Comments

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Fundamental Right, Fundamentally Wronged: Oregon's Unconstitutional Stand on Same-Sex Marriage

Perhaps he's your neighbor. Or your best friend. Perhaps she's your senator, or your co-worker, or your PTA president. Perhaps they're unknown souls with untold stories, flickering and fleeting images lost in the blur of faces you encounter every day: the grocery clerk, the bank teller, the mailman, the stranger holding a door.

Perhaps you haven't noticed. Or perhaps you have. Perhaps he's your child, or your beer league softball buddy, or your pastor. Perhaps she's your sister.

Perhaps she's you.

This much is certain: Oregon voters passed Measure 36 in the November 2004 general election, amending the state constitution[1] to prohibit same-sex marriage in Oregon and foreclosing one avenue of legal attack upon state machinery that openly and explicitly disadvantages homosexual individuals. More precisely, the voters of Oregon definitively chose to refuse thousands of their fellow citizens the basic, intimate, and cherished choice of

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1 Measure 36 adds a single sentence to the Oregon Constitution: "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." OREGON OFFICE OF THE SEC'Y OF STATE, VOTERS' PAMPHLET VOL. 1, at 77 (2004), *available at* http://www.sos.state.or.us/elections/nov22004/guide/pdf/vpvol1.pdf.

marrying the person they love. Perhaps your free will to marry still includes a free choice to marry. Perhaps it does not. It is true that Measure 36 does not strip anyone absolutely of the choice to marry. However, this Comment argues that the choice to marry is coextensive with the choice to marry the person of one's choosing. As such, Measure 36 effectively deprives gay men and lesbians of the choice to marry as a matter of state constitutional law.

That deprivation became a binding rule of Oregon constitutional law as part of a convulsive policy movement that gathered momentum through the run-up to the 2004 elections, and announced its arrival in eleven states across the country once the ballots were counted. In addition to Oregon, voters in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, and Utah amended their state constitutions in November 2004 to prohibit same-sex marriage.[2] This flurry of rewriting foundational documents brings the number of states that have constitutionally enshrined bans on same-sex marriage to fifteen,[3] and further crystallizes a legal debate—first emerging in the 1970s[4]—that will eventually demand a definitive

[2] *See* James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at A4 (noting the correlation between inclusion of same-sex marriage prohibitions on the ballot and an increased turnout by socially conservative voters); *see also id.* (noting that the constitutional amendments received at least sixty percent of the vote in every state besides Oregon and Michigan). Measure 36 garnered roughly 56.6% of the 1,816,102 votes counted in Oregon and received majority support in thirty-four of Oregon's thirty-six counties, failing to carry the vote in Benton County and Multnomah County. *See* OREGON OFFICE OF THE SEC'Y OF STATE, GENERAL ELECTION ABSTRACT OF VOTES, STATE MEASURE NO. 36 (2004), *available at* http://www.sos.state.or.us/elections/ nov22004/abstract/m36.pdf.

[3] *See* ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); MO. CONST. art. I, § 33 ("That to be valid and recognized in this state, a marriage shall exist only between a man and a woman."); NEV. CONST. art. I, § 21 ("Only a marriage between a male and female person shall be recognized and given effect in this state."). Hawaii's constitution does not specifically prohibit same-sex marriage, but reserves to the legislature the power to define marriage as existing solely between opposite-sex couples. *See* HAW. CONST. art. I, § 23. The Nebraska constitutional prohibition of same-sex marriage, adopted in 2000, was recently invalidated by a federal district court on First Amendment, Equal Protection, and Bill of Attainder Clause grounds. *See* Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005).

[4] *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (rejecting lesbian couple's challenge to state marriage statutes); Baker v. Nelson, 191 N.W.2d 185, 189 (Minn. 1971) (denying due process and equal protection challenge to statutory same-sex marriage prohibition).

answer from the United States Supreme Court.[5] Yet while helping sharpen the issue on a national scale, Measure 36 simultaneously cast large shadows of doubt upon a question which the Oregon Supreme Court once seemed poised to answer. Based in large part on county counsel's opinion that Oregon's marriage statutes, when construed so as to permit marriage solely between a man and a woman, were inconsistent with the state constitution's privileges and immunities clause,[6] Multnomah County began issuing marriage licenses to same-sex couples in March 2004.[7] When the state registrar refused to file and register those licenses because Oregon's marriage statutes prohibit same-sex marriage,[8] nine same-sex couples brought suit in April 2004 challenging the statutes under the Oregon Constitution.[9] Identifying the central issue in the case as involving access to benefits, rather than the right to marry, the trial court held that Oregon's marriage statutes impermissibly withheld the substantive benefits of marriage from same-sex couples.[10]

Despite a fast-track appellate process that bypassed the intermediate Oregon Court of Appeals entirely,[11] the Oregon Supreme Court never got the chance to pass on the *Li* plaintiffs'

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5 *See generally* Pamela S. Katz, *The Case For Legal Recognition of Same-Sex Marriage*, 8 J.L. & Pol'y 61, 61 (1999) (arguing that the inconsistencies inherent in a state-by-state patchwork approach to same-sex marriage create "instability, uncertainty and chaos, conditions which are unacceptable in a nation where due process and liberty are paramount values").

6 *See* Stipulated Facts, Ex. 2 at 1-2, Li v. Oregon, Civil No. 0403-03057 (Cir. Ct. Multnomah County, Or., Apr. 20, 2004) (memorandum prepared by the Multnomah County Attorney's Office advising that refusing to grant marriage licenses to same-sex couples violated article I, section 20 of the Oregon Constitution, which provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens").

7 *See Li*, Civil No. 0403-03057, at 2.

8 *See* Or. Rev. Stat. § 106.010 (2003) ("Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150."). While the language of the statute does not expressly limit marriage to between a man and a woman, "other provisions in ORS Chapter 106 demonstrate that this is the intention. For instance, ORS 106.041 provides that pursuant to ORS 106.120, persons or religious organizations can 'join together as husband and wife the persons named in the license.'" *Li*, Civil No. 0403-03057, at 6.

9 *See* First Amended Complaint at 28, *Li*, Civil No. 0403-03057 (arguing that failing to allow same-sex couples to marry is an unjustified denial of a privilege in violation of article I, section 20 of the Oregon Constitution).

10 *Li*, Civil No. 0403-03057, at 11, 15.

11 *See* Li v. Oregon, 338 Or. 376, 383, 110 P.3d 91, 94 (2005) (noting that after the State appealed the trial court's disposition, the court of appeals certified the appeal directly to the Oregon Supreme Court).

claim that they were entitled to the right to marry in order to access the benefits withheld them in violation of the state constitution. Rather, after the passage of Measure 36 in November 2004 and the certification of the election a month later, the court solicited supplemental briefing on Measure 36's impact on the issues raised in the *Li* litigation[12] and heard oral argument in December 2004.[13] Several months later, the court issued an opinion rejecting the plaintiffs' argument that Measure 36 is merely a statement of aspirational principle, holding instead that it is an operative principle of Oregon constitutional law.[14] That determination necessarily snuffed any claim that the plaintiff couples who had not obtained a marriage license had any right to one under the Oregon Constitution,[15] for a statutory scheme prospectively prohibiting same-sex marriage cannot, by definition, run afoul of a state constitution that does precisely the same.[16]

While that proposition seems straightforward enough, the picture is muddled by the fact that Measure 36, already a source of impassioned division among many in this state, has been challenged separately in state court. On the last day of January 2005, Basic Rights Oregon filed suit arguing that Measure 36 is procedurally unconstitutional.[17] Whether this suit will be successful,

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[12] *Id.* at 388, 110 P.3d at 97.

[13] *See generally* Bill Bishop, *Gay Marriages Rest with Justices*, REGISTER-GUARD (Eugene, Or.), Dec. 16, 2004, at A1.

[14] *Li*, 338 Or. at 390, 110 P.3d at 98 ("Today, marriage in Oregon – an institution once limited to opposite-sex couples only by statute – now is so limited by the state constitution as well . . . . Measure 36 resolves any prospective claims that plaintiffs may have had under *Article I, section 20*, to obtain marriage licenses. The claims of the five same-sex couples that they are entitled as a matter of state law, now or hereafter, to obtain marriage licenses and to marry thus fail.").

[15] *See id.* at 390, 110 P.3d at 98.

[16] The Court further held that the approximately 3000 marriage licenses issued by Multnomah County were void *ab initio* because the state legislature has exclusive authority to regulate marriage. *Id.* at 391-92, 110 P.3d at 99-100. Finally, it should be noted that the *Li* court did not address this Comment's basic assertion that prohibition of same-sex marriage, whether by state constitutional amendment or statutory scheme, violates the Federal Constitution. *See Id.* at 391 n.11, 110 P.3d at 99 n.11 (refusing to address the claim that Oregon's marriage statutes violate the Fourteenth Amendment to the United States Constitution because the issue was not raised in the trial court).

[17] *See* Complaint at 6-8, Martinez v. Kulongoski, Civil No. OSC-11023 (Cir. Ct. Marion County, Or., filed Jan. 29, 2005) (arguing that Measure 36 is so broad it constitutes a revision rather than an amendment to the constitution, and only the legislature has the power to revise the constitution; that Measure 36 affects at least eleven constitutional rights and failing to vote on each change individually violates the single-subject rule; and that Measure 36 constitutes an expression of policy,

and whether the Oregon Supreme Court might ultimately hold Measure 36 procedurally invalid and touch off another blitz to the voting booth, are matters of conjecture. But despite the shroud of uncertainty encircling much of the discussion, the central issue lying at the heart of Measure 36 remains clear: homosexual individuals in Oregon are being deprived of the fundamental right to choose marriage on no basis other than the sexual identity of those individuals' partners.

While directly imposed upon a numerical minority of individuals in the state,[18] such deprivation transcends all demographic lines and socioeconomic classifications. The immediate burden of Measure 36 is borne by individuals at all points in the social spectrum who happen to share one trait: a desire to marry someone of the same sex. Its derivative impact, though, reaches much further. Many in this state feel Measure 36's sting vicariously, as suggested above. Even those who do not are not exempt from its reverberations. The passage of Measure 36 affects each of us, implicating fundamental notions of liberty and equality, and calling into question the extent to which the State may justly order the decisions and affairs of its citizens.

This Comment makes the case that Measure 36 and laws of its ilk are impermissible violations of fundamental principles lying at the heart of our federal constitutional structure and its jurisprudence. Initially, the Comment considers the evolution of the Supreme Court's substantive due process jurisprudence and its protection of certain fundamental personal liberties, including the right to choose marriage. The Comment next examines the protection substantive due process has provided to the fundamental right to marry in other nontraditional contexts, and argues that enunciating the right of homosexual individuals to marry the person of their choice is a necessary and logical recognition of an existing fundamental right. The Comment then considers the methodology and implications of recent cases

which is not permitted by the initiative power granted by the constitution to enact laws and amendments).

18 Census 2000 counted Oregon's population at 3,421,399 people and reported 1,333,723 households in the state. See U.S. CENSUS BUREAU, CENSUS 2000 TABLE DP-1: OREGON (2001), *available at* http://censtats.census.gov/data/OR/04041.pdf. Gay couples comprised 8932 of those households. *See* DAVID M. SMITH & GARY J. GATES, GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS 4 (2001), *available at* http://www.urban.org/UploadedPDF/1000491_gl_partner_households.pdf.

extending the unfettered right to marry to homosexual individuals. Finally, the Comment examines and dispenses with the most prevalent arguments opposing same-sex marriage, revealing a bankrupt moralism that can—and should—no longer wield the mallet of deprivation and disassociation to deny homosexual individuals the fundamental, constitutionally protected right to marry the person of their choice.

