

# Does The Equal Protection Analysis In *Lawrence* Make Bans On Same-Sex Marriage Unconstitutional?

## I. INTRODUCTION

*"What is marriage, is marriage protection or religion, is marriage renunciation or abundance, is marriage a stepping-stone or an end"*<sup>1</sup>

Justice Sandra Day O'Connor's concurring opinion in *Lawrence v. Texas* stated that she would strike down an anti-sodomy statute on the basis of equal protection.<sup>2</sup> Her view is that a heightened version of rational basis review should be applied to equal protection claims involving social rather than economic issues.<sup>3</sup> Yet, she concluded that equal protection would not invalidate a government prohibition against same-sex marriages.<sup>4</sup> This Note asserts that if the equal protection analysis applied in *Lawrence*, is similarly applied to the issue of same-sex marriage, the result is that bans against same-sex marriage will be found unconstitutional. It is inconsistent for Justice O'Connor to support striking down a ban on sodomy under equal protection, only to imply that a ban on same sex marriage is permissible. It is important to examine Justice O'Connor's

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<sup>1</sup> GERTRUDE STEIN & VIRGIL THOMSON, *THE MOTHER OF US ALL* 91-92 (G. Schirmer, Inc. 1988) (1947), available at <http://www.bartleby.com/66/0/55600.html> (last visited Mar. 15, 2004).

<sup>2</sup> *Lawrence v. Texas*, 123 S. Ct. 2472, 2484-2488 (2003).

<sup>3</sup> *Id.* at 2485, 2487.

<sup>4</sup> *Id.* at 2488.

analysis in light of the majority's opinion in *Lawrence* that an equal protection analysis was a tenable reason for overturning the Texas sodomy law.<sup>5</sup> The Court should also apply equal protection analysis to same-sex marriage cases.

In order to examine the application of the *Lawrence* equal protection analysis as applied to the issue of same-sex marriage, it is important to see the historical evolution of marriage litigation. This Note, in Section II, also reviews the background of marriage issues and the history of same-sex marriage litigation in the United States. Section III analyzes Justice O'Connor's concurring opinion in *Lawrence* in order to see how she views the equal protection analysis. Section IV examines how the *Lawrence* equal protection analysis should be applied to the issue of same-sex marriage. Finally, Section V looks at the effect of *Lawrence* on three post *Lawrence* same-sex marriage cases.

## II. HISTORY OF SAME-SEX MARRIAGE LITIGATION

Historically, the main constitutional policy issue that pertained to same-sex marriage was interracial marriage. Interracial marriage, known as miscegenation, was prohibited in select states until 1967, when the Supreme Court struck down miscegenation laws in *Loving v. Virginia*.<sup>6</sup> In 1967, sixteen

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<sup>5</sup> *Id.* at 2482.

<sup>6</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

states, including Virginia, prohibited interracial marriage.<sup>7</sup> In 1949, when miscegenation statutes were at their peak, thirty states prohibited interracial marriage.<sup>8</sup> Before *Loving*, the only court to strike down a miscegenation statute was the Supreme Court of California, which held miscegenation violated the Equal Protection Clause of California's Constitution.<sup>9</sup> It was argued that the California miscegenation statute did not discriminate against race since all races were treated equally.<sup>10</sup> The California Supreme Court found the discrimination was aimed at individuals not races when it said:

The decisive question, however, is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals.<sup>11</sup>

The U.S. Supreme Court supported the California Supreme Court's view that miscegenation statutes violated the Equal Protection Clause of the U.S. Constitution.<sup>12</sup> The *Loving* Court

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<sup>7</sup> *Id.* at 6.

<sup>8</sup> *Baehr v. Lewin*, 852 P.2d 44, n.23 (Haw. 1993) ("[T]he following thirty of the forty-eight states banned interracial marriages by statute: Alabama; Arizona; Arkansas; California; Colorado; Delaware; Florida; Georgia; Idaho; Indiana; Kentucky; Louisiana; Maryland; Mississippi; Missouri; Montana; Nebraska; Nevada; North Carolina; North Dakota; Oklahoma; Oregon; South Carolina; South Dakota; Tennessee; Texas; Utah; Virginia; West Virginia; and Wyoming.")

<sup>9</sup> *Loving*, 388 U.S. at n.5 (citing *Perez v. Sharp*, 198 P.2d 17 (1948)).

<sup>10</sup> *Perez v. Sharp*, 198 P.2d 17, 20 (Cal. 1948).

<sup>11</sup> *Id.*

<sup>12</sup> *Loving*, 388 U.S. at 12, see also U.S. CONST. amend. XIV § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.")

held the violation occurred because marriage was available to everyone except people of differing races.<sup>13</sup>

During the Congressional debate on The Defense Of Marriage Act<sup>14</sup> ("DOMA"), which Congress passed in an attempt to limit the possibility of same-sex marriage in the United States, Congressman Lewis made a poignant statement that similarly could have been applied to miscegenation statutes:

Why do you not want your fellow men and women, your fellow Americans to be happy? Why do you attack them? Why do you want to destroy the love they hold in their hearts? Why do you want to crush their hopes, their dreams, their longings, their aspirations? We are talking about human beings, people like you, people who want to get married, buy a house, and spend their lives with the one they love.<sup>15</sup>

Congress passed DOMA, in part, as a response to the Hawaii Supreme Court's ruling that Hawaii's ban on same-sex marriage was unconstitutional.<sup>16</sup>

The quest for equality with the right to marry, began in the 1970's with several state cases denying this right.<sup>17</sup> In

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<sup>13</sup> *Id.* at 11.

