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The Constitution Should Protect the Right to Same-Sex Marriage

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It is my submission that the Constitution should protect the right to same-sex marriage. Specifically, I contend that the Equal Protection Clause should be interpreted by the Supreme Court to prohibit the state from discriminating against same-sex persons by denying them the right to enter into the legal relationship of marriage. Marriage is a legal relationship based on commitment and intimacy. For constitutional purposes, it is a fundamental right, which "the State not only must allow, but which, always and in every age it has fostered and protected."[1] Of course, marriage has always been understood to mean a legal relationship between a man and a woman, and this is how marriage has been defined at common law and in

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1. Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring); Poe v. Ullman, 361 U.S. 497, 523 (1961) (Harlan, J., dissenting). As Justice Douglas, writing for the Court in *Griswold*, stated:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold, 381 U. S. at 486. Since marriage is a fundamental right, due process and equal protection challenges to restrictions on individuals' freedom to marry are evaluated against the compelling governmental interest standard. Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. 173, 240 (2002). While traditional restrictions on the freedom to marry, such as a prohibition on plural marriage, would satisfy this standard, *see Reynolds v. United States*, 98 U.S. 145, 168 (1879), most other restrictions on the freedom to marry would not. Thus, a ban on marriage between persons of different races, in addition to being unconstitutional as amounting to invidious racial discrimination, is also violative of due process as improperly interfering with the freedom to marry. Loving v. Virginia, 388 U.S. 1, 11-12 (1967). It is also unconstitutional for a state to prohibit a prison inmate from marrying without the permission of prison authorities, *Turner v. Safley*, 482 U.S. 78, 99-100 (1987), and to prohibit the remarriage of a divorced parent under a duty of support to a child of a prior marriage unless the parent can demonstrate that he is in compliance with an existing support order and that the child was not likely to become a public charge. Zablocki v. Redhail, 434 U.S. 374, 390-91 (1978). Finally, since a person may be validly married to only one person at a time, the right to marry includes the right to divorce, and a state is constitutionally required to permit an indigent person to bring a divorce proceeding without having to pay court fees. Boddie v. Connecticut, 401 U.S. 371, 380-81 (1971).

the marriage laws of all of the states. However, there is no logical or rational reason why marriage should be limited to opposite-sex couples. Same-sex couples can and do have the same kind of committed and intimate relationships as opposite-sex couples. They get up in the morning, go to work, take care of children if they have them–which they can do by means of artificial insemination, surrogacy, and adoption–share life's joys and problems, and unfortunately, like opposite-sex couples, sometimes break up. The only difference between same-sex couples and opposite-sex couples in committed relationships is with respect to the sex of the person to whom they make their commitment and with respect to the way in which they express their physical intimacy with each other.[2] This difference, I submit, is not a constitutionally valid reason for denying them the same right to marry that the state provides for opposite-sex couples, and therefore, the denial of that right to them is a denial of equal protection of the laws.

I will approach this matter from the perspective of the litigating lawyer who is asserting a constitutional challenge to the state's refusal to permit same-sex persons to marry. Constitutional law develops in line of growth.[3] A Supreme Court decision in one case serves as a precedent for its decisions in later cases, and constitutional rights can be extended in the line of growth. Lawyers use doctrine and precedent to expand constitutional rights.[4] The expansion of constitutional rights in the line of growth is illustrated by the expansion of the constitutional right of privacy, first recognized in *Griswold v. Connecticut*,[5] from the protection of a married

2. The 2000 Census reported 506,745 same-sex-partner households, consisting of 259,807 male-partner households and 246,938 female-partner households. *Census 2000 Special Reports: Married-Couple and Unmarried Partner Households: 2000*, Feb. 2003, Table 1. According to Census figures, 22.3% of the male-partner households and 34.3% of the female-partner households include children. *Id.*, Table 4. The 2000 Census data is discussed in Robert Gebeloff & Mary Joe Patterson, *Gays, Straights: Much in Common*, DET. FREE PRESS, Nov. 28, 2003, at 9A.

3. *See generally* Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1054 (1981) (discussing the development of constitutional doctrine in a line of growth); Robert A. Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 118-20 (1983).

4. For the litigating lawyer, the "stuff of constitutional litigation" is the Supreme Court's precedents and the constitutional doctrine that has been promulgated by the Court in prior cases. In deciding whether or not to assert a constitutional challenge to a particular law or governmental action, and in deciding on the basis of that challenge, the lawyer must look to the precedents and doctrine. The examination of precedents and doctrine will determine the viability of a particular constitutional challenge and the basis on which that challenge should be made. *See* Robert A. Sedler, *The Constitution and Personal Autonomy: The Lawyering Perspective*, 11 T.M. COOLEY L. REV. 773, 775 (1994).

5. 381 U.S. 479, 485 (1965). In *Griswold*, the state law prohibiting married couples

couple's right to use contraception in their intimate relations to the protection of a woman's right to obtain an abortion in *Roe v. Wade*.[6] In *Griswold*, the Court found a constitutional right to privacy and held that this right of privacy protected as a fundamental right the right of married couples to use contraception in their intimate relations.[7]

The Court in *Griswold* was in considerable disagreement as to the constitutional basis for the newly-proclaimed constitutional right of privacy. Douglas, writing the Court's opinion, found the right of privacy in the "penumbras" of specific constitutional provisions that reflected "privacy" values, such as the First, Third, Fourth and Fifth Amendments.[8] Goldberg, Warren and Brennan found it in the Ninth Amendment, which had never before been invoked to protect individual rights.[9] White and Harlan found that it inhered in substantive due process.[10] The doctrinal difference on the Court was resolved by one sentence in the Blackmun opinion for the Court in *Roe v. Wade*, in which he said simply that the right to privacy was

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from using contraception in their intimate relations implicated both the fundamental right of marriage and the fundamental right of reproductive freedom. *See* Sedler, *supra* note 4, 783 (1994). For a discussion of the development of these two fundamental rights, see *id.* at 783-87.

6. 410 U.S. 113 (1973). For a more complete discussion of the development of the constitutional protection of personal autonomy, see Sedler, *supra* note 4. For a detailed discussion of the development of a constitutional right to abortion from *Griswold* to *Roe*, see Robert A. Sedler, *Abortion, Physician-Assisted Suicide and the Constitution: The View from Without and Within*, 12 NOTRE DAME J. L. ETHICS & PUB. POL'Y, 529, 531-43 (1998).

7. *Griswold*, 381 U.S. at 485. Because the right of married couples to use contraception in their intimate relations involved the exercise of a fundamental right for constitutional purposes, the constitutionality of the state law prohibiting such use was evaluated under the exacting compelling governmental interest standard of review. In terms of the development of constitutional doctrine in the line of growth, *Griswold* had the effect of reviving the Court's seemingly forgotten decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942). In that case, the Court held unconstitutional on equal protection grounds an Oklahoma law providing for the compulsory sterilization of persons convicted of three felonies "involving moral turpitude," but exempting "white collar" crimes such as embezzlement, political offenses and tax law violations, from the required sterilization. *Id.* at 543. Douglas, also writing for the Court in *Skinner*, found that the compulsory sterilization requirement violated the fundamental right of "marriage and procreation," *Id.* at 541, and so applied the compelling governmental interest standard of review. If the Court gave any scrutiny at all to the classification, it could have invalidated the state law under the rational basis standard of review as being "arbitrary and irrational."

The Court subsequently held that as a matter of equal protection, the right to use contraception extended to unmarried persons as well. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

8. *Griswold*, 381 U.S. at 484-85.

9. *Id.* at 486-89 (Goldberg, J., concurring).

10. *Id.* at 499-502 (Harlan, J., concurring); *id.* at 502-06 (White, J., concurring).

