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Constitutional Analysis of the Barriers Same-Sex Couples Face in Their Quest to Become a Family Unit

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CONSTITUTIONAL ANALYSIS OF THE BARRIERS SAME-SEX COUPLES FACE IN THEIR QUEST TO BECOME A FAMILY UNIT

The right to marry and raise a family are among the most significant rights accorded to American citizens.[1] Marriage is a fundamental right[2] and, as such, is protected by the Fourteenth Amendment of the United States Constitution.[3] Courts envision the right to marry as a union between a man and a woman, thus placing a continuing limitation on the recognition of same-sex marriages.[4] Furthermore, state statutory schemes have protected the morals and values of the traditional family consisting of a husband, a wife, and children.[5]

A significant consequence of failing to recognize same-sex marriage is the denial of benefits reserved for legally married

1 *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that basic civil right to marriage cannot be denied based on racial classification); Poe v. Ullman, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting) (stating that these rights are inherent in concept of liberty); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (finding that right to procreation is protected against state's unwarranted interference by sterilization); *see also* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (establishing liberty interest for families in raising children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating "right to marry," establish home and raise children are essential to happiness of people).

2 *See* Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (indicating right to marry is part of fundamental right of privacy implicit in Due Process Clause of Fourteenth Amendment).

3 *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that right to bear children free from government interference is fundamental and may not be burdened by classification based on marital status); *Loving*, 388 U.S. at 12 (announcing right to marriage cannot be denied based on race); *Skinner*, 316 U.S. at 541 (proclaiming that state's sterilization law is subject to strict scrutiny because it affects basic liberty).

4 *See* Julienne C. Scocca, *Society's Ban on Same-Sex Marriages: A Reevaluation of the So-Called "Fundamental Right" of Marriage*, 2 SETON HALL CONST. L.J. 719, 720 (1992) (stating that ". . .to date, no jurisdiction in this country has recognized same-sex marriage").

5 *See* Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (holding unmarried biological father has no fundamental right to relationship with his illegitimate child); Parham v. Hughes, 441 U.S. 347, 353 (1979) (finding state statute restricting wrongful death suits to parents who have legitimated child is rationally related to state's interest in promoting traditional family unit). *But see Zablocki*, 434 U.S. at 375-76 (holding that statute denying marriage to any man under obligation to support by any court order or judgment unconstitutional).

couples.[6] In addition, although inroads have been made which allow same-sex couples to adopt and raise children,[7] there is still reluctance to treat these couples the same as heterosexual couples.[8] Since society's goal is to promote stable family units, homosexuals should be permitted to marry and be afforded the same protections heterosexual couples enjoy.[9]

This Note focuses on homosexual couples' right to marry and their fight for equal rights and recognition as family units. Part One focuses on the evolving definition of marriage and the impact of the *Baehr v. Lewin*[10] decision on this issue. Part Two discusses the legislative ramifications that have arisen from same-sex couples' struggle to acquire the right to marry. Part Three analyzes the denial of this right under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Part Four traces the development of the right to raise a family with respect to traditional and non-traditional family structures and argues that a viable approach to establishing equal rights for families with same-sex parents is to utilize adoption law. Finally, this Note concludes that the right to

6 *See* Jennifer L. Heeb, *Homosexual Marriage, The Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL. L. REV. 347, 391 (1993) (concluding denial of right to marry denies same-sex couples legal, emotional and economic benefits granted to married heterosexual couples); Felicia E. Lucious, Note, *Adoption of Tammy: Should Homosexuals Adopt Children?*, 21 SYRACUSE L. REV. 171, 180-81 (1994) (articulating that denial of right to marry deprives same-sex couples all benefits and legitimacy which flow from this legal status).

7 *See* William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 61 (1995) (stating that "gay people's children come through prior relationships, artificial insemination, surrogacy and adoption"); Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms and Modern Sexual Controversies*, 80 VA. L. REV. 1515, 1650 (1994) (noting many same-sex couples turn to artificial insemination to obtain children).

8 *See* Lisa R. Zimmer, *Family, Marriage, and The Same-Sex Couple*, 12 CARDOZO L. REV. 681, 693 (1990) (stating that while same-sex couples share family characteristics similar to that found in traditional families, these families are not provided adequate legal protections).

9 *See* D. Marianne Brower Blair, *Getting the Whole Truth and Nothing But the Truth: The Limits of Liability for Wrongful Adoption*, 67 NOTRE DAME L. REV. 851, 945 (1992) (noting that ultimate goal of adoption is to place children with families that will best meet child's needs); Denise Tyler Kelly, *Decedent's Estates: The Rights of Adopted Persons Under Tennessee's Descent and Distribution and Adoption Statutes to Take by Intestate Succession or By Will or Trust*, 22 MEM. ST. U. L. REV. 339, 340 (1992) (asserting that goal of most modern legislation is integration of child into adoptive family). *But see* Florida, Dep't of Health & Rehabilitative Serv. v. Cox, 627 So.2d 1210, 1220 (Fla. Dist. Ct. App. 1993) (declaring it is important for adopted children to have stable heterosexual households during teenage years).

10 852 P.2d 44, 58 (Haw. 1993), *on remand*, No. Civ. 91-1394, *available in* 1996 WL 694235 (Haw. 1996), *aff'd*, 950 P.2d 1234 (Ha. 1997).

marry and raise a family are fundamental rights which should not be denied to couples of the same-sex.

I. THE RIGHT TO MARRY

Today, states retain the exclusive power to regulate marriage.[11] State statutes, however, must conform to constitutional principles since the Supreme Court has determined that the right to marry is a fundamental right.[12] The United States Supreme Court has recognized that the Fourteenth Amendment protects an individual's decision in the realm of marriage and family.[13]

A. Same-Sex Relationships Are Within the Definition of "Marriage"

Marriage is most commonly defined as the legal union of a man and a woman.[14] Society relies on this functional definition

11 *See id.* at *1 (stating marriage is "state conferred legal status which gives rise to rights and benefits reserved exclusively to that particular relationship"); *see also* Zablocki v. Redhail, 434 U.S. 374, 392 (1978) (stating right to marriage is "to be defined and limited by state law"); Maynard v. Hill, 125 U.S. 190, 205 (1884) (describing that marriage has always been controlled by state legislature); Salisbury v. List, 501 F. Supp. 105, 107 (D. Nev. 1980) (stating marriage is within province of state law); O'Neill v. Dent, 364 F. Supp. 565, 568 (E.D.N.Y. 1973) (discussing states power to regulate marriage); Arthur G. LeFrancois, *The Constitution and the "Right" To Marry: A Jurisprudential Analysis*, 5 OKLA. CITY U. L. REV. 507, 546 (1980) (explaining that marriage has traditionally been subject of state regulation); Erik J. Toulon, *Call the Caterer: Hawaii to Host First Same-Sex Marriage*, 3 S. CAL. REV. L. & WOMEN'S STUD. 109, 111 (1993) (noting states have typically interpreted gender-silent statutes as excluding same-sex marriages); Kevin Zambrowicz, *"To Love & Honor All the Days of Your Life" A Constitutional Right to Same-Sex Marriage?*, 43 CATH. U. L. REV. 907, 909 (1994) (noting regulation of marriage falls within province of state control).

12 *See* Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992) (noting State's right to interfere with persons decisions relating to family and parenthood is restricted by Constitution); Turner v. Safely, 482 U.S. 78, 95 (1987) (recognizing fundamental right to marriage); *Zablocki*, 434 U.S. at 374 (asserting right to marry is fundamental).

13 *See* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 816 (1978) (declaring that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Fourteenth Amendment"); Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 62, 639-40 (1974) (holding mandatory leave of pregnant school teachers violates due process since there was no valid relationship between time of leave and state interest); Loving v. Virginia, 388 U.S. 1, 12 (1967) (prohibiting denial of right to marriage based on race); *Maynard*, 125 U.S. at 205 (suggesting marriage is related to morals and civilization of people more than any other institution).

14 *See* Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971). The court found that the statute used the term "marriage" as a term of common usage, i.e., "the state of union between person of the opposite sex." *Id.* Courts also have defined marriage by looking into case law and dictionary definitions and found that "marriage is and always has been a contract between a man and a woman." *Id.* Courts have held that marriage is inherently a relationship between persons of different sexes. DeSanto v. Barnsley, 476 A.2d 952, 953

of marriage to preserve the role of the traditional family as a building block of the community[15] and to promote stability.[16]

Courts define the right to marry narrowly,[17] determining that a valid marriage contemplates only a union between a man and woman.[18] Some state legislatures have explicitly prohibited marriage between individuals of the same-sex.[19] Others implicitly reject same-sex marriages through interpretation of the applicable statute.[20] The right to marry, thus, has been denied to same-sex couples[21] because they cannot fit within the narrow

(Pa. Super. Ct. 1984).

15 *See* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy-Balancing the Individual and Societal Interests*, 81 MICH. L. REV. 463, 476 (1983) (asserting that marriage promotes community because marriage and kinship instruct parents and children in authority, responsibility, and duty); *see also* County of Dane v. Norman, 497 N.W.2d 714, 716 (Wis. 1993) (refusing to find landlord's refusal to lease to unmarried persons a violation of state's anti-discrimination statute promoting the stability of marriage and family); Zimmer, *supra* note 8, at 681 (suggesting procreation of family should be founded on reality of family life rather than biological relations).

16 *See* Note, *Developments in the Law-Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1607 (1989) (citing Zablocki, 434 U.S. at 384) [hereinafter Developments] (stating that "any stable and significant relationship between two consenting adults should be accorded constitutional protection"); Note, *In Sickness and in Health, In Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038, 2046 (1996) [hereinafter *In Sickness and in Health*] (suggesting that functional definition of marriage promotes familial and societal stability and thus should be used by states); *see also* Baehr v. Lewin, 852 P.2d 44, 58 (Haw. 1993) (defining marriage as "state-conferred legal partnership status").

17 *See* Zambrowicz, *supra* note 11, at 908 (noting marriage is defined narrowly).

18 *See* Baker, 191 N.W.2d at 186 (defining marriage as "state of union between persons of the opposite sex"); DeSanto, 476 A.2d at 952 (asserting "marriage is and always has been a contract between a man and a woman"); *see also* The Defense of Marriage Act of 1996, 1 U.S.C. § 7 (1996) (defining marriage as "only a legal union between one man and one woman as husband and wife").

19 *See* LA. CIV. CODE ANN. art. 89 (West 1996) (stating "[p]ersons of the same-sex may not contract marriage with each other"); TEX. FAM. CODE ANN. § 1.01 (West 1993) (noting "[a] license may not be issued for the marriage of persons of the same-sex"); UTAH CODE ANN. § 30-1-2(5) (1995) (deeming "[m]arriages . . . prohibited and declared void . . . between persons of the same-sex"); VA. CODE. ANN. § 20-45.2 (Michie 1995) (prohibiting "[a] marriage between persons of the same sex . . . ").

20 *See* HAW. REV. STAT. § 572-1 (1994) (warning that "[t]he marriage contract . . . shall be only between a man and a woman"); IND. CODE § 31-7-1-2 (1997) (declaring that "[o]nly a female may marry a male . . . [and] [o]nly a male may marry a female"); MD. CODE ANN., FAM. LAW § 2-201 (1997) (limiting "[o]nly a marriage between a man and a woman [to be] . . . valid in this state"); MINN. STAT. § 517-01 (1997) (establishing that "[m]arriage so far as its validity in law is concerned, is a civil contract between a man and a woman . . . ").

21 *See* Dean v. District of Columbia, No. 90-13892, 1992 WL 685364, at *1 (D.C. Super. Ct. 1992) (prohibiting same-sex marriage because historical definition of marriage has involved union between man and woman), *aff'd*, 653 A.2d 307 (D.C. 1995); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973) (interpreting marriage statute to exclude same-sex marriages); *DeSanto*, 476 A.2d at 953-54 (holding same-sex couple could never enter into common law marriage); Singer v. Hara, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974) (denying same-sex marriage and noting that legislature never intended state statute to sanction same-sex marriages); *see also Baker*, 191 N.W.2d at 185 (denying

definition of marriage.[22]

The rationale espoused by courts in prohibiting same-sex marriage is that these couples are incapable of natural procreation and therefore cannot satisfy one of the indispensable elements of marriage.[23] This presupposes that all heterosexual couples are able to and will procreate[24] once they have obtained a marriage license.[25] Theoretically then, childless heterosexual couples are in the same situation as childless homosexual couples.[26] Furthermore, many same-sex couples can and do raise

marriage license to two men based solely on their same-sex status).

22 *See* Constant A. v. Paul C. A., 496 A.2d 1, 6 (Pa. Super. Ct. 1985) (noting that inherent in definition of marriage is union between man and woman for purpose of procreating and raising families); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (1971) (stating marriage is voluntary union between man and woman); *Singer*, 522 P.2d at 1191 (defining marriage as legal union between man and woman); *see also* Adams v. Howerton, 486 F. Supp. 1119, 1222 (C.D. Cal. 1980) (contending that in both scriptural and canonical teachings, marriage of same-sex couples is "unthinkable and, by definition impossible").

