of a life partner is personal, intimate, and subject to the protection of the right to privacy." *Brause*, 1998 WL 88743, at *4. In the same vein, the *Lawrence* Court declared, "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." *Lawrence*, 539 U.S. at 567.

140. Same-sex marriage is legal in Massachusetts. *See* Rose Arce, *Massachusetts Court Upholds Same-sex Marriage*, CNN.com (Feb. 6, 2004), *at* http://www.cnn.com/2004/LAW/02/04/gay.marriage/index.html (last visited on Feb. 9, 2004) (noting that the Massachusetts high court ruling from last November 2003 will become state law in mid-May regardless of what the state legislature does and regardless of what the constitutional convention decides). *See infra* Part IV.B.

141. Letter from General Accounting Office, Office of the Attorney General, to Honorable Henry J. Hyde, Chairman of House Judiciary Committee (Jan. 31, 1997) (on file with author) The General Accounting Office identified 1,049 federal laws in which marital status is a factor. *Id.*

142. DOMA provides that the federal government will not recognize same-sex marriages. 1 U.S.C. § 7 (2003).

rights and privileges afforded to married couples.[143] In either case, the U.S. Supreme Court could be called upon to decide the constitutionality of DOMA[144] and likely would rule directly or indirectly on state prohibition of same-sex marriages. The issue might also come before the nation's highest court in the same way the issues of abortion and the criminalization of homosexual sodomy did—on appeal by petitioners who thought their federal constitutional rights were violated by their state's laws.[145]

Section A of this Part addresses the substantive due process claims of same-sex couples seeking to marry in light of *Lawrence*. Section B considers what *Lawrence* adds to an equal protection claim. Section C makes note of the Court's acknowledgement of foreign jurisdictions and illustrates the impact that decisions from foreign jurisdictions would have as persuasive authority on the issue of same-sex marriage.

A. SUBSTANTIVE DUE PROCESS

The Court's invalidation of the Texas anti-sodomy statute is a continuation of the dialogue between the Court and the American people regarding the zone of privacy protected by the liberty interest embodied in the Due Process Clause. Subsection 1 summarizes the values that animate the *Lawrence* decision and their application to

143. "No state has ever been required by the full faith and credit clause to recognize any marriage they (sic) didn't want to." Adam Liptak, *Bans on Interracial Unions Offer Perspective on Gay Ones*, N.Y. TIMES, March 17, 2004, at A22 (quoting Andrew Koppelman, Professor of Law at Northwestern University). "Traditionally, in choice-of-law cases involving the recognition of marriage, courts have balanced the forum's public policy interest against the interests of other states in effectuating their own marriage laws and the interests of the parties in having their marriages recognized in the forum." Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 923 (1998). While, "[t]he outcome has usually been recognition of the marriage . . . [t]here is ample precedent for states refusing to recognize marriages of their own residents who marry elsewhere in order to avoid their home states' marriage restrictions." *Id.* at 922. However, states that do not permit same-sex marriage may opt to recognize such marriages legally sanctioned in other states. In an informal advisory opinion, Eliot Spitzer, New York Attorney General, indicated that New York would recognize gay marriages from other states because "New York common law requires recognizing as valid a marriage, or its legal equivalent, if it was validly executed in another State, regardless of whether the union at issue would be permitted under New York's Domestic Relations Law." Letter from Eliot Spitzer, New York Attorney General, to Darrin B. Derosia, Corporation Counsel, City of Cohoes, New York and Peter Case Graham, Town Attorney, Town of Olive, Kingston, New York (Mar. 3, 2004), *available at* http://www.oag.state.ny.us/press/2004/mar/ mar03a_04.html. New York would make an exception to the common law if the union was abhorrent to New York's public policy. *Id.* But, "the abhorrence exception is so narrow that only marriages involving 'polygamy or incest in a degree regarded generally as within the prohibition of natural law' have been deemed abhorrent by the courts." *Id.* (internal citations omitted).

144. DOMA also declares that states are not required to give effect to a law of any other state that sanctions same-sex marriage. 28 U.S.C. § 1738C (2003).