"founded in the Fourteenth Amendment's concept of personal liberty."[11]

As might be expected, there has been much academic debate about *Griswold* and the constitutional basis of a right of privacy.[12] From the lawyer's standpoint, however, the academic debate about the basis of a constitutional right of privacy at the time of *Griswold* was completely irrelevant. *Griswold* had recognized a constitutional right of privacy, and in the wake of *Griswold* lawyers could, and did, use this constitutional right of privacy to challenge the constitutionality of the anti-abortion laws that existed in practically all of the states at that time.[13] If it had not been for *Griswold*, a viable constitutional basis for challenging the constitutionality of anti-abortion laws simply would not have existed at that time.[14]

The argument for the lawyers challenging the anti-abortion laws was obvious.[15] *Griswold* held that reproductive freedom was a fundamental right,[16] so that the compelling governmental interest standard of review applied. With regard to the reproductive freedom of the pregnant woman, there is no logical difference between using contraception to prevent an unwanted pregnancy from occurring and having a medical abortion to undo an unwanted pregnancy that has occurred because contraception was not used or has failed. Thus, under the compelling governmental interest standard of review, the state cannot prohibit or significantly restrict the

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11. *Roe*, 410 U.S. at 153.

12. *See, e.g.*, Robert G. Dixon, Jr., *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 BYU L. Rev. 43 (1976); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979); Michael J. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976); Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173 (1979).

13. At the time of *Roe*, thirty states, including Texas, where the *Roe* challenge was brought, had in effect laws that prohibited an abortion except where necessary to save the life of the mother. *Roe*, 410 U.S. at 118 n.2. Fourteen other states, including Georgia, the state of origin of the companion case of *Doe v. Bolton*, 410 U.S. 179 (1973), had "liberalized" abortion laws with significant regulatory restrictions, and only four states, Washington, Alaska, New York and Hawaii had repealed criminal penalties for abortions performed by a physician in the early stages of pregnancy. *Roe*, 410 U.S. at 140-41 n.37. The status of abortion was not clear in a few states. *Id.*

14. See the further discussion of this point in Sedler, *supra* note 4, at 794-96; Sedler, *supra* note 6, at 539-41.

15. The author litigated the challenge brought to the Kentucky "life-only" anti-abortion law on behalf of the American Civil Liberties Union of Kentucky. Crossen v. Attorney Gen., 344 F. Supp. 587 (E.D. Ky.1972) (three judge), *vacated and remanded by* 410 U.S. 950 (1973).

16. Griswold v. Connecticut, 381 U.S. 479, 485 (1965). This part of *Griswold* was supported by the now-revived *Skinner* and subsequent *Eisenstadt* decisions. *See* discussion *supra* note 7.

ability of a woman to obtain a medical abortion.

But, of course, there is a difference between a ban on contraception and a ban on abortion. It is difficult to see what legitimate, let alone compelling interest, a state could assert in prohibiting the use of contraception, and the state was not able to assert any such interest in *Griswold*.[17] A ban on abortion, however, advances the state's interest in protecting human life from the moment of conception. The overwhelming number of pregnancies, if uninterrupted, will result in a live birth. The lawyers for the state, in their defense of the anti-abortion laws, thus could have distinguished *Griswold* on a constitutionally principled basis; that is, on a basis that was consistent with the line of growth of existing constitutional doctrine applicable to the protection of reproductive freedom. And, staying within the analytical framework of the compelling governmental interest standard, the Court could have held that the state's interest in protecting potential human life was compelling, and that a ban on abortion was the only effective way, and thus the least drastic means of advancing that interest. The Court then, consistent with existing constitutional doctrine, could have upheld the constitutionality of the challenged anti-abortion laws.[18]

But constitutional law can also be extended in the line of growth. In *Roe v. Wade*, the Court, adopting a "stages of pregnancy" formulation, held that the state's interest in protecting potential human life does not become "compelling" until the stage of viability has been reached, so that the state could not constitutionally prohibit pre-viability abortions.[19] After the stage of viability has been reached, the state may prohibit abortion except where the abortion was necessary to protect the woman's life or health.[20] Since about 90% of the abortions in this country are performed during the first 12 weeks of pregnancy,[21] and since no ethical doctor would perform a post-viability abortion unless it is necessary to protect the woman's life or health, the effect of *Roe v. Wade* was to make abortion "available on demand."[22] In *Planned Parenthood v. Casey*,[23] the Court replaced the stages of pregnancy formulation with an undue burden formulation, but affirmed the essential holding of *Roe* that the state could not prohibit a pre-viability abortion at all or even a post-viability abortion necessary to protect the life or health of the

17. *See Griswold*, 381 U.S. at 485.

18. See the discussion of this point in Sedler, *supra* note 4, at 787-88.

19. Roe v. Wade, 410 U.S. 113, 163 (1973).

20. *Id.* at 163-64.

21. See the discussion and review of data concerning abortions in Sedler, *supra* note 6, at 543-44.

22. *Id.* at 539.

23. 505 U.S. 833 (1992).

woman.[24]

In defining the meaning of broadly-phrased and open-ended constitutional provisions such as due process and equal protection, the Court is necessarily engaged in constitutional balancing and in making value judgments. It is making value judgments as to the values that will be embodied in the concepts of due process and equal protection and is balancing the importance of individual and governmental interests in the context presented.[25] I have explained *Roe v. Wade* as a case where the Court was engaged in constitutional balancing and made a value judgment about the relative constitutional importance of the woman's interest in reproductive freedom and the state's interest in protecting potential human life in the context of state prohibitions on abortion. It made the value judgment in favor of the woman's reproductive freedom interest and thus held that the state's interest in protecting potential human life did not become compelling until the stage of viability had been reached. While it could have made the opposite value judgment, it did not, and the result is that, under the Constitution, a woman has the right to a safe and legal abortion.[26]

We turn now to the argument that the Constitution should protect the right to same-sex marriage. In fashioning a constitutional argument the litigating lawyer must make an initial decision as to what will be the strongest doctrinal basis for the claimed constitutional right.[27] In my opinion, the strongest doctrinal basis for asserting a constitutional right to same-sex marriage is found in the Fourteenth Amendment's Equal Protection Clause. I say this despite the fact that the argument will put heavy reliance on the Court's recent decision in *Lawrence v. Texas*,[28] where the Court held that as a matter of due process, the state could not prohibit oral and anal sex between same-sex persons.[29] Indeed, I see *Lawrence* as providing the same impetus to recognition of a constitutional right to same-sex marriage as *Griswold* provided to recognition of a constitutional right to abortion in *Roe v. Wade*. This is because in *Lawrence*, the Court made it unmistakably clear that the state could not justify a prohibition on oral and

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24. *Id.* at 846. See the discussion of *Roe* and *Casey* in Sedler, *supra* note 4, at 788-90.

25. See the discussion in Sedler, *supra* note 3, at 115-20.

26. See the discussion of the aftermath and societal impact of *Roe* in Sedler, *supra* note 6, at 539-45.

27. See the discussion of this point in connection with the *Roe* challenge to anti-abortion laws on due process rather than equal protection grounds in Sedler, *supra* note 4, at 792-96.

28. 123 S. Ct. 2472 (2003).

29. *See id.*

anal sex between same-sex persons on the ground that the state considered this kind of sex to be "immoral."[30] By removing morality as a permissible justification for the discriminatory treatment of same-sex persons, the Court at the same time has removed the morality justification that has been traditionally asserted for a ban on same-sex marriage. So, before developing the equal protection argument in support of a constitutional right to same-sex marriage, it is necessary to discuss the holding and rationale of *Lawrence*.

