2008

The Ultimate Association: Same-Sex Marriage and the Battle against Jim Crow's Other Cousin

Bryan K. Fair
University of Alabama - School of Law, bfair@law.ua.edu

The Ultimate Association: Same-Sex Marriage and the Battle Against Jim Crow's Other Cousin

BRYAN K. FAIR†

I. ON PATTERNS AND LIMITED PROGRESS 269
A. *Jim Crow's Other Cousin* 270
B. *Is Equality Still an Empty Idea?* 272
C. *Does Wait Really Mean Never?* 274
II. THE CONSTITUTIONAL STATUS OF SAME-SEX MARRIAGE 274
A. *The Power To Define Who Can Marry* 276
1. CONGRESS 276
2. SAME-SEX-MARRIAGE PROSCRIPTIONS AND THE STATES 277
III. THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF AMERICAN CITIZENS 279
A. *First Principles and Fundamental Rights* 279
B. *Sexual Orientation and Fundamental Rights* 284
IV. MARRIAGE AS AN INTIMATE ASSOCIATION 290
V. CONCLUSION 297

I. ON PATTERNS AND LIMITED PROGRESS

Twentieth-century American legal history is notable for a series of equal-rights struggles and partial, majestic triumphs. Since the 1950s, activists have insisted that the nation confront its formal policies of white supremacy and their legacies.[1] Since the 1960s, women have demanded an end to unequal protection before the law and broader rights to control their bodies and the social, economic, and political conditions of their lives.[2] And, since the 1970s, equality advocates have

† Bryan K. Fair is the Thomas E. Skinner Professor of Law and Associate Dean for Special Programs at the University of Alabama School of Law, where he teaches Constitutional Law, the First Amendment, and related classes. He is the author of *Notes of a Racial Caste Baby: Colorblindness and the End of Affirmative Action* and numerous articles on caste in the United States. Professor Fair wishes to thank his colleagues for their support over the years, Dean Kenneth Randall for his visionary leadership of the University of Alabama School of Law, and he is especially grateful to Katie Pope, Mark Libell, Oscar Price, and Jack Bethay for their excellent research assistance during the development of this project.

1. *See* DERRICK BELL, AND WE ARE NOT SAVED, at xi–xii (1987); DERRICK BELL, RACE, RACISM AND AMERICAN LAW 654–56 (4th ed. 2000); BRYAN K. FAIR, NOTES OF A RACIAL CASTE BABY: COLORBLINDNESS AND THE END OF AFFIRMATIVE ACTION 105–09 (1997); JUAN F. PEREA ET AL., RACE AND RACES 168–71 (2d ed. 2007).

2. Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1177 (1988) ("Between the mid 1960s and '70s, women's rights and women's liberation organizations became an increasingly visible presence on the cultural landscape, and offered a growing challenge to traditional gender patterns."); *see also* LAURA A. OTTEN, WOMEN'S RIGHTS AND THE LAW 80–86 (1993) (discussing the legal shift for women's rights); STEPHANIE M. WILDMAN ET

compelled Congress and the federal courts to address their disabled clients' inferior status under the law.[3] Although each of these landmark battles endures, with much work yet to be done to eliminate cumulative privilege for some Americans and cumulative disadvantage for others, those unfinished revolutions will likely await the resolution of the battle over the civil rights of American citizens who are also gay[4] individuals or couples.[5] And at stake is more than simply a license to marry. Like its predecessors, this epic battle is about again asserting the constitutional entitlement to equal dignity of all American citizens.

A. *Jim Crow's Other Cousin*

Much like Charlie Houston saw public schools as the best place to combat racial discrimination in public life,[6] new equality advocates have emerged to frame the legal assault on another Jim Crow cousin—discrimination against American citizens who are also gay—in the context of the fundamental right to marry.[7] Yet, the end they seek is nondiscrimination in all aspects of their lives. They seek to vindicate the American

---

AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 25–26 (1996) (discussing the difficulties women and feminism encountered in the workplace).

3. *See, e.g.*, Rehabilitation Act of 1973, 29 U.S.C. § 701 (2000); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000); Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1207–08 (2007).

4. Throughout this article, I use the term "gay" to refer to the community of American citizens who are gay, lesbian, bisexual, or transgendered. I do so only for convenience and not to diminish the unique concerns of individuals or groups.

5. *See generally* DONALD J. CANTOR ET AL., SAME-SEX MARRIAGE: THE LEGAL AND PSYCHOLOGICAL EVOLUTION IN AMERICA (2006) (discussing case law concerning gay marriage, research on gay families, and the law of adoption); JONATHAN GOLDBERG-HILLER, THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS (2002) (arguing that the same-sex-marriage controversy is a response to anxieties over the fragmented nature of community); KATHLEEN E. HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW (2006) (examining same-sex marriages in the contemporary United States); DAVID MOATS, CIVIL WARS: A BATTLE FOR GAY MARRIAGE (2004) (explaining the civil-union political debate in Vermont); RICHARD D. MOHR, THE LONG ARC OF JUSTICE: LESBIAN AND GAY MARRIAGE, EQUALITY, AND RIGHTS (2005) (employing the philosophy of "applied ethics" to the same-sex-marriage discussion); DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE (2006) (describing how courts, politicians, and activists deal with the same-sex-marriage issue); JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2004) (arguing same-sex marriages would benefit everyone); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993) (recounting the history of same-sex marriage).

6. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 116 (1983).

7. WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? 14–17 (2006); *see also* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 795–822 (1997) (describing the same-sex-marriage debate); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 627 (1980) (noting that marriage is a fundamental freedom).

Promise of liberty and equality, a guarantee of equal status in relation to the state. And judges throughout the country have been listening.

Consider the recent holding of the California Supreme Court in *In re Marriage Cases*:

> [W]e conclude that, under this state's Constitution, the constitutionally based right to marry properly must be understood to encompass the core set of basic *substantive* legal rights and attributes traditionally associated with marriage that are so integral to an individual's liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process. These core substantive rights include, most fundamentally, the opportunity of an individual to establish—with the person with whom the individual has chosen to share his or her life—an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.[8]

The Connecticut Supreme Court has reached the same conclusion, ruling that same-sex couples must have the same rights to marry as different-sex couples, nothing less. In his majority opinion, Justice Richard Palmer wrote that "segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm" since "the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody."[9] The import of this language is that gays are entitled to equality in marriage and other aspects of their lives as a matter of state constitutional law.

These conclusions closely parallel what Justice Kennedy wrote about the federal constitution in *Lawrence v. Texas*:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."
>
> Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.[10]

---

8. 183 P.3d 384, 399 (Cal. 2008).

9. Kerrigan v. Comm'r of Pub. Health, No. SC 17716, 2008 Conn. LEXIS 385, at *4 (Conn. Oct. 28, 2008).

10. 539 U.S. 558, 574 (2003) (citation omitted) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

They also call to mind Justice Douglas' admonition in *Griswold v. Connecticut* that

> [m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[11]

Finally, in *Loving v. Virginia*, Chief Justice Warren reminded the nation that

> [m]arriage is one of the "basic civil rights of man," fundamental to our very existence and survival. . . . The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.[12]

Taken together, these federal constitutional decisions make it seem universally accepted that burdens on the right to marry implicate the most exacting review by the Court, rendering most restrictions presumptively unconstitutional. Nonetheless, most states currently limit marriage to opposite-sex couples. Only two states, Massachusetts and Connecticut, recognize same-sex marriage. Several others provide same-sex couples comparable rights through domestic-partnership or civil-union statutes and procedures.[13] It is unclear if the principle of separate but equal has any currency regarding the civil rights of gays, even after its complete repudiation in earlier civil-rights battles.