145. *See* Roe v. Wade, 410 U.S. 113 (1973) (abortion); *Lawrence v. Texas*, 539 U.S. 558 (2003) (homosexual sodomy).

the issue of same-sex marriage. Subsection 2 describes the core holding in *Lawrence* and interprets its broader meaning. Section 3 considers the implications of *Lawrence* on the "fundamentalness" of marriage.

1. THE SWEEPING LANGUAGE

Justice Kennedy's opening line in *Lawrence v. Texas* set the tone for the opinion and the conclusion that was reached: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."[146] Basing the decision on substantive due process, Justice Kennedy placed the right of two adults to engage in consensual sexual activity squarely within the zone of privacy first identified by *Griswold*, expanded in *Eisenstadt*, elevated in *Roe*, and confirmed in *Carey*.[147] Here, the zone of privacy concept is extended beyond the privacy of one's body to the privacy of one's home and other private places.[148]

"Other private places" might mean other private *physical* places if the opinion were limited to protecting homosexual sodomy. But, Justice Kennedy added, "[t]he instant case involves liberty of the person both in its spatial and more transcendent dimensions."[149] If the Court had been concerned only with protecting homosexual sodomy, it would have been sufficient to protect the liberty of the person in its spatial dimension. The Court's discussion of the metaphysical underpinnings of the decision may foreshadow how the Court would deal with the issue of same-sex marriage.

What is the meaning and purpose of protecting the liberty of the person in its "more transcendent dimensions?" The American Heritage Dictionary defines transcendent as "(1) surpassing others; preeminent or supreme; (2) lying beyond the ordinary range of perception."[150] In proclaiming that the liberty in this case extends to more transcendent dimensions, Justice Kennedy, in effect, announced that the issue presented goes beyond the issue of homosexuality.[151] It involves a preeminent or supreme liberty.

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146. *Lawrence*, 539 U.S. at 562.

147. *See id.* at 564–66. *See* discussion *supra* Part II.B.2 (discussing the development of substantive due process jurisprudence that protects the right to privacy).

148. *Lawrence*, 539 U.S. at 562.

149. *Id.*

150. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

151. To describe the nature of the liberty protected by the Due Process Clause, Justice Kennedy quoted the following passage from a decision he co-authored with Justices O'Connor and Souter:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,

What liberties other than the conduct criminalized by the Texas statute are protected within the realm of "more transcendent dimensions?" Justice Kennedy explained, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[152] Therefore, it seems as though the freedom of thought to which Justice Kennedy referred is the freedom to know one's self, and based on that knowledge, to choose one's life partner. This notion is supported within the context of this case especially because the "freedom of thought" phrase is coupled in the same sentence with the "certain intimate conduct" phrase.[153]

What is "freedom of belief" if not the freedom to determine one's own beliefs? Freedom of belief includes the freedom not to be bound by the religious beliefs of others (*i.e.*, others' religious beliefs that homosexual sodomy and same-sex marriage are contrary to the word of God, or immoral).[154] Justice Kennedy said that the *Bowers* Court's reliance on religious beliefs was misplaced.[155] He explained that it is not the role of the law to enforce the moral views of the majority on society as a whole.[156] He emphasized, "Our obligation is to define the liberty of all, not to mandate our own moral code."[157]

"Freedom of expression" can be viewed as encompassing marriage and the act of getting married.[158] After all, at its core, marriage is a public statement two people make of their love for and lifelong commitment to each other.[159] When people get married, they publicly express their intent to make a good faith effort to make a

> are central to the liberty protected by the *Fourteenth Amendment*. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Lawrence, 539 U.S. at 574 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

152. *Lawrence*, 539 U.S. at 562.

153. *Id.*

154. *See* Michael W. McConnell, *Establishment and Toleration in Edmund Burke's "Constitution of Freedom,"* 1995 SUP. CT. REV. 393, 454 (1995) (noting that "[i]n our tradition, protection of freedom of religion includes freedom not to believe").

155. *Lawrence*, 539 U.S. at 571.

156. *Id.*

157. *Id.* (quoting Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992)).

158. "Freedom of expression protected by the First Amendment is not limited to spoken and written words, but also extends to symbolic speech or conduct communicative in character. The protected expression may encompass certain forms of conduct illustrative of ideas for bringing about political and social changes." 16A C.J.S. *Constitutional Law* §502 (2004).