Although Measure 36 certainly implicates substantial equal protection questions,[19] those are not addressed here. Rather, the

[19] In recent years, courts in several states have examined same-sex marriage cases under an equal protection analysis—or the substantial equivalent determined by the specific state constitution. *See, e.g.*, Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (under state constitution's equal protection clause, prohibition on same-sex marriage is sex-based classification subject to heightened scrutiny); Standhart v. Super. Ct., 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003) (applying rational basis standard to reject challenge to prohibition on same-sex marriage under state constitution's equal protection clause); Baehr v. Lewin, 852 P.2d 44, 59-60 (Haw. 1993) (holding that denying marriage license to applicants solely on the ground that they are of the same sex violates state constitution's equal protection clause unless the State satisfies strict scrutiny by showing the law is narrowly drawn to further compelling state interest); Morrison v. Sadler, No. 49A02-0305-CV-447, 2005 Ind. App. LEXIS 75, at *41 (Ind. Ct. App. 2005) (holding under rational basis review that prohibition of same-sex marriage does not violate state constitution's equal privileges and immunities clause); Goodridge v. Dep't of Mental Health, 798 N.E.2d 941, 961 (Mass. 2003) (stating that prohibition of same-sex marriage fails rational basis test under state constitution's equal protection clause); Lewis v. Harris, No. MER-L-15-03, slip op. at 56-58 (N.J. Super. Ct. Law Div. Nov. 5, 2003) (denying marriage licenses to same-sex couples does not violate state constitution's equal protection provisions); Baker v. State, 744 A.2d 864, 886 (Vt. 1999) (holding that excluding same-sex couples from benefits and protections of marriage violated state constitution's common benefits clause). The legislative response to the courts in these states has varied. For example, the holdings in *Brause* and *Baher* were overridden by subsequent statewide referenda that amended both states' constitutions. *See* ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."). The Hawaii Legislature has since adopted a domestic partnership law granting rights that include survivorship, inheritance, and property rights. HAW. REV. STAT. § 572C (Supp. 2003). On the heels of the court's decision in *Baker*, the Vermont Legislature passed, and Governor Howard Dean signed, a law permitting same-sex couples to enter into "civil unions" providing benefits and rights virtually identical to those provided in marriage. *See* Carey Goldberg, *Vermont Gives Final Approval to Same-Sex Unions*, N.Y. TIMES, Apr. 26, 2000, at A14. Finally, substantial recent commentary regarding equal protection and same-sex marriage has been generated in the wake of the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), striking down a ban on same-sex sexual acts, and particularly Justice O'Connor's concurring opinion relying on equal protection analysis to find the law unconstitutional. While an exhaustive cataloging is not possible here, the following articles are representative: William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. PUB. L. 623

emphasis that substantive due process jurisprudence places upon the constitutional right of personal autonomy, which includes the fundamental right to marry, makes that doctrine an especially compelling framework under which to analyze the constitutional implications of Measure 36.

I

PUBLIC LICENSING OF THE MOST PRIVATE UNION: WHY DOES THE STATE HAVE A STAKE IN MARRIAGE?

At the midpoint of the first decade in the new millennium, it can no longer be genuinely disputed that gay men and lesbians permeate every level, angle, and station in American society.[20] Homosexual individuals hold elected office, serve in the military,[21] and pay taxes. They vote, send their children to school, and contribute to their communities. They fall in love and establish committed, long-term relationships. Yet, despite the participation of homosexual individuals in nearly every facet of American life and the indicia of citizenship in which they share, state regimes forbidding the choice to establish a family through civil marriage effectively subjugate gay men and lesbians in a static position of second-class citizenship, denying full participation in our society.[22] The explicit result is that homosexual indi-

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(2004), Laurence H. Tribe, Lawrence v. Texas: *"The Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years From Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589 (2004).

[20] *See* GARY GATES, GAY VETERANS TOP ONE MILLION 1 (2003) (noting recent research that indicates four percent of U.S. adults are gay or lesbian) *available at* http://www.urban.org/url.cfm?ID=900642. Census 2000 counted 209,128,094 American adults. *See* U.S. CENSUS BUREAU, U.S. SUMMARY: 2000, at 2 (2002) *available at* http://www.census.gov/prod/2002pubs/c2kprof00-us.pdf. Based upon Gates' research, then, the homosexual adult population in the United States counts roughly 8,365,124 individuals among its ranks.

[21] This Comment does not address the efficacy or wisdom of the United States military's "don't ask, don't tell" policy. However, it is inconceivable that homosexual individuals have neither previously served nor continue to do so. Recent research indicates that 683,000 of the 27.5 million veterans counted in Census 2000 (two percent) are gay men and 350,000 (one percent) are lesbians. *See* GATES, *supra* note 20, at 1.

[22] The essential value judgment disapproving of same-sex relationships and manifested in laws such as Measure 36 is not limited to a hollow condemnation of same-sex individuals. Rather, that value judgment imports numerous tangible ramifications. In a report issued in January 2004, the United States General Accounting Office (GAO) identified 1138 federal statutory provisions that confer benefits,

viduals—while capable and licensed to teach in our schools, worship in our churches, and practice medicine in our hospitals—are prohibited from partaking of our most cherished social institution.[23] The implicit message is that homosexual individuals, despite broad participation in most other conceivable social contexts, are either unable or morally unfit to establish the most sacred of bonds with a person of their choosing.

The ability of any State to deprive any individual of such a deeply personal right has its foundations in the fact that marriage, as both a common law institution and creature of statute, is "an area which traditionally has been subject to pervasive state regulation."[24] Such regulation has traditionally included restrictions on the age and degree of consanguinity of the parties, as well as prohibitions of bigamy.[25] Because the family has long been the focal point[26] of our social structure, state regulation of the foundational component of family— marriage between two committed adults—inheres in our legal tradition. That this has been and continues to be the state of play makes sense. Simply put, the State has an important interest in promoting both a stable society and an environment where individuals are equipped with the tools to seek happiness. The critical role of the family in

rights, and privileges conditioned upon marital status. The report updated a GAO compilation issued in 1997, in connection with the enactment of the Defense of Marriage Act (DOMA), which identified 1049 federal laws conferring benefits, rights, and privileges contingent upon marital status. U.S. GENERAL ACCOUNTING OFFICE, GAO-04-353R 1 (2004), *available at* http://www.gao.gov/ new.items/d04353r.pdf. Between Sept. 21, 1996—the date DOMA was signed into law—and Dec. 31, 2003, 120 federal laws implicating marital status were enacted, and thirty-one were repealed or amended such that marital status is no longer a factor. *Id.* Non-exhaustive research by the author indicates that over 400 Oregon state laws implicate marital status, conferring rights, duties, and benefits on the basis of one's status as a "spouse."

[23] This is no longer the case in one of our fifty states. Massachusetts began issuing marriage licenses to same-sex couples in May 2004 after the Supreme Judicial Court of Massachusetts' landmark decision in Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). The court not only held that statutory prohibition of same-sex marriage and its attendant benefits violated the state constitution, it also ordered full extension of marriage to same-sex couples as a matter of remedy. *See infra* Part IV.B for further discussion of *Goodridge*.

[24] Zablocki v. Redhail, 434 U.S. 374, 396 (Powell, J., concurring).

[25] *See id.* at 392 (Stewart, J., concurring) (noting the legitimacy of state prohibitions on marriage by siblings, children, and those with a living spouse).

[26] *See* Bruce C. Hafen, *Puberty, Privacy, and Protection: The Risks of Children's "Rights,"* 63 A.B.A. J. 1383, 1383 (1977) (describing the "family tradition" as "such an obvious presupposition of our culture that it has not been well articulated, let alone explained or justified").

shaping each of us as individuals, as well as shaping the larger society we share, gives the State both incentive and entitlement to regulate the formation of family through the institution of marriage. As a result, the State may use age as a proxy to ensure that individuals appreciate the gravity of the decision to marry.[27] Likewise, the State may seek to discourage the very real genetic problems that children of incestuous relationships face by prohibiting marriage between closely related persons.[28]

Such regulations serve to protect a family structure that can be seen as instrumental in at least two contexts. In one regard, the family unit operates on the individual level as a primary relationship model, providing security, support, and reciprocal commitment whereby the individual partakes of, and is responsible to, something beyond him- or herself.[29] The state interest in promoting an environment in which individuals can thrive is thus advanced by the formation of families. This is so independent of the sex of the spouses involved.[30] The family also operates in a broader context as the elemental unit by which we organize our social relations, serving as a stabilizing agent for society at large by promoting both accountability to and responsibility for others.[31] The state interest in promoting a stable society marked by cooperative interdependence is thus served by the formation of families. This is likewise true regardless of the sexual identities of the spouses involved.[32]

There can be little question that homosexuals are as capable and worthy as heterosexuals of enjoying the basic human rights inherent in the concept of family—compassion, support, commit-

27 *See, e.g.*, OR. REV. STAT. § 106.010 (2003) (requiring that individuals be at least seventeen before they may marry).

28 *See, e.g., id.* § 106.020(2) (prohibiting marriage between those who are "first cousins or any nearer of kin to each other, whether of the whole or half blood, whether by blood or adoption, computing by the rules of the civil law, except that when the parties are first cousins by adoption only, the marriage is not prohibited or void").

29 *See infra* note 219 and accompanying text.

30 *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003); *see also infra* notes 213-216 and accompanying text.

31 *See infra* sources cited note 34.

32 *See* Goodridge, 798 N.E.2d at 964 (rejecting the argument that prohibiting same-sex marriage is rationally related to ensuring an optimal setting for child rearing, the court stated such prohibitions "will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of 'a stable family structure in which children will be reared, educated, and socialized'").

ment, and protection.[33] Yet despite an identity of capacity and desire to share in those elemental human rights flowing from the family, Measure 36 precludes homosexual individuals from access through the most-basic means—the institution of marriage.[34] No questions, no exceptions, no dice, as a matter of Oregon constitutional law. But apart from its stunting and subversive impact on family units that fall outside the heterosexual-centric status quo, the truly debilitative effect of Measure 36 takes place at the individual level.

II

Dollars and Sensations: The Tangible and Intangible Personal Benefits of Marriage Protected as a Matter of Substantive Due Process

The tangible benefits and rights withheld from same-sex couples and their children by Measure 36 are numerous and well-known. As of January 2004, more than 1100 federal laws conditioned benefits, rights, and privileges on an individual's marital status.[35] In Oregon, property transferal rights,[36] medical care rights and privileges,[37] and standing to bring wrongful death actions[38] are among the rights and privileges available with no questions asked to married couples. Those same valuable, deeply personal rights and privileges are withheld without exception from individuals in same-sex relationships under a statutory scheme—now backed by explicit constitutional mandate—that forbids homosexuals from electing the status that confers those

[33] *See* Lawrence v. Texas, 539 U.S. 558 (2003).

[34] *See* Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (describing marriage as "the relationship that is the foundation of the family in our society"); Maynard v. Hill, 125 U.S. 190, 211 (1888) (characterizing marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress").

[35] *See* discussion *supra* note 22.

[36] *See* Or. Rev. Stat. §§ 112.025, 112.035, 114.105 (2003) ("surviving spouse" has the right of intestate succession and may elect a statutory share of the deceased spouse's estate); *id.* § 107.105 (upon dissolution of the marriage, a spouse may be entitled to receive money from the other for spousal support).