B. *Is Equality Still an Empty Idea?*

The legal issues in this latest equal-rights battle are as diverse, dynamic, and important as the people of the whole country.[14] Can government prevent gay citizens from enjoying any fundamental rights, such as the right to marry, to adopt children, and to direct the upbringing of children? Does the fundamental right to privacy, so carefully elucidated in *Lawrence v. Texas*, provide full and equal rights to gay citizens in matters as personal as with whom they wish to join their lives, for better or worse?[15] Is marriage the ultimate intimate association and, like

11. 381 U.S. 479, 486 (1965).

12. 388 U.S. 1, 12 (1967).

13. *See* Misha Isaak, Comment, *"What's in a Name?": Civil Unions and the Constitutional Significance of "Marriage,"* 10 U. PA. J. CONST. L. 607, 608 nn.7 & 9 (2008).

14. *See* discussion *infra* Part II.

15. *See* Karst, *supra* note 7, at 634; Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. CIV. RTS. L.J. 269, 305–06 (2006);

family, protected against arbitrary governmental interference by the First Amendment's fundamental right to associate, as well as the Fourteenth Amendment's right to privacy? Is sexual orientation a permissible basis for distinguishing the rights of American citizens in marriage and family disputes, such as the awarding of custody? Are American citizens who are also gay America's Untouchables, subject to special legislation relegating them to permanent disadvantage and second-caste status?[16] Is private prejudice or animus towards gay citizens a legitimate basis for legislative classifications? And, if gay citizens can be subjects of discrimination in these areas of fundamental rights, what about others?

Legal commentators have begun to map the broad contours of the debate over same-sex marriage and the rights of gay and lesbian Americans. Professor Ken Karst was the first commentator to articulate a theory of constitutional privacy linking same-sex marriage and what he described as the freedom of intimate association.[17] Since then, other theorists have argued in favor of constitutional protection on a synthesis of due-process and equal-protection grounds, relying on Justice Anthony Kennedy's opinions in *Romer v. Evans*[18] and *Lawrence*,[19] and the *Planned Parenthood of Southeastern Pennsylvania v. Casey*[20] opinion. Others have advanced arguments for excluding gays from marriage, and for leaving the debate to the states.[21] Very few commentators have considered freedom of association as an independent constitutional source for protection of same-sex marriage.[22] Even fewer scholars have examined the fundamental rights to marriage, privacy, and association in tandem, examining the basic question of whether gay Americans enjoy all of these fundamental rights to the same extent as Americans who are

---

Jeffrey M. Shaman, *The Right of Privacy in State Constitutional Law*, 37 RUTGERS L.J. 971, 1033–34 (2006); Collin O'Connor Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231, 250–54 (1998).

16. *Cf. Global Caste Discrimination*, HUMAN RTS. NEWS, Aug. 29, 2001, http://hrw.org/english/docs/2001/08/29/global1815.htm (discussing caste systems); HUMAN RIGHTS WATCH, CASTE DISCRIMINATION (2001), http://www.hrw.org/reports/2001/globalcaste (same).

17. *See* Karst, *supra* note 7, at 626–47.

18. 517 U.S. 620 (1996).

19. *See, e.g.*, Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology when Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685, 685, 723–42 (2008).

20. 505 U.S. 833 (1992).

21. *See, e.g.*, Robert P. George, *Judicial Usurpation and Sexual Liberation: Courts and the Abolition of Marriage*, 17 REGENT U. L. REV. 21, 28–30 (2004).

22. *See* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1292 n.43 (1985) ("The Supreme Court, by dividing association into the two components of intimate and expressive association, has in effect subsumed the right to association into the rights of privacy and expression. Consequently, no independent basis for gay rights has been developed under the rubric of freedom of association." (citations omitted)).

not gay.[23] This Article seeks to begin to fill that void.

C. *Does Wait Really Mean Never?*

The purpose of this Article is to examine the legal foundations for this next epic equal-rights struggle and to explain why its outcome, the legal equality and equal dignity of American citizens who are also gay, appears all but a certainty given the Court's recent substantive due process and equality jurisprudence, especially its decisions regarding the right to marry, the right to privacy, and the freedom of intimate association. My thesis is simple; there is no coherent fundamental-rights theory to justify rights discrimination against American citizens who are gay, whether the relevant right is voting or marriage.

In Part II, I critique the coordinated assault on the presumptive rights of American citizens who are also gay, especially the right to marry, through legislative acts, referenda, and judicial decisions outside of the Supreme Court. In Part III, I describe the current legal landscape of the rights of American citizens who are also gay, in light of recent Supreme Court decisions. In Part IV, I isolate the fundamental right to freedom of intimate association, asserting that when this right is linked with the fundamental rights to privacy, marriage, and equality, these fundamental norms work together to protect consenting adults' choices about matters of marriage. In Part V, I conclude by explaining why *Lawrence v. Texas* only makes sense if it is given this broad meaning and with a word of caution and a word of criticism.

II. The Constitutional Status of Same-Sex Marriage

The U.S. Supreme Court has yet to address directly the federal constitutional status of same-sex marriage. The closest the issue has come to the Court was in the case of *Baker v. Nelson*.[24] In *Baker*, Richard Baker and James McConnell brought suit after they were denied a marriage license by a county clerk.[25] The Minnesota Supreme Court ruled that limiting marriage to heterosexuals did not violate either state or federal constitutional rights, including the Ninth Amendment or the Fourteenth Amendment's Equal Protection or Due Process Clauses.[26] The Supreme Court dismissed the appeal for lack of a substantial federal question.[27]

---

23. *But see, e.g.*, Udell, *supra* note 15, at 270–71.

24. 409 U.S. 810 (1972).

25. Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971).

26. *Id.* at 186–87; *see also* Nancy K. Kubasek et al., *Civil Union Statutes: A Shortcut to Legal Equality for Same-Sex Partners in a Landscape Littered with Defense of Marriage Acts*, 15 U. Fla. J.L. & Pub. Pol'y 229, 244 (2004) ("[T]he *Baker* court denied all of the constitutional arguments, some without discussion.").

27. *Baker*, 409 U.S. at 810.

Since then, the Supreme Court has held in 1975 that a summary dismissal for want of a federal question is a decision on the merits, and binding in later cases.[28] Because of this principle, some lower courts have treated the *Baker* decision as binding and used the state court's holding to strike down claims for gays.[29]

Other state courts have more recently struck down restrictions on same-sex marriage as inconsistent with their state constitutions. The first was Hawaii in *Baehr v. Lewin.*[30] In *Baehr*, the Hawaii Supreme Court ruled that sex was a suspect category for equal-protection analysis under the State's Constitution, and that Hawaii's law restricting marriage to between a man and a woman was presumed to be unconstitutional under equal-protection analysis.[31] The issue became moot there, however, when Hawaii amended its constitution to define marriage as only between a man and a woman.[32] The Hawaii experience created alarm among social conservatives around the country that state courts might expand marriage rights.[33] Massachusetts has also recognized constitutional protection for same-sex marriage rights.[34] And most recently, California and Connecticut courts have held that restrictions on same-sex marriage are unconstitutional under state law.[35]

Notwithstanding claims by some that these isolated examples portend a major shift by states, courts have not been particularly active in striking down legislation that treats same-sex marriage differently than opposite-sex marriage. Examples of legislation that has been upheld as constitutional by the nation's lower courts include the military's "don't ask, don't tell policy,"[36] a Florida law banning gays from adopting children,[37] and an Alabama decision disparaging the custodial rights of a

28. Hicks v. Miranda, 422 U.S. 332, 344–45 (1975); *see also In re* Estate of Cooper, 564 N.Y.S.2d 684, 686 (Sur. Ct. 1990) ("The appeal [in *Baker*] from the Minnesota Supreme Court to the United States Supreme Court was dismissed for want of a substantial Federal question. Such a dismissal is a holding that the constitutional challenge was considered and rejected." (citation omitted)), *aff'd*, 597 N.Y.S.2d 797 (App. Div. 1993).

29. *See, e.g.*, McConnell v. Nooner, 547 F.2d 54, 56 (8th Cir. 1976) (per curiam).

30. 852 P.2d 44 (Haw. 1993).

31. *Id.* at 67.