<sup>14</sup> 28 U.S.C. § 1738C (2002) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same-sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."); see also 1 U.S.C. § 7 (2003) ("In determining the meaning of any Act of Congress...the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

<sup>15</sup> 142 CONG. REC. H7441 (Thursday, Jul. 11, 1996) (Statement of Rep. Lewis).

<sup>16</sup> Diane M. Guillerman, *The Defense Of Marriage Act: The Latest Maneuver In The Continuing Battle To Legalize Same-Sex Marriage*, 34 Houston L. Rev. 425, 429-430 (1997) (discussing why Congress passed DOMA).

<sup>17</sup> *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980); and *Dean v.*

general, these cases ruled that there was no violation of equal protection under the Fourteenth Amendment of the U.S.

Constitution because the courts defined marriage as a union of one man and one woman.<sup>18</sup> Thus, by definition there could be no discrimination when denying a same-sex marriage license.

The second wave of state cases began in the 1990's with courts becoming more receptive to the idea of same-sex marriage. Some courts reversed the legislative ban on same-sex marriage finding that a prohibition violated the equal protection clause of their state Constitution.<sup>19</sup>

**A. EARLY CASES - ONLY TRADITIONAL MARRIAGE IS ALLOWED**

In early cases that challenged prohibitions to same-sex marriage, courts focused on how marriage was defined and what the fundamental purpose of marriage was. These courts ultimately based their rejection of same-sex marriage on the principles that the conventional purpose and definition of marriage were not compatible with same-sex marriages. The first major same-sex marriage case was the Minnesota Supreme Court case *Nelson*, in 1971.<sup>20</sup> The Minnesota Supreme Court held that because the purpose of marriage was procreation, there was no irrational or invidious discrimination by the state in denying

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District of Columbia, 653 A.2d 307, 361 (D.C. 1995).

<sup>18</sup> *Jones*, 501 S.W.2d at 589; *Hara*, 522 P.2d at 1187; *Adams*, 486 F. Supp. at 1119; and *Dean*, 653 A.2d at 361.

<sup>19</sup> *Baehr*, 852 P.2d at 44, *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. 1998), and *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>20</sup> *Nelson*, 191 N.W.2d at 185.

same-sex marriage, and that neither the state nor the U.S. Constitution was violated.<sup>21</sup> The *Nelson* court further refused to accept the analogy between *Loving* and same-sex marriage by finding that there was a difference between restrictions on marriage, "based merely upon race and one based upon the fundamental difference in sex."<sup>22</sup>

In 1973, the Kentucky appellate court defined marriage as between a man and woman for the purpose of founding and maintaining a family, making same sex marriage impossible by definition.<sup>23</sup> The Washington appeals court in *Hara* furthered this theme stating, "marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race."<sup>24</sup> This reasoning led the court to find there was no equal protection violation when same-sex couples were denied a marriage license. The court concluded same-sex couples weren't being denied marriage on the basis of their sex, but simply because the definition of marriage precluded them.<sup>25</sup>

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<sup>21</sup> *Id.* at 187.

<sup>22</sup> *Id.*

<sup>23</sup> *Jones*, 501 S.W.2d at 589.

<sup>24</sup> *Hara*, 522 P.2d at 1195.

<sup>25</sup> *Id.* at 1192 (comparing present case to *Loving*, "There is no analogous sexual classification involved in the instant case because appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex").

In *Adams*, a California federal court also defined marriage as a contract between a man and a woman.<sup>26</sup> The court found "the main justification in this age for societal recognition and protection of the institution of marriage is procreation, perpetuation of the race."<sup>27</sup> Since this court defined marriage as a contract between a man and a woman for procreation, there could be no equal protection or due process violation when same-sex couples tried to define themselves by "marriage" or as a "spouse".<sup>28</sup>

In *Dean*, the court summarized the reasoning of the marriage definition cases: "having concluded unanimously that it is impossible for two persons of the same-sex to marry, this court cannot also conclude that it is -- or even may be -- a denial of equal protection to refuse to allow such persons to marry."<sup>29</sup> After defining marriage as between a man and woman, the *Dean* court concluded, "the Supreme Court has *deemed marriage a fundamental right* substantially because of its relationship to procreation."<sup>30</sup>

The rationale for denying equal protection to same-sex marriage in the early cases is summed up in two principles. First, by definition, marriage is a union of a man and a woman.

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<sup>26</sup> *Adams*, 486 F. Supp. at 1122.

<sup>27</sup> *Id.* at 1124.

<sup>28</sup> *Id.*

<sup>29</sup> *Dean*, 653 A.2d at 361.

<sup>30</sup> *Id.* at 333.

Since men and women are treated equally in regard to marrying a member of the same-sex, no discrimination exists.<sup>31</sup> Second, marriage is not a fundamental right for same-sex couples because the fundamental right embodied in marriage is the right to procreate. There is no denial of equal protection with bans on same-sex marriage because a fundamental right has not been impacted. Since no fundamental right is at issue, only rational basis is needed to pass Constitutional muster. The rational basis the state asserts, is procreation, thus homosexual couples who cannot procreate may be denied marriage.