[37] *See, e.g.*, *id.* § 441.605(14) (guaranteeing residents of health care facilities privacy for visits by the resident's spouse, with no parallel provision for unmarried partners, as part of the Nursing Home Patients' Bill of Rights); *id.* § 735.615(1)(c) (the Oregon Medical Insurance Pool provides health insurance coverage to those whose medical conditions do not allow them to obtain coverage in the private sector; under the statute a medically eligible person's spouse is also entitled to coverage).

[38] *See id.* § 30.020.

rights. However, tax breaks[39] and economic advantages under intestacy statutes,[40] important as they are, are not what have moved the Supreme Court time and again to proclaim the right to marry a fundamentally guaranteed aspect of liberty protected as a matter of substantive due process by the United States Constitution.[41]

Rather, the choice of marriage is a fundamental right because of its central role in the definition of self, in the ordering of one's private life, and in the personalized expression of one's commitment, affection, and love to another. It is a fundamental right because it is intimately and inextricably linked to the core of one's emotional, social, and spiritual identity. It is a fundamental right because the very nature of the association—a promise to bind oneself exclusively to another—implicates a certain unassailable liberty of the soul that while difficult to articulate is unquestionably protected by the Due Process Clause of the Fourteenth Amendment.[42]

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[39] Over 300 different sections of the Internal Revenue Code provide differential tax treatment on the basis of marital status. *See, e.g.*, 26 U.S.C. § 32(b) (2000) (providing a higher phaseout amount for determining earned income child credit, which essentially allows married couples to make more money before the earned income credit is disallowed).

[40] *See* discussion *supra* note 22.

[41] Turner v. Safley, 482 U.S. 78, 95 (1987); Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (describing the "freedom to marry" as a "fundamental liberty protected by the Due Process Clause"); *id.* at 384 (citing with approval cases establishing that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause"); Carey v. Population Serv. Int'l, 431 U.S. 678, 684-85 (1977) (describing the right to personal privacy as including "the interest in independence in making certain kinds of important decisions," (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)) and stating that "it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage [and] . . . family relationships'" (quoting Roe v. Wade, 410 U.S. 113, 152-53 (1973)); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); Maynard v. Hill, 125 U.S. 190, 205 (1888) (characterizing marriage as "the most important relation in life").

[42] A right to "liberty of the soul" is neither a term of art, nor a doctrine the Supreme Court has adopted, nor a phrase the Court appears to have ever used. It is, however, one formulation of the foundational principle that there is a certain point past which the government may not infringe upon the personal liberty held by the individual. That principle has been expressed most commonly as a right to privacy since the Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), striking down a state law prohibiting the distribution or use of birth control devices to or by

The Court made that determination in *Loving v. Virginia,*[43] a case in which it did not have to, by answering a question that it did not need to reach. Considering the constitutional validity of a statutory scheme under which a white man and black woman were convicted for the criminal act of marrying one another, the Court first subjected Virginia's anti-miscegenation statutes to an equal protection inquiry.[44] Rejecting the State's argument that the statutes at issue applied equally to blacks and whites by prohibiting members of each race from marrying members of the other,[45] the Court struck down the prohibition on interracial marriage as an arbitrary and invidious racial classification violative of the Fourteenth Amendment's Equal Protection Clause.[46]

That conclusion alone could have ended the matter. It did not. Rather than resting solely on the determination that Virginia's

married couples. Justice Douglas' plurality opinion reflects the difficulties associated with articulating a right protected by the Constitution but not enumerated therein, ultimately concluding that the explicit guarantees contained in the Bill of Rights, when read as an integrated whole, extend implicitly to protect unenumerated zones of privacy: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." *Id.* at 484 (citations omitted). Despite the Constitution's lack of an overt guarantee of the right to privacy, Justice Douglas relied on the implicit ideals encompassed by the penumbras of the First, Fourth, Fifth, and Ninth Amendments to conclude not only that a constitutionally protected right to privacy exists, but that it is older than the Bill of Rights itself. *Id.* at 486. That notion is supported by the foundational documents. The Declaration of Independence, written eleven years prior to the Constitution, recognizes certain unalienable rights, including life, liberty, and the pursuit of happiness, *not granted by government*, but by mankind's Creator. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). When considered as one component of the basic right to liberty, or the pursuit of happiness, a fundamental, preconstitutional right to privacy emerges. More recently, the Court has recognized that substantive due process extends beyond the right to privacy discussed in *Griswold*, protecting privacy in relation to personal autonomy:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (citations omitted).

[43] 388 U.S. 1 (1967).

[44] *Id.* at 8.

[45] *Id.*

[46] *Id.* at 11-12.

anti-miscegenation statutes were unconstitutional as a matter of equal protection, the Court considered the substantive validity of the law and the substantive quality of the right it burdened.[47] Recognizing that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," the Court held that denying this freedom on the basis of racial classifications is a deprivation of liberty without due process of law.[48] In so doing, the Court considered the Constitution a source of individual rights, accessible on an individual basis by people who fall in love and wish to get married.[49] Concluding that the choice to marry is a fundamental right that includes the freedom to choose another independent of skin color,[50] the Court did not qualify the essential nature of the right. It did not condition recognition of the right on an individual's choosing only from a prefabricated pool of partners acceptable in light of history and tradition[51] or dictated by contemporary perceptions and mores.[52] Rather, the Court explicitly rejected such systems, rooted in little more than the

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[47] *Id.* at 12.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] The specific Virginia statutes at issue in *Loving* were adopted as part of the Racial Integrity Act of 1924 and prohibited absolutely the marriage of a "white person" to any other than another "white person"; required that marriage licenses be withheld until state officials confirmed the accuracy of applicants' assertions of race; required that local and state registrars maintain certificates of "racial composition"; and ensured that earlier prohibitions on interracial marriage were contemporaneously enforced. *Id.* at 6. While this particular statutory scheme was born in 1924, the Court noted that "[p]enalties for miscegenation arose as an incident to slavery and [had] been common in Virginia since the colonial period." *Id.* Furthermore, the traditional notions of marriage holding sway at the time—at least in some corners—were expressed by the Virginia trial court in which the Lovings were initially convicted: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." *Id.* at 3.

[52] It is important to note that when the Court decided *Loving*, Virginia was one of sixteen states that still prohibited interracial marriage. *Id.* at 6. Although fourteen states had repealed similar prohibitions in the fifteen years prior to the Court's decision, *id.* at 6 n.5, nearly one-third of the states in the Union retained anti-miscegenation statutes. Furthermore, Virginia's ban was reflective of the prevailing social attitude and perception in the particular time and place in which it was challenged: each of the sixteen states that retained interracial marriage bans in 1967 are south of the Mason-Dixon line. *See id.*

prejudice of a bygone era[53] and defended on little ground other than the comfort of the traditional status quo.[54] Counter to long-standing social practice and the codified law of sixteen states, the Court recognized that the transcendent nature of the fundamental right is not diminished merely by its exercise in a new context.[55]

A. *The Right to Privacy in Private Matters: Protecting the Sanctity of Marriage*

In light of *Loving's* fierce defense of the individual right to marry, it should be remembered that marriage is mentioned nowhere in the Declaration of Independence, the United States Constitution, or any of its twenty-seven amendments.[56] However, it has long been recognized as a matter of constitutional jurisprudence that substantive due process protects individual rights relating to privacy, particularly those bearing on the intimate choices relating to the family context.[57] The Court first explicitly recognized a constitutionally protected right to privacy in

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[53] *See, e.g., id.* at 11 (identifying no legitimate purpose for Virginia's anti-miscegenation statutes beyond invidious racial discrimination).

[54] In its brief to the Court, the State of Virginia argued first that the Fourteenth Amendment—intended to effectuate the provisions of the Civil Rights Act of 1866—could not reach a state's ban on interracial marriage because the Act was meant to have "no application to marriage contracts or anti-miscegenation statutes." Brief and Appendix on Behalf of Appellee at 27, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395). The State bolstered its appeal to history by pointing out that because its infringement on the right to marry had existed for over 200 years and "stood compatably" [sic] with the Fourteenth Amendment since its adoption, the statutes "infringe[d] no constitutional right." *Id.* at 52.

[55] Simply put, the Court did not accept the postulate that the right to marry was somehow stripped of its fundamental status merely because the identity of the individuals seeking to marry broke from the traditional status quo. Similar logic obtains elsewhere. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (quoting County of Sacramenty v. Lewis, 523 U.S. 833, 857 (1998)(Kennedy, J., concurring))).

[56] *See generally* Roe v. Wade, 410 U.S. 113, 168 (1973) (Stewart, J., concurring) ("The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life . . . .").

[57] A line of cases dealing with a variety of contexts has protected individual autonomy as a matter of substantive due process in personal decisions relating to marriage (Loving v. Virginia, 388 U.S. 1, 12 (1967)); procreation (Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 541-42 (1942)); contraception (Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972)); family relationships (Prince v. Massachusetts, 321 U.S. 158, 166 (1944)); and child rearing and education (Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925)); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923)).

Griswold v. Connecticut,[58] striking down a state law under which a doctor and Planned Parenthood executive had been convicted as accessories[59] for providing contraceptive advice and devices to married couples.[60] Recognizing the implicit right to privacy underlying the enumerated guarantees in the Bill of Rights[61] as protecting the "sanctity of . . . home and the privacies of life,"[62] the Court was particularly concerned with the specter of state agents busting into the privacy of the marital bedroom on suspicion that anything other than the State's vision of proper marital sex was taking place.[63] That the Constitution doesn't explicitly grant a right to privacy mattered little to the Court in recognizing a right of privacy inherent in personhood and predating the Bill of Rights.[64] Such individual liberty is particularly precious in the marital context, as Justice Douglas explained, because "[m]arriage 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."[65]

Justice Douglas' opinion in *Griswold* highlights several constitutionally significant components of marriage. To begin, by speaking to marriage's role in furthering a way of life rather than serving as a vehicle for politically fueled causes, it emphasizes the deeply personal commitment made by each party to the marriage. Secondly, reference to the notion of bilateral loyalty calls attention to the critical relational aspects being protected: the

[58] 381 U.S. 479 (1965).

[59] The challenged statutes provided first for the fining and imprisonment of anyone who used a "drug, medicinal article or instrument for the purpose of preventing conception." *Id.* at 480. The statute under which the appellants were convicted was a general accessory statute allowing a person that assisted or counseled another to commit an offense to be punished as the principal. *Id.*

[60] *Id.*

[61] *See* discussion *supra* note 42.

[62] *Griswold*, 381 U.S. at 484.

[63] *Id.* at 485-86. The Court asked rhetorically whether it would permit the State to "search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives," before concluding decisively that the idea is "repulsive to the notions of privacy surrounding the marriage relationship." *Id*.

[64] *Id.* at 486. *See also* discussion *supra* note 42.

[65] *Griswold,* 381 U.S. at 486. Regardless of whether one agrees with Justice Douglas' conception of marriage, he knew of what he spoke, having been down that road four times himself. *See* Merle H. Weiner, *"We Are Family": Valuing Associationalism in Disputes Over Children's Surnames*, 75 N.C. L. REV. 1625, 1670 n.177 (1997) (noting that Justice William O. Douglas was married four times).

companionship and devotion shared by two people within the marital confines. In this way, *Griswold* unequivocally stands for the proposition that marriage is constitutionally protected entirely independent of its relationship to procreation and child rearing. The Connecticut statute prohibited the use of contraceptives by married couples, a policy that clearly increased the likelihood of procreation and the raising of children. Yet when faced with a policy intended to promote procreation, but that did so to the derogation of marital intimacy,[66] the Court found preserving the sanctity of marriage[67] to be a countervailing concern.