In *Lawrence*, the Court held violative of due process a Texas law making it a crime for two persons of the same sex to engage in oral or anal sex.[31] In so doing, the Court overruled its earlier decision in *Bowers v. Hardwick*,[32] where the Court, in a 5-4 decision, upheld a Georgia law prohibiting all persons from engaging in oral or anal sex.[33] However, the challenge there was brought by two gay males, and the Court's decision was based on the fact that the Constitution did not protect the right to engage in "homosexual sodomy." At the heart of *Bowers* was the Court's emphasis on the state's entitlement to prohibit sexual conduct that it considered to be "immoral." Justice White, writing for the Court, formulated the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[34] He went on to say that "[p]roscriptions against that conduct have ancient roots."[35] Chief Justice Burger, in a concurring opinion, said that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization," and that "[c]ondemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards."[36] He concluded that since there was no "fundamental right" to engage in homosexual sodomy, the rational basis standard of review applied, and that under that standard the state's legitimate interest in enforcing moral standards justified a prohibition on homosexual sodomy.[37]

In his dissenting opinion in *Bowers*, Justice Stevens maintained that the

30. *Id.* at 2483.

31. *Id.* at 2476, 2484.

32. 478 U.S. 186 (1986).

33. *Id.* at 187-89.

34. *Id.* at 190.

35. *Id.* at 192.

36. *Id.* at 196 (Burger, C.J., concurring).

37. *Id.* I understood *Bowers* as holding that sexual freedom was not a fundamental right, so that the state could constitutionally prohibit all sex between unmarried persons, on the ground that the state considered such sex to be "immoral."

Burger analysis ignored the fact that "[o]ur prior cases make two propositions abundantly clear."[38]

> First, the fact that the governing majority in a State has traditionally viewed a practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.[39]

In *Lawrence*, Justice Kennedy, writing for the Court, concluded that "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here. *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."[40]

In leading up to this conclusion, Justice Kennedy first reviewed the *Griswold* line of cases, citing *Eisenstadt* for the proposition that a ban on contraceptive use by unmarried persons impaired the exercise of their personal rights.[41] He then noted, as I pointed out earlier, that *Griswold* and *Eisenstadt* were part of the background for *Roe v. Wade*, and, coupled with *Carey v. Population Services, International*,[42] where the Court invalidated a ban on the distribution of contraceptives to minors, confirmed that the reasoning of *Griswold* could not be confined to the protection of the rights

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38. Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (footnotes and citations omitted).

39. *Id.*

40. Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003). In justifying the overruling of *Bowers*, Justice Kennedy pointed out that stare decisis was not an "inexorable command." He also made a distinction between the Court's overruling a prior decision recognizing a constitutional liberty interest, where "individual or societal reliance on the existence of that liberty interest cautions with particular strength against reversing course," and overruling a decision denying recognition to a constitutional liberty interest, such as *Bowers*, where there has not been detrimental reliance on that decision. He also noted that, "*Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its essential holding." *Id.* at 2483 (citations omitted).

41. *Id.* at 2477.

42. 431 U.S. 678 (1977).

of married adults.[43] He then launched into an attack on the rationale of *Bowers*. In defining the issue in terms of whether homosexuals had a fundamental right to engage in sodomy, the *Bowers* Court, according to Kennedy, "discloses the Court's own failure to appreciate the extent of the liberty interest at stake."[44] As he stated:

> To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.[45]

Kennedy went on to make the point that the state should not be permitted to "define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[46] Here the effect of the law was to deny gay and lesbian persons the ability to express themselves in intimate conduct with another person and so to create a more intimate personal bond. As Kennedy concluded: "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."[47]

There are three additional components of the Kennedy opinion in *Lawrence* that are relevant in support of the argument that the Constitution protects the right to same-sex marriage.[48] First, Kennedy definitely rejected

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43. *Lawrence*, 123 S. Ct. at 2477.

44. *Id.* at 2478.

45. *Id.*

46. *Id.*

47. *Id.*

48. Kennedy went to great lengths to challenge the *Bowers* majority's use of history to show that "proscriptions against [homosexual] conduct have ancient roots," contending that "the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate." *Id.* at 2478-80. There can be no doubt, however, that as an historical matter, in the United States and the Western world,

the morality justification for a ban on sex between persons of the same sex. He said that the Court in *Bowers* made the point that "for centuries there have been powerful voices to condemn homosexual conduct as immoral," and that this condemnation "has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family."[49] Justice Kennedy then went on to say:

> These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."[50]

Citing with approval Justice Stevens' position in *Bowers* that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting that practice," Justice Kennedy stated that it was now controlling.[51] *Lawrence* then firmly establishes that the state cannot constitutionally prohibit sex between same-sex persons on the ground that it is "immoral." To put it another way, the state's asserted interest in "promoting morality" is not a legitimate interest to justify a ban on sex between same-sex persons. For the same reason, as I will argue subsequently, the state's interest in "promoting morality" is not a legitimate interest to justify denying same-sex persons the right to marry.

Second, Kennedy said that the foundations of *Bowers* "have sustained serious erosion"[52] from the Court's recent decisions in *Casey*, where it affirmed the "essential holding" of *Roe v. Wade*,[53] and in *Romer v. Evans*,[54] where it held that a Colorado state constitutional provision depriving

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marriage has always been limited to one man and one woman. Justice Kennedy also noted that Burger's reference to "the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction," such as a holding of the European Court of Human Rights that laws proscribing homosexual conduct were invalid under the European Convention on Human Rights. *Id.* at 2481. The fact that same-sex marriage has been held by Canadian courts to be protected under the Canadian Charter of Rights and the likely legalization of same-sex marriage in Canada, will be discussed subsequently.

49. *Id.* at 2480.

50. *Id.* (citation omitted).

51. *Id.* at 2484.

52. *Id.* at 2482.

53. 410 U.S. 113 (1973).

54. 517 U.S. 620 (1996).

homosexual persons of protection under state anti-discrimination laws was violative of equal protection as class-based discrimination directed at homosexuals.[55] In *Casey*, the Court set forth in sweeping terms the constitutional protection of personal autonomy. *Casey*, said Justice Kennedy, "again confirmed that our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[56] And he went on to say that, "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[57] As the above discussion indicates, denying same-sex persons the right to marry denies them the right to seek autonomy with respect to the most personal of all decisions, the right to enter into a legally protected relationship with a person whom they love.

In *Romer*, said Justice Kennedy, the Court "struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause," concluding that "the provision was 'born of animosity toward the class of persons affected,' and further that it had no rational relation to a legitimate governmental purpose."[58] The Court's citation of *Romer* in *Lawrence* as eroding the foundations of *Bowers* supports the contention that discrimination against same-sex persons is not rationally related to the advancement of a legitimate governmental purpose.

This point segues into the third component of *Lawrence* that is relevant in support of the argument that the Constitution protects the right to same-sex marriage. The plaintiffs in *Lawrence* argued that the ban on anal and oral sex only between persons of the same sex was violative of equal protection.[59] The Court decided the case on due process grounds in order to make it clear that as a constitutional matter the state could not prohibit any sexual conduct between consenting adults in private.[60] In so doing, the Court expounded on the proposition that a prohibition on conduct engaged in only by homosexual persons, even one that included a prohibition on that

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55. *Id.* at 635-36.

56. *Lawrence*, 123 S. Ct. at 2481. In *Casey* the Court stated that "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

57. *Lawrence*, 123 S. Ct. at 2482.

58. *Id.* (citation omitted).

59. *Id.* at 2472.