**A. LATER CASES - NON-TRADITIONAL MARRIAGE NOW ACCEPTED**

The second wave of same-sex marriages cases came in the 1990's. During the second wave, the state courts allowed for same-sex marriage, finding that their state's equal protection clause granted more rights than the U.S. Constitution. Thus, the state's equal protection clause was violated by a ban on same-sex marriage.<sup>32</sup>

Hawaii was the first state to begin this trend. In *Baehr*, the Hawaii Supreme Court rejected the equal protection argument of the previous courts that defined marriage as between a man and a woman.<sup>33</sup> When examining the marriage definition argument

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<sup>31</sup> *Hara*, 522 P.2d at 1192.

<sup>32</sup> See cases cited *supra* note 19.

<sup>33</sup> *Baehr*, 852 P.2d at 63.

of the early courts, the Hawaii Supreme Court said, "we reject this exercise in tortured and conclusory sophistry."<sup>34</sup>

Unlike earlier courts, which only applied a rational basis analysis, the Hawaii Court determined the denial of marriage was based on the sex of the marriage license seeker, and therefore subject to strict scrutiny under the Hawaii Constitution.<sup>35</sup> The Hawaii Supreme Court remanded the case. Thus, the state had the burden to overcome the presumption that the law was unconstitutional, by showing that the ban on same-sex marriage was a compelling state interest narrowly drawn to avoid infringing constitutional rights.<sup>36</sup>

In *Brause*, the superior court in Alaska found that "the decision to choose one's life partner and have a recognized nontraditional family [should be] constitutionally protected."<sup>37</sup> The underlying law the court relied on was Article I of the Alaska Constitution, which is more expansive than the U.S. Constitution.<sup>38</sup> Article I holds in part, "that all persons have a natural right to life, liberty, the pursuit of happiness...."<sup>39</sup>

<sup>34</sup> *Id.*

<sup>35</sup> Rational basis was applied in; *Hara*, 522 P.2d at 1196; *Dean*, 653 A.2d at 364 n.7. The Hawaii Supreme Court used strict scrutiny in; *Baehr*, 852 P.2d at 67.

<sup>36</sup> *Id.* at 68.

<sup>37</sup> *Brause*, 1998 WL 88743 at \*6 (Alaska Super. Ct.1998), ("However, just as the 'decision to marry and raise a child in a traditional family setting' is constitutionally protected as a fundamental right, so too should the decision to choose one's life partner and have a recognized nontraditional family be constitutionally protected. It is the decision itself that is fundamental, whether the decision results in a traditional choice or the nontraditional choice *Brause* and *Dugan* seek to have recognized. The same constitution protects both.").

<sup>38</sup> ALASKA CONST. art. I, § 1 (2003).

<sup>39</sup> *Brause*, 1998 WL 88743 at \*5.

The Alaska court used a sliding scale to determine the standard of review for equal protection cases arising under Article I. The scale first looks at the importance of the right asserted (here marriage). The court then looks at, "the degree of suspicion with which we view the resultant classification scheme."<sup>40</sup> The scrutiny becomes more rigorous based upon two factors. First, scrutiny is more rigorous as the right becomes more fundamental. Second, the scrutiny is more rigorous as the classification becomes more constitutionally suspect.<sup>41</sup> The court held that denial of same-sex marriage denied the fundamental right to choose a life partner and the classification was based on sex, thus the ban was unconstitutional.<sup>42</sup>

The next court to tackle same-sex marriage was the Vermont Supreme Court who, in *Baker*,<sup>43</sup> found that the state's equal protection clause required that homosexuals receive the same marriage benefits as heterosexual married couples. The Vermont Supreme Court avoided the issue of sex discrimination in its equal protection analysis. Instead, the Court required that the purpose of a gender-neutral law be discriminatory in purpose,

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* ("That this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.")

<sup>43</sup> *Baker*, 744 A.2d at 864.

not just in effect in order for the state equal protection clause to apply.<sup>44</sup> The Vermont Court's reasoning was based on the compelling state interest of providing for the security of children. A violation of equal protection was demonstrated because similarly situated married heterosexuals with children, as compared with cohabitating homosexuals with children, were not being treated equally under Vermont law.<sup>45</sup>

It is worth noting that by popular referendum in 1998, both Alaska and Hawaii amended their constitutions to limit marriage to heterosexual couples.<sup>46</sup> In Vermont, the Court allowed the legislature to craft a remedy.<sup>47</sup> The legislature had the choice of either making marriage available to same-sex couples, or creating a "civil union" which grants homosexual couples the same state benefits and protections under Vermont law that married heterosexual couples enjoy.<sup>48</sup> The Legislature chose to create civil unions rather than grant a marriage license to same-sex couples.<sup>49</sup>

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<sup>44</sup> *Id.* at 880, n.13.

<sup>45</sup> *Id.* at 882.

<sup>46</sup> Yasmin Anwar, *Will States Say 'I do' to Gay Marriage?*, USA TODAY, Mar. 6, 2000, at 3A.

<sup>47</sup> *Baker*, 744 A.2d at 889.

<sup>48</sup> Brief Summary of H.847 as Passed by the General Assembly, at <http://www.leg.state.vt.us/baker/h-847exsum.htm> last visited (Mar. 3, 2004).

<sup>49</sup> VT. STAT. ANN. TIT. 15, §§ 1201-1207 (2003).