159. *See* Beth A. Allen, *Same-Sex Marriage: A Conflict-of-Laws Analysis for Oregon*, 32 WILLAMETTE L. REV. 619, 628 (1996) ("[M]arriage is first and foremost about a loving union between two people who enter into a relationship of emotional and financial commitment and interdependence, two people who seek to make a public statement about their relationship, sanctioned by the state, the community at large, and, for some, their religious community.").

home together, and in return they ask their families, friends, and community for respect and support.[160]

Certain language in *Lawrence* suggests that the issue of gay marriage may have been on the minds of the majority.[161] Justice Kennedy need not have emphasized that "[l]iberty . . . includes freedom of thought, belief, expression, and certain intimate conduct"[162] merely to invalidate the Texas statute. It would have been sufficient simply to borrow language from any of the number of cases that were decided based on the Due Process Clause and to add homosexual sodomy to the list of protected liberties.[163]

Justice Kennedy stated, "In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds."[164] "In the home" suggests images of family life, which usually, though not necessarily includes parents and children. Justice Kennedy might have used more narrow language such as "in the bedroom" had he intended to limit his comments to homosexual sodomy.

Justice Kennedy alerts the reader to the broad sweep of this opinion when he declares that Americans are entitled to some privacy even in "our lives and existence, *outside* the home."[165] While homosexual sodomy is a component of same-sex marriage, it is a component confined to the privacy of one's personal space.[166]

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160. "Marriage is a major building block for strong families and communities. Weddings are an opportunity for friends, family and neighbors to come together to recognize a couple's lifelong commitment to one another. This occasion strengthens a couple's bond and marks their inclusion as a family into the communities of which they are a part." GLAD.org, *Why Marriage Matters*, *at* http://www.glad.org/rights/OP1-whymarriagematters.shtml (last visited Apr. 18, 2005).

161. *But see* Robert C. Post, *Forward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 104 (2003) (suggesting that the *Lawrence* Court did not intend any implications regarding homosexual marriage).

> These implications are effaced, however, because Lawrence deliberately retains, and even emphasizes, the rhetoric of the public-private distinction, with its attendant implication that liberty is to be especially protected within the private realm. By retaining this distinction, the Court reserves the option in future decisions to decline to use substantive due process to invalidate official refusals to accord public recognition to homosexual relationships.

Id.

162. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

163. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 506 (1977) (holding that people may define their families in terms that include extended family members); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (finding a right of parents to choice in the education of their children).

164. *Lawrence*, 539 U.S. at 562.

165. *Id.* (emphasis added).

166. Justice Kennedy unabashedly announced "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 572.

Justice Kennedy's carefully chosen words provide notice that this opinion is not limited to conduct in private space, conduct like homosexual sodomy. In fact, it is not limited to conduct; rather the constitutional liberty protected by the Due Process Clause extends to "spheres of our lives and existence outside the home."[167]

The lives and existence of married people outside the home are often defined and affected by their marital status.[168] One's status as a spouse bears heavily on the roles, responsibilities, and privileges one is provided in many spheres of life, including the economic, legal, social, and religious spheres. When Justice Kennedy says, "there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence,"[169] he may be offering a preview of his stand on the issue of same-sex marriage.

There is yet another indication in *Lawrence* that the justices are looking ahead to a ruling on same-sex marriage. Justice Kennedy states, "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[170] For most people in our society, that enduring bond is expressed in the act and institution of marriage. Justice Kennedy continues, "The liberty protected by the Constitution allows homosexual persons the right to make this choice."[171]

The *Lawrence* opinion is a legal landmark in its own right. Yet, in reading it, one has the sense that it was written with an eye toward the "next big issue."[172] Much of the language is easily applicable to both homosexual sodomy and same-sex marriage.

2. RATIONAL BASIS AND FUNDAMENTAL RIGHTS

Justice Kennedy summarized the core holding as follows: "The Texas statute furthers no legitimate state interest which can justify its

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167. *See* Post, *supra* note 161, at 97 (noting that "the theme of autonomy floats weightlessly through Lawrence").