60. *Id.* at 2482.

conduct when engaged in by heterosexual persons, was a form of discrimination against homosexual persons. In a broader sense, Justice Kennedy was explaining the relationship between liberty and equality of treatment. He stated as follows:

> Equality 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. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.[61]

By the same token, it can be contended that denying same-sex persons the right to marry solely because the way in which they physically express their intimacy differs from the way in which opposite-sex persons physically express their intimacy demeans the lives of same-sex persons. It says in effect that they are "less equal" than opposite-sex persons who wish to marry and "is an invitation to subject homosexual persons to discrimination both in the public and private spheres."[62]

It will be noted that nowhere in the Kennedy opinion is there any discussion of standards of review. As Justice Scalia points out in his dissent, the Court did not hold in *Lawrence* that the right to engage in homosexual sodomy (or for that matter in any sexual relations between unmarried persons) is a fundamental right for due process purposes, so as to render the Texas law subject to strict scrutiny.[63] And it does seem clear that insofar as standards were concerned, the Court was applying the rational basis standard of review, concluding that, "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[64] In the final analysis then, the Court in *Lawrence*, applying the rational basis standard of review, held that due

61. *Id.*
62. *Id.*
63. *Id.* at 2492 (Scalia, J., dissenting).
64. *Id.* at 2484.

process protects the right of consenting adults to engage in sexual activity in private, and that the state has no legitimate interest in prohibiting that conduct on the ground that it considers it to be "immoral."

This brings us to the concurring opinion of Justice O'Connor. Justice O'Connor, who was part of the majority in *Bowers*, was unwilling to overrule that case.[65] She based her decision on equal protection grounds, focusing on the fact that the law discriminated between same-sex and opposite-sex persons with respect to permissible sexual activity.[66] For the lawyer claiming that the Equal Protection Clause prohibits the state from denying same-sex persons the right to marry, considerable guidance can be obtained from Justice O'Connor's opinion. Justice O'Connor began by explaining the operation of the rational basis standard of review for equal protection purposes.[67] She noted that under this standard of review, economic and tax legislation will usually be upheld.[68] But under rational basis review, said O'Connor, the Court has held that some objectives, "such as 'a bare . . . desire to harm a politically unpopular group'"[69] are not legitimate state interests. In that situation, she said, the Court has applied a "more searching form of rational basis review to strike down such laws under the Equal Protection Clause."[70] Further, she said, the Court has been more likely to apply rational basis review to hold a law unconstitutional where it "inhibits personal relationships."[71] In O'Connor's view, the Texas law was unconstitutional because it was targeted against homosexual persons as a class and reflects moral disapproval of homosexual persons as a class. As she stated:

> Moral 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 . . . to justify a law that discriminates among groups of persons.
>
> Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of

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65. *Id.* at 2484 (O'Connor, J., concurring).

66. *Id.*

67. *Id.*

68. *Id.* at 2484-85 (O'Connor, J., concurring).

69. *Id.* at 2485 (O'Connor, J., concurring) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

70. *Id.*

71. *Id.* at 2485.

> disadvantaging the group burdened by the law."[72]

Since she found that the Texas law was "'born of animosity toward the class of persons affected'"[73] and discriminates against homosexual persons by "'making the conduct that defines the class criminal,'"[74] she held that it was violative of equal protection.[75]

Both the Kennedy and O'Connor opinions make it clear that the case did not involve the constitutionality of other forms of discrimination against homosexual persons, such as denying same-sex persons the right to marry. Kennedy observed that the case did not involve "whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[76] And O'Connor specifically stated:

> That this law as applied to private consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike 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.[77]

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72. *Id.* at 2486 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

73. *Id.* (quoting *Romer*, 517 U.S. at 634).

74. *Id.* (quoting *Romer*, 517 U.S. at 641 (Scalia, J., dissenting)).

75. *Id.* at 2487.

76. *Id.* at 2484.

77. *Id.* at 2487-88 (O'Connor, J., concurring). In a scathing dissent, Justice Scalia argued that society's belief that certain forms of sexual behavior are "'immoral and unacceptable'" is a rational basis for prohibiting that conduct. *Id.* at 2495 (Scalia, J., dissenting) (quoting Bowers v. Hardwick, 478 U.S. 186, 196 (1986)). The Court's reasoning in rejecting this argument, said Scalia, "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples." *Id.* at 2496. He went on to say that "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Id.* (Scalia, J., dissenting) (quoting ante, at 2488 (O'Connor, J., concurring)). However, the lawyer arguing that the Constitution protects the right to same-sex marriage would not rely on the hyperbolic language in Justice Scalia's dissent as support for that argument. And the lawyer for the state, attempting to assert a legitimate interest advanced by the prohibition on same-sex marriage, would certainly disagree that this interest is "just a kinder way of describing the State's *moral disapproval* of same-sex couples."

While *Lawrence*, of course, did not indicate a disposition on the part of the Court to hold that a ban on same-sex marriages is unconstitutional, nonetheless, as stated earlier, the lawyer asserting the constitutional challenge to such a ban would put heavy reliance on *Lawrence*. First and most important, the Court in *Lawrence* removed moral disapproval as a permissible justification for the discriminatory treatment of same-sex persons and thereby has removed the morality justification that has been traditionally asserted to justify a ban on same-sex marriages. As O'Connor emphasized, the state will have to assert some other reason to support its maintenance of the traditional institution of marriage. And the fact that the institution of marriage has traditionally been limited to opposite-sex persons is not in and of itself a legitimate reason for maintaining it that way. Rather the state will have to assert an independent interest, apart from tradition, for doing so.

Second, both the Kennedy and O'Connor opinions in *Lawrence* recognize the legitimacy of same-sex relationships and the human dignity of persons who choose to enter into them. This relationship, said Kennedy, "is within the liberty of persons to choose without being punished as criminals."[78] O'Connor said that the state could not discriminate against homosexual persons by "making the conduct that defines the class criminal."[79] In light of *Lawrence*, the state cannot justify the differential treatment of persons in same-sex relationships solely because those relationships are different from opposite-sex relationships. As a result of *Lawrence*, the Constitution protects all intimate relationships, homosexual as well as heterosexual.

Third, both the Kennedy and O'Connor opinions stress the constitutional importance of personal relationships. O'Connor pointed out that the Court has been more likely to hold a law unconstitutional where it "inhibits personal relationships."[80] Kennedy went further in relating same-sex relationships to the constitutional protection of personal autonomy, a component of which is the right to marry. In referring to the constitutional protection of personal autonomy, Kennedy said that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[81] Since marriage has long been held to be a fundamental right for constitutional purposes, and since same-sex persons can benefit from the institution of marriage in the same way as opposite-sex

78. *Id.* at 2478.

79. *Id.* at 2486 (O'Connor, J., concurring) (quoting *Romer*, 517 U.S. at 633 (Scalia, J., dissenting)) (internal quotation marks omitted).

80. *Id.* at 2485.

81. *Id.* at 2482.

persons, it can be contended that the state should have to assert a very important justification for denying same-sex persons the same right to enter into the marriage relationship that it affords to opposite-sex persons.

Finally, *Lawrence* reinforces the holding of *Romer*, where the Court struck down as "class-based legislation directed at homosexuals" a state constitutional provision depriving homosexual persons of protection under state anti-discrimination laws.[82] In *Lawrence*, Kennedy, who also authored the Court's opinion in *Romer*, asserted the right of homosexual persons to equality of treatment and the right to be free from irrational discrimination. He noted, "Where homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres."[83]

The above analysis of *Lawrence* and the reinforcement of *Romer* in *Lawrence* indicate the essential elements of the constitutional argument in favor of same-sex marriage. One. Marriage is a very important individual interest, rising to the level of a fundamental right where opposite-sex persons are involved. Same-sex persons can derive the same benefits as opposite-sex persons from being permitted to enter into the institution of marriage. The right to enter into the institution of marriage reflects the exercise of personal autonomy, which is strongly protected under the Constitution. Same-sex couples can and do have the same kind of committed and intimate relationships as opposite-sex couples. The only difference is with respect to the sex of the person to whom they make their commitment and the way in which they express their physical intimacy with each other, and *Lawrence* holds that the state cannot prohibit people from entering into these relationships.