23 *See* Skinner v. Oklahoma, 316 U.S. 535, 535 (1942) (stating procreation is fundamental to very existence and survival of our race). *But see* Adrienne K. Wilson, *Same Sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539, 544 (1991) (arguing that states can not logically require same-sex couple to be able to procreate if not required for heterosexuals to do same); Zambrowicz, *supra* note 11, at 922 (noting courts refuse to extend marriage-procreation reasoning to deny homosexual couples right to marry).

24 *See* Baehr v. Lewin, 852 P.2d 44, 61 (Haw. 1993) (rejecting argument that same-sex couples are precluded from marrying because of their biological inability to satisfy definition of that status), *on remand*, No. Civ. 91-1394, 1996 WL 694235) (Haw. 1996), *aff'd*, 950 P.2d 1234 (Ha. 1997); Teresa S. Collett, *Marriage, Family and the Positive Law*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467, 476 (1996) (noting that states sanction marriages between heterosexual couples who are sterile or who plan on not having any children); Mark Strasser, *Domestic Relations Jurisprudence and the Great Slumbering* Baehr*: On Definitional Preclusion, Equal Protection and Fundamental Interest*, 64 FORDHAM L. REV. 921, 954 (1995) [hereinafter *Slumbering* Baehr] (stating "there is no procreational requirement for marriage, because opposite sex couples who will not or can not procreate may nonetheless marry"); Mark Strasser, *Family Definition and the Constitution: On the Antimiscengenation Analogy*, 25 SUFFOLK U. L. REV. 981, 1010 (1991) [hereinafter *Antimiscengenation Analogy*] (noting states do not question heterosexual couples about their plans for children prior to granting marriage licenses); *In Sickness & in Health*, *supra* note 16, at 2055 n.46 (noting that states do not revoke marriage licenses of those heterosexual couples who do not procreate); Zambrowicz, *supra* note 11, at 922 (stating, in many marriages, couples do not have children or are unable to have them).

25 *See* Wilson, *supra* note 23, at 544 (noting heterosexual couples need not show capability to procreate); *see also* Zambrowicz, *supra* note 11, at 921 (noting procreation and child rearing are not defining characteristics of traditional marriage).

26 *See* Heeb, *supra* note 6, at 391 (acknowledging that "non-traditional forms [of families] parallel traditional family in terms of furthering the same values and interest, such as commitment, loyalty and intimacy"); Leo Sullivan, Comment, *Same-Sex Marriage and the Constitution*, 6 U.C. DAVIS L. REV. 275, 280 (1973) (discussing that Equal Protection Clause requires persons "similarly situated" be treated alike); Zambrowicz, *supra* note 11, at 922 (noting heterosexual couples are similarly situated to same-sex couples); William N. Eskridge Jr., *Would Legal Recognition of Same Sex Marriages Be Good for America? Yes Marriage Will Normalize Social Relations Between Gay and Straight People Throughout the Culture*, INSIGHT MAGAZINE, June 10, 1996, at 24 (commenting on stable family environments in which many same-sex couples raise their children); *see also* Wil-

children,[27] through alternate means of procreation,[28] thereby promoting the family unit just as heterosexuals do.[29]

B. Baehr v. Lewin

Recently, in *Baehr v. Lewin*,[30] the Hawaii Supreme Court considered whether same-sex couples have a right to marry.[31] Three same-sex couples challenged the constitutionality of an Hawaii statute that denied marriage licenses based solely on the fact that the applicant couples were of the same sex.[32] The plaintiff couples asserted that the Department of Health's interpretation of the statute which would deny marriage licenses to same-sex couples violated their right to privacy,[33] equal protection under the law and due process of law.[34]

The Supreme Court of Hawaii found that while there was no

son, *supra* note 23, at 544 (arguing that same-sex couples can provide stable home environments for raising children similar to that provided by heterosexual couples).

27 *See* Wilson, *supra* note 23, at 544 (noting many same-sex couples have children); *see also* Zimmer, *supra* note 8, at 705 (stating rise of medical technology has made lesbian motherhood and gay fatherhood feasible through surrogacy).

28 *See* Anthony D. D'Amato, *Conflict of Laws Rules and Interstate Recognition of Same Sex Marriages*, 1995 U. ILL. L. REV. 911, 933 (discussing methods same-sex couples employ to have children, including artificial insemination and surrogacy); Marla J. Hollandworth, *Gay Men Creating Families Through Surro-gay Arrangements: A Paradigm For Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 226 (1996) (discussing gay couples parenting children through artificial insemination or surrogacy); Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783, 1794 (1988) (discussing lesbian couple's efforts to have children via artificial insemination).

29 *See* D'Amato, *supra* note 28, at 928 (acknowledging that same-sex relationships support many of same values as traditional heterosexual relationships); Heeb, *supra* note 6, at 391 (stating same-sex couples form families that are functionally equivalent to traditional families insofar as they promote same values and interests); Donna Hitchens & Barbara Price, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 GOLDEN GATE U. L. REV. 451, 464 (1978-79) (citing studies indicating that in some areas lesbians are healthier than heterosexual women); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 218 (noting that many homosexual couples form stable loving homes); Mary P. Treuthart, *Adopting a More Realistic Definition of "Family"*, 26 GONZ. L. REV. 91, 92 (1991) (contending that nontraditional families promote same values and interests as traditional families).

30 852 P.2d 44 (Haw. 1993), *on remand*, No. Civ. 91-1394, *available in* 1996 WL 694235, at *1 (Haw. 1996).

31 *Id.*

32 *Id.* at 49-50 (stating that plaintiff's complaint alleged that Department of Health denied applicant couples' marriage licenses solely on ground that they were of same sex even though they complied with all marriage contract requirements and provisions).

33 *Id.* at 50 (alleging right to privacy is guaranteed by Article 1, § 6 of Hawaii Constitution).

34 *Id.* (noting plaintiff's complaint asserted that Article 1 § 5 of Hawaii Constitution guarantees due process of law and equal protection).

fundamental right to same-sex marriage,[35] the state marriage statute, prohibiting same-sex marriages, was unconstitutional, both on its face and as applied.[36] The rationale offered was that it was in violation of the Equal Protection Clause of the Hawaii Constitution, which stipulates that disparate treatment makes it a suspect classification.[37]

The specific provision violated by the Hawaii marriage statute[38] is one which prohibits "state sanctioned discrimination against any persons in the exercise of his or her civil rights on the basis of sex."[39] The court concluded that sex is a "suspect category" for purpose of equal protection analysis, thereby triggering a "strict scrutiny" test.[40] A strict scrutiny analysis requires that there be a compelling government interest and that the means undertaken be necessary to achieve that interest.[41] Under this analysis, the State did not meet its burden because it failed to demonstrate a compelling interest to justify preventing same-sex couples the right to marry.[42]

35 *Id.* at 55-67. The Court held that there was no fundamental right to same-sex marriages under Article 1, Section 6 of the Hawaii Constitution. *Id.* The court's reasoning was that a right to same-sex marriages is not so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice. *Id.*

36 *See generally* Zambrowicz, *supra* note 11, at 932-49. This Note demonstrates how same-sex marriages are unconstitutional under Equal Protection Clause. *Id.*

37 *Baehr*, 852 P.2d at 57-67. The Court also held that the Hawaii marriage statute violated the Equal Protection Clause under Article 1, section 5 of the Hawaii Constitution because it discriminated against same-sex marriages by establishing a sex-based classification. *Id.*

38 HAW. REV. STAT. § 572-1 (1995). The statute provides that "in order to make valid the marriage contract, which shall only be between a man and a woman . . .[requirements must be met]." *Id.*

39 *See* HAW. CONST. art. I, § 5 (providing that "[n]o person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof of race, religion, sex or ancestry."); Baehr v. Lewin, 1996 WL 694235, at *19.

40 *See* Baehr v. Lewin, 1996 WL 694235, at *19.

41 *See* Roe v. Wade, 410 U.S. 113, 115 (1973) (stating "where certain fundamental rights are involved, the Court has held that regulations limiting these rights may be justified only by a 'compelling state interest' and that legislative enactment must be narrowly drawn to express only the legitimate state interests at stake"); Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 389 (1994) (noting that state action interfering with fundamental right must be supported by compelling interest and be narrowly tailored to achieve that interest).

42 *See* Baehr v. Lewin, 1996 WL 694235, at *20-21 (stating public interest in well-being of children and families would not be negatively affected by same-sex marriage).

II. RAMIFICATIONS OF LEGITIMIZING SAME-SEX MARRIAGE

A. Full Faith and Credit Clause

Recently, changes have been made to the established jurisprudence in the area of same-sex marriage, as evinced by the *Baehr* decision.[43] Many states, therefore, are concerned that same-sex couples will obtain a marriage license in Hawaii and utilize the Full Faith and Credit Clause[44] to retain their martial status upon return to their state of domicile.[45] The Full Faith and Credit Clause requires states to honor "public acts, records, and judicial proceedings" of other states.[46] It appears that the Full Faith and Credit Clause would mandate that marriages recognized in one state be honored in all other states.[47] The Clause,

43 *See id.* at *20 (noting same-sex marriages will not harm important governmental interests); *see also* Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450, 450 (1994) (suggesting some states may soon recognize homosexual marriages). *But see* Jones v. Hallahan, 501 S.W.2d 588, 588 (Ky. Ct. App. 1973) (denying gays marriage license).

44 U.S. CONST. art. IV, § 1. The Full Faith and Credit Clause of the United States Constitution states: "Full Faith and Credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." *Id.*

45 *See* Nancy Klingman and Kenneth May, *For Better or for Worse, in Sickness and in Health, Until Death Do Us Part: A Look at Same-Sex Marriage in Hawaii*, 16 U. HAW. L. REV. 447, 483 (1994) (discussing belief that homosexual couples will marry in Hawaii and be able to retain their marital status after returning home); *see also In Sickness and in Health*, *supra* note 16, at 2041 (noting states should recognize Hawaii marriages and respect "the couples' reliance interest in continuation of their marriage"); Habib A. Balian, Note, *Till Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 CAL. L. REV. 397, 400 (1995) (noting states possess power to follow their citizens into other states to define their marriage). *See generally* Murphet v. Murphet, 502 P.2d 255, 260 (Or. 1972) (stating each state must accord judgments of another state with full faith and credit).

46 U.S. CONST. art. IV, § 1. *See* Robert L. Cordell II, *Same-Sex Marriage: The Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith and Credit Clause*, 26 COLUM. HUM. RTS. L. REV. 247, 264 (1994) (noting Full Faith and Credit Clause requires that state recognize judicial decrees of another state); Deborah M. Henson, *Will Same Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's* Baehr v. Lewin, 32 U. LOUISVILLE J. FAM. L. 551, 583 (1994) (discussing possible implications of recognizing same-sex marriages in Hawaii and impact of Full Faith and Credit Clause); Jon T. Alexander, Comment, *Issue Preclusion, Full Faith and Credit and Default Judgments: A Dilemma for the Bankruptcy Courts*, 44 U.C.L.A. L.REV. 159, 166 (1996) (stating Full Faith and Credit Clause mandates that states must recognize judicial proceedings of another state); Henry J. Reske, *A Matter of Full Faith and Credit*, A.B.A. J., July, 1996 at 34 (noting purpose of Full Faith and Credit Clause is to require states to honor each other's "public acts, records and judicial proceedings").

47 *See* UNIFORM MARRIAGE AND DIVORCE ACT § 210, 9A U.L.A. 176 (West Ann. 1982 & Supp. 1997) (exemplifying uniformity of language followed by many states: "Marriages

however, contains an exception which allows a state to reject the laws of other states if these laws are in violation of its own public policy interests.[48] The Supreme Court, however, has never invoked the Clause to require a state to recognize a valid marriage occurring in another state.[49]

Interstate marriages involve choice of law jurisprudence.[50] Choice of law analysis requires that one law, either the law of domicile or the law of the state of occurrence be applied to transactions occurring in another state.[51] With respect to marriage, the law of the state in which the ceremony occurred will apply unless the marriage offends an important public policy of the state of domicile, or if the state has enacted appropriate legislation which declares that the marriage will not be recognized.[52]

A state maintains its interest in regulating marriage by retain-

contracted within the State . . . or outside the State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties, are valid in this State"); Beth A. Allen, *Same-Sex Marriage: A Conflict of Laws Analysis for Oregon*, 32 WILLAMETTE L. REV. 619, 670 (1996) (noting prior to DOMA, all states were required to recognize same-sex marriage from another state when Full Faith and Credit Clause applied); Mark Strasser, *Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It's Due*, 28 RUTGERS L.J. 313, 313 (1997) [hereinafter Baehr *Essentials*] (stating on its face, Full Faith and Credit Clause implies that all states would recognize same-sex marriages once one state has recognized it); *see also* McDonald v. McDonald, 58 P.2d 163, 164 (Cal. 1936) (demonstrating that California court held marriage valid in California because it was valid in Nevada); *In re* Estate of Shippy, 678 P.2d 848 (Wash. 1984) (illustrating California's validation of marriage in Alaska); *In re* Estate of Ferguson, 130 N.W.2d 300 (Wis. 1964) (giving validity to Michigan marriage in Wisconsin).