168. For example, employers offer health insurance to their employees' spouses; hospitals allow spouses into the emergency room and allow them to make life and death decisions on the patients' behalf; probate laws provide automatic benefits for spouses; workers' compensation benefits are available to a spouse in the event of death; housing leases are automatically assumable by a spouse; possible tax benefits are available to married people; and only spouses have standing to recover for certain torts, etc.

169. *Lawrence*, 539 U.S. at 562.

170. *Id.* at 567.

171. *Id.*

172. *See* Pam Belluck, *Marriage for Gays Clears a Hurdle: Same-Sex Couples in Massachusetts to Be First to Wed*, HOUS. CHRON., Feb. 5, 2004, at 1A (referring to the *Goodridge* decision and stating, "it will undoubtedly unleash a flurry of activity in legislatures and in courtrooms nationwide, as activists on both sides of the issue seek to use the Massachusetts marriage decision to influence policy elsewhere").

intrusion into the personal and private life of the individual."[173] The words "no legitimate state interest" are associated with rational basis review.[174] Just because the Court did not apply strict scrutiny[175] does not necessarily mean that there is no fundamental right to homosexual sodomy. The line of cases providing legal precedent and cited in the opinion are fundamental rights cases: *Griswold*—the fundamental right of married couples to use contraceptives,[176] *Eisenstadt*—the fundamental right of unmarried individuals to use contraceptives,[177] and *Roe*—the fundamental right to abortion.[178] In expressing its view of what is "of fundamental significance in defining the rights of the person,"[179] the Court added *Lawrence* to this list of cases just as it added the right of adults to engage in private, consensual sexual conduct to the list of fundamental rights protected by the Due Process Clause.

Moreover, the Court explicitly overruled *Bowers'* holding that there is no fundamental right to homosexual sodomy: "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[180] A reasonable interpretation of this direct language is that there is a fundamental right to homosexual sodomy.[181] The Court did not identify the right as a fundamental right simply because, finding no legitimate state purpose, it did not reach the question.[182]

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173. *Lawrence*, 539 U.S. at 578.

174. Rational basis analysis requires the Court to uphold a provision if it simply "bears a rational relation to a constitutionally permissible objective." Ferguson v. Skrupa, 372 U.S. 726, 733 (1963) (Harlan, J., concurring) (citing Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955)).

175. Under strict scrutiny, reserved for fundamental rights, the state's interest must be more than legitimate; it must be compelling. *See* Roe v. Wade, 410 U.S. 113, 155 (1973). "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* (internal citations omitted).

176. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

177. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). Although the Court decided this case under the Equal Protection Clause, it did so based on a fundamental right: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.*

178. *Roe*, 410 U.S. at 164.

179. *Lawrence*, 539 U.S. at 565.

180. *Lawrence*, 539 U.S. at 578.

181. Professor Victor Flatt, Address at the Alternative Family Law Symposium (Nov. 7, 2003).

182. Similarly, the *Goodridge* court explained that because the state marriage ban did not survive rational basis review, it did not consider "the plaintiffs' arguments that the case merits strict judicial scrutiny." Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (2003).

3. THE FUNDAMENTAL RIGHT TO MARRY

Whether there is a fundamental right to homosexual sodomy may not matter in deciding the constitutionality of statutes prohibiting same-sex marriage. That *Lawrence* was decided under rational basis review does not mean gays and lesbians do not have a fundamental right to marry. The right to marry is fundamental, and although many state courts have found no fundamental right to same-sex marriage,[183] *Lawrence* portends the Court's possible unwillingness to view opposite-sex marriage and same-sex marriage as two different and distinct legal constructs; one fundamental, the other not.[184]

Even if state legislatures originally enacted marriage statutes to encourage procreative sexual activity, such intent would not save marriage as a uniquely heterosexual contractual arrangement under the U.S. constitutional analysis. "[T]he Constitution does not protect marriage because of its link to procreation. While not directly addressing this issue, the Court's holdings in *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade* clearly suggest that marriage can be understood independently of procreation."[185]

The values that are at the core of *Lawrence*—"autonomy of self[,] . . . freedom of thought, belief, expression, and certain intimate conduct,"[186] and the right to an enduring bond[187]—are the very values promoted by the right to marry. "If the Court is serious about the interests promoted by protecting the right to marry—self-determination, autonomy from the state, and societal and familial stability—then it should value them for heterosexuals and homosexuals alike and recognize that the fundamental right to marry should extend to gay and lesbian couples."[188] *Lawrence* stands for the principle that fundamental rights are available to all Americans.[189]

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183. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993) ("[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions.").