Preventing invasion of the physical privacy of the marital bedroom was obviously central to the *Griswold* Court's reasoning.[68] However, that narrow aspect of privacy was not the lone individual liberty implicated, and it was not the sole ground for the Court's decision. Rather, in formulating its "penumbra" approach to recognizing a constitutionally protected right of privacy,[69] the Court relied in part on the Self-Incrimination Clause of the Fifth Amendment as creating a "zone of privacy which government may not force [the citizen] to surrender to his detriment."[70] The Court further described that right as protecting against intrusion into the "privacies of life," characterizing the essence of the injury to the individual "not [as] the breaking of his doors and the rummaging of his drawers" but as "the invasion of his indefeasible right of personal security [and] personal liberty."[71]

The very language of *Griswold* thus reveals that the Court was not concerned merely with a right to privacy in the spatial context,[72] and did not intend to confine its application to behind

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66 *Griswold*, 381 U.S. at 482 (characterizing the law as operating "directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation"). *See also id.* at 486 ("Marriage is . . . intimate to the degree of being sacred.").

67 *Id.* at 486 (describing the liberty at stake as the "notions of privacy surrounding the marriage relationship").

68 *Id.*

69 *Id.* at 484.

70 *Id.*

71 *Id.* n.* (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

72 Indeed, subsequent jurisprudence has not hemmed the notion of constitutionally protected privacy within spatial or physical borders. Rather, the Court has recognized the right of privacy extends to *internal* traits of personhood: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters . . . fundamentally affecting a person . . . ." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis added).

closed doors and drawn curtains. Rather, the specific constitutional guarantees drawn on by the *Griswold* Court, divergent as they may be, share common underpinnings protecting an individual right to internal, personal privacy. For example, the nature of the privacy interest created by the Fifth Amendment[73] is internal to the individual, a right to privacy in choosing whether to speak on one's behalf.[74] Similarly, the Court recognized the internally held and internally exercised nature of certain liberties protected by the right to privacy emanating from the First Amendment's penumbra.[75] By relying on these aspects of constitutionally protected privacy, it follows that the Court was not concerned solely with protecting the sanctity of the marital bedroom enveloped within the marital home.[76] Instead, the Court simultaneously recognized an individual, indefeasible right of personal liberty, extending to the intimate decisions made within the confines of the "privacy surrounding the marriage relationship."[77]

B. Fundamental Even for Non-Fundamentalists: The Right to Marry in Nontraditional Contexts

Two years after *Griswold* demarcated a right to privacy of thought, choice, and action inhering in an established marital relationship, *Loving* recognized the fundamental right to choose not only whether to establish such a relationship, but with whom.[78] Two principal decisions subsequently added texture to the bare form of this fundamental right.

First, in *Zablocki v. Redhail*,[79] the Court struck down a statutory scheme that conditioned the right to marry upon proof of compliance with preexisting child support obligations.[80] Casting

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[73] *See Griswold*, 381 U.S. at 484.

[74] *See* U.S. Const. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . .").

[75] *See Griswold*, 381 U.S. at 482-83 (noting that the First Amendment protects not only the right to speak or publish in public, but also envelops privacies internally held by the individual such as "the right to read," the "freedom of inquiry," the "freedom of thought," and "the right of belief").

[76] Rather, the interest infringed by the Connecticut statute "involved . . . a particularly important and sensitive area of privacy–that of the *marital relation* and the marital home." *Id.* at 495 (Goldberg, J., concurring) (emphasis added).

[77] *Id.* at 486 (majority opinion).

[78] *See supra* notes 43-55 and accompanying text.

[79] 434 U.S. 374 (1978).

[80] *Id*. at 375, 377. The statute applied to any "Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court

the statutory scheme under an equal protection lens,[81] the Court relied heavily on the components of substantive due process[82] to conclude that it must be stricken for "interfer[ing] with the exercise of a fundamental right"[83] absent a sufficient state interest.[84] Two facets of *Zablocki* must be emphasized. To begin, it further supports the proposition that the Court has never treated the fundamental right to marry as coextensive with either the right of procreation or the multi-faceted state interest in protecting the best interests of children. The stricken law prohibited anyone who could not prove compliance with existing child support obligations from marrying.[85] Presumably, the law would protect the interests of specifically at-risk children by ensuring that a noncustodial parent fulfilled his or her financial obligations to the child before entering marriage—the only relationship in which the State lawfully allowed sexual relations and the concomitant possibility of further procreation.[86] However, despite the genuine validity of the State's proffered interest,[87] the statute's uneven sweep[88] in relation to its stated purpose constituted an unconstitutionally broad infringement of the right to marry.[89] In addition to the implicit partitioning of the right to marry and the parental responsibility to protect children—which was necessary to its holding—the Court affirmatively recognized that marriage on the one hand, and procreation and child rearing on the other, are not coextensive:

It is not surprising that the decision to marry has been placed

order or judgment," and further required a demonstration that any child covered by a support order was not then, and was unlikely to become, a public charge. *Id.*

[81] *See id.* at 382.

[82] *See, e.g.*, *id.* at 383-85 (collecting substantive due process cases concerning "the right of personal privacy" and its protection of the fundamental decision to marry); *see also id.* at 395 (Stewart, J., concurring in the judgment) (describing the equal protection doctrine as applied as "no more than substantive due process by another name").

[83] *Id.* at 388 (majority opinion).

[84] *Id.* at 390-91.

[85] *Id.* at 375.

[86] *See id.* at 386 & n.11 (citing WIS. STAT. § 944.15 (1973), which at the time levied criminal penalties for fornication, defined as sexual intercourse with a person other than a spouse). The current version of the statute punishes only public fornication. *See* WIS. STAT. § 944.15 (2005).

[87] *See Zablocki*, 434 U.S. at 388 (accepting "for present purposes" that protecting the welfare of out-of-custody children is a legitimate and substantial interest).

[88] *See id.* at 390 (describing the statute as both "grossly underinclusive" and "substantially overinclusive").

[89] *Id.* at 389.

> on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . [I]t would make little sense to recognize a right of privacy with respect to *other matters* of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.[90]

Zablocki is instructive on another point. That is, despite the substantial nature of a State's interest in providing for the well-being of its children,[91] any restriction that significantly interferes with the right to marry is subject to the traditional strict scrutiny applied to laws that burden fundamental rights.[92] In short, a State's legitimate concern about the welfare of children and adoption of a law aimed at protecting that welfare does not lessen the State's burden of proving the tight means-ends fit required by strict scrutiny when a fundamental right is implicated.[93] Just as the *Griswold* Court chose to preserve the sanctity of an established marriage when faced with a burdensome state policy geared to encourage procreation, the *Zablocki* Court soundly reaffirmed the right to *choose* marriage in the face of burdensome state regulations aimed at protecting the welfare of children.

The second principal right-to-marry case defining the contours of the fundamental right announced in *Loving* is *Turner v. Safley*,[94] which struck down a state prison policy that severely restricted the right of inmates to marry.[95] In so doing, the Court

[90] *Id.* at 386 (emphasis added).

[91] *See supra* note 87.

[92] *See, e.g., Zablocki*, 434 U.S. at 383 ("Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination' of the state interests advanced in support of the classification is required."); *see also id.* at 388 ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."); *id.* at 387 (characterizing the statutes at issue as effecting a "serious intrusion into [the] freedom of choice in an area in which we have held such freedom to be fundamental").

[93] *See id.* at 389 (declaring that the statutory purpose of creating incentive for noncustodial parents to make support payments "cannot justify the statute's broad infringement on the right to marry").

[94] 482 U.S. 78 (1987).

[95] The marriage regulation at issue made inmates' right to marry contingent on being granted permission by the prison superintendent, and provided that marriages should be permitted only when compelling reasons to do so presented themselves. *Id.* at 82. The regulation did not define "compelling," but trial testimony indicated that as a general matter only pregnancy or the birth of an illegitimate child were considered compelling reasons. *Id.*

carved an exception to the strict scrutiny standard applied in *Zablocki*. Recognizing the need to defer to the on-the-ground wisdom and expertise of prison administrators concerning institutional operations, the Court adopted a "reasonable relationship" standard under which to examine prison regulations burdening inmates' constitutional rights.[96] However, even under that relaxed standard, placing an inmate's right to choose marriage at the sole discretion and mercy of a state official went too far[97] in stripping the individual of constitutional protections that are not suspended at the intake counter of a state penitentiary.[98] En route to that conclusion, the Court highlighted two principles bearing on the constitutionality of Measure 36's prohibition of same-sex marriage.

First, the Court noted that an inmate "'retains those [constitutional] rights that are not inconsistent with his status as a prisoner.'"[99] Second, the Court offered an expansive list of the constitutionally significant qualities inhering in marriage and warranting rigorous protection—even in the nontraditional context of inmate marriage. The Court noted, for instance, that "inmate marriages, like others, are expressions of emotional support and public commitment."[100] Those elements, in turn, form "an important and significant aspect of the marital relationship."[101] The Court also emphasized the spiritual aspect of marriage, noting that for at least some couples "the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication."[102] Additionally, the Court recognized the tangible government benefits[103] and "other, less tangible benefits"[104] that attach as common incidents of marriage.

96 *Id.* at 89-91. The Court laid out the appropriate standard thusly: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id*. at 89.

97 *See id.* at 91 (stating that the marriage restriction failed the reasonable relationship standard as an "exaggerated response" to the state's rehabilitation and security concerns); *id.* at 97 ("[E]ven under the reasonable relationship test, the marriage regulation does not withstand scrutiny.").

98 *See id*. at 84 (stating that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution").

99 *Id.* at 95 (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

100 *Id.*

101 *Id.* at 96.

102 *Id.*

103 *Id.* (pointing to Social Security benefits and property rights, such as inheritance rights, as examples).

104 *Id.* Here, the Court offered the single example of legitimizing children born

Those are traits the Court itself identified as constitutionally significant accoutrements of marriage. And there can be little dispute they are just as relevant, sacred, and important to individuals in same-sex relationships as to those involved in different-sex relationships. More specifically, sexual orientation diminishes neither one's ability nor desire to partake of these and other incidents of marriage, up to and including the religious aspect.[105] Simply put, "being gay" has no bearing on one's fitness or capacity to reap the goodness of marriage described in *Turner*. Yet Measure 36 makes it the absolute and irremediable litmus test for access to the relationship imbued with—and constitutionally defined by—those qualities. Such an explicit disability, exacted so definitively and erected on such flimsy grounds, seems patently incompatible with the principles underlying *Turner* alone, independent of any consideration of other constitutional jurisprudence.

It is worth noting that the *Turner* Court characterized an inmate's right to marry as a constitutionally protected liberty that is "not inconsistent with his status as a prisoner."[106] While circumstances may vary by degree, a safe generalization is that a prisoner's "status" exemplifies the most extreme degradation of individual liberty and theft of personal identity sanctioned by contemporary American law. It is a status of subjugation. It is a status defined by institutional mandates establishing when one gets up, when one may bathe, when and what one may eat, when one may exercise, what one may wear, and when one must go to bed. Yet, bereft of choice concerning all but the most rudimentary aspects of existence, an inmate still retains a constitutionally

out of wedlock. *Id.* However, just as relevant and just as seamlessly added to the list of intangible benefits are other unquantifiable incidents of marriage such as legitimization of the couple and social recognition of the commitment made to the relationship by each individual involved.