48 *See* Balian, *supra* note 45, at 401 (noting states must grant Full Faith and Credit only if other state's interest is superior to its own).

49 *See* Allen, *supra* note 47, at 671 (noting Supreme Court has not ruled on effect of Full Faith and Credit Clause on interstate marriages); Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1435 (1997) (commenting that Supreme Court never articulated implications of Full Faith and Credit Clause for marriages).

50 *See* Baehr *Essentials*, *supra* note 47, at 314 (asserting that recognizing marriages of other states requires full faith and credit analysis and choice of law rules); Mark Strasser, *Loving the* Romer *Out or* Baehr*: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 281 (1997) [hereinafter *Loving the* Romer] (stating choice of law issues are involved in recognition of out-of-state marriages). *See generally* Hovermill, *supra* note 43, at 454 (discussing choice of law analysis to validate out of state marriages).

51 *See* Baehr *Essentials*, *supra* note 47, at 314 (asserting choice of law rules implies one state law be applied to transactions occurring in another state).

52 *See id.* at 314 (commenting that if strong public policy of state is implicated, law of domicile will apply); *Loving the* Romer, *supra* note 50, at 281 (noting that because of choice of law rules, states which enact appropriate legislation do not have to recognize same-sex marriage in another state); *see also* Allen, *supra* note 47, at 673 (discussing that forum state may refuse to recognize otherwise valid marriage performed in sister state if violative of forum state's public policy).

ing the power to statutorily mandate eligibility requirements.[53] A state has an interest in regulating marriage and protecting family stability. When a marriage offends these goals or violates the state's public policy, the marriage would not be recognized.[54] Same-sex marriages, however, do not offend these goals and therefore should be recognized regardless of where the marriage was created.[55]

Although the Full Faith Credit Clause would support recognition of same-sex marriages occurring in another state, Congress undercut the effect of the clause through the enactment of the Defense of Marriage Act.[56]

B. Defense of Marriage Act

In response to *Baehr*, Congress enacted the Defense of Marriage Act ("Act").[57] The purpose of the Act was to protect the in-

53 *See* Hovermill, *supra* note 43, at 454 (stating every state has right to determine who can enter into matrimonial relationship within its borders); *In Sickness and in Health*, *supra* note 16, at 2039 (asserting state law governs marriage by placing limitations on ability to marry).

54 *See* Hovermill, *supra* note 43, at 455 (commenting that choice of law rule provides exception to refuse to honor valid foreign marriages if it violates forum state's public policy); Baehr *Essentials*, *supra* note 47, at 362 (discussing states interest in preserving integrity of marriage); *In Sickness and in Health*, *supra* note 16, at 2039 (asserting state interest in promoting stability, safety, and health to justify prohibiting certain types of marriages).

55 *See* Balian, *supra* note 45, at 400 (commenting on state's power to define marital relations outside state promotes harmony between states); Baehr *Essentials*, *supra* note 47, at 362 (noting same-sex marriages support general interests of state). *See generally* James D. Esseks, *Recent Developments Redefining the Family*, HAR. C.R.-C.L. L. REV. 183, 195 (1990) (stating that nontraditional families deserve same respect and dignity that traditional families receive); David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM & MARY BILL RTS. J. 345, 348 (1994) (noting there is no significant difference between mental health of lesbian mothers as compared with heterosexual mothers).

56 *See* Larry Kramer, *Same-Sex Marriage, Conflict of Laws and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 2000 (1997) (commenting that DOMA repeals Full Faith and Credit Clause for same-sex marriages); Ruskay-Kidd, *supra* note 49, at 1435 (stating DOMA discourages interstate recognition of marriage by partially rescinding Full Faith and Credit Clause); *Loving the* Romer, *supra* note 50, at 292 (implying DOMA is "likely to destabilize the certainty and status of marriage").

57 *See* 28 U.S.C. § 1738(c) (1996) (stating that "no state . . . shall be required to give effect to any public act, record, or judicial proceeding of any other state . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state . . ."); *see also* Paula L. Ettlebrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 166 (1996) (discussing implications of Defense of Marriage Act which allows "states to ignore same-sex marriages approved by other states"); Reske, *supra* note 46, at 34 (describing Defense of Marriage Act which specifies that states are not required to give effect to same-sex unions and bars federal benefits to those couples); James Kunen, *Hawaiian Courtship Gay Marriage May Become Legal In the Islands—Without Necessarily Coming to a Chapel Near You*, TIME

stitution of traditional heterosexual marriage.[58] The Act allows an individual state to utilize its own public policy to determine whether or not to extend full faith and credit to same-sex marriages.[59] A state is therefore permitted to circumvent the principles espoused by the Full Faith and Credit Clause and deny recognition of same-sex marriages occurring outside its borders.[60]

The Act goes beyond pre-existing law by denying application of the Full Faith and Credit Clause to marriages, despite the lack of Supreme Court guidance on the matter.[61] Prior to the Act, each state retained the power to decide whether to recognize out-of-state, same-sex marriages.[62] The principle of equality of the

MAGAZINE, Dec. 16, 1996, at 44 (noting that although same-sex marriages may ultimately be permitted in Hawaii, it is unlikely that these marriages will be recognized in other states because of Defense of Marriage Act).

58 *See* 28 U.S.C. § 1738(c) (1996) (altering normal rules for recognizing acts in sister states); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283 (1971) (noting "strong public policy" of state governs whether upholding marriage valid); *see also* Stilley v. Stilley, 244 S.W.2d 958, 960 (Ark. 1952) (finding common law marriage contracted in Kansas to be valid in Arkansas); Gallegos v. Wilkerson, 445 P.2d 970, 973 (N.M. 1968) (reasoning that heterosexual parties' rental of apartment, agreement as to marriage, cohabitation, and holding themselves out as husband and wife supporting finding of valid common law marriage). *See generally* Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 128-130 (1996) (noting definition of marriage in DOMA means "only a legal union between one man and one woman as husband and wife").

59 *See* H.R. REP. NO. 104-664, at 2 (1996) (stating that purpose of Defense of Marriage Act was to "define and protect the institution of marriage"); *see also* 142 CONG. REC. S10579-01 (daily ed. Sept. 16, 1996) (statement of Sen. Pell) (arguing that passage of Defense of Marriage Act was premature because no state has yet to recognize same-sex marriages); John J. Ross, *The Employment Law Year in Review*, *in* 25TH ANNUAL INSTITUTE OF EMPLOYMENT LAW, AT 9, 9 (PLI LITIG. & ADMIN. PRACTICE COURSE HANDBOOK SERIES NO. 547, 1996) (noting that Defense of Marriage Act "defines marriage for federal purposes as 'legal union between one man and one woman', which would affect federal benefits"). *But see* 142 CONG. REC. S10552-01 (daily ed. Sept. 13, 1996) (statement of Sen. Dorgan) (supporting Defense of Marriage Act because historically, marriage has been union between man and woman); 142 CONG. REC. S10 100-02, S10100 (daily ed. Sept. 10, 1996) (statement of Sen. Lott) (noting that Defense of Marriage was "a response to an attack upon the institution of marriage itself").

60 *See* H.R. REP. NO. 104-664, at 73 (1996) (arguing that Defense of Marriage Act is unconstitutional because it violates Full Faith and Credit Clause of Constitution); *see also* Eric Schmitt, *Senate Passes Bill Against Gay Marriages/ Measure to Ban Anti Gay Job Discrimination Defeated*, AUSTIN AMERICAN-STATESMAN, Sept. 11, 1996, at A1 (noting that opponents of Defense of Marriage Act contend that it is unnecessary and unconstitutional); Patricia Wen, *Measure Barring Gay Marriages Seen as Vulnerable*, BOSTON GLOBE, Sept. 12, 1996, at B1 (stating that Harvard Law School Professor Lawrence Tribe believes that Defense of Marriage Act violates Full Faith and Credit Clause of Constitution).

61 *See* Ruskay-Kidd, *supra* note 49, at 1449 (asserting DOMA impermissibly overstepped constitutional mandate of full faith and credit).

62 *See* Kramer, *supra* note 56, at 2000 (noting DOMA authorizes states to ignore "judgments involving the marital rights or status of a same-sex couple"); Ruskay-Kidd, *supra* note 49, at 1450 (commenting that DOMA changes state's ability to recognize va-

states, espoused by the Full Faith and Credit Clause, is nullified by the Act, in that it authorizes a state to deny recognition of a valid, out-of-state, same-sex marriage.[63]

III. A FOURTEENTH AMENDMENT ANALYSIS

A. Substantive Due Process

The Due Process Clause of the Fourteenth Amendment[64] guarantees all citizens the right to life, liberty, and property without governmental interference.[65] Embodied in the Fourteenth Amendment is the right of privacy which is recognized as a fundamental right.[66] This right of privacy includes the rights to family autonomy,[67] freedom from governmental interference

lidity of same-sex marriage from another state through use of Full Faith and Credit Clause).

63 *See* Ruskay-Kidd, *supra* note 49, at 1438 (implying that Congress, through DOMA, judges individual state laws).

64 U.S. CONST. amend. XIV, § 1 (setting forth that states shall not deprive any person of life, liberty or property without due process of law).

65 *See generally* Arnette E. Clark, *Autonomy and Death*, 11 TUL. L. REV. 45, 71-72 (1996) (discussing right to die under Due Process Clause); Daniel W. Fessler, *Federalism in the Second Republic's Third Century*, 50 WASH. U. J. URB. & CONTEMP. L. 95, 103-04 (1996) (discussing Justice Douglas' interpretations of Due Process Clause); Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 63-64 (1996) (addressing use of Due Process Clause to obtain protection of gay rights).

66 *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (stating "right of privacy [is] found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action"); Mapp v. Ohio, 367 U.S. 643, 656 (1961) (recognizing that Fourteenth Amendment creates "right of privacy, no less important than any other right carefully and particularly reserved to the people"); State v. Mueller, 671 P.2d 1351, 1353 (Haw. 1983) (holding that "a right to personal privacy or a guarantee is implicit in the United States Constitution"); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 858 (1992) (stating that liberty interest includes rights to marriage, procreation, contraception, family relationships, and child rearing and education); Whisenhunt v. Spradlin, 464 U.S. 965, 966 (1983) (Brennan, J., dissenting) (arguing constitutionally protected liberty interest includes freedom from governmental interference with personal matters of individual); Carey v. Population Serv. Int'l, 431 U.S. 678, 685 (1977) (acknowledging right of privacy includes freedom from governmental intrusions into personal decisions); Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (noting personal privacy includes "interest in independence in making certain kinds of important decisions"). *See generally* Claudia Tuchman, Note, *Does Privacy Have Four Walls? Salvaging* Stanley v. Georgia, 94 COLUM. L. REV. 2267, 2279 (1994) (discussing development of right of privacy in constitutional jurisprudence); Annemarie Brennan, Note, *Is All Privacy Created Equal?*, 20 VT. L. REV. 815, 820 (1996) (discussing evolution of privacy doctrine).

67 *See* Thornborough v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 791 (1986) (recognizing Court's history of upholding claims predicated on personal autonomy in connection with conduct of family life and child rearing); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (noting line of jurisprudence which acknowledges personal autonomy of family without unwarranted governmental intrusion); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (stating parents have liberty in-

with regard to marriage,[68] and child-bearing.[69] The right of privacy protects an individual's freedom of choice with regards to who an individual chooses to marry and protects against unwarranted interference by the government in this area.[70] States, moreover, may interfere with the right to marry only if the en-

terest in directing upbringing and education of their children free from unwarranted governmental intrusions); Pierce v. Society of Sisters, 268 U.S. 510, 510 (1925) (asserting "the liberty of parents and guardians to direct the upbringing and education of their children"); Meyer v. Nebraska, 262 U.S. 390, 390 (1923) (acknowledging rights of family and marriage). *See generally* Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 937 (1996) (noting parent's have constitutionally protected right to control and direct their children's education); David L. Nessessian, *Mom Versus Grandma-or-Parent Preference Versus Best Interest: An Examination of the Case for Grandparent Custody*, 13 PROB. L.J. 133, 153 (1996) (noting "that parents have a right to privacy and family autonomy").