32. *E.g.*, Victor C. Romero, *The Selective Deportation of Same-Gender Partners: In Search of the* "Rara Avis," 56 U. MIAMI L. REV. 537, 542 n.32 (2002); *cf.* Brad K. Gushiken, Comment, *The Fine Line Between Love and the Law: Hawai'i's Attempt To Resolve the Same-Sex Marriage Issue*, 22 U. HAW. L. REV. 149, 166 (2000) (noting a constitutional amendment's ability to moot the point).

33. *See* Gushiken, *supra* note 32, at 162–63.

34. *See Same Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONF. ST. LEGISLATURES, May 2008, http://www.ncsl.org/programs/cyf/samesex.htm.

35. *See id.*

36. *See* Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997).

37. *See* Lofton v. Kearney, 157 F. Supp. 2d 1372, 1385 (S.D. Fla. 2001).

mother who had chosen a same-sex partner.[38] And each year, the list of states with restrictions on same-sex marriage expands. In the end, the state and federal courts will follow the U.S. Supreme Court, and an opinion from the Court granting gays protected status as a suspect class or recognizing a constitutional right to same-sex marriage is the best hope to ensure the broadest protection of fundamental rights.[39]

A. *The Power To Define Who Can Marry*

1. CONGRESS

A new impediment to protection of same-sex marriage arose when Congress enacted the Defense of Marriage Act (DOMA).[40] DOMA was Congress's reaction to fears that the Full Faith and Credit Clause of Article 4, Section 1 of the Constitution would require states to recognize same-sex marriages performed in other states where the unions were not prohibited.[41] This argument seems implausible if not irrational. First, "[t]he Full Faith and Credit Clause has rarely been used by courts to validate marriages because marriages are not [considered] 'legal judgments.'"[42] Section 283 of the Second Restatement of Conflict of Laws provides the following:

> (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.
>
> (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.[43]

The real purpose for DOMA is apparent considering its text:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife,

---

38. *See Ex parte* H.H., 830 So. 2d 21, 26, 31 (Ala. 2002) (Moore, C.J., concurring).

39. *But see* Charles E. Mauney, Jr., Comment, *Landmark Decision or Limited Precedent: Does* Lawrence v. Texas *Require Recognition of a Fundamental Right to Same-Sex Marriage?*, 35 CUMB. L. REV. 147, 173 (2005).

40. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000)).

41. *See* Gushiken, *supra* note 32, at 162–63.

42. ALISON M. SMITH, SAME-SEX MARRIAGE: LEGAL ISSUES 6 (Cong. Research Serv., Order Code RL31994, 2005), *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-8030.

43. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

> and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[44]

A constitutional challenge to DOMA has yet to reach the Supreme Court.

2. SAME-SEX MARRIAGE PROSCRIPTIONS AND THE STATES

Forty-four states currently have either a Defense of Marriage Act statute, state constitutional amendment, or some other legislation prohibiting same-sex marriage.[45] Recent decisions by courts in New Jersey and New York, have affirmed prohibitions on same-sex marriages.[46] The volume of legislation at the state level prohibiting same-sex marriage would seem to indicate that most Americans are vehemently opposed to same-sex marriage: State constitutional amendments prohibiting these marriages have passed in most jurisdictions by overwhelming margins since 2004.[47]

Though a majority of states currently prohibit same-sex marriage and explicitly define marriage as between a man and a woman,[48] there have been a handful of recent decisions that have gone the other way. In *Deane v. Conaway*, a Baltimore City Circuit Court struck down Maryland's ban on same-sex marriage as an unconstitutional violation of the State's equal-rights amendment, as well as its due-process amendment,

---

44. 1 U.S.C. § 7.

45. Connecticut, Massachusetts, New Jersey, New Mexico, New York, and Rhode Island are the current holdouts, but pressure to enact same-sex-marriage legislation in these states remains high. *See* Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. 257, 263–65 (Supp. 2006).

46. *See* Lewis v. Harris, 875 A.2d 259, 274 (N.J. Super. Ct. App. Div. 2005) (affirming grant of summary judgment to defendant state officials where same-sex couples brought action alleging that refusal to issue them marriage licenses violated their constitutional rights); Hernandez v. Robles, 805 N.Y.S.2d 354, 377 (App. Div. 2005) (reversing the New York County Supreme Court's grant of summary judgment to same-sex couples who brought action challenging constitutionality of Domestic Relations Law provisions that did not permit same-sex marriage).

47. *See* Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, STATELINE.ORG, Nov. 3, 2004, http://www.statelinc.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576.

48. *See* ALASKA CONST. art. I, § 25; ALASKA STAT. § 25.05.011(a) (2006); ARIZ. REV. STAT. ANN. § 25-101(C) (2007); COLO. REV. STAT. § 14-2-104(1)(b) (2005); DEL. CODE ANN. tit. 13, § 101(a), (d) (2008); FLA. STAT. § 741.04 (2008); GA. CODE ANN. §§ 19-3-3.1, -3-30(b)(1) (2004); HAW. REV. STAT. ANN. §§ 572-1, -1.6, -3 (LexisNexis 2005); IDAHO CODE ANN. §§ 32-201, -209 (2006); 750 ILL. COMP. STAT. ANN. 5/201, /212, /213.1 (West 2008); IND. CODE ANN. § 31-11-1-1 (West 2008); KAN. STAT. ANN. §§ 23-101, -115 (2007); LA. CIV. CODE ANN. arts. 86, 89, 96 (1999 & Supp. 2008); MD. CODE ANN., FAM. LAW § 2-201 (West 2007); MICH. COMP. LAWS ANN. §§ 551.1–.4 (West 2005); MINN. STAT. ANN. § 517.01 (West 2006); MO. ANN. STAT. § 451.022 (West 2003); MONT. CODE ANN. § 40-1-103 (2007); N.H. REV. STAT. ANN. §§ 457:1–:2 (LexisNexis 2007); N.C. GEN. STAT. § 51-1.2 (2007); P.R. LAWS ANN. tit. 31, § 221 (1993 & Supp. 2005); S.C. CODE ANN. §§ 20-1-10, -15 (Supp. 2007); S.D. CODIFIED LAWS § 25-1-1 (1999); TENN. CODE ANN. § 36-3-113 (2001); TEX. FAM. CODE ANN. § 2.001 (Vernon 2006); UTAH CODE ANN. § 30-1-2(5) (2007); VA. CODE. ANN. § 20-45.2 (2008).

because it was not narrowly tailored to serve a compelling state interest.[49] The court found that there was no rational relationship between protecting the best interests of children and preventing same-sex marriages.[50]

The most recent decisions striking down a same-sex marriage ban are from California, as noted earlier, Massachusetts, and Connecticut. In the Massachusetts State Supreme Court case of *Goodridge v. Department of Public Health*, the court held that the State's equal protection clause prohibited the legislature from limiting the benefits of marriage to heterosexual couples.[51] The Connecticut Supreme Court has also recently rejected as unconstitutional the state's civil-union legislation. Justice Richard N. Palmer wrote that "segregation of heterosexual and homosexual couples into separate institutions constitutes cognizable harm."[52] Moreover, Vermont, New Hampshire, and New Jersey have enacted civil-union statutes that provide essentially the same benefits for same-sex couples as married couples receive.[53]

What is most striking to me about the discourse regarding same-sex marriage is that it seems to rest more on traditional stereotypes rather than rigorous examination and explanation of why marriage rights should be denied. Few commentators discuss what marriage is or the benefits of marriage which are routinely denied same-sex couples. In one extraordinary book, Richard Mohr's *The Long Arc of Justice*, the author seeks to explain philosophically and morally the case for gay marriage. For Mohr, marriage isn't simply a legal construction, it "is a mode of daily living, a type of connection between persons, one that most closely resembles old-fashioned common law marriage."[54] Mohr uses research on gay couples' relationship, including their love, commitment, and intimacy to expand the discourse on what is marriage and to illustrate that gay couples embrace all of its practical attributes, even though in so many places they are denied it legal protection and its benefits. And, as Mohr explains, denying marriage rights to gays, denies them enormous advantages, including tax deductions, credits, and exemptions; enhanced public assistance; property distribution rights; inheritance rights; special protection of the law from property attach-

49. No. 24-C-04-005390, 2006 WL 148145, at *1, *3 (Md. Cir. Ct. Jan. 20, 2006), *rev'd*, 932 A.2d 571 (Md. 2007).

50. *Id.* at *7.