[105] *See* Michael J. Kanotz, *For Better or for Worse: A Critical Analysis of Florida's Defense of Marriage Act*, 25 FLA. ST. U. L. REV. 439, 439 (1998) ("Several major religions in the United States recognize same-sex marriages, including the Reformed Jewish, Unitarian Universalist, Episcopalian, Lutheran, Presbyterian and Methodist churches, among others."); *see also* Complaint, *supra* note 17, at 5-6 (describing plaintiff Glenna Shepherd as the senior pastor of the Metropolitan Community Church of Portland, "a progressive, inclusive worldwide movement of more than 300 churches in twenty countries around the world. It is a Christ-centered community of faith that welcomes all people and has a primary outreach to gay, lesbian, bisexual and transgendered communities"). The complaint further states that Shepherd has performed hundreds of marriages for same-sex couples. *Id.* at 6.

[106] 482 U.S. at 95.

protected right to choose marriage.[107]

That central holding of *Turner* illuminates the focal nature of the right to marry among the various personal liberties protected by substantive due process.[108] For even when the most basic day-to-day decisions of personhood are stripped away, the fundamental and fundamentally protected choice of whether to marry another is preserved at the individual level, free from state compulsion and immune from unreasonable state interference.[109] In the light shed by *Turner*, then, the question arises: If an inmate's status of state-defined deprivation of choice is "not inconsistent" with the choice to marry, what peculiar status do homosexual individuals occupy such that the right to marry may constitutionally be withheld?

The obvious rejoinder from same-sex marriage opponents is that Measure 36 deprives no one absolutely of the right to marry but merely defines the field of legally cognizable partners. Similar logic has been tried and found wanting elsewhere. The *Loving* Court, for example, made clear that a State could not justify depriving interracial couples of the right to marry on the grounds that such individuals retained the right to marry, just not someone of another race.[110] The argument is similarly unpersuasive here. What purpose is served by protecting the right to marry as a fundamental individual liberty and simultaneously refusing to protect the right to choose *whom* to marry?[111]

Additionally, both *Zablocki* and *Turner* counsel against such an analysis. *Zablocki* essentially stands for the interrelated propositions that the family is entitled to substantial constitutional protection,[112] that marriage can be a central part of family,[113] and that the choice to marry should thus be similarly protected.[114] However, arguing that each member of a homosexual couple

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[107] *Id.* at 99-100.

[108] *See supra* note 57 and accompanying text.

[109] *See Turner,* 482 U.S. at 89.

[110] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

[111] This point seems so elementary as to need little further discussion. However, as an analogy, what good would the Free Exercise Clause serve if such free exercise was extended only to those who chose Catholicism? *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[112] *See* Zablocki v. Redhail, 434 U.S. 374, 385 (1978) (noting the constitutionally protected nature of individual decisions relating to procreation, contraception, family relationships, child rearing, and education) (internal citations omitted).

[113] *See id.* at 386.

[114] *Id.* ("[I]t would make little sense to recognize a right of privacy with respect to

raising a child together has the right to marry someone of the opposite sex is at least incompatible with, and perhaps antithetical to, promoting the family interest emphasized in *Zablocki*.[115] *Turner* exposes a different set of foibles in the argument that Measure 36 does no more than restrict the choice of whom to marry. It should be noted that the regulation at issue in *Turner* did not conclusively absolve inmates' choice to marry, but rather conditioned that right on receiving permission from the prison superintendent for "compelling reasons."[116] For all practical purposes, however, inmates were forbidden to marry except in cases of pregnancy or the birth of an illegitimate child.[117] Such a broad prohibition, requiring either a pregnancy extant at the time of incarceration or conception during incarceration, effectively foreclosed the option of marriage for most inmates. Analogously, Measure 36 effectively shuts the door to marriage to homosexual individuals. Presuming both that most people choose a marital partner according to their own sexual orientation, and that most people would not consider marriage counter to that orientation a legitimate option, Measure 36 operates practically to deprive homosexual individuals of the choice to marry. Just as in *Turner*, such a broad infringement of a fundamental right need not reach the heights of an absolute prohibition on marriage before it can no longer withstand constitutional inquiry.

One final point about *Turner* warrants examination. While discussing the critical attributes of marriage, Justice O'Connor noted that because most inmates are eventually released, most inmate marriages are entered into under the expectation that the marriage eventually will be fully consummated.[118] Although the point made emphasizes a single aspect of the personal right to choose marriage, it also reveals another facet of the Court's conception of that right. While *Griswold* and *Zablocki* firmly hold that procreation is neither a condition precedent nor a required

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other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.").

[115] In such a scenario, the child of the homosexual couple would be no more socially legitimized by having two homosexual parents, each of whom happened to be married to an opposite-sex partner while maintaining their relationship, than by having two unmarried homosexual parents. Similarly, by prohibiting the appellee from marrying the mother of his second child, the net result of the statute at issue in *Zablocki* was "simply more illegitimate children." *Id.* at 390.

[116] Turner v. Safley, 482 U.S. 78, 82 (1987).

[117] *Id.*

[118] *Id.* at 96.

outcome of marriage, *Turner* goes even further. For at least some inmates have no chance of ever being released. Others may not outlive their sentences. Yet even those inmates may not be prohibited from entering into marriage relationships that in some instances would be formed with no expectation of ultimate consummation. By recognizing that the marital interest in sexual relations is an expected component of most, rather than all, inmate marriages, Justice O'Connor made two points abundantly clear. First, the physical act of sexual intercourse, like procreation and child rearing, is entirely distinct from the fundamental right to choose marriage. Second, while it is a constitutionally significant incident of marriage, the expectation of sexual intercourse is not a condition precedent to constitutional protection of marriage. Thus, after *Turner*, marriage not only concerns a fundamental interest regardless of the actual or potential existence of children, it also concerns a fundamental interest regardless of the actual or potential incidence of sexual intercourse.[119]

The *Loving* line of cases thus establishes two elemental principles beyond question. Discussion of the first principle comprises the balance of this Part, while Part III undertakes consideration of the second.

To begin, the line of cases beginning with *Loving* establishes that the right to marry is fundamentally important to all individuals[120] for a variety of closely related yet discrete reasons.[121] However, existence does not necessarily equate with recognition, and terming a given liberty interest a fundamental right in one context does not necessarily mean it will be treated as a fundamental right in the next. Thus, when faced with the expression of a fundamental right in a new context, such as the right to marry with regard to same-sex couples, the Court considers whether the implicated interest is so deeply rooted in the nation's history and traditions as to be implicit in the Anglo-American concept of ordered liberty.[122] It may well be argued that the right to marry a

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[119] That this conclusion is the constitutional state of play is not surprising. Impotent men and paralysis victims are two examples of individuals who cannot have sexual relations because of sheer physical incapacity. However, such conditions are not fraught with an attendant loss of the fundamental right to marry. This fundamental reality was explicitly recognized by the Supreme Judicial Court of Massachusetts when striking down that state's statutory bar to same-sex marriages in a landmark 2003 decision. *See infra* notes 200-215 and accompanying text.

[120] *Zablocki*, 434 U.S. at 384.

[121] *See, e.g.*, *Turner*, 482 U.S. at 95-96.

[122] *See* Moore v. City of East Cleveland, 431 U.S. 494, 503-04 & nn. 10, 12 (1977).

same-sex partner is not so deeply rooted, and thus laws such as Measure 36 are properly analyzed under rational basis review. This argument is flawed in at least two ways.

First, there is reasonable cause to doubt that the "deeply rooted" test remains the sole tool available to identify fundamental rights. The Court has at least suggested an evolving standard to identify and classify claimed rights, based upon the drafters' purpose that the Constitution remain agile enough to respond to unforeseen questions, so that "persons in every generation can invoke its principles in their own search for greater freedom."[123] While not all rights are fundamental, determining which are cannot simply be a matter of determining whether the implicated interest as specifically expressed is deeply rooted in this nation's history and traditions.[124]

Second, even with application of the deeply rooted test, it does not necessarily follow that same-sex marriage does not implicate a fundamental right. Initially, it must be acknowledged that the narrow instance of men marrying men and women marrying wo-

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[123] Lawrence v. Texas, 539 U.S. 558 (2003). In this connection, the Court stated:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id. at 578-79.

[124] If appealing to history were the lone consideration, one would expect numerous cases to come out differently because the specific act at issue had little basis as a deeply rooted part of our tradition or history. For example, *Griswold* protected a married couple's right to use contraceptives as part of the broader right to privacy, despite long-standing state prohibitions on such use. *See* Griswold v. Connecticut, 381 U.S. 479, 505-06 (1965) (White, J., concurring) (noting that the State disapproved of contraceptive use as a means of facilitating illicit sexual relationships and had prohibited such use for more than eighty years). Similarly, the *Loving* Court recognized the fundamental right to marry a person of another race, despite widespread historical and contemporary opposition. *See* Loving v. Virginia, 388 U.S. 1, 6, 12 (1967) (noting that anti-miscegenation statutes had been common since the colonial period, and that at the time of the decision sixteen states still prohibited interracial marriage). Finally, in *Roe v. Wade* the Court held that the constitutionally guaranteed right to privacy includes a woman's fundamental right to choose an abortion, despite historical evidence that casts doubt on the notion that the right to an abortion is intimately bound up with our history or tradition. *See* Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) (arguing that because a majority of states at the time had restricted abortion for at least a century, it is not so deeply rooted as to be considered a fundamental right).

men is not a deeply rooted part of this nation's history and tradition. That precise argument, however, applies just as forcefully to interracial marriage between black and white individuals. The same could likely be said of inmates' choice to marry and of marriages involving indigent people who cannot afford their child support payments. However, despite circumstantial variances, each of these situations shares a common element: Implication of the constitutionally protected fundamental right to choose marriage. And, in each case, the Court rejected the opportunity to define the implicated interest narrowly in favor of broadly construing and protecting the fundamental right to marry, despite the nontraditional context in which it was asserted.[125]

So it is that the precise liberty repeatedly protected against state-contrived infringement is severely burdened by Measure 36. Just as in *Loving*, a recognized and constitutionally protected aspect of personal liberty is being withheld on the sole ground of a partner's genetically-determined makeup.[126] Just as in *Zablocki*, a variety of justifications purporting to protect the family unit have been offered to justify the deprivation.[127] And, just as in *Turner*, members of a traditionally marginalized minority group

[125] *See Turner*, 482 U.S. at 78 (inmate marriages); *Zablocki*, 434 U.S. at 374 (marriages involving indigent individuals); *Loving*, 388 U.S. 1 (interracial marriages).

[126] Though perhaps more germane to an equal protection challenge to Measure 36, it is worth noting this similarity: The Virginia statute in *Loving* prohibited a white person from marrying anyone besides another white person—a genetically determined characteristic. Similarly, Measure 36 prohibits individuals from marrying a partner of the same sex—also a genetically determined characteristic.