184. *See* Part III.A.2 (discussing homosexual sodomy as a fundamental right).

185. SEXUAL ORIENTATION AND THE LAW 98 (Harv. L. Rev. eds., 1989). In discrediting the procreation argument, many have pointed out that gays and lesbians procreate too; some in previous heterosexual relationships and some with the help of modern reproductive technology. "Thus, allowing gay men and lesbians to marry would not be inconsistent with policies favoring procreation." *Id.*

186. *Lawrence*, 539 U.S. at 562.

187. *See id.* at 567.

188. SEXUAL ORIENTATION AND THE LAW, *supra* note 185, at 98.

189. *See Lawrence*, 539 U.S. at 578 (quoting Planned Parenthood v. Casey, 505 U.S. 883, 847 (1992)) ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.").

Historically, under the Due Process Clause, the Court has looked to the "Nation's history and tradition"[190] to identify fundamental rights.[191] In *Lawrence*, the Court refused to be bound by this requirement.[192] Although it did not explicitly identify homosexual sodomy as a fundamental right, it displayed its willingness to determine the "fundamentalness" of a right based on its own concept of "ordered liberty." Once the Court announces that the fundamental right to marriage extends to all citizens, it will have at its disposal the strict scrutiny standard of review for any provision denying access to homosexuals. Should the Court opt to use it, the old adage "strict in theory, fatal in fact" would likely hold true again.[193]

Until now, laws that excluded gays from marriage arguably could survive strict scrutiny because they furthered a state's important purpose—namely, its moral objection to homosexual sodomy—which, after all, was criminal conduct.[194] As long as *Bowers* was good law, the contention that states had an important purpose in limiting marriage to opposite-sex couples was reasonable.[195] Perhaps *Lawrence's* greatest contribution is that it

190. *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) (arguing that "*only* fundamental rights which are 'deeply rooted in this Nation's history and tradition' qualify for anything other than rational basis scrutiny under the doctrine of 'substantive due process'") (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

191. *See* Sunstein, *supra* note 64, at 1163 (explaining that "[t]he Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack").

192. *See* Post, *supra* note 161, at 89 (discussing the Court's two approaches to determining fundamental rights: the "'traditional' approach, focused on a hermeneutics of history and tradition" and the "'autonomy' approach, focused on the forms of liberty prerequisite for 'personal dignity and autonomy'"). "[Lawrence] simply shatters, with all the heartfelt urgency of deep conviction, the paralyzing carapace [of the traditional approach] in which Glucksberg had sought to encase substantive due process." *Id.* at 96.

193. Some commentators have described strict scrutiny, at least as it relates to Equal Protection, as being "strict in theory, fatal in fact." Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) ("[Strict scrutiny is] 'strict' in theory and fatal in fact."); Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (noting that some have viewed strict scrutiny as "strict in theory, but fatal in fact."); The only Equal Protection cases to survive strict scrutiny since its inception have been *Korematsu v. United States*, *United States v. Paradise*, and *Grutter v. Bollinger*. Libby Husky, *Constitutional Law—Affirmative Action in Higher Education—Strict in Theory, Intermediate in Fact?*, 4 WYO. L. REV. 439, 470 (2004).

194. In *Goodridge v. Dep't of Pub. Health*, for example, Justice Greaney acknowledged the appellee's morality argument saying, "I do not doubt the sincerity of deeply held moral or religious beliefs that make inconceivable to some the notion that any change in the common-law definition of what constitutes a legal civil marriage is now, or ever would be, warranted." 798 N.E.2d 941, 973 (Mass. 2003) (Greaney, J., concurring).