51. 798 N.E.2d 941, 961 (Mass. 2003).

52. Kerrigan v. Comm'r of Pub. Health, No. SC 17716, 2008 Conn. LEXIS 385, at *4 (Conn. Oct. 28, 2008).

53. *See* N.H. REV. STAT. ANN. § 457-A:3 (Westlaw through 2008 Reg. and Spec. Sess.); N.J. STAT. ANN. § 37:1-1 (West 2008); VT. STAT. ANN. tit. 15, §§ 1201–1207 (2007); *id.* tit. 18, §§ 5160–5169.

54. MOHR, *supra* note 5, at 11.

ments resulting from a spouse's debts; a right to bring a wrongful-death suit and a right to receive survivor benefits; and the right to next-of-kin status at death.[55] Thus, in a real sense, denying marriage to same-sex couples renders those couples second-class citizens.

This legal battle is far from over and it is likely that additional states will expand restrictions, while others will strike down all marriage distinctions. Thus, this is an area screaming for constitutional clarity. The Supreme Court should take its first opportunity to settle the federal constitutional claims of American citizens who are also gay. They should not be made to wait for equal justice under law. They should know whether the federal constitution fully protects them, too, in matters relating to fundamental rights of privacy, marriage, and association, among others.

III. THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF AMERICAN CITIZENS

Most Americans have an incoherent view of what the Constitution protects. Former Associate Justice Hugo Black was fond of declaring that for most Americans, the "Constitution prohibits that which they think should be prohibited and permits that which they think should be permitted."[56] Fortunately, the Court has not left constitutional interpretation to the whim of the majority of Americans, especially in matters relating to family, privacy, and marriage. In these areas, as in so many others, there is simply no language in the Constitution fixing the right to marry, freedom of association, the right to privacy, or personal autonomy over private choices regarding family or self. Despite this constitutional ambiguity, the Court has unequivocally "derived from the word liberty a special constitutional protection for privacy, personal autonomy, and some family relationships requiring special justification for state infringements on those interests."[57]

A. *First Principles and Fundamental Rights*

Beginning in the 1920s, and consistently from the 1960s, the Court has held that the government cannot interfere with matters of family, marriage, and privacy, absent a compelling reason for doing so, as well as a showing that the government's regulation was essential to achieve

55. *Id.* at 63–64.

56. William W. Van Alstyne, *Reflections on the Teaching of Constitutional Law*, 49 ST. LOUIS U. L.J. 653, 658 n.16 (2005).

57. WILLIAM COHEN ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 583 (12th ed. 2005).

the government's goals.[58] In virtually every case presenting such regulations over the past eighty years, the Court has ruled against the government. For example, in *Meyer v. Nebraska*,[59] *Pierce v. Society of Sisters*,[60] *Skinner v. Oklahoma*,[61] *Loving v. Virginia*,[62] *Griswold v. Connecticut*,[63] *Moore v. City of East Cleveland*,[64] and *Zablocki v. Redhail*,[65] the Court rejected each state regulation as inconsistent with the fundamental rights of individuals to make personal choices about their lives.

The Supreme Court first maintained that there was a Constitutional right to privacy in *Griswold v. Connecticut*. In *Griswold*, the appellants were convicted of violating Connecticut's statute banning contraceptives.[66] Justice Douglas, writing for the Court, noted while striking down Connecticut's ban that "the First Amendment has a penumbra where privacy is protected from governmental intrusion."[67] Justice Douglas then reached the topic of marriage:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. *Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.*[68]

Since 1965, the Court has carefully explained the nature and scope of constitutional privacy to include, among other interests, the rights of married or unmarried adults to use contraception,[69] the right to terminate a pregnancy,[70] the right to marry,[71] the right to live with family mem-

---

58. *E.g.*, Zablocki v. Redhail, 434 U.S. 374, 383–88 (1978); Moore v. City of E. Cleveland, 431 U.S. 494, 499–500 (1977) (plurality opinion).

59. 262 U.S. 390, 403 (1923).

60. 268 U.S. 510, 534–35 (1925).

61. 316 U.S. 535, 536–38 (1942).

62. 388 U.S. 1, 2 (1967).

63. 381 U.S. 479, 485–86 (1965).

64. 431 U.S. 494, 505–06 (1977) (plurality opinion).

65. 434 U.S. 374, 377 (1978).

66. 381 U.S. at 480.

67. *Id.* at 483.

68. *Id.* at 486 (emphasis added). At least five members of the Court agreed with Justice Douglas's opinion, although Justices Goldberg, Brennan, and Chief Justice Warren would have relied more directly on the Ninth Amendment. *See id.* at 486–87.

69. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

70. Roe v. Wade, 410 U.S. 113, 153 (1973).

71. Zablocki v. Redhail, 434 U.S. 374, 386 (1978); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

bers,[72] the rights of expressive or intimate association,[73] and, generally, the right to avoid the disclosure of certain private matters and the right to make certain private decisions.[74]

Reversing the conviction of a parochial-school language teacher who violated a law forbidding the teaching of any language other than English in the first eight grades of public or private school, the Court wrote,

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[75]

Likewise, the Court ruled that Oregon could not, consistent with the Constitution, compel parents to send their children between the ages of eight and sixteen to public schools.[76] Absent some justification for the loss of such rights, parents and guardians have broad authority to make private choices about the education and upbringing of children under their control.[77]

In *Skinner v. Oklahoma*, where the Court struck down an Oklahoma statute that would have provided for mandatory sterilization for certain habitual criminals, the Court again stressed the importance of marriage in American society.[78] The Court noted that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[79]

The Court emphasized the importance of marriage as early as 1888. In *Maynard v. Hill*, the Court wrote that marriage is "the most important relation in life."[80] The Court declared marriage to be a fundamental right for all citizens in *Loving v. Virginia*.[81] In *Loving*, a Virginia couple convicted of violating the State's ban on interracial marriages challenged the statute as a violation of the Equal Protection and Due Process

72. Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion).
73. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644, 655–56 (2000).
74. *See* Whalen v. Roe, 429 U.S. 589, 591, 605 (1977).
75. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
76. Pierce v. Soc'y of Sisters, 268 U.S. 510, 530, 534–35 (1925).
77. *Id.* at 535.
78. 316 U.S. 535, 541 (1942).
79. *Id.*
80. 125 U.S. 190, 205 (1888).
81. 388 U.S. 1, 12 (1967).

