

# Marriage, Equal Protection, and New Judicial Federalism: A View from the States

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The marital relation constitutes the basic foundation of American society. Marriage blends intimacy and publicity. It shapes the manner in which individuals perceive themselves and the way in which they are viewed by others. Because marriage is strictly regulated by the state,<sup>1</sup> it carries an inherent tension between the relational autonomy of the individual and the state interest in sanctioning relationships. This tension is illustrated in the current national debate on the legitimacy of same-sex marriages.

Issues at the heart of the same-sex marriage debate include morality, the right of privacy, and equal protection of the laws. The state and the individual have strong, yet conflicting interests in each of these areas that must be resolved by any litigation strategy promising success for state recognition of same-sex unions. This Note presents an analysis of these issues and a proposal for balancing them to achieve state recognition of same-sex marriages. Under current federal jurisprudence, the right of privacy does not create a right to engage in same-sex marriage. Equal protection, however, presents a compelling legal argument for recognizing same-sex unions. Ultimately, a state equal rights amendment prohibiting discrimination based on sex is the most promising basis for recognition of a right of same-sex marriage.<sup>2</sup>

This Note reviews the case for same-sex marriage through the lens of state constitutional law. The state law context is particularly appropriate in this era

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1. *See* *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971).

2. Currently, seventeen states have provisions in their state constitutions that prohibit some form of discrimination based upon sex. These states include Alaska, California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Rhode Island, Texas, Washington, and Wyoming. California and Louisiana offer only limited protection from sex-based discrimination, however. California's guarantee is limited to the business context. CAL. CONST. art. I, § 8. Louisiana protects its citizens only from "arbitrary, capricious, or unreasonable discrimination" based upon sex. LA. CONST. art. I, § 12. *See infra* note 125.

of new judicial federalism in which state legal sources promise new success for civil rights and civil liberties litigation. This Note identifies the factors relevant to a state's likelihood of recognizing same-sex marriages.<sup>3</sup> These factors include the absence of a sodomy statute, a privacy amendment in the state constitution, an equal rights amendment in the state constitution, an individualistic or moralistic political culture, an activist legal culture, a diverse population, and the absence of a process for state constitutional amendment by direct citizen initiative. An ideal state in which to challenge a prohibition on same-sex marriage would have a combination of these elements.

A review of the current obstacles faced by same-sex partners and an analysis of modern equal protection doctrine will establish the above factors as relevant to a successful challenge of state proscription of same-sex marriages. Part I of the Note reviews the current legal status of same-sex unions in our society. Part II identifies recent societal changes which indicate an increased likelihood of public and judicial approval of marriages between same-sex partners.<sup>4</sup> Part III analyzes the possible dangers inherent in anchoring a right of same-sex marriage to a state constitutional provision. Part IV examines past federal claims which failed to achieve a recognition of same-sex marriage, as well as recent opinions suggesting new promise for same-sex unions.<sup>5</sup> Part V analyzes equal protection doctrine and its applicability to challenges against the proscription of same-sex marriage. Part VI discusses the national significance of state approval of same-sex marriage and targets future sites for litigation. Through this analysis, it becomes clear that societal changes in the perception of both the individual and the government hold promise for the eventual recognition of same-sex marriages in the states.

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3. For a similar discussion targeting other states likely to recognize same-sex marriage, but measuring very different factors of import and reaching different conclusions, see Brown, *infra* note 209, at 818-33. Brown names Hawaii, Nevada, and Vermont as states likely to recognize same-sex unions. *Id.*

4. The two most important developments increasing the likelihood of state recognition of same-sex marriages are the AIDS crisis and the new judicial federalism movement. See NATIONAL RESEARCH COUNCIL, *THE SOCIAL IMPACT OF AIDS IN THE UNITED STATES*, 219-38 (1993); William J. Brennan, Jr., *Guardians of Our Liberties — State Courts No Less Than Federal*, in *VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS* 229 (Mark W. Cannon & David M. O'Brien eds., 1985); Christine M. Durham, *Obligation or Power? The New Judicial Federalism and the Policy-Making Role of State Supreme Courts*, 1989 *EMERGING ISSUES IN STATE CONST. L.* 219; A.E. Dick Howard, *The Renaissance of State Constitutional Law*, 1988 *EMERGING ISSUES IN STATE CONST. L.* 1.

5. The most common federal claim made against the proscription of same-sex marriages was that marriage was a fundamental right and, therefore, its denial violated constitutional rights of privacy and due process. See *Jones v. Hallahan*, 501 S.W. 2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W. 2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. 1974); see also *infra* notes 86-104 and accompanying text.

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### I. THE CURRENT STATE OF SAME-SEX UNIONS: THE NECESSITY OF STABILITY

In the absence of a right to marriage, gay and lesbian couples manipulate existing law to gain the legal benefits and stability awarded to married persons. Two methods currently used are adult adoption and contract.<sup>6</sup> Additionally, gay rights activists have met with some success in recent years with the passage of domestic partnerships. These methods incur tremendous transaction costs and fail to produce the complete range of benefits that stem from the legally recognized union of marriage. When upheld by courts, however, they demonstrate an evolution in judicial treatment of gay couples.