68 *See Casey*, 505 U.S. at 927 (noting throughout this century Court has recognized that fundamental right of privacy protects citizens from governmental intrusion in matters related to childrearing, marriage and contraceptive choice); Turner v. Safely, 482 U.S. 78, 94 (1978) (noting right of marriage is fundamental); Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (reaffirming under right of privacy individuals have freedom from unjustified governmental interference with personal decisions involving marriage); Doe v. Bolton, 410 U.S. 179, 185 (1973) (holding Georgia statute invaded right of privacy and liberty in matters related to family, marriage and sex); Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing marriage as personal right "essential to the orderly pursuit of happiness"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating that "marriage is one of the basic civil rights of man, fundamental to our very existence and survival").

69 *See Roe*, 410 U.S. at 152-154 (noting that right of privacy protects activities relating to procreation, but that this right was not absolute); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (stating that single individual's right to obtain contraceptive is part of right of privacy); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (recognizing marital privacy includes right to obtain contraceptives); *see also* Peggy Cooper Davis, *Neglected Stories and Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299, 364 (1993) (discussing constitutional protection of right of privacy concerning procreation issue); Karin Mika & Bonnie Hurst, *One Way to Be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 933, 933 (1996) (detailing constitutional jurisprudence which supports existence of "fundamental right of individual, married or single to make procreative choices"); Note, *Reproductive Technology and Procreative Rights of the Unmarried*, 98 HARV. L. REV. 669, 669 (1985) (arguing that unmarried person's have constitutionally protected right to birth control).

70 *See Turner*, 428 U.S. at 82 (holding even in prison setting, marriage regulations are unconstitutional infringement upon fundamental right to marry); Anne M. Burton, *Gay Marriage—A Modern Proposal: Applying* Baehr v. Lewin *to the International Covenant on Civil and Political Rights*, 3 IND. J. GLOBAL LEGAL STUD. 177, 180 (1995) (confirming state power to regulate marriage and noting constitutional protection of right to marry as fundamental right); Rev. Robert F. Drinan, S.J., *The* Loving *Decision and the Freedom to Marry*, 29 OHIO ST. L.J. 358, 360 (1968) (interpreting *Loving* to represent freedom of personal choice in selecting spouse); Heeb, *supra* note 6, at 376 (arguing that Due Process Clause of Fourteenth Amendment provides constitutional support to notion that same-sex couples have right to marry); Hovermill, *supra* note 43, at 469-70 (indicating right to privacy includes right of homosexuals to marry); Zambrowicz, *supra* note 11, at 932 (arguing that rationale which supported right of interracial couples to marry in *Loving* is equally applicable to that of same-sex couples). *But see* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims For Same Sex Marriage*, 1996 BYU L. REV. 1, 6 (contending there is no sound constitutional doctrine to support assertion that laws which prohibit same-sex couples from marrying are unconstitutional).

croachment survives the highest level of scrutiny.[71] In addition to federal constitutional protection, states often afford even greater protection of the right to marry in their individual state constitutions.[72]

The *Baehr* court failed to recognize the existence of a fundamental right to same-sex marriages under the Due Process Clause of the Hawaii Constitution.[73] The court reasoned that although the fundamental right to marry fell within the constitutionally protected right to privacy, it was strictly limited to a union between a man and a woman.[74] The court further noted that granting same-sex couples the right to marry would therefore create a "new" fundamental right, an extension they did not want to grant.[75]

B. Equal Protection Analysis

Although the due process analysis was insufficient, the court utilized the Equal Protection Clause to "look forward" and up-

71 *See* Planned Parenthood v. Casey, 505 U.S. 833, 952 (1992) (finding that substantive liberties under Due Process Clause may only be abridged in manner that withstands strict scrutiny); Vlandis v. Kline, 412 U.S. 441, 460-61 (1973) (Burger, C.J., dissenting) (noting strict scrutiny should be read into Due Process Clause); *see also* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 612 (1996) (discussing whether Due Process Clause also includes equal protection component of strict scrutiny).

72 *See* Winfield v. Division of Parvi-Mutual Wagering, Dep't of Bus. Regulation, 477 So. 2d 544, 548 (Fla. 1985) (acknowledging that Florida Constitution provides greater protection from governmental intrusion than that of Federal Constitution); *see also* Mozo v. Florida, 632 So. 2d 623, 626 (Fla. Dist. Ct. App. 1994) (noting right of privacy protected by Florida's Constitution is broader than that of Federal Constitution), *aff'd*, 655 So. 2d 1115 (Fla. 1995); Hawaii v. Kam, 748 P.2d 372, 377 (Haw. 1988) (stating that Hawaii's constitutional protection of right of privacy is broader than that of Federal Constitution); Bedford v. Sugarman, 772 P.2d 486, 493 n.10 (Wash. 1989) (noting California's constitutional right of privacy is significantly broader than right of privacy protected by Federal Constitution); Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMP. L. REV. 1279, 1298 (1992) (noting that privacy right protected by state constitution is broader than that of Federal Constitution); Michael K. Steenson, *Fundamental Rights in the "Gray" Area: The Right of Privacy Under the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 383, 403 (1994) (stating Illinois state constitution explicitly guaranteed right of privacy and thus state constitution offers greater protection of individual rights does Federal Constitution).

73 Baehr v. Miike, 1996 WL 694235, at *1,*19 (Haw. 1996) (holding that under Article 1, § 6 of Hawaii Constitution there is "no fundamental right to marriage for same-sex couples").

74 Baehr v. Lewin, 852 P.2d 44, 56 (Haw. 1993) (noting fundamental right to marry "presently contemplates unions between men and women").

75 *Id.* at 57 (asserting that same-sex marriages are not rooted on traditions and customs of society).

hold same-sex marriages due to sex-based classifications.[76]

The Equal Protection Clause states that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws." [77] The Equal Protection Clause is designed to protect people from being denied the same privileges and benefits under the laws that are given to other people in like circumstances.[78] State regulations are subject to different standards of review based on the classification made to determine if there is an equal protection violation.[79] Strict scrutiny review is invoked when legislation infringes on the rights of a suspect class,[80] and will be upheld only if the state interest is compelling and the means undertaken are narrowly tailored to achieve that interest.[81]

76 *See* Megan E. Farrell, Baehr v. Lewin: *Questionable Reasoning ; Sound Judgment*, 11 J. CONTEMP. HEALTH L. & POL'Y 589, 615 (noting that Equal Protection Clause operates "to protect disadvantaged groups from discriminatory practices, however deeply engrained and long standing").

77 U.S. CONST. amend. XIV, § 1.

78 *See Baehr*, 852 P.2d at 71 (Heen, J., dissenting) (noting guarantee of equal protection of laws); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985) (discussing mandate of Equal Protection Clause); Eisenstadt v. Baird, 92 S. Ct. 1029, 1035, 405 U.S. 438, 446-48 (1972) (recognizing that Equal Protection Clause does not deny states power to create certain classifications).

79 *See Cleburne*, 473 U.S. at 439 (discussing that standards of review under equal protection depend upon classification at issue); *see also* Adarand Construction, Inc. v. Pena, 515 U.S. 200, 213-18 (1995) (discussing cases involving classifications burdening groups that suffer societal discrimination and noting appropriate standards of review pursuant to these classifications and Equal Protection analysis). *See generally* United States v. Paradise, 580 U.S. 149, 166 n.16 (1987) (noting that Equal Protection component of Due Process Clause of Fifth amendment is coexistent with Fourteenth Amendment); Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975) (stating equal protection analysis is same under Fifth and Fourteenth Amendments); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (finding that Due Process Clause of Fifth Amendment imposes same equal protection requirement on federal government as Equal Protection Clause of Fourteenth Amendment imposes on state governments).

80 *See* Holdman v. Olim, 581 P.2d 1164, 1167 (Haw. 1978). The court, in deciding which standard to apply when there is a denial of equal protection of the laws, recognized that "laws classifying on the basis of suspect categories or impinging upon fundamental rights, expressly granted by the Constitution are presumed to be unconstitutional unless the state shows a compelling interest justifying such classifications." *Id.* However another test that the courts have applied is a standard between rational basis and strict scrutiny, in which "important" interest must be served. *Id.*; Beverly A. Uhl, *A New Issue in Foster Parenting-Gays*, 25 J. FAM. L. 577, 594 (1986-87). The criteria for suspect class requires that "the objectives must be substantially related to achievement of those objectives." *Id.*

81 *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 765-67 (1994) (explaining that under strict scrutiny courts determine whether restriction is necessary to serve compelling governmental interest, and if it is narrowly drawn to achieve that end); Metro Broad. v. FCC, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting) (noting that strict scrutiny requires statute be "narrowly tailored to achieve a compelling governmental interest" in order to pass constitutional muster); *Cleburne*, 473 U.S. at 432-33 (excluding group because mental retardation did not represent legitimate government interest);

The *Baehr* court's equal protection analysis found that gender was a suspect category and thus should be reviewed using strict scrutiny analysis.[82] The court held the Hawaii marriage statute unconstitutional because it discriminated against same-sex marriages by establishing a sex-based classification.[83] Although the statute was applied equally to both sexes, this did not eliminate the invidious discrimination resulting from compliance with the statute.[84]

Under strict scrutiny analysis,[85] the State was unable to prove that the sex-based classification was justified by a compelling interest and that it was narrowly tailored to avoid unnecessary infringements of constitutional rights.[86]

The State failed to establish that same-sex marriages would result in harm to governmental or public interests, or effect the well-being and development of children and families.[87] The State's asserted interests in fostering morality, encouraging family stability, supporting bans on homosexual activity, and fostering procreation were not sufficiently compelling interests to justify the classification here at issue.[88]

Salisbury v. List 501 F. Supp. 105, 105-110 (D. Nev. 1980) (holding state statute that denied prison inmates right to marry unconstitutional due to lack of compelling state interest and existence of less burdensome ways to protect state's concern regarding security and discipline); Korematsu v. United States, 323 U.S. 214, 216 (1967) (classifying based upon national origin is suspect); Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding classification based on race is suspect).

82 Baehr v. Lewin, 1996 WL 694235, at *19 (concluding that "sex is a 'suspect category' for purposes of equal protection analysis under Article 1, § 5 of the Hawaii Constitution").

83 *Id.* at *19-21 (finding Hawaii marriage statute creates sex-based classification and is not "narrowly tailored to avoid unnecessary abridgments of constitutional rights").

84 *See* Farrell, *supra* note 76, at 605-06 (noting *Baehr* court drew analogy to *Loving* and declared Hawaii marriage statute discriminates on basis of sex even though it punishes participants equally).

85 Baehr v. Lewin, 852 P.2d 44, 65 (Haw. 1993) (stating for purposes of equal protection analysis, sex-based classifications are subject to heightened form of scrutiny).

86 *Baehr*, 1996 WL 694235, at *21 (stating presumption that Hawaii marriage statute is unconstitutional was not overcome by State because State could not prove that it "furthers a compelling state interest").

87 *Id.* (noting state failed to demonstrate that same-sex marriages would have negative impact on institution of traditional marriage or important public interests).

88 *See* Zambrowicz, *supra* note 11, at 943-949 (explaining four primary public policy reasons proffered by states for denial of same-sex marriage); *see also* John D. Ingram, *A Constitutional Critique of Restrictions on the Right to Marry - Why Can't Fred Marry George - or Many and Alice at the Same Time*, 10 CONTEMP. L. 33, 34-35 (1984) (stating that statutory prohibition of same-sex marriage is "based on outdated concepts of morality, sexual stereotypes and misguided sense of tradition"); Arthur S. Leonard, *Lesbian and Gay Families and the Law: A Progress Report*, 21 FORDHAM URB. L.J. 927, 940-41 (1994) (noting that courts have historically justified denial of same-sex marriage based on states' desire to preserve marriage for procreation and child-rearing).

IV. THE RIGHT TO RAISE A FAMILY

A. Definition of Family

The constitutionally protected right to marry encompasses the right to establish a home and raise children.[89] In order to adequately understand this constitutional protection, it is necessary to examine society's definition of "family."[90]

Today, the term "family" has expanded beyond the traditional boundaries.[91] Families now range in form from those headed by single parents, grandparents, and gay and lesbian parents.[92] The dramatic increase in non-traditional families has, therefore, led

89 *See* Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (holding state law denying marriage to any man under obligation to pay support by any court order or judgment unconstitutional); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (holding zoning ordinance prohibiting grandchild dwelling with grandmother violated due process); Boddie v. Connecticut, 401 U.S. 371, 376 (1971) (finding state's denial of access to courts by indigent women seeking divorce violative of due process); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (establishing statute prohibiting teaching of language other than English unconstitutional); Maynard v. Hill, 125 U.S. 190, 205 (1888) (proposing that marriage is more related to morals and civilization of people than any other institution).