[127] Because Measure 36 was a ballot measure to amend the Oregon Constitution, and because of the posture of the current litigation, the State has never had occasion to argue the merits of Measure 36 in relation to the Due Process Clause of the Fourteenth Amendment. However, the Defense of Marriage Coalition (DOMC), an intervenor-defendant in the *Li* litigation, *see supra* notes 6-17 and accompanying text, has presented arguments in favor of Oregon's statutory prohibition of same-sex marriage that DOMC may well reprise in favor of the constitutional prohibition of same-sex marriage embodied in Measure 36. In its brief to the Oregon Supreme Court in the *Li* case, DOMC argued that banning same-sex marriage is justified because of biological differences relating to procreation ("[I]f a partner in a same sex relationship produces a child, it is not genetic procreation *by the two partners*. Natural procreation is always the result of sexual intercourse between a physically healthy man and a woman."); child rearing ("same sex couples and married parents are not similarly situated regarding child rearing because a same sex couple can never provide a child with the advantages of being raised by both biological parents"); and historical status ("The only historical cultures that supposedly accepted same sex relationships were those without momentum."). *See* Intervenor-Defendants-Appellants, Cross-Respondents Defense of Marriage Coalition Opening Brief at 29-36, Li v. Oregon, Civil No. S51612 (S. Ct. Or., filed Sept. 20, 2004).

are being denied a fundamental right that is not inconsistent with their present status. The deprivation, however, is starkly inconsistent with the Court's proclamation that "the right to marry is of fundamental importance for all individuals."[128] If that indeed is the case, it is hard to see how the fundamental right to marry can be construed to exclude the right to choose a partner of the same sex. The fundamental interest in personal liberty and autonomy enveloping the choice to marry could not be shackled by prohibitions on interracial marriage, inmate marriage, or the marriage of an indigent with child support obligations. Similarly, under this body of well-settled law, that individually held interest should not be irrevocably held captive on the basis of one's choosing a same-sex partner.

III

Away from an Uncertain Compass: Taking Moral Disapproval off the Table as a Legitimate State Interest

The second core principle emerging from the *Loving* line of cases is that while the State may legitimately impose reasonable restrictions that do not significantly interfere with the decision to marry,[129] there exists a "limit beyond which a State may not constitutionally go."[130] As a corollary to that principle, the Court's holding in *Lawrence v. Texas*[131] unmistakably delineates interests upon which a State may not constitutionally rely to justify prohibitions on same-sex marriage.

Faced with a state law prohibiting oral and anal sex between same-sex individuals,[132] under which two consenting adults were convicted for conduct undertaken within the privacy of the home,[133] the Court in *Lawrence* once again refused to confine the liberty recognized in *Griswold* within a narrow majoritarian

[128] *Zablocki*, 434 U.S. at 384.
[129] *See id.* at 386.
[130] *Id.* at 392 (Stewart, J., concurring).
[131] 539 U.S. 558 (2003).
[132] The statute at issue punished "deviate sexual intercourse" only with a same-sex partner, defining "deviate sexual intercourse" as any contact between one's genitals and another's mouth or anus; or the penetration of the genitals or anus of another with an object. *Id.* at 563.
[133] *Id.* at 578 (noting that the case did not involve minors, individuals incapable of consenting, public conduct, or prostitution, but rather "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle").

view of history or tradition.[134] Moreover, by invalidating the law as a matter of substantive due process,[135] the Court conclusively established that the liberty of the individual cannot be forsaken merely in the name of adhering to the Court's own precedents.[136] But in overruling its earlier decision in *Bowers v. Hardwick*,[137] the Court did more than cast aside a decision whose underpinnings had "sustained serious erosion."[138] Rather, it took general moral disapproval off the table as a legitimate state interest able to justify prohibiting traditionally disfavored conduct.[139]

In *Bowers*, the Court split 5-4 in upholding a state law prohibiting all individuals, regardless of sex or sexual orientation, from engaging in anal or oral sex.[140] However, the law was challenged by a homosexual man,[141] and the Court's disposition of the case hinged on the conclusion that engaging in homosexual sodomy is not a constitutionally protected right.[142] Framing 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,"[143] the majority emphasized a State's prerogative to flatly prohibit sexual activity it considered "immoral and unacceptable."[144] Such authority existed,

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134 *See id.* at 566-72 (discussing the historical development of laws prohibiting homosexual sexual acts before concluding that the laws and traditions of the past half century "are of most relevance" and reflect "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"); *see also id.* at 572 ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.") (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

135 *Id.* at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

136 *See id.* at 577 (describing the doctrine of *stare decisis* as a prudential consideration rather than "an inexorable command"); *see also id.* at 579 ("[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

137 478 U.S. 186 (1986).

138 *See Lawrence*, 539 U.S. at 576.

139 *See id.* at 577-78 (recognizing Justice Stevens' dissent in *Bowers*, which argued that traditional perceptions of a practice as immoral are not enough to uphold a law prohibiting the practice, as controlling the issue before the Court).

140 *See* Bowers v. Hardwick, 478 U.S. 186, 188 n.1 (1986).

141 *See id.* at 188.

142 *See id.* at 190.

143 *Id.*

144 *Id.* at 196.

partially, because in the Court's view prohibitions on homosexual sodomy had "ancient roots."[145] Chief Justice Burger amplified the appeal to history and majoritarian morality in his concurrence, arguing that the regulation of homosexual conduct has been a common government function "throughout the history of Western civilization."[146] Chief Justice Burger further argued that "[c]ondemnation of those practices is firmly rooted in Judeao-Christian moral and ethical" tradition and that protecting homosexual sodomy as a fundamental right would "cast aside millennia of moral teaching."[147] Since no such right existed, rational basis review attached and the state's interest in imposing its version of morality justified the prohibition of intimate sexual relations between homosexual individuals.[148]

That view of the legitimacy of a state's interest in enforcing moral standards prevailed with five Justices when *Bowers* was decided.[149] Seventeen years later, *Lawrence* changed that.

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145 *Id.* at 192.

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

147 *Id.* at 196-97.

148 *Id.* at 197.

149 Justice Blackmun attacked the majority's reliance on morals-based value judgments: "[T]he fact that the moral judgments expressed by [statutes such as the one at issue] may be 'natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'" *Id.* at 199 (Blackmun, J., dissenting) (citation omitted). Taking more explicit issue with the majority's reasoning, Justice Blackmun argued that if the constitutional right to privacy means anything, it means that before a State may "prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an 'abominable crime not fit to be named among Christians.'" *Id.* at 199-200 (citation omitted). Justice Blackmun also criticized the Court for ignoring the basic reasons why certain individual rights associated with the family are protected by the Due Process Clause: "We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life." *Id.* at 204. Justice Stevens also dissented, arguing in part that the Court's prior cases made "abundantly clear" 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 the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Id.* at 216 (Stevens, J., dissenting). And, even before *Bowers* was overruled by *Lawrence*, conviction in its holding and rationale began to wane among some who joined the majority position. Justice Powell is widely considered to have come to regret joining the majority in *Bowers*. *See, e.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1258 (4th ed. 2000) (noting Justice Powell's regret concerning his position in *Bowers* and his explanation that he had never met a homosexual); Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3 (quoting Justice Powell as saying, in a speech to law students, "I think I probably made a mistake in that one.").

A. Morality No Longer Enough—Where's the Harm?

Overruling *Bowers* in no uncertain terms,[150] the *Lawrence* Court determined the issue it faced was squarely controlled by Justice Stevens' dissent in *Bowers*.[151] There, Justice Stevens emphasized that the Court's substantive due process jurisprudence made "abundantly clear" 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 the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."[152]

After *Lawrence*, neither may those interests alone justify Measure 36's prohibition of same-sex marriage. By endorsing Justice Stevens' dissent in *Bowers*, the *Lawrence* Court definitively took mere moral disapproval, as well as historically prevailing mores, out of the mix of interests the State may legitimately offer to justify infringement upon individually held liberty interests.[153] That is to say, the State may not constitutionally prohibit sexual activity between same-sex individuals on the basis of "promoting morality" without showing some further harm prevented, or some further interest served. Nor can such laws be saved because the prohibited activity has historically been considered immoral. As discussed below, there is no principled reason why this logic should not extend to prohibitions on same-sex marriage. Simply put, under *Lawrence*, Measure 36 must be justified on some grounds apart from a bare desire to promote morality,[154] and independent of the argument that same-sex marriage

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150 Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("*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.").

151 *Id.* ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.").

152 *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting); *cf. id.* at 210 (Blackmun, J., dissenting) ("I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny.").

153 *Lawrence*, 539 U.S. at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

154 Justice O'Connor's concurring opinion states as much. Justice O'Connor departed from the majority and argued that the Texas prohibition on same-sex oral and anal sex was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 579 (O'Connor, J., concurring). Yet she too recognized that plain moral disapproval would not suffice to justify a prohibition on same-sex marriage. *Id.* at 585 (noting that the State could not assert any legitimate interest, but

is not a historically recognized institution.[155] While noting the infirmities of *Bowers'* depiction of the historical condemnation of homosexual conduct,[156] *Lawrence* did not sidestep the historical issue but rather addressed it head-on. The Court acknowledged *Bowers'* broader point that powerful voices, influenced by religious beliefs, notions of acceptable behavior, and respect for the traditional family unit, had condemned homosexual conduct as immoral for hundreds of years.[157] Even so, the Court concluded that:

> These considerations do not answer the question before us. . . . 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."[158]

B. Does One Plus One Equal Two for Same-Sex Partners?

Exercise of that obligation not only required rejection of *Bowers*, it also signaled a constitutional legitimization of same-sex relationships based upon "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to con-

stating that, unlike moral disapproval of homosexual relationships—the interest asserted by the State in *Lawrence*—there are "other reasons . . . to promote the institution of marriage beyond mere moral disapproval of an excluded group").

155 The Court's opinion in *Loving v. Virginia*, 388 U.S. 1 (1967), declaring anti-miscegenation statutes violative of due process despite the historical prevalence of such statutes, indicates the Court has long viewed simple appeals to history as insufficient to support prohibitions on marriage. *See supra* notes 43-55 and accompanying text. Furthermore, the proposition that same-sex marriage may not be prohibited merely because it falls outside of the "traditional" definition of marriage seems to flow lockstep from the majority's adoption of Justice Stevens' dissent in *Bowers*, which stated 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 the practice." *Lawrence*, 539 U.S. at 577 (citing *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)). However, this is another point on which Justice O'Connor appears to depart from the majority. *See id.* at 585 (O'Connor, J., concurring) (stating that the prohibition of same-sex sexual activity was supported by no legitimate interest, "such as national security or preserving the traditional institution of marriage").

156 *Id.* at 571 (majority opinion) (characterizing the historical grounds *Bowers* relied upon as more complex than indicated by either the majority or Chief Justice Burger and stating that "[t]heir historical premises are not without doubt, and at the very least, are overstated").

157 *Id.*

158 *Id.* (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)). Justice Kennedy's majority opinion in *Lawrence* traces Justice Blackmun's *Bowers* dissent closely on this point. *See infra* notes 222-223 and accompanying text.

duct their private lives in matters pertaining to sex."[159] That emerging awareness exposed both *Bowers'* misapprehension of the liberty implicated, and its crude methodology for disposing of it: "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."[160] Aside from the point that this line of argument is foreclosed by *Turner*,[161] this statement seemingly indicates the Court's recognition that homosexual couples are as fit as heterosexual *married* couples to reap the nonsexual benefits of committed relationships.[162] The central holding of *Lawrence*, in turn, extends constitutional protection to the private and consensual sexual activity of two adults regardless of each individual's sex or orientation.[163] Thus, sexual intimacy, the constitutionally protected physical component of marriage,[164] is a right available on equal ground to homosexual individuals. And as *Lawrence* explains, casting an intimate relationship as implicating nothing more than that right demeans homosexual individuals precisely as it demeans the individuals who compose a married couple.[165]

These distinct considerations combine to form a single proposition emerging from *Lawrence*. Simply put, homosexual individuals both have a constitutional right to engage in the constitutionally protected physical aspect of marriage, and are constitutionally capable of enjoying the constitutionally pro-

159 *Lawrence*, 539 U.S. at 559.