### III. LAWRENCE HOLDING

*Lawrence v. Texas* was the landmark Supreme Court case that struck down a Texas law prohibiting homosexual sodomy acts.<sup>50</sup> A large part of the majority's reasoning cited substantive due process as the grounds for striking down the sodomy law.<sup>51</sup> Justice O'Connor, however, in her concurring opinion, stated she would strike down the anti-sodomy law on the basis of a violation of equal protection.<sup>52</sup> The majority in *Lawrence* also supported equal protection as a basis for striking down the anti-sodomy law, but wanted to go further by basing their opinion upon substantive due process.<sup>53</sup>

Justice O'Connor started her analysis by determining the standard of review. She began with the well established proposition that all persons similarly situated should be treated alike.<sup>54</sup> She then stated that economic and tax laws have been scrutinized under a rational basis review. Under rational basis, legislation is presumed to be valid and "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."<sup>55</sup> She continued by finding that some laws were subjected to a more searching form of rational review, such as laws with a bare

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<sup>50</sup> *Lawrence*, 123 S. Ct. at 2484.

<sup>51</sup> *Id.*

<sup>52</sup> *id.*

<sup>53</sup> *Id.* at 2482.

<sup>54</sup> *Id.* at 2484.

<sup>55</sup> *Id.*

desire to harm politically unpopular groups and laws inhibiting personal relationships.<sup>56</sup>

Justice O'Connor pointed out that similarly situated persons were not being treated equally when sodomy between people of the opposite sex was allowed, but sodomy between people of the same-sex was not.<sup>57</sup> The result was such that the Texas statute made homosexuals unequal in the eyes of the law. Justice O'Connor found that the statute "legally sanctions discrimination" against homosexuals in employment, housing, and family law.<sup>58</sup>

Having found that the sodomy law was discriminatory against homosexuals, Justice O'Connor then applied the rational basis test. Was the classification drawn by the statute rationally related to a legitimate state interest? Texas argued that the law satisfied rational basis review because the law furthered the legitimate goal of promoting morality.<sup>59</sup> In response, Justice O'Connor reasoned that "[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."<sup>60</sup> Texas asserted it was not targeting

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<sup>56</sup> *Id.* at 2485 (citing *Department of Agriculture v. Moreno*, 413 U.S. 528, 534; *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-447; *Romer v. Evans*, 517 U.S. 620, 632).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2486.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

homosexuals, but merely homosexual conduct.<sup>61</sup> Justice O'Connor disagreed, instead finding that when homosexual sodomy, but not heterosexual sodomy, was criminal there was discrimination against homosexuals that invites further discrimination in private and public spheres.<sup>62</sup> She reasoned that the discrimination of the sodomy law could not be sanctioned under the Equal Protection Clause, which "neither knows nor tolerates classes among citizens."<sup>63</sup> She concluded that the government could not single out one identifiable class of citizens, such as homosexuals, for a law that did not apply to everyone else, with only moral disapproval as the state interest.<sup>64</sup> The Equal Protection Clause does not allow homosexuals to be treated as an underclass facing, "a lifelong penalty and stigma" from the remainder of society.<sup>65</sup>

After finding that the Texas sodomy law violated the Equal Protection Clause, Justice O'Connor then went on to state that preserving the traditional institution of marriage would not discriminate against homosexuals, because there were other reasons to promote marriage than mere moral disapproval of homosexuals.<sup>66</sup>

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<sup>61</sup> *Id.* at 2486-2487.

<sup>62</sup> *Id.* at 2487.

<sup>63</sup> *Id.* (citing *Romer v. Evans*, 517 U.S. 623, quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

<sup>64</sup> *Id.* at 2487.

<sup>65</sup> *Id.* (citing *Plyler v. Doe*, 457 U.S. 202, 239 (1981)).

<sup>66</sup> *Id.* at 2488.

#### IV. LAWRENCE HOLDING APPLIED TO SAME-SEX MARRIAGE

In applying the *Lawrence* analysis to same-sex marriage, it must first be determined whether homosexuals seeking marriage are similarly situated to heterosexuals seeking marriage, and whether they are treated differently. Next, the level of scrutiny must be determined by examining the right being impacted. If the right impacted is a fundamental right or affects a protected class, then strict scrutiny will be applied. If a suspect or semi-suspect class is involved, then intermediate scrutiny is applied. In all other cases a rational basis standard is used.<sup>67</sup>

##### A. ARE SAME-SEX COUPLES SITUATED SIMILARLY TO OPPOSITE-SEX COUPLES

In order to apply the *Lawrence* analysis, the first step is to determine whether similarly situated people are treated equally. With marriage, same-sex couples are situated exactly the same as opposite-sex couples. In both cases, two non-related individuals are seeking to gain the benefits of marriage. Whether this is because they deeply love each other, want to cement a familial alliance, or are marrying in Las Vegas on a drunken dare is immaterial. They are all situated similarly. The difference is that heterosexual couples, but not homosexual couples, are allowed to marry.

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<sup>67</sup> *Cleburne Living Ctr. v. Cleburne*, 726 F.2d 191, 195-196 (5th Cir. 1984), *aff'd in part, vacated in part by* 473 U.S. 432 (1985).