195. After *Lawrence*, it is questionable whether a state can proffer even a legitimate purpose. Justice O'Connor opined that "[u]nlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring). Unfortunately, she failed to offer a hint as to what they might be.

obliterated the foundation for that assumption.[196]

B. EQUAL PROTECTION

Although *Lawrence* was decided under substantive due process, the Court observed that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[197] An important contribution of *Lawrence* to the equal protection argument for same-sex marriage is that it strengthens the argument for heightened scrutiny for provisions that discriminate based on sexual orientation. The Court has not ruled on whether discrimination against homosexuals as a class is discrimination that must be subjected to heightened scrutiny.[198]

The Court has, however, discussed the factors it considers in making such a determination. One of the factors is whether "the group suffered a history of purposeful discrimination."[199] With the perspective provided by *Lawrence*, the holding in *Bowers* and all other cases decided under its authority appear to be purposeful discrimination. In overruling *Bowers*, Justice Kennedy noted "[i]ts continuance as precedent demeans the lives of homosexual persons."[200] To the extent that *Lawrence* clarifies contemporary understanding of the discriminatory nature of earlier anti-homosexual holdings based on animus, it contributes to the argument that as a class, homosexuals are entitled to heightened scrutiny.

Lawrence demonstrates that heightened scrutiny is not a prerequisite for invalidating discriminatory statutes. It is conceivable that an anti-gay-marriage statute, like the anti-sodomy statute, would not survive an equal protection claim under rational basis review, but rather, under heightened scrutiny. Nonetheless, heightened scrutiny would strengthen an equal protection claim.

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196. "[A]s matter of constitutional law, neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families." *Goodridge*, 798 N.E.2d at 973 (Greaney, J., concurring) (citing *Lawrence*, 539 U.S. at 581-82 (O'Connor, J., concurring) (moral disapproval, with no other valid State interest, cannot justify law that discriminates against groups of persons); Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992) ("Our obligation is to define the liberty of all, not to mandate our own moral code.").

197. *Lawrence*, 539 U.S. at 575.

198. *See* Spiro P. Fotopoulos, Note, *The Beginning of the End for the Military's Traditional Policy on Homosexuals:* Steffan v. Aspin, 29 WAKE FOREST L. REV. 611, 642 (1994) ("Presently, homosexuals are not considered to be a suspect or even quasi-suspect class.").

199. Dean v. District of Columbia, 653 A.2d 307, 339 (1995) (Ferren, J., dissenting).

200. *Lawrence*, 539 U.S. at 575.

C. RELIANCE ON INTERNATIONAL LAW

In an unusual show of openness, the *Lawrence* Court looked outside the U.S. legal system to a decision of the European Court of Human Rights.[201] The European Court held that the law forbidding homosexual conduct was invalid under the European Convention on Human Rights.[202] This holding was persuasive authority for the *Lawrence* Court in its decision to overturn *Bowers*.[203]

If the Court is willing to consider decisions of foreign nations in a ruling on same-sex marriage, there is considerable persuasive authority to invalidate restrictive statutes.[204] The Netherlands and Belgium extend full marriage rights to same-sex couples, as do Ontario and British Columbia, Canada.[205] "France, Germany, Finland, Sweden, Norway, Denmark and Iceland allow gays and lesbians to enter into legal partnerships that award many of the same protections and responsibilities that marriage does."[206] Even in Spain, where the overwhelming majority of citizens are Catholic, Prime Minister Jose Luis Rodriquez Zapatero announced that Spain will legalize gay unions, although it may not call them marriages.[207] One article had this to say about the state of marriage in the U.S.:

> To the extent that American courts have historically taken for granted the notion that the institution of marriage, by definition, involves the union of one man and one woman, a survey of the laws of other Western democracies reveals that this conclusion is not self-evident. Indeed, such a survey suggests that recognizing the legitimacy of same-sex unions is the logical consequence of a fundamental commitment to civil rights and principles of equality.[208]

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201. *See Lawrence*, 539 U.S. at 573.

202. *Id.*

203. *Id.*

204. *See Developments in the Law: II. Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2006 (2003) [hereinafter *Inching Down the Aisle*] (noting that "the perpetuation of marriage discrimination in the United States represents a denial of civil rights to same-sex couples that is increasingly out of step with the trend toward marriage equality across the Western world").