160 *Id.* at 567.

161 *See supra* note 119 and accompanying text.

162 *See Lawrence*, 539 U.S. at 567 ("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."); *cf*. Turner v. Safley, 482 U.S. 78, 96 (1987) (discussing various beneficial incidents such as emotional support, public commitment, and spiritual significance as components of marriage constitutionally distinct from marital sexual intercourse).

163 *See Lawrence*, 539 U.S. at 578 ("The State cannot demean [petitioners'] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."); *see also id.* ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

164 *See Turner*, 482 U.S. at 78; Griswold v. Connecticut 381 U.S. 479 (1965).

165 *See also* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.").

tected emotional aspects of marriage.[166] Homosexual individuals thus have a constitutional right to enjoy the component parts of marriage. Yet Measure 36 forbids them access to the integrated institution. As discussed below, there is no rational reason why this equation of one plus one should not equal two for same-sex partners.

While legitimizing homosexual individuals' *ability* to experience the psychological and emotional benefits of marriage, *Lawrence* definitively recognizes their constitutional *prerogative* to do so as part of the personal autonomy protected by substantive due process. "[O]ur laws and tradition," the Court said, "afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[167] Furthermore, that protection is not contingent upon satisfying some traditional "moral" standard. Rather, "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[168] Yet with its absolute prohibition of same-sex marriage, Measure 36 stamps out the right of individuals in homosexual relationships to seek autonomy through the most basic, personal, and intimate means of all: The choice to marry the person they love.

A similarly bruising deprivation of individual liberty, "state-sponsored condemnation"[169] of private sexual practices, could not stand in *Lawrence*. The challenged statute not only failed to advance any legitimate state interest,[170] it actively authorized the denigration of homosexuals.[171] Although the statute exacted a relatively minor criminal penalty,[172] the social subjugation implicit in its justification and attendant in its operation bore much heavier weight. Extending its inquiry beyond the statute's legal

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[166] If this were not the case, it would make little sense to argue that casting homosexual relationships as involving merely the right to have sex demeans the individual claim to liberty in the same way it would demean a married couple to define that relationship as implicating only the right to have sex. *See Lawrence*, 539 U.S. at 567.

[167] *Id.* at 574 (citing Planned Parenthood of Se. Pa. v. Casey 505 U.S. 833, 851 (1992)).

[168] *Id.*

[169] *Id.* at 576.

[170] *Id.* at 578.

[171] *See id.* at 574-75 (describing the statute as imposing a stigma upon the lives of homosexual individuals).

[172] *See id.* at 575 (noting that violating the statute amounted to a class C misdemeanor, "a minor offense" under Texas law).

formalities, the Court recognized the debilitating normative effect of the stricken law:

> 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.[173]

In precisely the same way, Measure 36 demeans the lives of homosexuals. While it must be acknowledged that there is a difference between criminalizing a given behavior and refusing to legally recognize a given relationship, the restrictions bring identical normative impacts to bear. The formal legal effect of Measure 36 is to prohibit the individual choice to marry a same-sex partner. Yet, precisely like the law struck down in *Lawrence*, Measure 36 operates in a broader social context as a vehicle of subjugation, aimed singly and directly at homosexual individuals. It effectively deprives such individuals of the choice to marry at all, if one accepts that most people do not consider the choice to marry a partner counter to their sexual orientation a legitimate choice. And in so doing, Measure 36 effectively stands for the proposition that homosexual individuals are second-class citizens, either less capable or less worthy of partaking in the constitutionally protected institution of marriage. In short, it too "is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[174]

It should be noted that the Court had the opportunity to determine the fate of the statute at issue in *Lawrence* under the Equal Protection Clause,[175] and that Justice O'Connor's concurrence specifically relied on equal protection jurisprudence to find the statute unconstitutional.[176] While recognizing "a tenable argument"[177] for doing so, the majority instead relied on substantive due process analysis to strike the statute down.[178] That decision reveals the Court's paramount concern with protecting the con-

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[173] *Id.*

[174] *Id.*

[175] *Id.* (noting that the petitioners pressed an equal protection argument as alternative grounds for finding the statute unconstitutional).

[176] *See id.* at 579-81 (O'Connor, J., concurring).

[177] *Id.* at 574 (majority opinion).

[178] *See id.* at 578 ("The State cannot demean [petitioners'] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty

stitutional boundaries of individual liberty, rather than determining whether a heavy-handed attack on personal autonomy applied evenly enough to all to pass constitutional muster. As the Court explained, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects."[179] They are not, however, coextensive. And while the doctrines intersect in certain places, substantive due process reflects a more delicate appreciation of the soul's right to breathe, rather than asking whether all are being suffocated equally. For when "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."[180] Thus, striking a law that irrationally discriminates against homosexual individuals merely because it does not extend to heterosexuals does little to avenge the individual liberty lying at the heart of substantive due process.[181] However, substantive due process analysis avoids this consequence, exposing the stigmatic effect of laws such as Measure 36 by requiring an affirmative showing of their substantive validity. After *Lawrence*, when intended to differentiate individuals based merely upon the State's moral disapproval of their actions or associations, such laws and their stigmatic effects come at a price too steep to constitutionally bear.

IV

Gauging Interest: Is There a Legitimate Reason to Prohibit Same-Sex Marriage?

A final critical component of the *Lawrence* analysis is the Court's application of substantive due process to protect the individual right to liberty and autonomy in private sexual conduct, without resort to strict scrutiny or the pronouncement of a "new" fundamental right. Yet even had the Court couched the liberty at stake in terms of a "fundamental right," it does not seem to me

under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

[179] *Id.* at 575.

[180] *Id.*

[181] *See id.* ("Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.").

that the Court would have been creating a "new" category of fundamental right, so much as recognizing a new expression of an already deeply embedded fundamental right. In extending constitutional protection and legitimization to the intimacies of homosexual relationships for the first time, the Court did not treat the liberty being protected as a newly created interest, but rather as part of the personal autonomy protected by existing substantive due process jurisprudence.[182] While the majority opinion did not explicitly discuss the applicable standard of review, it seems evident that the Court conducted its analysis under the rational basis standard,[183] concluding that the individual right of consenting adults to engage in private sexual activity is protected by substantive due process, and that the State has no legitimate interest in prohibiting such conduct merely because it considers it immoral.

I have argued that the fundamental right to marry guaranteed by the United States Constitution as a matter of substantive due process necessarily includes the fundamental right to choose whom to marry, and should be recognized as extending to individuals in same-sex relationships. However, even should the Court decline to apply strict scrutiny to state-contrived prohibitions on same-sex marriage, the rational basis standard still requires the State to make an affirmative showing of "the relation between the classification adopted and the object to be attained."[184] And *Lawrence* helps provide the proper scope under which to consider the interests proffered by the State in support

[182] *See id.* at 578 (stating that the right of homosexual couples to liberty gives them the full right to engage in private sexual conduct free from government intervention, because "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.") (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992)).

[183] *Id.* ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."). *See also id.* at 580 (O'Connor, J., concurring) (noting that the Court has applied "a more searching form" of rational basis review to laws that exhibit a desire to harm a politically unpopular group than to run-of-the-mill economic legislation, and stating that the Court has been most likely to invalidate laws under rational basis review when "the challenged legislation inhibits personal relationships").

[184] Romer v. Evans, 517 U.S. 620, 632 (1996). In striking down on equal protection grounds an amendment to the Colorado Constitution that prohibited all state action designed to provide homosexual or bisexual persons with a claim to any minority status, quota preference, protected status, or claim of discrimination, the Court found the law supported by no legitimate state interest, and found rather that it raised an "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634.

of depriving homosexual individuals of the constitutionally protected right to choose marriage. The argument here is not that the *Lawrence* analysis applies seamlessly to the constitutional questions raised by Measure 36. Rather, the argument is that an analysis must be provided, and that for Measure 36 to survive even rational basis review, a legitimate state interest must be shown.

A. *Tradition: One Man, One Woman, One Tired Refrain*

This line of argument relies upon strict definitional exclusions: any relationship that is not entered into by one man and one woman is not a marriage.[185] Thus, whatever other label may attach to a same-sex relationship, the individuals can never marry each other, because a marriage requires one member of each sex. The circularity of the logic is apparent. And this line of attack is not so much an argument advancing a legitimate state interest as it is an exercise in tautology, for the institution of marriage is always defined by those who may access it. For example, before *Loving*, marriage could have been defined as the union of one man and one woman of a common race. The simple point is that such tautological definitional exclusions reveal nothing about the substantive nature of the right to marry, and serve merely to skirt the issue of same-sex marriage by stating what is, rather than offering an analysis of why. Further, such reflexive dismissal of the arguments in favor of recognizing the right of homosexual individuals to marry the person of their choice is inconsistent with our jurisprudential tradition. A colorable constitutional claim, even an unpopular one, is entitled to fair and considerate review. For example, in passing upon whether the State could prohibit polygamy, the Tenth Circuit did not merely say that since marriage is a union of one man and one woman no further inquiry was required. Instead, the court considered the issues presented and the competing claims before concluding that the state has a compelling interest in prohibiting plural marriage.[186]

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[185] *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (rejecting a lesbian couple's challenge to state marriage statutes on the ground that, because each party to the relationship was a woman, "the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage").

[186] *See* Potter v. Murray City, 760 F.2d 1065, 1070 (10th Cir. 1985). In addition to refusing to resort to the mere tautology of the "one man-one woman" marriage argument, the court there also refused to treat the Supreme Court's decision in

Again, the argument is not that the analysis applied to polygamous marriage is the appropriate analysis under which to consider prohibitions on same-sex marriage. The argument is rather that an analysis, apart from tautological conclusions, must be offered.

Closely related to the strictly definitional line of argument is the argument that same-sex marriage may be prohibited because marriage has historically encompassed only heterosexual unions.[187] In the light cast by *Lawrence* on the permissibility of relying strictly on traditional notions of constitutional rights,[188] the fact that marriage has historically included only those relationships composed of one man and one woman is not a state interest sufficient to support Measure 36.[189] Moreover, reliance need not be placed on *Lawrence* to reveal the infirmities with this argument. It should be remembered that the prohibitions on interracial marriage struck down in *Loving*[190] "arose as an incident to slavery and [had] been common in Virginia since the colonial period."[191] Yet that long-standing subjugation of the fundamental right to choose marriage could not answer the bell as a legitimate reason for continued deprivation. Neither should reference to history, alone, suffice as a legitimate state interest to continue depriving homosexual individuals of the deeply personal choice to enter into marriage.

Reynolds v. United States, 98 U.S. 145 (1878), upholding the criminal conviction of a Mormon for practicing polygamy, as dispositive. Rather, the *Potter* court considered the plaintiff's claim that *Reynolds* was no longer controlling before offering an analysis of why it disagreed. *Id.* at 1068-70.

[187] *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (denying challenge to same-sex marriage prohibition in part because "[t]he 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").

[188] *See* 539 U.S. at 571-72 ("[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."); *see also id.* at 572 ("History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))).

[189] *See id.* at 577 ("[T]he 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 the practice." (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

[190] 388 U.S. 1 (1967).

[191] *Id.* at 6. *See supra* note 51.

B. Promoting Procreation and Child Rearing

There can be little doubt that the State has a critical interest in encouraging the propagation of its members and ensuring that the current generation carry forward through future generations. It is also true that the state interest in promoting procreation has often been considered intertwined with marriage.[192] However, the argument that a prohibition on same-sex marriage advances the state's distinct interest in promoting procreation is fraught with holes.