Two. Under the Equal Protection Clause, same-sex persons have the right to equality of treatment and cannot be subject to irrational discrimination by the state. Under *Lawrence*, the state cannot discriminate against them in any way, including by denying them the right to marry, because of moral disapproval of their relationship.

Three. The state must assert an important interest to justify denying same-sex persons the same right to marry as it provides to opposite-sex persons. If the state cannot assert such an interest, the denial to same-sex persons of the right to marry constitutes irrational discrimination, in violation of the Equal Protection Clause.

The first two components of the argument are fully supported by *Lawrence* and *Romer*. This being so, the constitutional result will depend

82. *Id.* at 2474 (citing *Romer*, 517 U.S. at 624).
83. *Id.* at 2482.

on whether the state can assert a sufficiently important interest to justify its across the board denial to same-sex persons of the right to marry.

In evaluating the constitutional importance of the interest asserted by the state, it is necessary to analyze the operation of the rational basis standard of review where the state discriminates against persons on the basis of their membership in an identifiable group. Here I want to expand on Justice O'Connor's discussion of this point in *Lawrence*. She says that the Court has applied "a more searching form of rational basis review"[84] where the law is motivated by "'a bare . . . desire to harm a politically unpopular group.'"[85] She illustrates this point by four cases: *Department of Agriculture v. Moreno*,[86] invalidating as discrimination against "hippies" a provision of the federal food stamp law denying food stamps to an otherwise eligible households containing unrelated individuals; *Eisenstadt v. Baird*,[87] invalidating a state law prohibiting the distribution of contraceptives to unmarred persons; *Cleburne v. Cleburne Living Center*,[88] striking down a city's refusal to issue a permit for a group home for retarded persons because of hostility to their living in the neighborhood; and *Romer*. She also refers to *Plyer v. Doe*,[89] where the majority opinion applied rational basis to invalidate a state law denying a free public education to illegal alien children.

The Court's application of the rational basis standard of review in these cases, I would submit, must be understood in terms of the Court's underlying value judgment about the justification for the particular form of discrimination practiced against the particular group. When the Court first dealt with the constitutional permissibility of gender-based discrimination in *Reed v. Reed*,[90] it apparently was applying the rational basis standard of review.[91] However it made a value judgment in *Reed*, which it confirmed two years later in *Frontiero v. Richardson*,[92] that the government could not justify gender-based classifications on the basis of stereotyped assumptions about men and women and their respective societal roles, even though those assumptions may have been objectively reasonable in light of the societal

84. *Id.* at 2485 (O'Connor, J., concurring).

85. *Id.* (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

86. 413 U.S. 528 (1973).

87. 405 U.S. 438 (1972).

88. 473 U.S. 432 (1985).

89. 457 U.S. 202 (1982).

90. 404 U.S. 71, 75-76 (1971).

91. *Id.* at 76. It was only in the later case of *Craig v. Boren*, 429 U.S. 190 (1976), that the Court specifically held that the constitutionality of gender-based classifications was to be evaluated under the heightened scrutiny of the important and substantial relationship test.

92. 411 U.S. 677, 682 (1973).

situation of women compared to men.[93] In *Reed*, the Court held unconstitutional a state law preferring males to females when two persons were otherwise equally entitled to be the administrator of an estate. The state contended that the purpose of the law was to avoid one class of contests over the appointment of administrators and that the legislature might reasonably have concluded that, in general, men are more qualified to act as an administrator than women.[94] The Court rejected this justification as being constitutionally permissible, in stating that, "[t]o give a mandatory preference to members of either sex over members of the other sex, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by Equal Protection."[95] This legislative choice was not "arbitrary" in the sense of being objectively unreasonable, because at that time men were more likely to be engaged in the workforce while women were more likely to be staying at home, so the legislature could reasonably conclude that in general men were more qualified to act as administrators.[96] It was "forbidden by equal protection," because the Court made the value judgment that the purported administrative convenience, as it relates to stereotyped assumptions about men and women and their respective societal roles, was a constitutionally insufficient justification for a gender-based classification.[97] In *Frontiero*, the gender-based classification was challenged only on the basis of its over-inclusiveness.[98] All servicewomen who could show that they were the primary breadwinner in the marriage received a dependency allowance. All servicemen received the dependency allowance automatically.[99] The government argued that the over-inclusive classification advanced the interest of administrative convenience, since the government could reasonably assume that the overwhelming number of servicemen were the primary breadwinners in their marriage while the overwhelming number of servicewomen were not.[100] The Court rejected this justification, stating that, "[any] statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, [violates equal protection]."[101]

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93. *Reed*, 404 U.S. at 76-77.
94. *Id.* at 76.
95. *Id.*
96. *Id.*
97. *Id.* at 76-77.
98. Frontiero v. Richardson, 411 U.S. 677, 679 (1973).
99. *Id.* at 678-79.
100. *Id.* at 681-82.
101. *Id.* at 690.

The Court made this value judgment about administrative convenience and stereotyped assumptions precisely because it was these "gross, stereotyped distinctions between the sexes"[102] that had put women in a subordinate role in society. Since at the time these stereotyped assumptions of *Reed* and *Frontiero* were true for the great majority of men and women living in American society, gender-based classifications would almost always be objectively reasonable, since they would almost always advance the administrative convenience interest. This is why they were so pervasive. If the Court then held that administrative convenience was a sufficient justification for a gender-based classification, it would have been legitimatizing and perpetuating the present consequences of a long history of societal discrimination. In light of the value judgment the Court had made, administrative convenience could not be a "legitimate" governmental interest to justify a gender-based classification, and any such classification justified in terms of administrative convenience would be struck down as "arbitrary."[103]

The Court likewise made a value judgment about the wrongfulness of discrimination against out-of-wedlock children, when, applying the articulated rational bass standard of review, it invalidated most of the traditional forms of discrimination against them. In *Levy v. Louisiana*,[104] the Court, in invalidating a state law denying out-of-wedlock children the right to bring a wrongful death action for the death of their mother, held for the first time that out-of-wedlock children could not constitutionally be singled out for disparate treatment solely because of their status, as had previously been assumed. The assumption on which discrimination against out-of-children was predicated was that rights dependent on or derived from family relationships could be accorded only to relationships based on marriage. All relationships formed or created outside of marriage, including the parent-child relationship, were "illegitimate" and, for that reason, could be denied legal recognition.[105] The value judgment that the Court made was that the interest of the state in encouraging and preserving marriage as the basis of legal family relationships did not justify the discriminatory treatment of out-of-wedlock children. This is because the children were not responsible for their status and their status bore no relationship to their ability to participate

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102. *Id.* at 684.

103. As the Court stated in *Craig v. Boren*: "Decisions following *Reed* . . . have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications." Craig v. Boren, 429 U.S. 190, 198 (1996).

104. 391 U.S. 68 (1968).

105. *Id.* at 70.

in and contribute to society.[106] As the Court stated, in a later application of *Levy*:

> [the] status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation of the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.[107]

In light of this value judgment, it followed that most of the traditional forms of discrimination against out-of-wedlock children were "arbitrary and irrational" and hence unconstitutional.[108]

In *Cleburne v. Cleburne Living Center, Inc.*,[109] the Court carefully considered the appropriate standard of review under which to evaluate classifications on the basis of mental retardation, and concluded that the standard should be rational basis.[110] But the Court went on to say that under that standard, the mentally retarded would be protected from "invidious discrimination," and holding in the case before it, that a city could not deny a license to a group home for retarded persons because of community prejudice and "undifferentiated fears."[111]

As we look to the results in the earlier cases involving gender discrimination and discrimination against out-of-wedlock children, as well as the result of *Cleburne*, we see that the Court's application of the rational

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106. *Id.* at 72.