90 *See* People v. Hasse, 291 N.Y.S.2d 53, 55 (Dist. Ct. Suffolk Cty. 1968) (defining term "family" as referring to parents and children, "constituting the fundamental social unit in a civilized society"); *see also Moore*, 431 U.S. at 506 (announcing that Constitution prevents states from forcing all to subscribe to certain narrowly defined family patterns).

91 *See Moore*, 431 U.S. at 503-04 (acknowledging extended familial structure rather than strictly traditional nuclear composite); Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166 (1944) (recognizing line of Supreme Court cases that define boundaries for interference into family matters); *In re* Guardianship of Kowalski, 478 N.W.2d 790, 791 (Minn. App. 1991) (finding lesbian partner's right of guardianship of disabled partner was essentially that of family); Braschi v. Stahl Assoc. & Co., 544 N.Y.S.2d 784, 788-89, 543 N.E.2d 49, 53-54 (N.Y. 1989) (recognizing household of gay couple formed family unit); *see also* ARLENE S. SKOLNICK & JEROME H. SKOLNICK, FAMILY IN TRANSITION 7-8 (1971) (noting traditional foundation of nuclear family); Heeb, *supra* note 6, at 390 (citing cases acknowledging alternative family forms); Kristen Korn, Comment, *The Struggle for the Child: Preserving the Family in Adoption, Disputes Between Biological Parties and Third Parties*, 72 N.C. L. REV. 1279, 1291 (1994) (discussing shift in definition due to reality of "family"); Zimmer, *supra* note 8, at 699 (noting formation of today's families occur in many different manners); Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47 (suggesting that most successful social arrangement ensuring survival and social development of child is family unit of biological mother and father); *cf.* Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 843 (1978) (stating biological relationships "are not exclusive determinations of the existence of a family").

92 *See In re* B.G.C., 496 N.W.2d 239, 240 (Iowa 1992) (holding father's existing rights made adoption proceeding fatally flawed); *see also Moore*, 431 U.S. at 505 (exploring social conditions which create need for extended family units); Robert Dawidoff, *Do Gay Partners and Parents Have a Place in the Family of Values? Yes: Family Roles Aren't Automatic or Biological and Traditional Families Aren't a Model of Success in Protecting Children*, L.A. TIMES, Dec. 26, 1996, at B7 (discussing qualities of gay families which can benefit American society).

to an evolution in the meaning of family.[93]

B. Protection of the Family Unit

The right to privacy[94] gives rise to both the right to marry and the right to family autonomy.[95] Due to the strong policy favoring family autonomy, the right to privacy dictates that intimate matters within a family should not be subject to governmental interference,[96] so that family values and stability are promoted.[97] For this reason, these areas of family life are protected from state intrusion by substantive and procedural due process.[98]

Despite the evolving nature of the term "family," the homosexual community continues to be negatively affected by the more

93 *See* Andrew H. Friedman, *Same-Sex Marriages and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based on Definitions of Marriage*, 35 HOW. L.J. 173, 221 (1992) [hereinafter *Right to Privacy*] (discussing need to expand definition of family beyond traditional notion); Lauren Anderson, Note, *Property Rights of Same-Sex Couples: Toward a New Definition of Family*, 26 J. FAM. L. 357, 367 (1988) (asserting "judicial system is in flux regarding its notions of what constitutes a family"); Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family"*, 29 J. FAM. L. 497, 497 (1991) (discussing changing definition of family).

94 *See* M.L.B v. S.L.J., 117 S. Ct. 555, 556-57 (1996) (stating that choices regarding marriage, family life and child upbringing are essential to our society); Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992) (reaffirming notion that Constitution limits states' rights to interfere with individual's personal decisions concerning family life); *Moore*, 431 U.S. at 494 (noting that freedom of personal choice in matters of marriage and family life are constitutionally protected by liberty interest of Due Process Clause of Fourteenth Amendment); Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166 (1944) (acknowledging state interference is restricted pursuant to privacy realm of family life).

95 *See* Zimmer, *supra* note 8, at 699 (proposing right to marriage gives rise to family unit); *see also* Eisenstadt v. Connecticut, 405 U.S. 438, 453 (1972) (finding right to privacy encompasses right to decide to bear children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding right to instruct child in foreign language is protected by due process).

96 *See* Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1543 (1994) (stating "rights to marital privacy, and to marry and raise a family are of similar order and magnitude as fundamental rights specifically protected by the Constitution"); Lawrence C. Nolan, *Honor Thy Father and Thy Mother: But Court-Ordered Grandparents Visitation in the Intact Family?*, 8 BYU J. PUB. L. 51, 53 (1993) (pointing out that families regulate their internal affairs).

97 *See* Zimmer, *supra* note 8, at 699 (asserting family builds social stability, helps members develop social skills and acts as emotional and economic support system); *see also* David Link, *The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 LOY. L.A. L. REV. 1055, 1100 (1990) (discussing family values and sexual orientation).

98 *See* Casey v. Planned Parenthood of Southeastern Pennsylvania, 505 U.S. 833, 834 (1992) (noting substantive due process protection granted to family relationships); Lehr v. Robertons, 463 U.S. 248, 258-260 (1983) (discussing procedural and substantive protection of Due Process Clause of family relationships); *Moore*, 431 U.S. at 546-547 (White, J., dissenting) (discussing substantive and procedural due process protection afforded to family units); *see also* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 845 (1978) (regarding family privacy as "intrinsic human right").

traditional and restrictive definition.[99] Consequently, these couples are denied their fundamental right to marry.[100]

C. Same-Sex Couples and Adoption of Children

Notwithstanding the aforementioned barriers, there has been a significant increase in the number of gay and lesbian couples raising children.[101] Same-sex couples utilize adoption,[102] the most permanent form of non-biological parenthood,[103] to estab-

99 *See* Andrew Koppelman, *Why Discrimination Against Lesbian and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 238 (1994) (stating "the single best predictor of homophobia is a belief in the traditional family ideology"); Law, *supra* note 29, at 218 (suggesting that opposition to homosexuality stems from traditional ideas of family stability); Link, *supra* note 97, at 1081 (noting that use of positive words, such as "family" and "marriage" do not pertain to homosexuals); *see also* Chai R. Feldblum, *Sexual Orientation, Morality, and the Law:* Devlin *Revisited*, 57 U. PITT. L. REV. 237, 311 (1996) (acknowledging that prohibition of same-sex marriages serves legitimate governmental goal of promoting stable family structures).

100 *See* Ingram, *supra* note 88, at 47 (discussing irrationality of permitting heterosexual couples incapable of having children to benefit from marriage while denying right to same-sex couples); Kathryn E. Kovacs, *Recognizing Gay and Lesbian Families: Marriage and Parental Rights*, 5 LAW & SEX. 513, 513 (1996) (addressing barriers and solutions to gay marriage and parenting).

101 *See* Flaks, *supra* note 55, at 345 (estimating there are as many as five million lesbian mothers and one to three million gay fathers in United States); *see also Developments*, *supra* note 16, at 1629 (citing psychosocial study estimating three million gays and lesbians in United States are parents, and eight to ten million children are raised by gay or lesbian parents); Kovacs, *supra* note 100, at 515 (indicating eight to ten million children have gay or lesbian parents). *See generally* Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L.Q. 347, 352 (1991) (noting that only Florida and New Hampshire have statutes barring homosexuals from adopting).

102 *See In re* M.M.D. v. B.H.M., 662 A.2d 837, 857 (D.C. 1995) (providing that adoption transfers to adoptive parent all legal rights, duties, and consequences of parental relationship; severs rights and obligations of natural parent who no longer will have custody of child; and determines all other legal effects of adoption upon families of natural parents and adoptive parents); *see also* Marc E. Elovitz, *Adoption By Lesbian and Gay People: The Use and Misuse of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207, 207 (1995) (noting traditional adoption extinguishes rights of biological parent and creates rights in adoptive parent).

103 *See* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 844 n.51 (1978) (asserting language of New York adoption statute, that "adoption is recognized as the legal equivalent of biological parenthood"); Phillip S. Welt, *Adoption and the Constitutions: Are Adoptive Parents Really "Strangers Without Rights?*, 95 ANN. SURV. AM. L. 165, 165 (1995) (pointing out Supreme Court's recognition that adoption is equivalent to natural parenthood); Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 925 (1991) (concluding that once adoption proceedings are finalized, all rights and responsibilities with regard to child attach); Fran Pfeifer Pero, Note, *In the Best Interest of the Child: Litigation in the Post Placement Adoption Setting*, 11 N.Y.L. SCH. J. HUM. RTS. 383, 383 (1994) (defining adoption as vesting all parental rights and duties in adoptive parents providing equivalent status as biological parents); *see also In re* Adoption of Robert Paul P., 471 N.E.2d 424, 481 (N.Y. 1984) (finding that adoption statute creates principle that parent-child relationship can be formed by operation of law); *In re* Upjohn's Will, 107 N.E.2d 492, 494 (N.Y. 1952) (observing that ability of state to ordain, by operation of law, relationship between adult and non-biological child has existed in New York since nine-

lish secure and permanent families.[104] Fortunately, a significant number of these couples are overcoming the barriers emanating from society's perception of homosexuality, as evidenced by the increasing number of same-sex adoptive parents.[105] However, considerations regarding parental fitness have not been uniformly applied to heterosexual and homosexual couples.[106]

There is no common law right to adopt children; adoption is solely a creature of statute.[107] Adoption is not a fundamental right and therefore states are granted vast discretion in limiting adoption rights.[108] Generally, adoption statutes are silent on the

teenth century).

104 *See* Brown v. County of San Joaquin, 601 F. Supp. 653, 659 (E.D. Cal. 1985) (asserting that if reunification with natural parent is undesirable, focus is to place child in stable and permanent home); Estate of Pierce, 196 P.2d 1 (Cal. 1948) (stating that for purposes of interpreting testamentary intent, adopted child obtains all rights related to parent-child relationship); *In re* Adoption of V.R.O., 822 P.2d 83, 86-87 (Mont. 1991) (finding that adopting parent assumes legal relationship to child); Evall, *supra* note 101, at 349 (noting that adoption is attempt at imitating birth, providing fresh start for children in need of homes); David P. Russman, *In Whose Best Interests?*, 27 SUFFOLK U. L.REV. 31, 49 (1993) (recognizing that modern adoption is primarily for purpose of providing permanent home for children whose natural parents could not take care of them); *see also* Mitchell A. Charney, *The Rebirth of Private Adoptions*, 71 JUNE A.B.A. J. 52, 53 (1985) (noting satisfaction of placing children with permanent stable homes).

105 *See, e.g., In re* Adoption of J.M.G., 632 A.2d 550, 551 (N.J. Super. Ct. Ch. Div. 1993) (finding that adoption would provide financial and emotional benefits to children of same-sex couples, and further stating "the rights of parents cannot be denied, limited, or abridged on the basis of sexual orientation"). *See generally In re* Guardianship of Astonn H., 167 Misc.2d 840, 635 N.Y.S.2d 418, 422 (N.Y. Fam. Ct. 1995) (reasoning that prospective parents' sexual orientation was not determinative of her fitness to be child's guardian); *In re* Camilla, 620 N.Y.S.2d 897, 900 (N.Y. Fam. Ct. 1994) (noting that an unmarried adult may not be denied adoption rights based solely on sexual orientation).

106 *See* Bezio v. Patenaude, 381 Mass. 563, 579, 410 N.E.2d 1207, 1216 (1980) (holding homosexuality does not render parent per se unfit); *In re* Evan, 583 N.Y.S.2d 997, 999 (N.Y. Sur. 1992) (noting "New York specifically prohibits discrimination against homosexuals in granting adoption"); *see also* Henry J. Reske, *Lesbian Loses Custody*, 79 A.B.A. J. 24, 25 (1993) (addressing family law expert, Sanford N. Katz's, statement that courts are permitting lesbians to adopt children of their partners, hence indicating trend toward acceptance of gay parenting arrangements).

107 *See In re* Jacob, 636 N.Y.S.2d 716, 718, 660 N.Y.2d 397, 399 (N.Y. 1995) (*citing In re* Eaton, 111 N.E.2d 431 (N.Y. 1953)) (labeling adoption as "solely a creature of statute"); *see also* Butterfield v. Sawyer, 58 N.E. 602, 604 (Ill. 1900) (explaining that modern adoption was "unknown at common law" but derived from ancient legal systems); Petition of Leach, 128 N.W.2d 475, 276-77 (Mich. 1964) (indicating that adoption is purely statutory in Michigan and words of statute must prevail in this context); Vincent C. Green, Note, *Same-Sex Adoption: An Alternative Approach to Gay Marriage in New York*, 62 BROOK. L. REV. 399, 416 (1996) [hereinafter *Same-Sex Adoption*] (discussing importance of courts' deference to language of adoption statutes because it is purely statutory creation).