To begin, no State has ever required proof of the physical ability to procreate, or a promise to do so,[193] before granting entry into marriage.[194] Secondly, *Griswold*,[195] *Zablocki*,[196] and *Turner*[197] make clear as a matter of constitutional law that procreation is neither a condition precedent to, nor required outcome of, entering marriage. Furthermore, that marriage and procreation are distinctly different considerations is illustrated by the fact that, as Justice Scalia notes in his dissenting opinion in *Lawrence*, "the sterile and the elderly are allowed to marry."[198] In addition to that reality, the attenuation between marriage and procreation is illustrated by the fact that not all couples who produce children are required to marry one another.

Yet even if having and raising children were an indispensable component of marriage, same-sex couples could not be prohibited from marrying on that basis. While it is true that only opposite-sex couples can procreate through sexual intercourse, same-

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[192] *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing the importance of the right "to marry, establish a home and bring up children").

[193] Granting marriage licenses contingent on such a promise would obviously raise serious constitutional problems. *See* Zablocki v. Redhail, 434 U.S. 374, 386-88 (1978) (explaining that while "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may be legitimately imposed," significant interference with the exercise of a fundamental right "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests"); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

[194] *See, e.g.*, M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (upholding marriage to a transsexual despite his sterility).

[195] 381 U.S. 479.

[196] 434 U.S. 374.

[197] 482 U.S. 78 (1987).

[198] Lawrence v. Texas, 539 U.S. 558, 605 (Scalia, J., dissenting).

sex couples can and do choose to have children through adoption or assisted reproduction. Furthermore, these options are likewise open to opposite-sex couples, meaning that sexual intercourse, or "natural procreation," is no longer required for any couple who wishes to have children. With this as the current state of play, it is difficult to understand how imposing absolute prohibitions on same-sex marriage in any way advances the State's interest in promoting procreation.[199]

In its groundbreaking decision ordering the unfettered extension of marriage to same-sex couples, *Goodridge v. Department of Public Health*,[200] the Supreme Judicial Court of Massachusetts recognized as much. Rejecting the State's argument that prohibiting same-sex couples from marrying is justified by an interest in "providing a favorable setting for procreation," the court answered the trial court's holding that the primary purpose of marriage is procreation with a simple three-word rejoinder: "This is incorrect."[201] Despite the fact that many married couples do have children together, that is not the feature of the relationship upon which the fundamental interest hinges. Rather, "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."[202] The court also considered the various family combinations that raise children with the State's benediction, noting 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 her partner is heterosexual, homosexual, or bisexual."[203]

For those reasons, the court held that prohibiting same-sex

[199] The fallacy of the argument may be most clearly stated in commonsense terms. How many opposite-sex couples are going to quit engaging in sexual intercourse, or decide not to adopt a child, if same-sex couples are allowed to marry? In the same connection, how many homosexual individuals are going to suddenly begin engaging in heterosexual intercourse because they are not allowed to marry the partner of their choosing? The answer, on both counts, I suspect is very few.

[200] 798 N.E.2d 941 (Mass. 2003).

[201] *Id.* at 961. The court went on to state that such a position was untenable because the state's marriage statutes "do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family." *Id.*

[202] *Id.*

[203] *Id.* at 962.

marriage is not rationally related to the State's interest in creating a "favorable setting for procreation."[204] Similarly, the *Goodridge* court exposed the fallacies of another state interest commonly proffered to justify prohibitions on same-sex marriage: Protecting children and promoting their well-being.

Rejecting the State's argument that confining marriage to opposite-sex couples ensures an "optimal" setting for raising children, the court recognized that "[p]rotecting the welfare of children is a paramount State policy," but also that prohibiting same-sex marriage "cannot plausibly further this policy."[205] To begin, the State made no showing that forbidding marriage to individuals of the same sex would increase the number of individuals choosing to marry opposite-sex partners in order to have and raise children.[206] Further, the State conceded that individuals in same-sex relationships may be "excellent" parents.[207] And, while "[e]xcluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure,"[208] the "task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws."[209]

Rejecting the justifications offered by the State, the *Goodridge* court found that the prohibition on same-sex marriage served to further no legitimate state interest and thus violated the equal protection and due process clauses of the Massachusetts Constitution.[210] In so holding, the court echoed themes running deep through Supreme Court jurisprudence, including the critical nature of the bilateral commitment protected by the right to marry[211] and the clear distinction between marriage and procreation.[212] It also stepped out into uncharted waters, legalizing in full same-sex marriage as of May 2004 for the first time in an American jurisdiction.[213]

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[204] *Id.* at 961 ("[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection [under the Massachusetts Constitution].").

[205] *Id.* at 962.

[206] *Id.* at 963.

[207] *Id.*

[208] *Id.* at 964.

[209] *Id.* at 963.

[210] *See supra* note 204.

[211] *Goodridge*, 798 N.E.2d at 954-55.

[212] *Id.* at 962 ("If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means.").

[213] As a matter of remedy for the constitutional violations, the court did not order

C. Promotion of Stability and Protection of the Family

One final category of argument advanced against same-sex marriage is an ill-defined but volubly-made claim that recognizing the right of homosexual individuals to marry one another will serve to debase and destabilize society. It is clear that the State has an important interest in creating and maintaining a stable society, the elemental component of which is the family, the basic structure of which is most often provided by marriage. What is unclear is how recognizing same-sex marriages would serve to undermine the family or the integrity of the institution of marriage.[214] Rather, because marriage serves as a stabilizing force in the establishment and continuity of families, extending the benefits and protections of marriage to same-sex couples and their children would serve only to foster social stability, as opposed to

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immediate issuance of marriage licenses to same-sex couples, but rather stayed judgment for 180 days to allow the legislature to "take such action as it may deem appropriate" in light of the court's opinion. *Id.* at 970. The court clarified its holding in February 2004, announcing that only full access to marriage satisfied constitutional demands. Rejecting a proposed civil union bill, the court stated:

> The history of our nation has demonstrated that separate is seldom, if ever, equal. . . . For no rational reason the marriage laws of the Commonwealth discriminate against a defined class; no amount of tinkering with language will eradicate that stain. The [civil union] bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits.

Opinions of the Justices to the Senate, SJC 09163 (Mass. Feb. 4, 2004), *available at* http://glad.org/marriage/Goodridge/SJC_Advisory_Opinion_020404.shtml. The constitutional implications of *Goodridge* are significant, not merely because it allows fully recognized same-sex marriage in an American jurisdiction for the first time, but also because same-sex couples married in Massachusetts and seeking to have their marriages recognized in other states will likely be able to bring a full-bore constitutional challenge to the Defense of Marriage Act, under which no state is required to recognize a same-sex marriage performed in another state. *See* 28 U.S.C. § 1738C (2000). Although *Goodridge* breaks new constitutional ground, courts in several other states have recently gone the opposite direction. Faced with similar claims and presented with substantially similar arguments as the *Goodridge* court, intermediate courts of appeal in Arizona and Indiana have instead relied predominantly on the deferential nature of the rational basis standard to uphold statutory prohibitions on same-sex marriage. *See* Standhart v. Super. Ct., 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003) (applying rational basis standard to reject challenge to prohibition on same-sex marriage under state constitution's equal protection clause); Morrison v. Sadler, 821 N.E.2d 15, 31 (Ind. Ct. App. 2005) (holding under rational basis review that prohibition of same-sex marriage does not violate state constitution's equal privileges and immunities clause).

[214] For example, there is no evidence that Massachusetts has plunged into a state of social anarchy or destabilization—with the notable exception of a few days in October 2004 after the Red Sox won the World Series—since marriage was made available in full to same-sex couples.

casting those families into social exclusion and legal uncertainty.[215]

A similarly flawed argument in this vein is that opening the door to allow homosexual individuals to marry necessarily entails polygamous and incestuous marriage crashing through the door behind them. The argument is flawed practically, because each constitutional claim must necessarily rise or fall on its own merits. The argument is also flawed logically, because laws that prohibit multiple marital partners or marriage between individuals within certain degrees of consanguinity involve significantly different questions than the deprivation visited by Measure 36 upon two competent, unrelated adults who wish to marry.[216]

The argument that permitting same-sex marriage alone somehow undermines the institution of marriage is likewise precarious.[217] Rather than diminishing a union that is "intimate to the degree of being sacred,"[218] recognizing the right of same-sex couples to marry only broadens the class of persons who can partake of the goodness of marriage, thus furthering the state's in-

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[215] As explained by the court in *Goodridge*:

> While establishing the parentage of children as soon as possible is crucial to the safety and welfare of children, same-sex couples must undergo the sometimes lengthy and intrusive process of second-parent adoption to establish their joint parentage. While the enhanced income provided by marital benefits is an important source of security and stability for married couples and their children, those benefits are denied to families headed by same-sex couples. While the laws of divorce provide clear and reasonably predictable guidelines for child support, child custody, and property division on dissolution of a marriage, same-sex couples who dissolve their relationships find themselves and their children in the highly unpredictable terrain of equity jurisdiction.

798 N.E.2d at 963 (citations omitted).

[216] For example, incestuous marriages implicate legitimate state interests in protecting public health, including the genetic complications suffered by children born to parents of close blood relationship. Polygamous marriages implicate the legitimate state interest in maintaining order in conferring marital benefits, such as intestate succession, based on a two-party relationship. *See generally* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (describing marriage as "an association that promotes . . . a bilateral loyalty").

[217] In light of inmates' right to choose marriage protected by *Turner v. Safley*, 482 U.S. 78 (1987), one can't help but wonder how admitting same-sex couples into the "club" of those who may choose marriage diminishes the institution. On the one hand, individuals whose choices and behavior are personally and socially destructive, and whose confinement leaves little room at all for exercise of individual will, are still free to choose marriage. On the other hand, individuals across the social spectrum are prohibited from making the free choice of marriage, based solely on a minority sexual orientation.

[218] *Griswold*, 381 U.S. at 486.

terest in the happiness and fulfillment of its citizens.[219] As the *Goodridge* court stated:

> [T]he plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished . . . . Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. 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.[220]

Conclusion

Homosexual individuals across Oregon are harmed in very real ways by Measure 36. Those who wish to marry are left with a hollow promise—in violation of the principle laid down in *Loving*—that they may marry, just not the person of their choice. Those who do not wish to marry presently are similarly harmed, their individual definition of self demeaned by categorical exclusion from the future option of partaking in the most cherished and intimate social relation. And those of us who fall outside these groups are nonetheless affected. To one degree or another we are each involved in a social structure permitting the moral will of the majority to be imposed upon the private choices of the individual. Forget what you may have heard about activist judges. It is squarely within the Court's tradition to serve as a counterweight to prevailing majoritarian views.[221] As Justice Blackmun wrote, dissenting in *Bowers*:

> "[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization . . . .

[219] *See* Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) ("[W]e protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households.").

[220] *Goodridge*, 798 N.E.2d at 965 (citations omitted).

[221] *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (noting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

> [Freedom] to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.[222]

Writing for the *Lawrence* Court seventeen years later, Justice Kennedy struck a similar chord: "[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[223]

Here's hoping that a generation of the near future sees Measure 36 and its brethren for what they truly are, and lifts their yoke of oppression in the search for our greater freedom.

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222 *Bowers*, 478 U.S. at 211 (Blackmun, J., dissenting) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943)).

223 Lawrence v. Texas, 539 U.S. 558, 579 (2003).