107. Weber v. Aetna Cas. and Sur. Co., 406 U.S. 164, 175 (1972) (applying the precedent of *Levy*, by the fact that in *Weber*, the Court invalidated a law denying dependent, unacknowledged out-of-wedlock children recovery of workers' compensation for the death of their father).

108. *See* Clark v. Jeter, 486 U.S. 456 (1988) (holding that discrimination against out-of-wedlock children is to be evaluated under the heightened scrutiny of the important and substantial relationship test).

109. 473 U.S. 432 (1985).

110. *Cleburne*, 473 U.S. at 446. The Court concluded that heightened scrutiny was not necessary or appropriate. This was because: (1) Mental retardation covered a large and diverse group with different treatment needs; (2) There has been a positive response to the problems of mental retardation, which "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary"; (3) The mentally retarded did not constitute a politically powerless group; (4) There was no principled way of distinguishing the mentally retarded from other groups having similar disabling characteristics. *Id.* at 443–46.

111. *Id.* at 449.

basis standard of review to evaluate discrimination against identifiable groups is strongly influenced by the Court's underlying value judgments about the justification for the particular form of discrimination practiced against the particular groups. The Court made the same kind of value judgment in *Romer v. Evans*[112] when it first dealt with a constitutional challenge to discrimination on the basis of sexual orientation. Applying the rational basis standard of review, the Court held that a Colorado state constitutional provision depriving homosexual persons of protection under state anti-discrimination laws was in fact in violation of the Equal Protection Clause.[113] Writing for the Court, Justice Kennedy, who also authored the Court's opinion in *Lawence*, cited *Moreno* for the proposition that "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[114] He went on to state that this was a constitutional provision which identifies persons by a single trait and then denies them protection across the board, and "it is not within our constitutional tradition to enact laws of this sort."[115] He concluded the following: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[116] In *Romer* then, we see the Court applying the rational basis standard of review to invalidate this form of discrimination against homosexual people.

The Scalia dissent in *Romer* is even more significant than his dissent in *Lawrence*. In *Romer*, he argued that a political majority should be able to wage a "culture war" against homosexuality, and that the Court should not take sides in this "culture war."[117] But the Court has done so, holding in *Romer* that the state cannot discriminate against homosexuals because of hostility to them as a group, and holding in *Lawrence* that the state cannot prohibit oral and anal sex between same persons on the ground that it considers that kind of sex to be "immoral." Thus, whenever the state discriminates on the basis of sexual orientation, it must demonstrate that the discrimination is rationally related to the advancement of a legitimate state interest. The Court will evaluate the validity of the asserted state interest with reference to its value judgment that the state cannot discriminate against homosexual persons because of hostility toward them as a group or because of the belief that they are engaging in "immoral" conduct.

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112. 517 U.S. 620 (1996).
113. *Id.* at 635-36.
114. *Id.* at 634.
115. *Id* at 633.
116. *Id.*
117. *Id.* at 652 (Scalia, J., dissenting).

At this point I will turn to the precise argument that I would make as a litigating lawyer asserting a constitutional challenge to the refusal of an American state to permit same-sex persons to marry. The claim would be that the denial of the right to marry to same-sex persons, a right that is accorded to opposite-sex persons, deprives same-sex couples of equal protection of the laws. The two essential components of the argument are: (1) that the right to marry is a very important individual interest, and same-sex persons can benefit from the institution of marriage in the same way as opposite-sex persons; and (2) that the state has no legitimate interest in denying the right to marry to same-sex persons.

As a litigating lawyer, I would look first to see if I can find any reported cases involving a constitutional challenge to a ban on same-sex marriages. Looking at these cases would help me shape my own constitutional argument and anticipate the state's argument in trying to defend the ban on same-sex marriage. At this point in time, I would find two sets of cases: (1) the decisions of the Ontario Court of Appeals and the British Columbia Court of Appeals, Canadian intermediate appellate courts, holding that Canada's ban on same-sex marriages violates the equal protection clause of the Canadian Charter of Rights;[118] and (2) a decision of the Arizona Court of Appeals, an intermediate appellate court, holding that the state's ban on same-sex marriage did not violate the federal or state constitutions,[119] and a decision of the Massachusetts Supreme Court, holding, over a strong dissent, that the state's ban on same-sex marriage was violative of the state constitution.[120] The Canadian decisions and the majority opinion of the Massachusetts Supreme Court follow the same lines. So do the decision of the Arizona Court of Appeals and the dissenting opinion in the Massachusetts Supreme Court. Thus, all of these decisions would be helpful to me in a fashioning my arguments and in anticipating the state's argument

118. Halpern v. Toronto, [2003] 65 O.R.3d 161 (2003); EGALE Canada, Inc. v. Canada, 15 B.C.L.R.4th 226 (2003). Canada has a unified court system, in which the same court decides all questions of federal and provincial law. In Canada, marriage is a federal power. It is possible that in the wake of these decisions, the Canadian government will seek a change of the marriage law in Parliament to guarantee all Canadians the right to same-sex marriage. *See id.*

119. Standhardt v. Superior Court, 77 P.3d 451 (Ariz. App. 2003).

120. Goodridge v. Dep't of Mental Health, 798 N.E.2d 941 (Mass. 2003). The plaintiffs in that case sought a declaratory judgment that their exclusion from access to civil marriage violated the Massachusetts Constitution. The court granted the declaratory judgment, but then stayed entry of that judgment for 180 days "to permit the Legislature to take action as it may deem appropriate in light of this opinion." *Id.* at 970. As to subsequent developments in Massachusetts, see *infra* note 153.

in defense.[121]

Let me begin with the decision of the Ontario Court of Appeals, holding that denying same-sex persons the right to marry violated equal protection provision of the Canadian Charter of Rights. The court first noted that the claim involved marriage solely as a legal institution, and not marriage as a religious or social institution.[122] It then pointed out that Parliament and the provincial legislatures "have built a myriad of rights and obligations around the institution of marriage," that the marriages of opposite-sex couples are formally recognized by law,[123] and that denying same-sex couples the same right constitutes discrimination on the basis of sexual orientation.[124] The court found that the differential treatment between opposite-sex couples and same-sex couples with respect to the right to marry imposes a burden upon, or withholds a benefit from, the claimants in a manner that reflects the stereotypical application of presumed group or personal characteristics, or that otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.[125]

The parts of the *Halpern* opinion that are most relevant for the argument in support of a constitutional right to same-sex marriage are those that reject the arguments that the government set forth to justify the ban.[126]

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121. As a litigating lawyer, I would be bringing the suit in federal court with the expectation that it would ultimately come before the Supreme Court. Thus, the Canadian and state court decisions would merit only a footnote reference. The Canadian decisions, however, would serve another function. Those decisions and the possible subsequent amendment of the Canadian marriage law to permit same-sex persons to marry mean that same-sex marriage will exist in our neighbor to the north, and so suggest that it would not be "too far out" for same-sex marriage to exist in the United States as well.

122. *Halpern*, 65 O.R.3d at 177.

123. *Id.* at 181.

124. *Id.*

125. *Id.* at 182.

126. Constitutional analysis under the Canadian Charter of Rights is structurally very different from constitutional analysis under the United States Constitution. Canadian constitutional jurisprudence does not distinguish between fundamental and non-fundamental rights: all rights under the Charter are in theory entitled to the same degree of constitutional protection. The first part of the constitutional inquiry is whether the law infringes on a right guaranteed by the Charter. If so, then the court proceeds to the second part of the inquiry, which is whether the infringement can be justified as a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights, sec.1. *See* Robert A. Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191 (1984); Robert A. Sedler, *The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States: A Comparative*

The first justification was, as we will see, the same one advanced by the Arizona Court of Appeals in upholding the ban on same-sex marriage: marriage can be limited to two people who have the ability to procreate children.[127] The Canadian government argued that "[t]he concept of marriage—across time, societies and legal cultures—is that of an institution to facilitate, shelter and nurture the unique union of a man and woman who, together, have the possibility to bear children from their relationship and shelter them within it."[128] The court's reply to this justification was two-fold. First, while "only opposite-sex couples can 'naturally' procreate, same-sex couples can choose to have children by other means, such as adoption, surrogacy and donor insemination."[129] In this connection, it should be noted that opposite-sex couples likewise can and do choose to have children by other means, such as adoption, surrogacy and donor insemination. In today's world then, couples, whether same-sex or opposite-sex, can have children by means other than sexual intercourse, and there is no longer any necessary connection between sexual intercourse and having children.