This situation is analogous to the *Lawrence* case, where heterosexual couples were situated similarly to homosexual couples. Each wanted to engage in one form of intimate conduct, but only heterosexual couples could do so without legal repercussions. In *Lawrence*, Justice O'Connor emphasized the negative effect on gays in housing, employment, and family law as a direct result of state sanctioned discrimination.<sup>68</sup> When looking at same-sex marriage, the same discriminations apply.

When discussing the discriminatory effects of denying marriage to same-sex couples, it is important to understand the magnitude of the lost benefits. There are 1,049 protections, rights and responsibilities from federal law associated with marriage, including health care benefits and rights, social security benefits, and tax benefits.<sup>69</sup> Justice O'Connor in *Lawrence*, found the sodomy law violated equal protection in part because the law made it difficult for homosexuals to be treated the same as everyone else in other areas such as employment, family issues, and housing.<sup>70</sup> The same is true for same-sex marriage when marriage benefits and responsibilities are denied.

One example of how homosexuals are directly impacted by the denial of marriage, is the loss of access to the Family and

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<sup>68</sup> *Lawrence*, 123 S. Ct. at 2486.

<sup>69</sup> Evan Wolfson, *For Richer, For Poorer: Same-Sex Couples and the Freedom to Marry as a Civil Right*, 2003, at [http://www.drummajorinstitute.org/plugin/template/dmi/\\*/593](http://www.drummajorinstitute.org/plugin/template/dmi/*/593) (last visited Mar. 5, 2004).

<sup>70</sup> *Lawrence*, 123 S. Ct. at 2486.

Medical Leave Act of 1993.<sup>71</sup> The Family and Medical Leave Act requires all employers with fifty or more employees to extend unpaid leave, up to twelve weeks during each year, to an employee to care for a spouse with a serious health condition.<sup>72</sup> Heterosexuals who are married and work for a qualifying employer automatically receive the leave benefit. For example, if heterosexuals need to take four weeks off to care for their spouses after an accident, they would not have to worry about losing their jobs. Homosexuals, however, who need to take time off to care for their life partners under the same circumstances, would have to contend with the possibility of losing their jobs. Because they would not be classified as a "spouses" within the definition of the statute, they would not be beneficiaries under the federal law.

Discrimination denying same-sex marriage is not always detrimental. Sometimes it can benefit same-sex couples. The federal anti-nepotism statute, which prohibits public officials from hiring, promoting, or advocating hiring or promotion of their spouses is one example.<sup>73</sup> Continuing the example above, when the husband went back to work, he could not hire his wife, nor encourage any government agency to hire or promote her. The anti-nepotism law, however, does not limit the hiring of a

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<sup>71</sup> See 29 U.S.C. §§ 2611-2654 (2002).

<sup>72</sup> 29 U.S.C. § 2612(a)(1)(C) (2002).

<sup>73</sup> See 5 U.S.C. § 3110(a)(3) (2003).

partner in a same-sex relationship. This discrimination, while beneficial to same-sex couples, violates the Equal Protection Clause.

The discrimination against homosexual couples goes beyond the abstract rules and regulations of law. This discrimination impacts people in their most personal lives. Arthur Richter while discussing his thirteen year relationship with Jeffrey Sock of Barrington, Rhode Island stated, “[c]an you imagine if something happened to me and if my family said you [Sock] can’t see him or you have no say [in his medical care]?”<sup>74</sup> They have spent hundreds of dollars on legal fees to protect their rights. Richter continued, “from a legal standpoint, we wanted to cross the t’s and dot all of the i’s so that everything was done to the best of our knowledge to take care of one another and make sure that nobody could interfere.”<sup>75</sup> As Richter noted, married couple's rights are automatically guaranteed, and a married couple does not have to go through the same efforts:

[Consider] income taxes, what we pay in taxes, and our health benefits ... All of the things that are afforded to a straight couple in today’s society are denied to two people who’ve been together for one year, or [ten] years or [twenty] years. We don’t have any benefits. We don’t have any rights. These are all the things that we’re fighting for.<sup>76</sup>

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<sup>74</sup> Laura Meade Kirk, *Till Death Do Us Part - For Some Lesbian And Gay Couples, Civil Unions Are A Joyous Step Toward Equality*, PROVIDENCE JOURNAL-BULLETIN (Rhode Island), October 13, 2002, at L7.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

To put this in perspective, all of the benefits denied to a homosexual couple of twenty years can be instantly had by a heterosexual couple that just met and got married in a drive through chapel in Las Vegas.

It is in the realm of healthcare where marriage rights may be most important. Reverend Jan Nunley, a lesbian and rector of St. Peter's and St. Andrew's Episcopal Church in Providence, Rhode Island, talked about living in Texas with her partner Denee Roy, who was diagnosed with cancer.<sup>77</sup> Roy's family barred Nunley from contact:

Decisions about Denee's care were taken away from me and given to her mother instead - a woman ignorant of medical procedures and so emotionally unstable and morally unfit that as her daughter lay dying, she conducted a torrid affair with her ex-brother-in-law, who had come to visit his niece on her deathbed.<sup>78</sup>

These are just a few examples that illustrate how denial of marriage to same-sex couples creates a vast discriminatory ripple effect that impacts many aspects of life, just as the sodomy law had a wide impact in *Lawrence*.<sup>79</sup> The rights of same-sex couples, who are similarly situated to heterosexual couples are vastly different.