108 *See* Lindley v. Sullivan, 889 F.2d 124, 131 (7th Cir. 1989) (finding that because adoption process is conditioned upon numerous variables, there is no fundamental right to adopt); *In re* Opinion of the Justices, 530 A.2d 21, 24 (N.H. 1987) (noting rights to adopt and be foster parents are not fundamental); *In re* Angel Lace M., 516 N.W. 678, 685 (Wis. 1994) (finding that because adoption is not fundamental right, having child's best interest as paramount consideration is "neither fundamental nor protected by our society"). *See generally* Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (noting that Court

issue of whether homosexual couples may adopt.[109]

1. "Best Interests of the Child" Standard

Courts adhere to the best interests of the child standard, the fundamental purpose of all adoption statutes, when evaluating prospective adoptive parents.[110] The Uniform Marriage and Divorce Act[111] defines the best interests of the child and instructs courts to consider the conduct of the proposed guardian only as it effects his or her relation to the child.[112]

Despite this legal standard, judicial preferences illustrate that the subjective nature of the best interests test allows courts to knowingly or subconsciously mingle personal prejudices, fears,

is unwilling to take expansive view of fundamental rights).

109 *See In re* M.M.D. & B.H.M., 662 A.2d 837, 862 (D.C. 1995) (concluding that applicable statute allows for unmarried couples, whether same sex or opposite sex, to adopt); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993) (finding that in interpreting best interest of child standard, it was permissible to grant adoption to two unmarried cohabitants if they met this standard); *see also* Mary L. Bonauto, *Advising Non-Traditional Families: A General Introduction*, 40 Oct. A.B.A. J. 10, 10 (1996) (noting increased willingness in courts to treat non-traditional families as legal family in context of adoption). *See generally* Joseph W. de Fucia, Jr., *Testamentary Gifts Resulting in Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200, 209 (1989) (observing that changing attitudes regarding unmarried couples is evident in context of increase of child custody cases going to unmarried cohabitants).

110 *See, e.g.*, N.Y. DOM. REL. LAW § 114 (McKinney's 1996). "If satisfied that the best interest of the adoptive child will be promoted . . . thereby the judge or surrogate shall make an order approving the adoption . . . " *Id.*; *see also In re Jacob*, 63 N.Y.2d at 718, 660 N.E.2d 397, 399. The court stated that "in strictly construing the adoption statute, [its] primary loyalty must be to the statute's legislative purpose—the child's best interests." *Id.*; Constant A. v. Paul C.A., 496 A.2d 1, 9 (Pa. Super. Ct. 1985). In deciding the issue of custody, this court stated that the "paramount consideration [was] the welfare of the children and all considerations, including the rights of parents, are subordinate to the children's physical, intellectual, moral, spiritual and emotional well being." *Id.*; Doe v. Doe, 284 S.E.2d 799, 800 (Va. 1981) (citing Cunningham v. Gray, 273 S.E.2d 562, 564 (1981)). In deciding whether the lesbian step-mother should have been granted the right to adopt, the *Doe* court utilized the Cunningham court's statement: "While the welfare of the child is of paramount concern in adoption cases, nonetheless the rights of a natural parent vis-à-vis a non-parent will be maintained if at all consistent with the child's best interests." *Id.*

111 UNIFORM MARRIAGE & DIVORCE ACT §402, 9A U.L.A. 561 (West Ann. 1987 & Supp. 1997).

112 *Id.* The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

> (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and inter-relationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved. The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

Id.

and moral views with this standard.[113] For example, there is a preference to place children with married couples reflecting the belief that marriage automatically indicates stability and the child's best interests.[114]

Fortunately, a number of courts are breaking away from the confines of stereotyping homosexuals and are granting second-parent adoptions to homosexual couples[115] when consistent with the best interests of the child.[116] A common barrier, however, is

113 *See* Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 720 (1985) (pointing out judicial approach lacking presumptions truly allows case-by-case evaluations); Felicia Meyers, Note, *Gay Custody and Adoption: An Unequal Application of the Law*, 14 WHITTIER L. REV. 839, 841 (1993) (discussing how courts have allowed "judicial misconceptions and prejudice to enter into [best interest] analysis"); *see also* Jeff Atkinson, *Criterion for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 3 (1984) (noting that there is lack of uniformity in child custody cases because judges apply their own life experiences to these cases). *See generally* Steve Suseoff, *Assessing Children's Best Interest When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 856 (1985) (discussing how best interest standard is useful in avoiding arbitrary decision making but lends itself to extensive abuse).

114 *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1493 (1993) (responding to traditional rationales opposing same-sex marriage); *see also* Russman, *supra* note 104, at 50 (articulating that statutory, regulatory, and judicial barriers all help to discourage homosexual adoption); Mark Strasser, *Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interests of the Child*, 45 KAN. L. REV. 49, 49 (1996) [hereinafter *Legislative Presumptions*] (noting some courts use parents' sexual orientation to determine best interests while some legislatures have established unrebuttable presumptions against such parents).

115 *See* Adoption of Tammy, 619 N.E.2d 315, 316(Mass. 1993) (noting lesbian couple provided loving home for daughter and participated equally in parenting responsibilities); *In re* Evan, 583 N.Y.S.2d 997, 998-99 (N.Y. Sur. Ct. 1992) (recognizing that child's best interest is not controlled by parental sexual orientation); Adoptions of B.L.V.B and E.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993) (asserting that to deny children of same-sex partners security of legal relationship would not be in their best interests); Julia Frost Davies, Note, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoption*, 29 NEW ENG. L. REV. 1055, 1067-68 (1995) (analogizing step-parent exception with second-parent adoption, insofar as new spouse may adopt legal parent's child without terminating his or her rights); *see also* Elovitz, *supra* note 102, at 207 (explaining that unlike traditional adoption, where parental rights and obligations of legal or biological parent are extinguished, second parent adoption leaves natural parent's rights intact and creates second, legally recognized parent); Kovacs, *supra* note 100, at 536 (asserting legalization of gay and lesbian marriage facilitates recognition of relationships between second-parents and child in same-sex family, hence, legitimizing non-traditional families); Lucious, *supra* note 6, at 194 (discussing second parent adoption); Elizabeth Zuckerman, Comment, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729, 729-32 (1986) (defining second parent adoption as adoption of child by natural parent's non-marital partner wherein, unlike traditional adoption, rights and obligations of natural parent are not terminated or cut off).

116 *See In re* M.M.D. & B.H.M., 662 A.2d 837, 854 (D.C. 1995) (hypothesizing that if children available for adoption are likely to be denied permanent, loving homes when unmarried couples are refused opportunity to adopt, "absurdity" or "injustice" criteria cuts against restrictive interpretation of adoption statute); *see also In re* Jacob, 636 N.Y.S.2d 716, 724, 660 N.E.2d 397, 405 (N.Y. 1995) (concluding that New York statute was designed to protect new adoptive families and not intended to prohibit otherwise

that same-sex couples are not afforded the right to marry and courts are reluctant to automatically grant these adoptions because of this restriction.[117]

2. Myths and Misconceptions Regarding Homosexuals

In evaluating same-sex couples as prospective adoptive parents, courts often subordinate the best interests of the child and focus, instead, on the myths and stereotypes regarding homosexuality.[118] One common misconception views homosexuality as a form of mental illness.[119] This is an antiquated notion confirmed by the fact that the American Psychiatric Association ("APA") has removed sexual orientation from its list of mental disorders.[120] Furthermore, in 1976 the APA adopted a resolution

beneficial intrafamily adoptions by second parents); Davies, *supra* note 115, at 1072-1074 (including inheritance, succession, and health insurance in discussion of familial benefits and obligations incurred upon adoption of child). *See generally In re* Adoption of Caitlin, 622 N.Y.S.2d 835, 839, 163 Misc.2d 999 (N.Y. Sur. Ct. 1994) (asserting stepparent exception established because it was illogical to terminate biological parent's rights when parent continues to raise and be responsible for child, "albeit in family unit with partner who is biologically unrelated to child").

117 *See* Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 MICH. J. GENDER & L. 175, 189-90 (1995) (noting statutory exception to automatic termination of natural parent's legal rights is inapplicable to homosexual partners because they are not legal spouses); *see also In re M.M.D.*, 662 A.2d at 859 (providing purposes of D.C. stepparent exception provision).

118 *See* S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985) (overturning trial court ruling denying lesbian mother custody since it "relied on its own unsupported opinion that homosexual relationships are unstable and usually of short duration"); Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 19 (1995) (noting emphasis placed on concept of nuclear family permeates legal decisions); Gwynne L. Skinner, *Intimate Association and the First Amendment*, 3 LAW & SEX. 1, 14 (1993) (proposing that rights of intimate expression should become part of this analysis and extend beyond traditional family); *see also* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional* Families, 78 GEO. L.J. 459, 545 (1990) (criticizing tendency of courts and legislature to rely on "discriminatory ideologies disguised as scientific truth to serve as basis for judicial and statutory activism in area of child rearing"); Russman, *supra* note 104, at 58 (analyzing myths regarding homosexual parenting).

119 *See* Stephen B. Pershing, *"Entreat Me Not to Leave Thee":* Bottoms v. Bottoms *and the Custody Rights of Gay and Lesbian Parents*, 3 WM. & MARY BILL RTS. J. 289, 299 (1994). Even religious organizations are changing their view on homosexuality as a mental illness as evidenced by an amicus brief filed on behalf of Hardwick to eliminate sodomy laws. *Id.*; Annamay T. Sheppard, *Lesbian Mothers II: Long Night's Journey into Day*, 14 WOMEN'S RTS. L. REP. 185, 188 (1992). The author discusses mental illness and its relation to homosexuality. *Id.*; Donald H. Stone, *The Moral Dilemma: Child Custody When One Parent is Homosexual or Lesbian - An Empirical Study*, 23 SUFFOLK U. L. REV. 711, 739 (1989). Despite actions by highly respected medical associations removing homosexuality from the list of mental illnesses, courts in child custody cases are slow to utilize these findings. *Id.*

120 *See* AMERICAN PSYCHIATRIC ASSOCIATION, D.S.M III: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 281-82, 380 (3d ed. rev. 1980) (noting homosexuality "implies no impairment in judgment, stability, reliability or general social or

stating that sexual orientation should not be the sole or primary consideration in custody cases.[121]

Another common misconception is that children placed with same-sex couples are subject to an increased risk of contracting the HIV virus because of the high percentage of HIV infected individuals in the homosexual community.[122] This myth, however, is dispelled since it is commonly understood that the virus cannot be contracted through casual contact.[123] It is contracted primarily through unprotected sex and the sharing of hypodermic needles.[124] In addition, AIDS is not limited to the homosex-

vocational activities").

121 *See* William E. Adams, *Whose Family is it Anyway? The Continuing Struggle for Lesbian and Gay Men Seeking to Adopt* Children, 30 NEW ENG. L.REV. 579, 598 (1996) (analyzing different professional organizations, including American Psychiatric Association, which removed homosexuality from list of mental illnesses for purposes of child custody cases); John J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1976*, 32 AM. PSYCHOL. 408, 432 (1977) (quoting A.P.A.'s resolution that: "[T]he sex, gender identity, or sexual orientation of natural or prospective adoptive or foster parents should not be the sole or primary variable considered in custody or placement cases"); Elovitz, *supra* note 102, at 216 (noting that many other scientific bodies have acted to rebut myths about homosexuals in this context); *see also* Gregory M. Herek, *Myths About Sexual Orientation: A Lawyers Guide to Social Science Research*, 1 LAW & SEX. 133, 138-43 (1991) (reviewing development of social science research in this field).

122 *See* Evall, *supra* note 101, at 357-58. Often the HIV status of a homosexual seeking to adopt is discarded and the perceived likelihood is given greater weight. *Id.*; Amy D. Ronner, Bottoms v. Bottoms*: The Lesbian Mother and The Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J.L. & FEMINISM 341, 345 (1995). Courts have also branded a homosexual parent as one who will infect the child with AIDS. *Id.*; David S. Dooley, Comment, *Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 CAL. W. L. REV. 395, 422 (1989/1990). Often the potential for children to be infected with HIV is used in an attempt to deny custody in many disputes, however it has enjoyed limited success. *Id.*; *see also In re* Adoption of Charles B., 552 N.E.2d 884, 891 (Ohio 1990) (Resnick, J., dissenting). Judge Resnick believed the risk of HIV in the homosexual community is too high to be in the best interest of the child. *Id.* He thought that since AIDS is terminal and adoption was permanent, the risk of the child being left parentless again warranted refusing homosexual people permission to adopt. *Id.*

123 *See* Gerald H. Friedland et al., *Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex With Oral Candidiasis*, 314 NEW. ENG. J. MED. 344, 348 (1986) (concluding that AIDS is transmitted exclusively by injection of infected blood or blood products, or by intimate sexual contact with infected individual, and not by casual contact); *see also* Bless S. Young & Kimberly R. Wells, *Managing AIDS in the Workplace*, 41 No.3 PRAC. LAW. 41, 43 (1995) (noting all scientific studies to date indicate that casual contact does not spread AIDS).