Clauses of the Fourteenth Amendment.[82] The State argued that, because whites and blacks were both equally prohibited from interracial marriage, there was no invidious discrimination and thus no equal-protection violation.[83] The state also contended that, if the Equal Protection Clause does not outlaw miscegenation laws because of their reliance on racial classifications, the appropriate standard of review was rational basis and deference goes to the state.[84] Chief Justice Warren declared that Virginia's "equal application" of the law did "not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race."[85]

The Chief Justice went on to hold that the law also violated the Due Process Clause of the Fourteenth Amendment, writing, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[86] The Chief Justice continued, "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[87]

In *Zablocki v. Redhail*, the Court again described the right to marry as fundamental.[88] There, a Wisconsin law was challenged, which required that a marriage license not be granted unless the applicant proved that any dependent children not in his care were not likely to become charges of the state, and that all child support obligations had been met.[89] The plaintiff brought suit challenging the law after being denied a marriage license because of failure to meet the law's requirements.[90] The Court struck down the regulation because it violated the Fourteenth Amendment's Equal Protection Clause.[91]

The Court noted that "the right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause."[92] The Court went on to say:

> "While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are

82. *Id.* at 2–3.
83. *Id.* at 7–8.
84. *Id.* at 8.
85. *Id.* at 9.
86. *Id.* at 12.
87. *Id.* (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
88. 434 U.S. 374, 383 (1978).
89. *Id.* at 375.
90. *Id.* at 376.
91. *Id.* at 377.
92. *Id.* at 384 (internal quotation marks omitted) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

> personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'"[93]

The *Zablocki* Court also noted that "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[94]

The Court did not hold that marriage was without limits, noting that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."[95] The Court found that the Wisconsin statute substantially interfered with the right to marry, because there was a segment of the population that would forever be barred from marriage, while others might be "coerced" into avoiding marriage, and even those who could meet the statute's requirements would "suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental."[96]

The Court reiterated its standard of review for fundamental rights when it noted that, "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[97]

The right to marry holds up in less traditional circumstances, as was seen in *Turner v. Safley*.[98] In *Turner*, the plaintiffs challenged a Missouri law forbidding inmates to marry without the authorization of the superintendent of the prison, and only then when there were compelling reasons to do so.[99] The Court described the advantages of marriage, noting that "inmate marriages, like others, are expressions of emotional support and public commitment," and that "[t]hese elements are an important and significant aspect of the marital relationship."[100] The Court noted that even under a reasonable-relationship test, the marriage regulation could not survive.[101]

Some lower courts have attacked the idea of same-sex marriage as a fundamental right and have attempted to limit the extent to which marriage is protected. In *Dean v. District of Columbia*, the District of

93. *Id.* at 385 (alteration in original) (citations omitted) (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977)).
94. *Id.* at 386.
95. *Id.*
96. *Id.* at 387.
97. *Id.* at 388.
98. 482 U.S. 78 (1987).
99. *Id.* at 82.
100. *Id.* at 95–96.
101. *Id.* at 97.

Columbia Court of Appeals upheld a District of Columbia statute prohibiting the grant of marriage licenses to same-sex couples.[102] The concurring Judge Ferren wrote, "[W]e cannot overlook the fact that the Supreme Court has deemed marriage a fundamental right substantially because of its relationship to procreation."[103] The court reinforced this line of reasoning by pointing to language in *Skinner*[104] and *Zablocki*,[105] where it interpreted the Court as declaring procreation a fundamental right.[106]

The debate over how marriage should be classified is an important one. Fundamental rights carry with them strict scrutiny, which the government can only overcome by showing that its actions were narrowly tailored to serve a compelling interest.[107] This is usually a monumental task. It is thus helpful to proponents of same-sex marriage to be able to invoke marriage as a fundamental right. If they can convince the Court to look at the issue from this point of view, then a successful ruling is almost guaranteed.[108]

These cases frame one core aspect of the Court's fundamental-rights jurisprudence. They provide a set of neutral principles, available to any American seeking to contest regulatory burdens on their fundamental constitutional freedoms. If one assumes, as I do, that these basic fundamental rights, as declared by the Court, extend to all Americans under our equality guarantee, then Americans who are gay must, in the end, enjoy the same fundamental rights.

B. *Sexual Orientation and Fundamental Rights*

Unfortunately, the Court has a less consistent record describing how these fundamental-rights norms apply in challenges to regulations by Americans who are gay. In some cases, it appears some Justices have been unable to escape general societal prejudice and homophobia.[109] In recent ones, the Court implies that Americans who are gay have the

102. 653 A.2d 307, 308 (D.C. 1995) (per curiam).

103. *Id.* at 333 (Ferren, J., concurring in part and dissenting in part).

104. *See id.* ("[M]arriage and procreation are fundamental to the very existence and survival of the race." (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942))).

105. *See id.* ("It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships." (quoting Zablocki v. Redhail, 434 U.S. 374, 386 (1978))).

106. *Id.*

107. *E.g.*, *Zablocki*, 434 U.S. at 388.

108. *But see* Lynne Marie Kohm, *Liberty and Marriage*—Baehr *and Beyond: Due Process in 1998*, 12 BYU J. PUB. L. 253, 274 (1998).

109. *See* Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

same fundamental rights as Americans who are not gay or lesbian.[110]

Consider *Bowers v. Hardwick*,[111] *Romer v. Evans*,[112] and *Lawrence v. Texas*.[113] In *Bowers*, the Court ruled that Georgia's application of its anti-sodomy laws did not violate the substantive due process rights guaranteed by the Fourteenth Amendment.[114] The Supreme Court has not always applied this privacy right equally to all sexual persuasions. *Bowers v. Hardwick* marked a low point in the fight for equality for gays. In *Bowers*, the Court ruled that Georgia's sodomy statute did not violate the Due Process Clause of the Fourteenth Amendment.[115] The Court noted that there was no privacy right that extended to homosexual sodomy.[116] In evaluating what was a fundamental liberty, the Court based its conclusion on "history and tradition."[117] The Court left for another day analysis of Equal Protection Clause and Ninth Amendment challenges.[118]

Romer v. Evans marked a turning point for gay and lesbian rights. At issue in *Romer* was Amendment 2, an amendment to Colorado's Constitution that banned laws prohibiting discrimination based on sexual orientation.[119] A number of citizens brought suit challenging the law as being in violation of the Fourteenth Amendment's Equal Protection Clause.[120] The Court held that under rational-basis equal-protection analysis, Colorado's amendment was unconstitutional.[121] The Court wrote that "Amendment 2 . . . in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."[122]

One can take from *Romer* the idea that gays and lesbians are subject to the same treatment as other minority groups. At the conclusion of its opinion, the Court wrote, "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."[123] While this sentence suggests that there can be valid legislation

110. *See Lawrence*, 539 U.S. at 562, 567.
111. 478 U.S. 186.
112. 517 U.S. 620 (1996).
113. 539 U.S. 558.
114. *Bowers*, 478 U.S. at 189, 196.
115. *Id.* at 189.
116. *Id.* at 190–91.
117. *Id.* at 192 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).
118. *Id.* at 196 n.8.
119. Romer v. Evans, 517 U.S. 620, 623–24 (1996).
120. *Id.* at 625.
121. *Id.* at 631–32.
122. *Id.* at 635.
123. *Id.*

that refers to homosexuals as a class, its more important point is that legislation that declares gays unequal to others is improper and in violation of the Fourteenth Amendment's Equal Protection Clause.[124] Professor Karst wrote of *Romer*:

> Unquestionably, *Romer* stands as an official expression, at the highest level, that antigay sentiment is an unacceptable basis for governmental action. That interpretation of the Constitution is no little achievement—given that some Americans continue to loathe the idea of homosexuality, equating it with such evils as predatory pedophilia.[125]

Romer was only the first step in the march toward equality for gays and lesbians. In *Lawrence v. Texas*, the Court gave equality advocates for gays their greatest victory thus far. In *Lawrence*, the plaintiffs were convicted of violating a Texas statute prohibiting "deviate sexual intercourse" between individuals of the same sex.[126] They challenged the law as violating their Fourteenth Amendment Due Process and Equal Protection rights.[127] The Court overruled *Bowers*, reaffirming not only the equal-protection guarantees for gays, but also the substantive due process protections as well.[128]

Justice Kennedy's opinion for the Court gives broad protection to Americans who are also gay. He wrote,

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.[129]

After describing the liberty interests at stake, Justice Kennedy framed the legal issue: "the validity of a Texas statute making it a crime for two people of the same sex to engage in certain intimate sexual conduct."[130] To resolve it, the Court deemed it necessary to reconsider its holding in *Bowers*.[131] Kennedy concluded that several factors cast *Bowers*'s holding in significant doubt. First, he noted that the Court had not

---

124. *Id.* at 635–36.

125. Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 WAKE FOREST L. REV. 513, 551 (2003).

126. Lawrence v. Texas, 539 U.S. 558, 563 (2003).

127. *Id.*

128. *Id.* at 578.

129. *Id.* at 562.