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<sup>77</sup> Scott MacKay, *Legislation Left Behind In Debate On Issues Of Morality*, PROVIDENCE JOURNAL-BULLETIN (Rhode Island ), April 4, 1997, at A1.

<sup>78</sup> *Id.*

<sup>79</sup> *Lawrence*, 123 S. Ct. at 2487.

## B. DETERMINING THE STANDARD OF REVIEW

The next step in the equal protection analysis is determining the standard of review. In *Lawrence*, Justice O'Connor used a rational basis review.<sup>80</sup> When the law implicates a fundamental right, an intensified or heightened scrutiny of the law is applied. In this case, the state must provide a compelling justification for the law to discriminate.<sup>81</sup>

There is a long history of the Supreme Court holding that marriage is a fundamental right.<sup>82</sup> The real issue is whether same-sex couples are being denied this fundamental right by bans on same-sex marriage, just as interracial couples were denied the right by miscegenation statutes. As Representative Lewis (D-GA) said during the debate on DOMA, "[m]arriage is a basic human right. You cannot tell people they cannot fall in love. Dr. Martin Luther King, Jr. used to say when people talked about interracial marriage and I quote, 'Races do not fall in love and get married. Individuals fall in love and get married.'" <sup>83</sup>

Modern courts should not follow the narrow definitional

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<sup>80</sup> *Id.* at 2484.

<sup>81</sup> *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986).

<sup>82</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (applying strict scrutiny to a sterilization statute because marriage and procreation re fundamental the very existence of the race); *Loving*, 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights...Marriage is one of the 'basic civil rights of man'"); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse...it is an association for as noble a purpose as any involved in our prior decisions.").

<sup>83</sup> See *supra* note 15.

arguments made by the 1970's courts designed to deny gay rights while avoiding the "fundamental right to marry" issue.<sup>84</sup>

Instead, modern courts should, as the Hawaii court did, "reject this exercise in tortured and conclusory sophistry" that dodges the issue of marriage as a fundamental right.<sup>85</sup> Because marriage is a fundamental right, the court should examine bans on same-sex marriage under strict scrutiny to see if there is a compelling state interest being furthered by denying same-sex marriages.<sup>86</sup>

There is no guarantee a court will not define marriage as between a man and a woman, finding that a fundamental right is not impacted. A more conservative court could follow the precedent of the 1970's cases in order to deny same-sex marriage fundamental right status.<sup>87</sup> If the court does define marriage as between a man and a woman, the court will adopt a rational basis standard of review for laws prohibiting same-sex marriage.<sup>88</sup> The question then becomes, under the *Lawrence* rationale, will same-sex marriage bans fail even under the more searching rational basis as did the sodomy law in *Lawrence*, or will the ban meet the rational basis as Justice O'Connor implied it would?<sup>89</sup>

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<sup>84</sup> See cases cited *supra* note 18.

<sup>85</sup> *Baehr*, 852 P.2d at 63.

<sup>86</sup> See cases cited *supra* note 82.

<sup>87</sup> See cases cited *supra* note 18.

<sup>88</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest").

<sup>89</sup> *Lawrence*, 123 S. Ct. at 2487-2488.

In *Lawrence*, Justice O'Connor reasoned that moral disapproval was not a legitimate state interest, and therefore it was improper for the state to target homosexual sodomy but not heterosexual sodomy.<sup>90</sup> There are countless examples of how the denial of same-sex marriage is based on simple moral disapproval of homosexuals.

In the debate over DOMA, representative Coburn (R-OK) shared his reasons as to why same-sex marriage is not tolerated:

We heard a lot in the debate on the rule about discrimination. We just heard about family values. I do not think it is about any of those things. The real debate is about homosexuality and whether or not we sanction homosexuality in this country...[my district] has very profound beliefs that homosexuality is wrong...What they believe is, is that homosexuality is immoral...<sup>91</sup>

Assemblyman Dennis Mountjoy, during debate on creating domestic partnerships in California stated, "[g]ay marriage is wrong, it's an aberration to God..."<sup>92</sup> Joanne McOsker, president of Catholics for Life said, "[s]ame-sex marriage is against all laws of nature and of God...It's abnormal. We're sending a message to our young people that it's perfectly all right, and it isn't. It's a sick situation...that is not healthy, morally, physically, spiritually, and in every way."<sup>93</sup>

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<sup>90</sup> *Id.* at 2486.

<sup>91</sup> 142 CONG. REC. H7441 (Thursday, July 11, 1996) (Statement of Rep. Coburn).

<sup>92</sup> Jim Sanders, *Davis Signs Bill For Domestic Partners*, SACBEE, Sept. 20, 2003, at <http://www.sacbee.com/content/politics/story/7449511p-8392252c.html> Last visited (Mar. 5, 2004).

<sup>93</sup> Meade Kirk, *supra* note 74.

As Justice Scalia noted in his dissent in *Lawrence*, “‘preserving the traditional institution of marriage’ is just a kinder way of describing the State’s *moral disapproval* of same-sex couples. Texas’s interest in [the sodomy law] could be recast in similarly euphemistic terms: ‘preserving the traditional sexual mores of our society.’”<sup>94</sup> Taken together legislative and judicial opinion show that opposition to same-sex marriage is simply moral disapproval.