Second, "no one . . . [was] suggesting that procreation and childrearing are the only purposes of marriage, or the only reasons why couples choose to marry."[130] The *Halpern* court went on to find that:

> [i]ntimacy, companionship, societal recognition, economic benefits, the blending of two families, to name a few, are other reasons that couples choose to marry . . . . same-sex couples are capable of forming 'long, lasting, loving and intimate relationships.' Denying same-sex couples the right to marry perpetuates the contrary view, namely, that same-sex couples . . . are not worthy of the same respect and recognition as opposite-sex relationships.[131]

A final justification advanced by the Canadian government was that the "rational connection for the opposite-sex nature of marriage is 'self-evident', considering its universality and its effectiveness in bringing the

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Analysis, 20 CASE W. RES. J. INT'L. L. 577 (1988) (discussing the Canadian Charter of Rights at an early stage of its development).

127. *Halpern*, 65 O.R.3d at 185-86; Standhardt v. Superior Court, 77 P.3d 451, 463-64 (Ariz. App. 2003).

128. *Halpern*, 65 O.R.3d at 185-86.

129. *Id.* at 187. The court also noted that, "An increasing percentage of children are being conceived and raised by same-sex couples."

130. *Id.*

131. *Id.*

two sexes together, in sheltering children, and in providing a stable institution for society."[132] The court replied that the ban on same-sex marriage was not rationally connected to the encouragement of procreation because it was both over-inclusive and under-inclusive.[133] "The ability to 'naturally' procreate and the willingness to raise children are not prerequisites of marriage for opposite-sex couples."[134] Many opposite-sex couples are either "unable to have children or choose not to do so," and conversely, the ban on marriage "excludes same-sex couples that have and raise children."[135] The court also noted that while marriage has indeed been a stabilizing and effective institution, the same-sex couples were not seeking to abolish marriage, rather they were seeking access to it, and marriage would be no less a stabilizing institution if it were expanded to include same-sex couples.[136] The *Halpern* court concluded that denying same-sex persons the right to marry could not be justified and deprived them of equality on the basis of sexual orientation.[137]

The decision of the Massachusetts Supreme Court holding that the state's ban on same-sex marriage violated the due process and equal protection clauses of the Massachusetts Constitution follows the same lines of the decision of the Ontario Court of Appeals. Being an American state court, however, its analysis of the constitutional question began with the matter of standards of review. The court held that the rational basis standard of review was applicable, and that the ban could not withstand rational basis scrutiny, because the state "has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples."[138] The court began by describing marriage as a "social institution of the highest importance,"[139] and emphasizing the social and legal benefits that flow from marriage.[140] The state asserted three justifications for the ban on same-sex marriage: "(1) providing a 'favorable setting for procreation;' (2) ensuring the optimal setting for childrearing, which the department defines as a 'two-parent family with one parent of each sex;' and (3) preserving scarce

132. *Id.* at 194.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 200.
138. Goodridge v. Dep't of Mental Health, 798 N.E.2d 941, 948 (Mass. 2003). The court found that the ban violated both the due process and equal protection guarantees of the Massachusetts Constitution, noting that in this case the two constitutional concepts overlapped.
139. *Id.* at 954.
140. *Id.* at 954-55.

state and private financial resources."[141]

In rejecting the first justification, the court pointed out that the legal institution of marriage was based on the exclusive and permanent commitment of the marriage partners to one another, not on the begetting of children.[142] It went on to say that the state affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or partner is heterosexual, homosexual, or bisexual.[143] For these reasons, this justification was not rationally related to the ban on same-sex marriage. In rejecting the second justification of "optimal setting" for raising children, the court noted that while protecting the welfare of children was a paramount state policy, restricting marriage to opposite-sex couples "cannot plausibly further this policy."[144] Not only had the state "responded supportively to 'the changing realities of the American family, and "moved vigorously to strengthen the modern family in its many variations,"[145] but the state "has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children."[146] In addition, the state conceded that people in same-sex couples may be "excellent" parents, and the court noted that the task of childrearing for same-sex couples "is made infinitely harder by their status as outliers to the marriage laws."[147] For these reasons, there was no rational relationship between the ban on same-sex marriage and the justification of protecting the "optimal" child rearing unit.[148] The "preserving resources" justification was premised on the assumption that same-sex couples were more financially independent than married couples and thus less needy of "public marital benefits."[149] This justification was completely irrational, since it ignored the fact that many same-sex couples had children, and since the marriage laws did not condition the receipt of "public marital benefits" on a showing of need.[150]

Finally, the court responded to the argument developed in some of the

141. *Id.* at 961.
142. *Id.*
143. *Id.* at 962.
144. *Id.*
145. *Id.* at 963.
146. *Id.*
147. *Id.*
148. *Id.* at 964.
149. *Id.*
150. *Id.*

amici briefs that broadening civil marriage to include same-sex couples would trivialize or destroy the institution of marriage as it has historically been fashioned. As did the Ontario Court of Appeals, it found that a change in the definition of marriage would not "disturb the fundamental value of marriage in our society," since the plaintiffs did not want to abolish marriage, but to be permitted to join in it.[151] As the court stated:

> If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.[152]

Since the state could not advance any constitutionally adequate reason for denying civil marriage to same-sex couples, the ban violated the equal protection and due process clauses of the state constitution.[153]

The Arizona Court of Appeals, in contrast, upheld the state's ban on same-sex marriage as being rationally related to the state's interest "in encouraging procreation and child-rearing within the marital relationship."[154] What is most interesting about the opinion overall is its tone. There is none of the hostility toward homosexuality that was so evident in the White and Burger opinions in *Bowers* and in the Scalia

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151. *Id.* at 965.

152. *Id.*

153. The court stayed the decision for 180 days to afford the legislature the opportunity to conform the existing marriage statutes to the provisions of its decisions. In the interim a bill was introduced in the state senate that would preserve marriage as an institution exclusively for opposite-sex couples, but recognize civil unions for same-sex couples and provide them with "all the same benefits, protections, rights and responsibilities under law as are granted to spouses in a marriage." In response to a request by the Senate for an advisory opinion as to whether the proposed bill would satisfy state constitutional requirements, the court advised that it would not, because "[t]he bill maintains an unconstitutional, inferior, and discriminatory status for same-sex couples." Opinions of the Justices to the Senate, 2004 Mass. LEXIS 35 at *18 (Mass. Sup. Ct.), Feb. 3, 2004. The legislature has since proposed an amendment to the Massachusetts Constitution that would incorporate the provisions of the civil marriage bill. However, the proposed amendment must pass another session of the legislature, and then be approved by the voters, so it could not go into effect until 2006. As of May 17, 2004, coincidentally the date of the fiftieth anniversary the United States Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), same-sex persons have been permitted to marry in Massachusetts.