130. *Id.*

131. *Id.* at 564.

fully appreciated the extent of the liberty interest at stake.[132] *Lawrence* makes clear what *Bowers* did not:

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[133]

Kennedy next noted that the Court was wrong when it declared that proscriptions against consensual sodomy had ancient roots.[134] Instead, the Court found that such laws were not directed at homosexuals, but rather at specific "non-procreative sexual activity more generally."[135] And states that adopted these general laws avoided their import by refusing to apply them against acts by consenting adults in private.[136] Kennedy noted that it was not until the 1970s that a few states singled out same-sex relations for criminal prosecutions.[137]

Third, Justice Kennedy acknowledged that some members of the Court and many Americans generally condemn homosexual conduct as immoral based on their own private religious beliefs, notions of what is right or wrong behavior, and their views about the traditional family.[138] But the question is "whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."[139] And Kennedy warned, "Our obligation is to define the liberty of all, not to mandate our own moral code."[140]

Fourth, Kennedy summarized national and international legal trends away from criminalizing sexual activity between consenting adults acting in private.[141]

Then Kennedy wrote, "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[142] The Court then quoted *Planned Parenthood of Southeastern*

132. *Id.* at 567.
133. *Id.*
134. *Id.* at 567–68.
135. *Id.* at 568.
136. *Id.* at 569.
137. *Id.* at 570.
138. *Id.* at 571.
139. *Id.*
140. *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)).
141. *Id.* at 571–73.
142. *Id.* at 567.

Pennsylvania v. Casey:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."
>
> Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.[143]

Justice Kennedy concluded by saying, *Bowers* should be overruled,[144] and that Justice Stevens' dissent in *Bowers* stated the proper analysis and should have controlled there, and should control in *Lawrence*.[145] He then wrote,

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[146]

After laying out its findings, the Court finally announced, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[147] The Court went on to hold that "[the petitioners'] right to

---

143. *Id.* at 574 (citation omitted) (quoting *Planned Parenthood*, 505 U.S. at 851).

144. *Id.* at 578.

145. *Id.* Justice Stevens had relied on two propositions.

> First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . . Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment.

Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

146. *Lawrence*, 539 U.S. at 578 (quoting *Planned Parenthood*, 505 U.S. at 847).

147. *Id.*

liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government" and declared the law unconstitutional.[148]

Justice Scalia, in his *Lawrence* dissent, makes as strong a case for same-sex marriage rights as does the majority. Justice Scalia notes that, if moral condemnation of homosexual conduct is not a legitimate state interest,

> what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution?" Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.[149]

Justice Scalia, with this argument, exposed the shaky Constitutional grounds upon which opponents of same-sex marriage stand. Justice Scalia was admitting that, if moral disapproval were taken out of the equation, homosexuals would be entitled to the same rights as heterosexuals under the Constitution. As past opinions involving controversial topics such as abortion, pornography, and profanity have shown, moral disapproval is not enough to deny a group of individuals the opportunity to carry out a constitutionally protected right.

Given that *Bowers*, where the Court had declared that there was no privacy right to sodomy, was overturned, it is worth asking what other rights for same-sex couples might be protected under the right to privacy. *Lawrence* would certainly seem to stand for the premise that homosexuals and heterosexuals share the same privacy rights. Laurence Tribe wrote that "the evil targeted by the Court in *Lawrence* wasn't criminal prosecution and punishment of same-sex sodomy, but the disrespect for those the Court identified as 'homosexuals' that labeling such conduct as criminal helped to excuse."[150]

In *Zablocki*, the Court noted that the Wisconsin legislation would have had the effect of creating more out-of-wedlock children.[151] Considering that the prohibition on gay marriage causes many children to be raised by unmarried couples, this observation appears to ring true in the case of same-sex marriage as well. Facts such as this one expose the fallacy of the argument advocating the prohibition of same-sex marriage for the sake of children. Courts and legislatures, with a few notable exceptions, have shown little problem letting gay couples adopt chil-

148. *Id.*

149. *Id.* at 605 (Scalia, J., dissenting) (alteration in original) (citation omitted); *see also* William N. Eskridge, Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1046–47 (2005) (discussing Scalia's *Lawrence* dissent).

150. Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1948 (2004).

151. Zablocki v. Redhail, 434 U.S. 374, 390 (1978).

dren, only objecting when the couple seeks to cement their relationship. What could benefit children more than a stable home? Yet laws prohibiting same-sex marriage continue to place families in a state of flux where benefits, visitation rights, and other family protections are concerned.

In less than twenty years, the Court has come a long way toward granting equality regardless of sexual orientation. There are still obstacles to overcome, however. Though the Supreme Court in *Romer* used the Equal Protection Clause to strike down legislation that discriminated against gays and lesbians,[152] the Court did not rule that gays were a suspect class. As a result, legislation affecting gays is analyzed using a rational-relation test under the Equal Protection Clause.

Just as the Court struggled with other discriminatory classifications in the past, it now must resolve the legal status of gays under the Constitution.[153] And surely Professor Karst is correct when he writes, "[L]aw can (and does) both express and reinforce the status ordering of social groups—or, as the civil-rights movement illustrates, law can contribute to a status reordering."[154]

I had assumed that the law of privacy and marriage as fundamental rights were anathematic and have long ago believed that restrictions on same-sex marriage are antithetical to equality. And when these fundamental rights are read alongside the fundamental freedom of association, it seems inescapable that same-sex-marriage rights should enjoy complete constitutional protection.

IV. Marriage as an Intimate Association

Though the freedom of intimate association has been recognized by the Court as a constitutionally protected right for more than twenty years, the Court has never taken the time to explain where this right comes from. Professor Karst defined an intimate association as "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship."[155] He wrote that "the constitutional freedom of intimate association . . . serves as an organizing principle in a number of associational contexts by promoting awareness of the importance of those values to the development of a sense of individuality,"[156] and that the freedom was "presumptive rather than absolute" and did not "imply that the state is wholly disabled from

152. *See* Romer v. Evans, 517 U.S. 620, 631–32 (1996).

153. *See* Brenda Feigen, *Same-Sex Marriage: An Issue of Constitutional Rights Not Moral Opinions*, 27 Harv. Women's L.J. 345, 345–46 (2004).

154. Karst, *supra* note 125, at 545.

155. Karst, *supra* note 7, at 629.

156. *Id.* at 626 (footnote omitted).

promoting majoritarian views of morality."[157]

> What the freedom does demand is a serious search for justifications by the state for any significant impairment of the values of intimate association. And, like the First Amendment, which is one of its doctrinal underpinnings, it rejects as illegitimate any asserted justification for repression of expressive conduct based on the risk that a competing moral view will come to be accepted.[158]

For Karst, "[t]he one most clearly established feature of the constitutional freedom of intimate association is the freedom to marry, which radically restricts the state's power to withhold the status of marriage from a willing couple."[159] In determining what interests the state has in restricting marriage, Karst wrote,

> [T]here are occasions when the state may properly attach legal consequences to someone's choice to enter or refrain from entering such a status. Both sets of occasions are identifiable not by mechanical application of definitions of status, but by careful weighing of the associational values at stake in particular types of cases against the justifications asserted for their restriction.[160]

Again, Karst elaborated on the balancing between individual and state:

> The freedom of intimate association is unquestionably a "liberty" interest, and the claimant is thus entitled to procedural due process whether or not the benefit at stake is a "property" interest. Furthermore, when the courts do their substantive interest balancing in such cases, whether or not they explain that operation in terms of a particular standard of review, they should weigh the associational interests on the claimant's side of the balance, and not merely the material benefit he or she is claiming.[161]

Karst believed intimate association did not come from the Due Process Clause alone:

> Some of the values in intimate association are closely bound up with a person's sense of self: caring, commitment, intimacy, self-identification. When the state seriously impairs those values by restricting intimate association, the equal protection clause is at its most demanding, insisting on justifications of the highest order if the state is to be allowed to persist. The equal citizenship principle serves in the context of intimate association as it serves elsewhere, not as a result-producing formula but as a substantive guide to the interest balancing that the Supreme Court has recently practiced in the name