124 *See* L. FRUMKIN & J. LEONARD, QUESTIONS AND ANSWERS ON AIDS 32-52 (1987) (asserting that AIDS is transmitted through bodily fluids; sexual contact, intravenous injection of drugs with unsterilized needles, blood transfusions or in utero from mother to child); David M. Rosenblum, *Custody Rights of Gay and Lesbian Parents*, 36 VILL. L. REV. 1665, 1682-83 (1991) (indicating that although AIDS virus cannot be spread by casual contact, courts often rely on myth that all gay people are equally likely to carry AIDS virus).

ual population.[125] It logically follows, therefore, that homosexuals should not be precluded from adopting due to the fear of HIV transmission.[126]

Often, criticism of same-sex couple adoption has focused on the immorality of their lifestyle.[127] The stigma of immorality has attached to homosexuality, in large part, due to the decision in *Bowers v. Hardwick*,[128] upholding Georgia's criminalization of homosexual conduct.[129] Homosexual sodomy has been criminalized in almost half of this nation's jurisdictions.[130] Even in jurisdictions that prohibit homosexual conduct, however, few cases have actually been prosecuted, illustrating the ambiguous nature

125 *See* Judith A. Lintz, *The Opportunities, of Lack Thereof, for Homosexual Adults to Adopt* Children, 16 U. DAYTON L.REV. 471, 493 (1991) (indicating "AIDS is [] sexually transmitted illness that does not discriminate on basis of sexual orientation").

126 *See* Josephine Gittler & Merle McPherson, Symposium: *HIV Infection Among Women of Reproductive Age, Children, and Adolescents, Introduction*, 77 IOWA L. REV. 1283, 1287 (1992). HIV is largely transmitted through heterosexual intercourse. *Id.*; Rev. Raymond C. O'Brien, *An Argument for the Inclusion of Children Without Medicare*, 33 U. LOUISVILLE J. FAM. L. 567, 608-09 (1995). HIV is spreading more rapidly in the heterosexual population. *Id.*

127 *See* Scott v. Scott, 665 So. 2d 760, 764 (La. Ct. App. 1995) (reasoning that mother's display of affection towards female partner in presence of child was harmful and therefore valid basis for altering custody rights); Bottoms v. Bottoms, 457 S.E.2d 102, 107 (Va. 1995) (discussing harmful effects of child's exposure to immoral behavior of same-sex couples behavior); Roe v. Roe, 324 S.E.2d 691, 691 (Va. 1985) (holding best interests of child were jeopardized if court granted custody to parent who "carr[ied] on active homosexual relationship in the same residence as the child"); *see also* Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 859 (1997) (analogizing that to uphold public perception of immorality of same-sex relations warrants outdated opinion that interracial relationships are also immoral).

128 478 U.S. 186, 189 (1986).

129 *Id. See* Murray L. Manus, *The Proposed Model Surrogate Parenthood Act: A Legislative Response to the Challenges to Reproductive Technology*, 29 MICH. J.L. REF. 671, 703 (1995) (noting it would be difficult for Supreme Court to be supportive of homosexual desire to have or adopt children in light of *Bowers*); Russman, *supra* note 104, at 51-52 (stating some courts deny homosexuals adoption privileges because homosexual acts are criminal in their jurisdiction); *see also* John C. Hayes, Note, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After* Bowers v. Hardwick, 31 B.C. L. REV. 375, 376 (1990) (noting result in *Bowers* is that there will be increased force for state sponsored discrimination against homosexuals).

130 *See* ALA. CODE § 13A-6-65(a)(3) (1996); ARIZ. REV. STAT. § 5-14-122 (1995); FLA. STAT. § 800.02 (1997); IDAHO CODE § 18-6605 (1996); KAN. STAT. ANN. § 21-3505 (1996); KY. REV. STAT. ANN. § 510.100 (Michie 1996); LA. REV. STAT. ANN. § 14.89 (West 1997); MD. ANN. CODE Art. 27, §§ 553-554 (1996); MASS. GEN. LAWS ch. 272, § 34 (1996); MICH. COMP. LAWS ANN. § 750.158 (West 1996); MINN. STAT. § 609.293 (1997); MISS. CODE ANN. § 97-29-59 (1994); MO. ANN. STAT. § 566.090 (West 1997); MONT. CODE ANN. § 45-5-405 (1995); NEV. REV. STAT. ANN. § 201.190 (Michie 1992); N.C. GEN. STAT. § 14-177 (1995); OKLA. STAT. ANN. tit. 21, § 886 (West 1997); R.I. GEN. LAWS § 11-10-1 (1994); S.C. CODE ANN. § 16-15-120 (Law Co-op. 1996); TEX. PENAL CODE ANN. § 21.06 (West 1997); UTAH CODE ANN. § 76-5-403 (1995); VA. CODE ANN. § 18-2-361 (Michie 1996).

of public sentiment on homosexual conduct.[131] Moreover, although homosexuality is not the "social norm," it must also be noted that, historically, social norms such as segregation and religious condemnation have often enveloped immorality.[132]

A common fear is that children raised in same-sex households may question their own sexual preference.[133] Research, however, indicates that children raised by homosexual mothers and fathers do not display an increased likelihood of becoming gay or lesbian.[134] Further, it is also well documented that there are no significant differences in the psychological health of children raised by lesbian or gay parents, as compared with children raised by heterosexual parents.[135] There also is little evidence to

131 *See* Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 227. Even if sodomy statutes are not enforced, they still loom as part of a larger oppression against lesbians and gay men. *Id.*; *see also* Janet E. Halley, *Reasoning About Sodomy: Act and Identify In and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1722 (1993). Sodomy statutes continue to exist to identify and subordinate homosexuals. *Id.*; Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN'S RTS. L. REP. 263, 284-85 (1992). These statutes are the reinforcing principle behind forbidden same-sex marriage. *Id.*

132 *See* Polikoff, *supra* note 118, at 549-54 (analyzing myth equating homosexuality and immorality); *see, e.g.*, Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 84-85 (utilizing Nazi Germany as example of erroneous presumption that simply because majority agrees that something is good does not necessarily mean that it is, since some social norms are themselves immoral).

133 *See* Shaista Parveen Ali, Comment, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L.REV. 1009, 1013 (1989) (noting that many courts assume same-sex couples will turn their children into homosexuals); Tiffani G. Lee, Note, Cox v. Dep't of Health and Rehabilitative Services: *A Challenge to Florida's Homosexual Adoption Ban*, 51 U. MIAMI L.REV. 151, 155 (1996) (asserting that judicial preconceptions regarding same-sex parents includes fear that child will become homosexual). *But see* Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of* Romer v. Evans, 32 NEW ENG. L.REV. 263, 321 (1997) (indicating that studies reveal that there is no evidence of significant disturbances in development of sexual identity among children of same-sex parents).

134 *See* Elovitz, *supra* note 102, at 213 (dispelling myth that sexuality of children is affected by sexuality of parent); Flaks, *supra* note 55, at 369-70 (citing various scientific studies supporting conclusion that parental sexuality is not determinative factor in development of homosexuality in children); *Homosexual Parents: All in the Family, Emotional Development of Children of Homosexual Parents*, SCI. NEWS, Jan. 21, 1995, at 42, *available in* 1995 WL 122553461 (referring to three studies in January Developmental Psychology that show large majority of sons of homosexual men are themselves heterosexual); *see also Scientists Find New Evidence of Homosexuality Gene in Men*, CHICAGO TRIB., Oct. 30, 1995, at 1, *available in* 1995 WL 6260810 (reaffirming 1993 headlines that scientific evidence supports theory that gene inherited from mother influences son's sexuality).

135 *See* Martha Ertman, *Denying the Secret of Joy: A Critique of Posner's Theory of Sexuality*, 45 STAN. L. REV. 1485, 1512 (1993) (doubting whether homosexual partners impair child's psychological health); Paula L. Ettelbrick, *Custody/ Visitation Issues in* LEGAL ISSUES FACING THE NON-TRADITIONAL FAMILY, at 299, 342 (PLI TAX L. & EST. PLANNING COURSE HANDBOOK SERIES No. 232, 1994) (discussing studies showing lesbian mothers differ little from heterosexual parents); Anne B. Goldstein, *Reasoning About Homosexuality: A Commentary on Janet Halley's "Reasoning About Sodomy: Act and*

support the notion that homosexual parents are more prone to sexually abuse their children or to allow others to molest their children.[136] Statistics consistently illustrate that the vast majority of incest cases involve heterosexual fathers and their daughters, and that in general, sex offenders are predominantly heterosexual men.[137]

3. Same-Sex Marriages are in the Best Interests of the Children of Same-Sex Parents

The United States Supreme Court has recognized a link between marriage and parental rights in numerous custody

Identity In and After Bowers v. Hardwick, 79 VA. L. REV. 1781, 1800 (1993) (noting New Hampshire legislature received no meaningful evidence that homosexual parents endanger their children's psychological health when enacting statute prohibiting same-sex adoptions); Deborah M. Henson, *A Lesbian Feminist Critique of Susan Okin's Justice, Gender, and the Family: Lesbian Development of Morality and Justice*, 4 HASTINGS WOMEN'S L.J. 249, 260-61 (1993) (stating studies reveal children born to or adopted by lesbian mothers have greater sense of well-being than children of heterosexual couples); Charlotte J. Patterson, *Adoption of Minor Children By Lesbian and Gay Adults: A Social Science Prospective*, 2 DUKE J. GENDER L.& POL'Y 191, 204 (1995) (asserting children of lesbian mothers feel most wanted because of difficulty of adopting that child); David M. Rosenblum, *Custody Rights of Gay and Lesbian Parents*, 36 VILL. L. REV. 1665, 1676 (1991) (asserting there is lack of research concluding that homosexual parents affects child's development); *see also* Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 ARCHIVES SEXUAL BEHAVIOR 179, 184 (1986) (examining scientific studies concerning children of lesbian mothers).

136 *See* Shaista-Parveen Ali, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009, 1013 (1989) (outlining judicial and social preconceptions over homosexual parents, including fear of child molestation); Katja M. Eichinger-Swainston, Fox v. Fox*: Redefining the Best Interest of the Child Standard for Lesbian Mothers and Their Families*, 32 TULSA L.J. 57, 71 (1996) (discussing myth that homosexual parents are more likely to molest children than heterosexuals); Carol Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41, 44 (1994) (finding child is 100 times more likely to be sexually abused by heterosexual partner of relative than by gay adult); DARYL R. WISHARD, OUT OF THE CLOSET AND INTO THE COURTS: HOMOSEXUAL FATHERS AND CHILD CUSTODY 93, 401, 410 (1989) (discounting myth that homosexual fathers are more likely to molest their children).

137 *See* John C. Hayes, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After* Bowers v. Hardwick, 31 B.C. L. REV. 375, 397-98 (1990) (noting homosexual males are less prone to molest children than heterosexual males); Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law Over Adoption by Gays and Lesbians*, 30 COLUM J.L. & SOC. PROBS. 91, 96 n.23 (1996) (indicating that 97% of sex offenses against children are committed by heterosexual men); William B. Rubenstein, *Legal Issues Facing the Non-Traditional Family in* LEGAL ISSUES FACING THE NON-TRADITIONAL FAMILY, at 9, 36 (PLI TAX L. & EST. PLANNING COURSE HANDBOOK SERIES No. 232m 1994) (stating that most perpetrators of child sex offenses are heterosexual men and most victims are girls); Steve Suseoff, *Assessing Children's Best Interests When a Parent Is Gay or Lesbian: Towards Rational Custody Standard*, 32 UCLA L. REV. 852, 880-81 (1985) (discussing research showing disproportionately high number of heterosexual child sex offenders as compared to homosexuals).

cases.[138] When same-sex parents are denied the right to marry, they are also denied the benefits normally associated with marriage, such as family privileges.[139] The state's alleged interest in regulating marriage is rooted in fostering procreation and establishing family stability.[140] It should follow that the sex of the parents should not interfere with the child's ability to receive the numerous legal and emotional benefits enjoyed by a child of a married couple.[141]

Absent marital status, many same-sex partners are denied benefits under the laws of intestacy,[142] divorce,[143] tax,[144] insur-

138 *See* Lehr v. Robertons, 463 U.S. 248, 267-68 (1983) (upholding child's adoption by stepfather over objections of biological father); Kovacs, *supra* note 100, at 534 (discussing Supreme Court cases emphasizing link between marriage and parental rights); *see also* Santovsky II v. Krammer, 455 U.S. 745, 760 (1982) (refusing to assume separated parents are adversaries when considering best interests of child in granting custody); Caban v. Mohammed, 441 U.S. 380, 397 (1979) (considering effect of non-marriage of parents on parental rights); Stanley v. Illinois, 405 U.S. 645, 646 (1972) (holding Due Process and Equal Protection Clauses afforded unwed father right to hearing on fitness as parent, focusing on his significant interest in his children).