154. Standhardt v. Superior Court, 77 P.3d 451, 463-64 (Ariz. App. 2003)

dissents in *Romer* and *Lawrence*. This is not surprising, since after *Lawrence*, the state could not try to justify the ban on the ground that it considered same-sex marriage to be "immoral." Rather the court emphasizes the deference that it must give to legislative judgment under the rational basis standard and its reluctance to use the Constitution to resolve such a controversial question. It is almost as if the court is saying to the same-sex couple: "We recognize your humanity, and maybe the legislature will allow you to formalize your relationship in a civil union, or even at some time in the future in the institution of marriage, but we can't do anything for you now as a constitutional matter." This is very similar to the position taken by the dissenters on the Massachusetts Supreme Court: any change in the nature of the institution of marriage must come from the legislature and the court will not require it as a constitutional matter.[155]

As in the Massachusetts case, the plaintiffs in *Standhardt* asserted both a due process and equal protection challenge, the court's analysis was the same for both challenges,[156] and the court held that discrimination on the basis of sexual orientation is evaluated under the rational basis standard of review.[157] Under that standard, the law is presumed constitutional, so the challengers had the burden of proving that it was not "related to any conceivable legitimate state interest."[158] The court held that it would uphold the law if there is "a 'reasonable, even though debatable' basis for [its] enactment."[159] By formulating the rational basis standard of review in this way, the *Standhardt* court made it clear that it was going to uphold the ban. Its application of the rational basis standard here clearly differed from the way that the United States Supreme Court applied rational basis in *Romer* and *Lawrence*. The court accepted the state's "marriage and procreation" argument:

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155. In that case, Justice Cordy concluded his dissent as follows:

> [t]his case is not about government intrusions into matters of personal liberty. It is not about the rights of same-sex couples to choose to live together or to be intimate with each other, or to adopt and raise children together. It is about whether the State must endorse and support their choices by changing the institution of civil marriage to make its benefits, obligations, and responsibilities applicable to them. While the courageous efforts of many have resulted in increased dignity, rights, and respect for gay and lesbian members of our community, the issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative not judicial action.

Goodridge v. Dep't of Mental Health, 798 N.E.2d 941,1004-05 (Mass. 2003) (Cordy, J., dissenting).

156. *Standhardt*, 77 P.3d at 454, 464.

157. *Id.* at 460-61.

158. *Id.* at 461.

159. *Id.*

> The State contends it has a legitimate interest in encouraging procreation and child-rearing within the stable environment traditionally associated with marriage, and that limiting marriage to opposite-sex couples is rationally related to that interest . . . . Because the State's interest in committed sexual relationships is limited to those capable of producing children, it contends it reasonably restricts marriage to opposite-sex couples.[160]

The same-sex couple here responded to this argument in the same way as the same-sex couples in the Canadian cases, arguing that "(1) opposite-sex couples are not required to procreate in order to marry, and (2) same-sex couples also raise children, who would benefit from the stability provided by marriage within the family."[161] The court responded by invoking rational basis and deference to legislative judgment: "However, as the State notes, '[a] perfect fit is not required' under the rational basis test, and we will not overturn a statute merely because it is not made with 'mathematical nicety, or because in practice it results in some inequality.'"[162] The court also found that "[a]llowing all opposite-sex couples to enter marriage . . . regardless of their willingness or ability to procreate, does not defeat the reasonableness of the link between opposite-sex marriage, procreation, and child-rearing."[163] The court supplied three reasons for its finding: (1) privacy concerns would preclude the state from asking the opposite-sex couples about their intention to have children before issuing a license,[164] (2) "in light of medical advances affecting sterility, the ability to adopt, and the fact that intentionally childless couples may ultimately choose to have a child or have an unplanned pregnancy," it would be nearly impossible for the state to identify couples who would never bear or raise children,[165] and (3) "because opposite-sex couples have a fundamental right to marry, excluding such couples from marriage could only be justified by a compelling state interest . . . ."[166]

The first fallacy in the court's reasoning here is that the same-sex couple is not seeking to prevent opposite-sex couples from marrying; the couple is merely seeking the same access to marriage provided to opposite-sex couples. The second fallacy is that precisely because opposite-sex couples can have children by insemination, adoption or surrogate parenting,

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160. *Id.*
161. *Id.* at 462.
162. *Id.*
163. *Id.*
164. *Id.* (citation omitted).
165. *Id.*
166. *Id.* (citation omitted).

they are no different from same-sex couples, who can have children in the same manner. This point completely undercuts the "marriage and procreation" justification for the ban on same-sex marriage. Since both opposite-sex couples and same-sex couples can have children by means other than sexual intercourse, there is no logical "parenting" reason for denying same-sex persons the same right to marry granted to opposite-sex persons. These were the positions taken by the Canadian and Massachusetts courts in holding that there was no constitutionally valid justification for the ban on same-sex marriage.

The *Standhardt* court acknowledged that while same-sex couples may also have children (and as stated above that opposite-sex people like same-sex people sometimes have children by means other than sexual intercourse), only opposite-sex couples can have children by sexual intercourse, and the state could decide that "sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships."[167] It is difficult to see any logical connection here between procreation and committed long-term relationships. Since, as the court recognizes, opposite-sex couples in committed, long-term relationships sometimes have children without procreation, same-sex couples who have children without procreation can also remain in committed long-term relationships.[168] What the court really seems to be talking about is responsible parenting, and the court does not suggest, nor could it, that there is any demonstrable connection between responsible parenting and the manner in which parenting was achieved.

Finally, the *Standhardt* court acknowledges that "[c]hildren raised in families headed by a same-sex couple deserve and benefit from bilateral parenting within long-term, committed relationships just as much as children with married parents."[169] The court, however, then falls back on rational basis review, finding that:

> although the line drawn between couples who may marry (opposite-sex) and those who may not (same-sex) may result in some inequity for children raised by same-sex couples, such inequity is insufficient to negate the State's link between opposite-sex marriage, procreation and child-rearing . . . . The fact that the line could be drawn differently is a matter for legislative, rather than judicial, consideration, as long as plausible reasons exist for placement of the current line.[170]

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167. *Id.* at 463.
168. *Id.*
169. *Id.*
170. *Id.* (internal citations omitted).

The decision of the Arizona Court of Appeals is a good indication of the approach that the state will take to justify its ban on same-sex marriage. The state will emphasize that the constitutionality of the ban must be evaluated under the rational basis standard of review and argue that this standard of review requires some deference to legislative judgment. The state will then argue that it has a legitimate interest in relating marriage to procreation and that limiting marriage to opposite-sex couples who can procreate "naturally" is rationally related to the advancement of that interest. In addition, the state may also argue, as did the dissenters in the Massachusetts case, that it is too early to tell whether families headed by same-sex parents are as successful in childrearing as families headed by opposite-sex parents, and that the matter needs more study by the legislature before making a fundamental alteration to the institution of marriage.[171]

The counter to the state's arguments along these lines is that a court's application of the rational basis standard of review should be influenced by the value judgment that the Supreme Court has made in *Romer* and *Lawrence*: the state's differential treatment of same-sex persons in comparison to opposite-sex persons has to be objectively reasonable. This is especially true in regard to marriage, since marriage is a very important individual interest that the law has always strongly protected for opposite-sex persons. Same-sex persons can benefit from being permitted to enter into the institution of marriage as well, as can children raised in families headed by a same-sex couple. It is logically irrelevant that same-sex couples cannot procreate "naturally," since same-sex couples can become parents by means of artificial insemination, surrogacy and adoption, as do opposite-sex parents. More importantly, opposite-sex couples can marry without any intention or ability to procreate. For all of these reasons, the state's denial to same-sex persons of the ability to enter into marriage is objectively unreasonable and thus violates equal protection.

In this writing, I have presented the arguments to support the proposition that the Constitution should recognize the right to same-sex marriage. Cases presenting this constitutional claim are beginning to make their way through the lower courts. At some point in time, such a case likely will come before the United States Supreme Court, and the Court will definitively resolve the issue. It is my submission that the Court should resolve the issue in favor of recognition of the constitutional right of same-sex persons to enter into the institution of marriage.

171. 798 N.E.2d at 980 (Sosman, J., dissenting).