157. *Id.* at 627.
158. *Id.*
159. *Id.* at 652.
160. *Id.*
161. *Id.* at 659 (footnotes omitted).

of a variable standard of review.[162]

Karst mentioned same-sex marriage as a specific example of an equal-protection intimate-association issue and framed the proper analysis:

> Which of the values of intimate association are impaired? Does the formal status in question have importance as a symbol, or as a key to some benefit, or both? Does the impairment of associational values imply some serious invasion of the equal citizenship interests of respect, responsibility, and participation? If so, has the state sufficiently justified that invasion?[163]

Four years after their publication, Karst's ideas became law. In *Roberts v. United States Jaycees*, a female challenged her exclusion from membership as a violation of Minnesota's public-accommodation statute, which made it unlawful to "deny any person the full and equal enjoyment of . . . a place of public accommodation because of . . . sex."[164] In response, the Jaycees asserted that the state law violated its right to freedom of association.[165]

Justice Brennan wrote that the freedom of association was a "fundamental element of personal liberty."[166] Justice Brennan broke the freedom of association into two categories: expressive association and intimate association.[167] Examples of protected acts of intimate association included: marriage; childbirth; "the raising and education of children"; and "cohabitation with one's relatives."[168]

Justice Brennan stated that relationships of a smaller, more specialized nature would be encompassed by this protection, while more impersonal groups, like corporations, would be less likely to be protected.[169] Justice Brennan explained that,

> [b]etween these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.[170]

Included as factors aiding in deciding where in the spectrum a particular

162. *Id.* at 663.
163. *Id.*
164. 468 U.S. 609, 615 (1984) (quoting MINN.STAT. § 363.03(3) (1982)).
165. *Id.*
166. *Id.* at 618.
167. *Id.* at 617–18.
168. *Id.* at 619.
169. *Id.* at 619–20.
170. *Id.* at 620.

association fell were the following: "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."[171] Nowhere in the opinion did Justice Brennan explain where in the Constitution the right to intimate association came from. It is important to note though that the Court, when citing examples of protected intimate association, points to a series of cases decided under the Due Process Clause of the Fourteenth Amendment.[172] In *Roberts*, Justice Brennan held that the Jaycees were not entitled to protection under intimate association, because they are a "large and basically unselective" group.[173]

The Court has addressed intimate association three times since the *Roberts* case.[174] In *Board of Directors of Rotary International v. Rotary Club of Duarte*, the dispute arose when the International Rotary Club revoked a local chapter's charter for allowing women membership in accordance with California's antidiscrimination statute.[175] The Court held that the Rotary Club could not find refuge for its discriminatory actions under a theory of freedom of association and was not the type of organization protected under the theory of intimate association.[176]

The Court did recognize that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights."[177] Moreover, the Court had in mind a particular type of relationship: one which "presuppose[s] 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'"[178] In making its determination, the Court considered the size, purpose, selectivity, and exclusivity of Rotary, concluding the club was not an intimate association, but rather a club that keeps its "windows and doors open to the whole world."[179]

The Court addressed intimate association for the second time in 1989, in *City of Dallas v. Stanglin*.[180] Chief Justice Rehnquist, while

171. *Id.*

172. *See id.* at 619 (citing Zablocki v. Redhail, 434 U.S. 374, 383–86 (1978); Carey v. Population Servs. Int'l, 431 U.S. 678, 684–86 (1977); Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1977) (plurality opinion); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)).

173. *Id.* at 621.

174. *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 236–37 (1990); City of Dallas v. Stanglin, 490 U.S. 19, 23–25 (1989); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544–46 (1987).

175. 481 U.S. at 541.

176. *Id.* at 546.

177. *Id.* at 545.

178. *Id.*

179. *Id.* at 547.

180. 490 U.S. 19 (1989).

holding that the right to intimate association was not violated when the City of Dallas required that dance halls for teenagers could only serve those between the ages of fourteen and eighteen, found the right to association to be governed by the First Amendment.[181] Rehnquist noted that the right of patrons to mingle with those of a different age group was not one of the "intimate human relationships" discussed in *Roberts*.[182]

In *FW/PBS, Inc., v. City of Dallas*, Justice O'Connor held that motel owners' freedom of intimate association was not violated by a statute forbidding rentals of ten hours or less.[183] Justice O'Connor based her decision on the idea of intimate association protecting "traditional personal bonds" as discussed in *Roberts*.[184] It is important to note that though Justice Brennan does speak of traditions after mentioning examples of protected activities, he never placed the label "traditional personal bonds" on these acts, rather referring to them only as "personal bonds."[185] This distinction is interesting because, when the word "traditional" is invoked, courts are more likely to look at a society's history as opposed to fundamental rights for guidance.[186]

An expressive association case that briefly addressed the scope of intimate association was *Boy Scouts of America v. Dale*, where Chief Justice Rehnquist held that requiring the Boy Scouts, a private organization, to allow a gay scoutmaster violated their freedom of intimate association under the First Amendment.[187] The Chief Justice cited *Roberts*, where Justice Brennan wrote that "implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[188] The Chief Justice noted that this protection was in place to keep the majority from imposing its beliefs "on groups that would rather express other, perhaps unpopular, ideas."[189] The Chief Justice went on to write that "[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express."[190] In his dissent, Justice Stevens addressed the merits of a claim by the Boy Scouts that their right to exclude was also protected by intimate association:

---

181. *Id.* at 23–25, 28.
182. *Id.* at 24.
183. 493 U.S. 215, 236–37 (1990).
184. *Id.* at 237.
185. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).
186. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 191–94 (1986).
187. 530 U.S. 640, 644 (2000).
188. *Id.* at 647 (internal quotation marks omitted) (quoting *Roberts*, 468 U.S. at 622).
189. *Id.* at 647–48.
190. *Id.* at 648.

> Our cases recognize a substantive due process right "to enter into and carry on certain intimate or private relationships." As with the First Amendment right to associate, the State may not interfere with the selection of individuals in such relationships. Though the precise scope of the right to intimate association is unclear, "we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship" to determine whether a group is sufficiently personal to warrant this type of constitutional protection. Considering BSA's size, its broad purposes, and its nonselectivity, it is impossible to conclude that being a member of the Boy Scouts ranks among those intimate relationships falling within this right, such as marriage, bearing children, rearing children, and cohabitation with relatives.[191]

It is important to note that Stevens once again cited marriage as an example of a protected intimate association. There is arguably no more personal a relationship than that between a couple who wants to marry. Justice Stevens also mentioned the right to intimate association in his *Troxel v. Granville* dissent:

> But the instinct against overregularizing decisions about personal relations is sustained on firmer ground than mere tradition. It flows in equal part from the premise that people and their intimate associations are complex and particular, and imposing a rigid template upon them all risks severing bonds our society would do well to preserve.[192]

The four Supreme Court cases addressing intimate association provide surprisingly little guidance into the right. Though intimate association was addressed four times in a period of less than ten years, the actual discussion of the contours of intimate association only fills half a dozen pages or so combined. The lower courts have thus been left to struggle with the boundaries of this right, and subsequently have developed widely disparate views on the matter.[193]

One of the most interesting recent intimate-association disputes was the Eleventh Circuit case *Shahar v. Bowers*.[194] Robin Shahar accepted a job at the Georgia Department of Law after graduating from Emory Law

---

191. *Id.* at 698 n.26 (Stevens, J., dissenting) (citations omitted) (quoting Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545–46 (1987)).

192. 530 U.S. 57, 91 n.10 (2000) (Stevens, J., dissenting).