205. *See* James Bone, *Landmark Ruling Allows Gay Marriage in U.S.*, LONDON TIMES, Nov. 19, 2003, at 15.

206. Clifford Krauss, *Gay Canadians' Quest for Marriage Seems Near Victory*, N.Y. TIMES, June 15, 2003, at A3.

207. The Data Lounge, *Spain Moves to Back Gay Unions* (Mar. 19, 2004), *at* http://www.datalounge.com/datalounge/news/record.html?record=21259 (noting that Zapatero called "full partnership rights a characteristic of a 'modern and tolerant society'").

208. *Inching Down the Aisle*, *supra* note 204, at 2027.

IV. *STOP! IN THE NAME OF LOVE*: SAME-SEX MARRIAGE CASES AFTER *LAWRENCE*

Subsequent to *Lawrence*, two state courts have ruled on the constitutionality of their respective state marriage statutes, and the two courts reached opposing conclusions.[209] An Arizona Appeals Court narrowly interpreted *Lawrence's* holding and "reject[ed] Petitioners' contention that *Lawrence* establishes entry in same-sex marriages as a fundamental right."[210] The Massachusetts Supreme Court read *Lawrence* as

> affirm[ing] that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner. The Court also reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity.[211]

The following discussion examines the decisions in these two cases.

A. *STANDHARDT V. ARIZONA*

The Arizona Court of Appeals was the first to rule on the issue of same-sex marriage after *Lawrence*, and its reading of the decision provided no support for the petitioners' claims that their equal protection and due process rights under both the state and federal constitutions were violated.[212] The court began its analysis by stating, "Whether entry in state-licensed, same-sex marriages is a constitutionally anointed 'fundamental right' is a critical inquiry in deciding the viability of [the Arizona marriage statute]."[213] The Arizona court's reading of *Lawrence* led it to conclude that "the [*Lawrence*] Court did not consider sexual conduct between same-sex partners a fundamental right."[214] In turn, the Arizona court determined that "it would be illogical to interpret [*Lawrence*] as recognizing a fundamental right to enter a same-sex marriage."[215]

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209. *Compare* Standhardt v. Arizona, 77 P.3d 451 (Ariz. Ct. App. 2003) *with* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

210. *Standhardt*, 77 P.3d at 457.

211. *Goodridge*, 798 N.E. 2d at 948.

212. *See id.* at 457 (noting that "the Court did not intend by its comments to address same-sex marriages").

213. *Id.* at 454.

214. *Id.* at 457.

215. *Id.*

The Arizona court also pointed out that Justice Kennedy acknowledged that the case [at issue] "[did] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[216]

Having found no fundamental right to same-sex marriage under the federal or state constitution,[217] the Arizona court applied rational basis review.[218] Completely disregarding the Hawaii, Alaska, and Vermont courts' holdings, the Arizona court ruled that:

> The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term committed relationships, which society has traditionally viewed as advantageous for children. Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships.[219]

With this holding, the Arizona court became the first court post-*Lawrence* to rule that states may legitimately reason that heterosexual couples provide a preferred environment for the procreation and raising of children.[220]

B. *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH*

Citing *Lawrence*, the Massachusetts Supreme Court, like the courts of Hawaii, Alaska, and Vermont, found that the state is prohibited by its own constitution from denying its homosexual citizens the right to marry.[221] Just as the U.S. Supreme Court found that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the

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216. Standhardt v. Super. Ct. of Arizona, 77 P.3d 451, 456 (Ariz. Ct. App. 2003) (quoting Lawrence v. Texas, 539, U.S. 558, 578 (2003)).

217. *Id.* at 460.

218. *Id.* at 460–61.

219. *Id.* at 462–63.

220. However, some argue that the Arizona Court of Appeals decision upholding Arizona's ban on same-sex marriage is unlikely to provide persuasive authority to other courts because the decision "was handed down without a trial and involved no factual record or extensive legal briefing, the ingredients for a major test case on a constitutional question." Lyle Denniston, *Arizona Court Says Gays Do Not Have Right to Wed*, BOSTON GLOBE, October 10, 2003, at A26.