The government, in defending such a law, will say that there is a legitimate interest beyond mere moral disapproval in forbidding same-sex couples from marrying. If the legitimate state interest is encouraging procreation and child rearing in marriage, a basis on which states often rely, then it is rational to deny marriage to homosexual couples who cannot procreate.<sup>95</sup>

However, it not rational to encourage procreation by only allowing heterosexuals to marry, as accomplishing the goal in this manner is both over-inclusive and under-inclusive. Opposite-sex marriage statutes are over-inclusive because they allow many people to marry who have no desire, or cannot procreate. The court’s reasoning for allowing the over-

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<sup>94</sup> *Lawrence*, 123 S. Ct. at 2496.

<sup>95</sup> *Nelson*, 191 N.W.2d at 186 (“The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis”), *Adams*, 486 F. Supp. at 1123 (“The legal protection and special status afforded to marriage (being defined as an union of persons of different sex) has ... been rationalized as being for the purpose of encouraging the propagation of the race.”).

inclusiveness is, “[t]he alternative would be to inquire of each couple, before issuing a marriage license, as to their plans for children and to give sterility tests to all applicants, refusing licenses to those found sterile or unwilling to raise a family.”<sup>96</sup>

Notwithstanding this overly intrusive scenario, if the goal were to have procreation and child rearing within the confines of marriage, the state could still narrow the overbreadth of the marriage statutes. For example, when an obviously postmenopausal woman seeks a marriage license, the State can deny issuance of the license. The reason for denying would be that such a union goes against the purpose of marriage, which is to foster procreation within the confines of matrimony. If the real reason for marriage was to foster procreation, the State would take this minimal step.

Marriage statutes are also under-inclusive. There are no laws prohibiting unmarried people from procreating and raising children. If it is a legitimate state interest to confer rights and benefits on married couples in order to encourage them to procreate, it is equally legitimate for the state to deny benefits to people who procreate outside the state sanctioned manner.

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<sup>96</sup> *Id.* at 1124-1125.

When looking at the purpose of marriage, it is obvious that procreation and child rearing are not the reason marriage benefits exist. Many of the marriage benefits have nothing to do with children at all. For example, inheritance laws in many jurisdictions in the U.S. require that one-third of the estate be granted to the surviving spouse.<sup>97</sup> Yet, even under the most progressive inheritance scheme "a testator is free to disinherit his children."<sup>98</sup> The result being that "statutory protection afforded the disinherited surviving spouse has increased significantly in recent decades, and the protection afforded the disinherited child has diminished steadily."<sup>99</sup> This marriage benefit does not follow if the underlying reason for marriage is procreation.

Procreation and child rearing is the thin smoke screen of a "legitimate" state interest thrown up to hide the real reason the government does not want to recognize same-sex marriage: moral disapproval. There is no legitimate state interest in denying same-sex marriage under the equal protection of the *Lawrence* rationale.

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<sup>97</sup> Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 84, 100 (1994).

<sup>98</sup> *Id.* at 166.

<sup>99</sup> *Id.* at 83.

## V. POST LAWRENCE CASES

Since *Lawrence*, three state cases addressing same-sex marriage have been decided: *Standhardt*<sup>100</sup> in Arizona, *Lewis* in New Jersey,<sup>101</sup> and *Goodridge* in Massachusetts.<sup>102</sup> The courts in *Standhardt* and *Lewis* fall back on the reasoning of the 1970's courts that marriage is between a man and a woman. As *Standhardt* held, "recognizing a right to marry someone of the same-sex would not expand the established right to marry, but would redefine the legal meaning of 'marriage'."<sup>103</sup> The *Lewis* court added, "It is abundantly clear to this court...that marriage has always been considered to be a union between a man and a woman."<sup>104</sup>

The *Standhardt* court relied on the traditional definition of marriage, "as an institution involving one man and one woman" in order to decide same-sex marriage is not a fundamental right.<sup>105</sup> The court went on, using rational basis, to hold that there was no violation of equal protection because the state had a legitimate interest in promoting traditional marriage.<sup>106</sup>

The *Lewis* court, using somewhat circular reasoning, found that there was no equal protection problem with the state ban on

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<sup>100</sup> *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451 (Ariz. Ct. App. 2003).

<sup>101</sup> *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at \*1 (N.J. Super. Ct. Law Div. Nov. 5, 2003).

<sup>102</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d. 941 (2003).

<sup>103</sup> *Standhardt*, 77 P.3d at 458.

<sup>104</sup> *Lewis*, WL 23191114 at \*3.

<sup>105</sup> *Standhardt*, 77 P.3d at 460.

<sup>106</sup> *Id.* at 464-465.

same sex marriage. To begin, the court held that marriage is defined as between a man and a woman.<sup>107</sup> The court went on to state that same-sex couples were not situated similarly to opposite-sex couples seeking to enter "mixed gender marriage" because, by definition, marriage is between a man and a woman.<sup>108</sup> Since the desire of same-sex couples is not to enter a mixed gender marriage, they are dissimilar to the standard marriage seeking couple and equal protection does not apply.<sup>109</sup>

Neither the Arizona, nor the New Jersey courts followed Justice O'Connor's more searching standard of rational basis review. If both courts had followed the *Lawrence* equal protection analysis as discussed above, they would have found a violation of equal protection under the U.S. Constitution, if not their respective state Constitutions as well. In both Arizona and New Jersey, the state targeted an unpopular group, denying them the fundamental right to marry, and did so out of malice towards gays.