193. *See, e.g.*, Montgomery v. Carr, 101 F.3d 1117, 1118 (6th Cir. 1996) (holding that school's anti-nepotism policy affected the associational right of marriage, but using rational-basis review to uphold the regulation), McCabe v. Sharrett, 12 F.3d 1558, 1563, 1574 (11th Cir. 1994) (holding that secretary has no intimate association claim where she is transferred because she marries another officer), Trujillo v. Bd. of County Comm'rs, 768 F.2d 1186, 1189–90 (10th Cir. 1985) (holding that right to intimate association is protected under substantive due process).

194. 70 F.3d 1218 (11th Cir. 1995), *rev'd en banc*, 114 F.3d 1097 (11th Cir. 1997); *see also* Cornelia Sage Russell, Comment, Shahar v. Bowers*: Intimate Association and the First*

School.[195] When her boss, Attorney General Michael Bowers, discovered that Shahar was a lesbian and planning a wedding with her partner, he withdrew her job offer.[196] Shahar sued, and a three-judge panel of the Eleventh Circuit Court of Appeals found that Shahar's relationship was a protected intimate association, and that the government would have to overcome a strict-scrutiny standard of review since burdens on civil marriage are usually judged with a strict-scrutiny standard.[197] The Eleventh Circuit granted Attorney General Bowers a rehearing *en banc* and this time ruled against *Shahar*.[198] The court held that the right of intimate association was a First Amendment right, and that the appropriate standard of review was the *Pickering* balancing test—which is used in cases where a public employee has been punished because she exercised free speech rights and which balances the interests of the speaker and the state—and ruled that the government's interests outweighed Shahar's.[199] Many thought that the Supreme Court would grant certiorari to resolve the lower court split over the nature and extent of intimate association, but the Court declined to accept the case.[200] Nonetheless, the Eleventh Circuit panel's initial decision marked a step forward for advocates of same-sex marriage rights.

More recently, in *Citizens for Equal Protection v. Bruning*, a Nebraska constitutional amendment was challenged by civil-liberties organizations as being unconstitutional.[201] The amendment declared that "[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."[202] The Federal District Court held that the amendment violated the plaintiff group's right to intimate association and declared this right to come from the Due Process Clause of the Fourteenth Amendment to the Constitution.[203] The District Court quoted the Supreme Court's decision in *Citizens Against Rent Control/ Coalition for Fair Housing v. City of Berkeley*, which stated that "[t]he voters may no more violate the Constitution by enacting a ballot mea-

---

Amendment, 45 EMORY L.J. 1479, 1517–27 (1996) (analyzing *Shahar* as it applies to the right to intimate association and same-sex relationships).

195. *Shahar*, 114 F.3d at 1100; Russell, *supra* note 194, at 1517.

196. *Shahar*, 114 F.3d at 1101.

197. *Shahar*, 70 F.3d at 1226.

198. *Shahar*, 114 F.3d at 1110–11.

199. *Id.* at 1102 n.9, 1103, 1110.

200. *See* Shahar v. Bowers, 522 U.S. 1049 (1998) *denying cert. to* 114 F.3d 1097.

201. 368 F. Supp. 2d 980, 985 (D. Neb. 2005), *rev'd*, 455 F.3d 859 (8th Cir. 2006).

202. NEB. CONST. art. I, § 29.

203. *Citizens for Equal Prot.*, 368 F. Supp. 2d at 989.

sure than a legislative body may do so by enacting legislation."[204] The court noted that the amendment "potentially prohibits or at least inhibits people, regardless of sexual preference, from entering into numerous relationships or living arrangements that could be interpreted as a same-sex relationship 'similar to' marriage."[205] The court went on to argue that "[a]mong the threatened relationships would be those of roommates, co-tenants, foster parents, and related people who share living arrangements, expenses, custody of children, or ownership of property."[206] The court concluded this line of reasoning by stating that, if the *Roberts* spectrum test was applied, these relationships would fall "closer to the end of the continuum that deserve[s] Constitutional protection."[207]

The *Bruning* victory would be short-lived. The United States Eighth Circuit Court of Appeals reversed the lower court's ruling in July of 2006.[208] The court used the Equal Protection Clause of the Fourteenth Amendment to support its decision to overturn the lower court, only briefly addressed the association question, and noted that the amendment did not directly or substantially interfere with the ability to associate.[209]

The district court's opinion in *Bruning* shows that there is a segment in the judicial community, whatever its size may be, that believes that the freedom of intimate association protects same-sex relationships. Given the inevitability of a same-sex-marriage case reaching the Supreme Court, it is reasonable to expect that the intimate association argument is one that the Court will face.

Though the lower courts are split on the origins of the right of intimate association, and the Supreme Court has chosen not to elaborate on the nature of the protected relationships in the past fifteen years, there is nevertheless no dispute as to the existence of a right of intimate association. A same-sex-marriage case might provide the Court with the perfect opportunity to define once and for all the extent of this right.

V. CONCLUSION

To paraphrase Justice Kennedy:

> Same-sex-marriage cases will rarely involve minors. They do not involve persons who might be injured or coerced or who are situated in relationships where consent might easily be refused. Same-sex marriage does not involve public conduct or prostitution. It does

204. *Id.* at 990 (alteration in original) (quoting Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 295 (1981)).

205. *Id.* at 995.

206. *Id.*

207. *Id.* at 996.

208. Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 863 (8th Cir. 2006).

209. *Id.* at 866, 870.

> involve whether the government must give formal recognition to marital a relationship that homosexual persons seek to enter. Same-sex marriage does involve two adults who, with the full and mutual consent from each other, commit themselves to each other. Same-sex couples are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by demeaning them and their marriages. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.[210]

I have argued for a broad freedom of intimate association, an interpretation of the fundamental constitutional guarantee that protects all of the fundamental rights of American citizens who are also gay. This interpretation is flatly inconsistent with legislative trends across the United States. Nonetheless, I remain convinced that bans on gay marriage are unconstitutional on several grounds. First, they burden the fundamental right to marry. Second, they impermissibly intrude on constitutional privacy. And, perhaps most importantly, they impede the freedom of intimate association. Each ground alone should be sufficient to turn back same-sex-marriage bans. But I am arguing that taken together, the collective constitutional violations render such bans presumptively invalid and subject to the highest judicial scrutiny.

Herein, I have argued that the ultimate personal liberty, protected by due process and equality guarantees, is the freedom to form intimate associations without interference by the government. Justice Kennedy has marked a pathway by writing: "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[211] The question remains whether the Roberts Court will follow it.

Both Chief Justice John Roberts and Associate Justice Samuel Alito were asked during their confirmation hearings if they believed the Constitution protects the right to privacy. Both answered affirmatively, but neither indicated that he supported a broad freedom of intimate association.[212] If one assumes that Roberts and Alito will not endorse a broad right of privacy, there is still Justice Kennedy, in the middle of a sharply divided Court, holding the constitutional meaning of liberty in his hands.

---

210. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

211. *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992)).

212. *See Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 318, 400 (2006) (testimony of Samuel A. Alito, Jr.); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 146–47 (2005) (testimony of John G. Roberts, Jr.).

In brief, my argument is that the barest majority of the Supreme Court appears prepared to defend these fundamental rights and not to reify outdated theories of substantive due process or equal protection that have been repudiated during the past fifty years.[213] It also appears that some members of the Court remain willing to tell some American citizens they must wait for their day in Court and for their due process or equal justice before the law.

The Court should not abdicate its duty to declare what the law is. It should lead, explaining to the nation that American citizens who are also gay, individually and as couples and/or families, enjoy broad federal constitutional protection over matters as fundamental as the freedom of intimate association and the right to marry.

I agree with Mohr, Karst, and others who have written forcefully that "legal bars to same-sex marriage are profoundly unjust."[214] It is time for the Court to dismantle all discriminations against gays, and the place to begin is with the invalidation of laws proscribing same-sex marriage.

213. "The State finds support for its 'equal application' theory in the decision of the Court in [the 1883 case of] *Pace v. Alabama*." Loving v. Virginia, 388 U.S. 1, 10 (1967) (citation omitted) (citing Pace v. Alabama, 106 U.S. 583 (1883)).

214. MOHR, *supra* note 5, at 10.