221. *Goodridge*, 798 N.E.2d at 948.

individual,"[222] the Massachusetts Supreme Court found that no legitimate state interest was furthered by limiting marriage to opposite-sex couples.[223] The *Goodridge* court concluded that the ban failed the rational basis test for both due process and equal protection.[224]

As in so many prior cases, the Massachusetts Department of Public Health cited procreation as a legitimate interest in limiting marriage to intersex couples. The *Goodridge* court said the following:

> The "marriage is procreation" argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like "Amendment 2" to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly "identifies persons by a single trait and then denies them protection across the board." In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.[225]

The court declared that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[226] The Massachusetts Supreme Court remanded the case to the lower court, but stayed its order for 180 days to give the state legislature time "to take such action as it may deem appropriate in light of [the court's] opinion."[227] In response to a Massachusetts Senate request for an advisory opinion on a bill that would create Vermont-style civil unions, the Massachusetts Supreme Court said, "The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely

222. *Lawrence*, 539 U.S. at 578.

223. *Goodridge*, 798 N.E.2d at 961–66.

224. *Id.* at 961 (explaining that because the statute does not survive rational basis review, the court did not consider the plaintiffs' argument that the claims should be reviewed under strict scrutiny).

225. *Id.* at 962 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

226. *Id.* at 969.

227. *Id.* at 969–70.

homosexual, couples to second-class status."[228]

Either the Arizona case or the Massachusetts case could give rise to the first controversy on the issue of same-sex marriage to be decided by the U.S. Supreme Court. Because the petitioners in Arizona made claims under the Federal Constitution, if they appeal to the Arizona Supreme Court, and if they lose there, they could appeal to the nation's highest court. Because the plaintiffs in the Massachusetts case made no claims under federal law, *Goodridge* is not likely to be appealed; it could, nonetheless, give rise to a controversy that may find its way to the U.S. Supreme Court.

V. *I LOVE YOU JUST THE WAY YOU ARE*: CONCLUSION

Like abortion and sodomy, same-sex marriage is likely to be decided by the nation's highest court.[229] It is risky to predict whether the U.S. Supreme Court will consider the issue in light of its holding in *Romer* and other equal protection cases or whether it will consider the issue through the lens of the broad libertarian decision in *Lawrence* and other fundamental rights cases. It is speculative to guess what the Court will say when it speaks. Will it say that arguing procreation as the raison d'etre of marriage to justify excluding homosexuals is, at best, facetious? Or, will it say that fundamental rights are fundamental to all Americans? Or, will it say that the liberty interest protected by the Fourteenth Amendment and providing the freedom of thought, belief, expression, and certain intimate conduct includes the right to marry the person of one's choice? Regardless of the approach, it seems that the legality of same-sex marriage for citizens in all fifty states is a question of when, not if. After all, "every constitutional right has at one point been 'found' for the first time."[230] The history of constitutional law is "the story of the extension of constitutional rights and protections to people once ignored or excluded."[231] As Justice Greaney said in his *Goodridge* concurrence:

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228. *Excerpts from Ruling on Gay Marrige*, N.Y. TIMES, Feb. 5, 2004, at A27 (reporting on the Massachusetts Supreme Court advisory opinion that stated that nothing short of full-fledged marriage would comply with the court's earlier ruling).

229. The issue might also be decided by an amendment to the U.S. Constitution defining marriage as the union of one man and one woman. Before the Massachusetts ruling, President George W. Bush said that he supported a federal definition of marriage as a solely man-woman union. Associated Press, *Bush Says He Could Back Gay Marriage Ban* (Dec. 16, 2003), *available at* http://www.hrc.org/Content/ContentGroups/News3/2003_Dec/Bush_Says_He_Could_Back_Gay_Marriage_Ban.htm. After the ruling he said, "If necessary, I will support a constitutional amendment which would honor marriage between a man and a woman, codify that." *Id.*

230. Kenneth Jost, *Debating Gay Marriage*, LEGAL TIMES, Oct. 6, 2003, at 30.

231. United States v. Virginia, 518 U.S. 515, 557 (1996).

> We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do.[232]

232. Goodridge v. Dep't of Pub. Health, 798 N.E.2d, 941, 973 (Greaney, J., concurring).