In *Goodridge*, the Massachusetts Supreme Court held that the equal protection component of the state Constitution required the law serve a legitimate purpose in a rational way.<sup>110</sup> Even though marriage is a "civil right" the Court applied rational

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<sup>107</sup> *Lewis*, WL 23191114 at \*22.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at \*23.

<sup>110</sup> *Goodridge*, 798 N.E. 2d. at 959-960.

review.<sup>111</sup> The court examined the state's reasons for banning same sex marriage and concluded, "The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason."<sup>112</sup>

Massachusetts justified the ban with the reasons that marriage: provides a favorable setting for procreation, provides an optimal child-rearing environment, and preserves state resources.<sup>113</sup> The state also argued that broadening marriage would destroy the institution as it historically existed.<sup>114</sup> Other states have found the same arguments rational as well.<sup>115</sup>

The Massachusetts Supreme Court did not find these reasons rational. As for the state interest in procreation being a rational reason for regulating marriage, the Court bluntly said, "[t]his is incorrect."<sup>116</sup> Married people do not have to procreate and non-married people can procreate. The Court explicitly pointed out that fertility was not a condition of getting a marriage license.<sup>117</sup> The Court, citing *Romer*, found a similarity between the "marriage is procreation" argument and Amendment 2 in Colorado, which effectively denied homosexual persons equality under the law and full access to the political process

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<sup>111</sup> *Id.* at 957.

<sup>112</sup> *Id.* at 968.

<sup>113</sup> *Id.* at 961.

<sup>114</sup> *Id.* at 965.

<sup>115</sup> See discussion *supra* Part II.A.

<sup>116</sup> *Goodridge*, 798 N.E. 2d. at 961.

<sup>117</sup> *Id.*.

simply because they were homosexual.<sup>118</sup> With the "marriage is procreation" argument, a court singles out the one difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. As the court found, banning same sex marriage "identifies persons by a single trait and then denies them protection across the board."<sup>119</sup>

Nor was it rational for the state to claim that opposite sex marriage was needed for optimal child rearing. The Court noted that Massachusetts had adopted laws for the modern family in its many forms by allowing co-parent adoption, grandparent visitation rights, and custody rights to homosexual parents, to name a few.<sup>120</sup> In fact, the Court found that denying same-sex couples marriage harmed their children by denying the enhanced income, benefits, and stability provided by marriage and that granting same-sex couples marriage rights did not harm children in opposite-sex marriages.<sup>121</sup> Thus, a ban on same-sex marriage makes no sense if one goal of marriage, as the state asserts, is to provide better care for children.

Massachusetts claimed that same-sex couples were financially independent and did not need to drain state resources by being married.<sup>122</sup> The court found that the rationale

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<sup>118</sup> *Id.* at 962.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 963.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 964.

of preserving state finances by denying marital benefits to same-sex couples did not make sense, because marital benefits to opposite-sex couples were not based on financial independence.<sup>123</sup> The Court also found that the dependents of same-sex and opposite-sex couples were just as deserving of the state-provided benefits, thus denying marriage to same-sex couples was illogical on this basis.<sup>124</sup>

Finally, the Massachusetts Supreme Court did not find that allowing same-sex couples marriages would weaken the tradition of marriage. The Court found that the plaintiffs did not want to abolish or eliminate marriage; they wanted only to be included.<sup>125</sup> Recognizing the right of same-sex partners to marry no more weakens the tradition of marriage than does allowing mixed race partners to marry.<sup>126</sup>

The analysis of the Massachusetts Supreme Court was very similar to the searching form of rational review that Justice O'Connor suggested in *Lawrence*. Since there was no rational basis for denying same-sex marriage, the Massachusetts Supreme Court did not decide if strict scrutiny was appropriate for homosexuals.<sup>127</sup> If the *Lawrence* test is used, as in *Goodridge*,

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 965.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 961.

there will be no rational basis for upholding bans on same-sex marriage.

## VI. CONCLUSION

*"Love alters not with his brief hours and weeks, but bears it out even to the edge of doom."<sup>128</sup>*

The courts of tomorrow, when deciding whether denial of same-sex marriage rights are unconstitutional, need not rely on substantive due process, nor decide if marriage is a "fundamental" right. Future courts need only use Justice O'Connor's equal protection analysis from *Lawrence*. If the court follows Justice O'Connor's analysis, they will find under the searching form of rational basis there is not a legitimate state interest in denying same-sex couples the right to marry.

Homosexuals seeking marriage licenses are situated exactly the same as heterosexuals seeking marriage licenses. Denial of same-sex marriage intrudes upon a deeply personal aspect of life, as well as denying important benefits for no reason other than moral disapproval of gays. As Justice Harlan eloquently stated, "[our Constitution] neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."<sup>129</sup> Let us hope it does not take as long

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<sup>128</sup> WILLIAM SHAKESPEARE, SONNET 116, available at <http://www.shakespeare-online.com/sonnets/116.html>, ("Let me not to the marriage of true minds admit impediments...") (Last visited Mar. 28, 2004).

<sup>129</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)

for sexual orientation to be renounced as a valid basis for repression as it did for race to escape the tyranny of separate but equal.<sup>130</sup>

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<sup>130</sup> It took 58 years from the time of *Plessy*, (standing for separate but equal) to be overruled by *Brown v. Board of Education.*, 347 U.S. 483 (1954).

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