139 *See* Leonard, *supra* note 88, at 942 (contending that giving same-sex couples benefits assists children in similar fashion as for children of opposite-sex couples); Lucious, *supra* note 6, at 179 (addressing same-sex couples' denial of family privileges which opposite-sex couples receive upon marriage); Wilson, *supra* note 23, at 543 (arguing that denial of same-sex marriage licenses actually deters state interest in promoting family stability).

140 *See* Christine Jax, *Same-Sex Marriage-Why Not?*, 4 WIDENER J. PUB. L. 461, 463 (1995) (illustrating states' interest in regulation of marriage derived from values regarding "procreation, family stability, safeguarding societal mores, and preserving personal morals"); *see also Antimiscengenation Analogy*, *supra* note 24, at 1012 (indicating judicial perspective of underlying purpose of marriage is to provide stable setting for children and that propagation of human race is basic to marriage and its legal attributes); *see, e.g.*, Constant A. v. Paul C., 496 A.2d 1 (Pa. Super. 1985) (describing goals of traditional family as stable family relationship and procreation). *See generally Same-Sex Couples and the Law*, 102 HARV. L. REV. 1603, 1608-10 (1989) (setting forth state justifications for prohibiting same-sex marriages); Wilson, *supra* note 23, at 544 (1991) (discussing state interest in promoting traditional family unit).

141 *See* Sue N. Averill, *Desperately Seeking Status: Same-Sex Couples Battle for Employment Linked Benefits*, 27 AKRON L. REV. 253, 280 (1993) (addressing issue of denial of employment benefits to same-sex couples); *Same-Sex Adoption*, *supra* note 107, at 425 (addressing issue of denial of health insurance benefits to children of same-sex couples); Christine Jax, *Same-Sex Marriage-Why Not?*, 4 WIDENER J.PUB.L. 461, 463 (1995) (associating social acceptance, public recognition and legal and financial benefits with recognized marriage); Kovacs, *supra* note 100, at 533 (explaining legalization of gay and lesbian marriage would provide children with predictability and stability of existing statutes and case law with respect to custody, visitation, and support of children).

142 *See In re* Estate of Cooper, 564 N.Y.S.2d 684, 688 (N.Y. Sur. Ct. 1990) (holding surviving gay partner did not have right to elect against partner's will), *aff'd*, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dept. 1993); *see also* Dena L. Narbaitz, *Minimizing the Trauma: A Need for Change in State Conservatorship Laws as Applied to Same-Sex Life Partners*, 44 SYRACUSE L. REV. 803, 825 (1993) (discussing denial of spousal preference to same-sex partners in state conservatorship laws).

143 *See* Rhonda R. Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311, 325 (1980) (noting that there were no statutes or legal procedures that en-

ance,[145] and employer-related benefits.[146] For example, although traditional adoption was originally created in order to provide an heir for the adoptive parent,[147] children of same-sex couples are often denied inheritance rights.[148] Family status is also defined by marriage, in many cases, so that same-sex parents and their children are denied family member status[149] with respect to medical emergency, incompetence and guardianship.[150]

sured fair treatment of same-sex partners upon separation).

144 *See generally* Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 359-65 (1995) (delving into practical and economic issues, including tax ramifications, of "marital package," not available to same-sex couples).

145 *See* Chase, *supra* note 144, at 363-64 (pointing out denial of federal programs to same-sex couples, such as social security, veterans' benefits and disability insurance); Treuthart, *supra* note 29, at 92 (noting that legally married couples are entitled to recovery for loss of consortium, financial support upon separation, and lower insurance premiums).

146 *See Same-Sex Adoption*, *supra* note 107, at 427 (outlining various benefits that arise from marriage); *see also In re* Rovira v. AT&T, 817 F. Supp. 1062, 1072 (S.D.N.Y. 1993) (holding surviving same-sex partner and her children were not entitled to death benefits under AT&T pension plan). *See generally* Averill, *supra* note 141, at 280 (addressing denial of employment benefits to unmarried couples' partners).

147 *See* William F. Fratcher, *Class Gifts to "Heirs," "Issue," and Like Groups*, 55 ALB. L. REV. 1205, 1225 (1992) (observing that while many questions were left unanswered by early adoption statutes, there was no question that adopted children could take from adoptive parents through intestate succession); *see also* Russman, *supra* note 104, at 48 (noting historical purpose of adoption was to provide heir for adoptive parent); William H. Wood, Jr. et al., *Treatment of Adopted Individuals Under Laws of Descent and Distribution in Connecticut*, 9 CONN. PROB. L.J. 211, 212-13 (1995) (noting first adoption statute in Connecticut provided inheritance rights between adoptive parents and children and cut off inheritance rights between natural parents and child).

148 *See* Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L.REV. 93, 149 (1996) (pointing out corollary between establishing new, parent-child relationship with adoption and automatic inclusion as heir); *see also* Ralph C. Brashier, *Protecting the Child From Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 26 (1996) [hereinafter *Protecting the Child*] (noting disinheritance of children of non-traditional families undermines best interests of those children). *See generally* Ettlebrick, *supra* note 57, at 126-30 (including survivor's and inheritance rights among those rights denied to lesbian and gay families).

149 *See* Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partner Ordinances*, 92 COLUM. L. REV. 1164, 1174-75 (1992) (addressing non-traditional families' struggle for protection under traditional family laws); Jennifer Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207, 217 (1988) (discussing role of marriage in assessing whether parents are good or bad); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1456 (arguing for less legal definitions of marriage and for more familial definition); Zimmer, *supra* note 8, at 681 (discussing inter-relationship of marriage, families, and legitimate societal status); *Same-Sex Adoption*, *supra* note 135, at 424-26 (discussing "financial well-being approach" and discrimination of same-sex partners in both public and private sector because of unmarried status).

150 *See* Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 126-30 (1996) (enumerating several economic and legal benefits non-traditional families are denied, such as: Healthcare; paid bereavement leave; parenting leave; sick leave; discounts or tuition waivers; death benefits; family memberships; discounted family travel; home insurance coverage; tax breaks; social security benefits; survivor's and inheritance rights; family court services for domestic vio-

Consequently, the children of parents not legally recognized as "married" or as "spouses," are at a financial disadvantage due to the unavailability of many legal rights and remedies.[151] Same-sex parents and their children deserve the financial and societal benefits that are linked with the right to marry.[152] The denial of this right undermines the policy of promoting the best interests of the children.[153]

The definition of family has evolved to reflect the realities of modern life.[154] The concept of the family has been expanded to incorporate same-sex couples, thus, the legal definition of marriage should mirror this reality, as well.[155] As Justice Blackmun

lence; standing for wrongful death action; guardianship preference; medical decisionmaking; and preferential treatment for immigration); *Same-Sex Adoption*, *supra* note 107, at 413 (asserting same-sex partners may confront problems when making decisions for one another in cases of medical emergency or incompetence); *see also* Mary F. Gardner, Braschi v. Stahl Associates, Co.: *Much Ado About Nothing?*, 35 VILL. L. REV. 361, 365 (1990) (noting requirement that only next-of-kin may make emergency medical decisions); Neal F. Spline, *The Incompetent Individual's Right to Refuse Life-Sustaining Medical Treatment: Legislating, Not Litigating, A Profoundly Private Decision*, 27 SUFFOLK U. L. REV. 905, 933-34 (1993) (arguing incompetent patient's interests are best protected by surrogates who are family members).

151 *See* Davies, *supra* note 115, at 1072-74 (asserting child of same-sex couple is treated as "biological stranger" and denied acknowledgment of family ties and legal rights which flow from recognition of parent/child relationship). *See, e.g.*, *In re* Jacob, 636 N.Y.S.2d 716, 719-720, 660 N.E.2d 397, 400-01 (N.Y. 1995) (noting child would receive many advantages under more liberal adoption arrangement).

152 *See* Toulon, *supra* note 11, at 131-32 (noting marriage offers society benefits and protections); Treuthart, *supra* note 29, at 92 (discussing various legal and economic benefits of marriage); *Same-Sex Adoption*, *supra* note 107, at 426-27 (addressing societal benefits to children of marriages); *see also* Polikoff, *supra* note 118, at 561 (concluding children of same-sex couples need recognition of their non-traditional families so legal rules can reflect "reality of their lives"). *See generally* Jeffrey G. Gibson, *To Love, Honor, and Build a Life: A Case for Same-Gender Marriage*, 23 HUM. RTS. Q. 22, 22 (1996) (addressing financial benefits of marriage).

153 *See Right to Privacy*, *supra* note 93, at 179 (providing that "[i]f states licensed same-sex marriage, the courts could use precedents from marriage and family law to determine the legal rights of members of same-sex families"); Mishra, *supra* note 137, at 102 (stating best interests of child is analyzed on case-by-case basis); *Legislative Presumptions*, *supra* note 114, at 66-67 (arguing maintenance of parent-child relationship in best interests of child); *see also* Polikoff, *supra* note 118, at (suggesting judicial attitudes failing to recognize integrity of two lesbian families deserves best interest of children). *See generally Protecting the Child*, *supra* note 148, at 26 (noting state must protect child's best interests by preventing disinheritance).

154 *See* Toulon, *supra* note 11, at 132 (stating that as definition of family continues to change, definition of marriage must also evolve); *see also* Zambrowicz, *supra* note 11, at 929 (noting some courts and legislatures acknowledge reality that families are not always in traditional form).

155 *See* N.Y. RENT STAB. CODE § 2520.6(o) (McKinney 1996) (setting out "family" under statute as including among other things, long term relationship not evidenced through marriage); Braschi v. Stahl, 544 N.Y.S.2d 784, 788-89, 543 N.E.2d 49, 52-54 (N.Y. 1989) (finding that lifetime partners are family in context of real property laws in New York); East 10th Street Assoc. v. Estate of Goldstein, 552 N.Y.S.2d 257, 258 (App. Div. 1990) (relying on precedent set by New York Court of Appeals in *Braschi* that same-

once said, "we protect [the] family because it contributes so powerfully to the happiness of individuals, not because of a preference of stereotypical households."[156]

CONCLUSION

The right to marry and raise a family is firmly protected by the Constitution, and has been historically recognized as the bedrock of society. Regardless of whether an individual chooses to legitimize his or her relationship through the legal institution of marriage, the fundamental right to marry should not be contingent upon sexual orientation. Same-sex marriages should be afforded the same recognition as heterosexual marriages because they promote the same family values, including emotional support, companionship and economic stability.

Recent developments illustrate an increased willingness to afford same-sex couples adoption rights, historically reserved for heterosexual, married couples. Courts consistently assert that the goal of adoption is to strengthen the family as a social unit and to promote the best interests of the child. However, denial of same-sex couples' right to marry overlooks this public policy. The use of the best interest standard may be the public policy force necessary to lift the prohibition on same-sex marriages. If same-sex couples are granted the right to adopt children and to establish family units, it seems only logical to permit them to legitimize this unit through valid, legal marriage. Traditions

sex couples should be considered family in this context); *see also* Zambrowicz, *supra* note 11, at 929 (noting inconsistency in recognizing same-sex couples in context of real property law while failing to provide recognition in other contexts); Zimmer, *supra* note 8, at 698 (noting right to privacy, family autonomy, and right to marry support right to same-sex marriage). *See generally* Thomas F. Coleman, *The Hawaii Legislature Has Compelling Reasons to Adopt a Comprehensive Domestic Partnership Act*, 5 LAW & SEX. 541, 551 (1995) (noting that support for more inclusive definitions of family is forcing legislatures to act accordingly).

156 *See* Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting); Anne M. Burton, *Gay Marriage - A Modern Proposal: Applying* Baehr v. Lewin *To The International Covenant on Civil and Political Lights*, 3 IND. J. GLOBAL STUD. 177, 178 (1995) (discussing importance of family unit for both heterosexual and same-sex couples); D'Amato, *supra* note 28, at 940 (discussing Blackmun's dissent in *Bowers v. Hardwick* and arguing for recognition of same-sex marriages); Amy D. Rosner, *Amathia and Denial of "In the Home" in* Bowers v. Hardwick *and* Shahar v. Bowers: *Objective Correlatives and the Bacchae as Tools for Analyzing Privacy and Intimacy*, 44 U. KAN. L. REV. 263, 285 (1996) (discussing various dissents offered in *Bowers v. Hardwick*); David M. Smolin, *The Jurisprudence of Privacy In a Splintered Supreme Court*, 75 MARQ. L. REV. 975, 982 (1992) (stating that families and other nontraditional forms of associations promote "personal development and continual self-definition" of individual).

and customs are amenable to societal changes and courts must apply the law to reflect these developments in order for society to grow and function on a just level for all.

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