Some gay couples have resorted to adult adoption to establish legal recognition of their family. Numerous jurisdictions define adoption as a "legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person."<sup>7</sup> However, not all states require that the adoptee be a minor. For gay couples, the primary legal goal of adoptions is to provide an avenue for legal inheritance. The gay partner with inheritable property adopts his partner in order to assure that the partner will inherit his wealth upon his death. In addition, "[v]ery often, the parties to adult adoption express their desire to legally formalize their personal commitment to each other."<sup>8</sup>

Not all jurisdictions equally recognize adult adoption. Only New York has addressed the quasi-marital aspects of such adoptions. The New York Court of Appeals has concluded that the sexual nature of such relationships is in opposition with the commonly understood parental function of adoption.<sup>9</sup> "Where the relationship between the adult parties is utterly incompatible with the creation of a parent-child relationship between them, the adoption process is not the proper vehicle by which to formalize their partnership in the eyes of the law."<sup>10</sup> Subsequent lower court rulings have, however, circumvented the decision of the Court of Appeals by holding that adult adoptions may stand where economic concerns are a primary motivation for such adoption.<sup>11</sup> In three cases, lower courts in the state of New York have upheld adult adoptions for inheritance purposes between gay life partners.<sup>12</sup>

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6. See Lisa R. Zimmer, Note, *Family, Marriage, and the Same-Sex Couple*, 12 CARDOZO L. REV. 681, 688-97 (1990).

7. *Id.* at 688-89 (quoting N.Y. DOM. REL. LAW § 110 (McKinney 1988)). Arkansas, New York, and North Dakota expressly allow adult adoption. See ARK. CODE ANN. § 9-9-203 (1987); N.Y. DOM. REL. LAW §§ 109, 110 (McKinney 1988); and N.D. CENT. CODE § 14-15-02 (1981).

8. Zimmer, *supra* note 6, at 689.

9. *In re Robert Paul P.*, 471 N.E.2d 424 (N.Y. 1984).

10. *Id.* at 439.

11. 333 E. 53rd Street Assoc. v. Mann, 503 N.Y.S.2d 752 (1986).

12. Zimmer, *supra* note 14, at 690.

Adult adoption signifies the commitment between same-sex partners, but does not achieve the full scope of legal rights in marriage.<sup>13</sup> Adoption creates a more permanent commitment than modern marriage because no mechanism exists for dissolution of adoption.<sup>14</sup> In addition, the adopter/adoptee relationship assigns each partner different legal rights and responsibilities, unlike the equal commitment created by marriage.

Same-sex couples also use contract law to signify their commitment and establish binding rights. Carefully constructed contracts that obey all requirements of state statutes and judicial precedents can establish rights and responsibilities between same-sex cohabitators. Contracts are primarily used to distribute property upon dissolution of the relationship. Contracts can also establish support guidelines, assign responsibility for medical decision-making, and be of use in estate planning.<sup>15</sup> Although traditional legal doctrine disallowed contracting between parties engaging in sexual relations as a matter of public policy,<sup>16</sup> this policy has been abandoned so long as sexual conduct is not referred to specifically.<sup>17</sup> However, legal planning required to create enforceable contracts between same-sex partners is time-consuming and expensive and therefore is not an adequate substitution for the default rights created between married persons.

In recent years, domestic partnerships have extended government recognition to same-sex unions. These ordinances allow nonmarried city employees who reside with a significant other of either sex to provide their partner with the same rights to health benefits, hospital visitation, sick leave, bereavement leave, property and life insurance, and annuity and pension rights as those enjoyed by married employees.<sup>18</sup> The requirements for domestic partner status tend to be more exacting than the requirements for marriage.<sup>19</sup> Although domestic partnership laws are growing in number, they exist only at the municipal level in metropolitan areas and offer limited legal benefits.

The recognition of adult adoption, contract, and domestic partnership in establishing rights for gay life partners is evidence of an increased willingness

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13. *Id.* at 691.

14. *Id.* at 692.

15. *Id.* at 695.

16. Such was interpreted as consideration, thereby rendering the agreement unenforceable as a matter of public policy. *See, e.g.*, *Updeck v. Samuel*, 266 P.2d 822 (Cal. 1964); *Hill v. Estate of Westbrook*, 213 P.2d 727 (Cal. 1950).

17. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), upheld cohabitation agreements between nonmarried couples, recognizing that, in light of changing standards of morality, "adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights." *Id.* at 116. Where a "meretricious" relationship is not the sole consideration for the agreement, remedies under express or implied contract may be awarded. *Id.* at 122.

18. *See Zimmer, supra* note 6, at 693.

19. *Id.* at 692-93. This is because "domestic partnership" is often only vaguely defined in the regulations.

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of judges to find protection for homosexual relationships in the law. The difficulties faced by same-sex partners in using these avenues to achieve recognition and stability for their unions suggest that a policy change is necessary. The time for an analysis of methods most likely to achieve equality under law for same-sex unions is at hand.

### II. PROMISING SOCIAL DEVELOPMENTS

Two recent changes in American society, one primarily social and the other primarily political, indicate promise for future recognition of same-sex unions in the states. The first is a more open attitude toward relationships between persons of the same sex that stems from a desire to foster stability in interpersonal physical relationships.<sup>20</sup> The second is a national shift in judicial decision-making that has created unprecedented opportunities for important civil liberties rulings in state supreme courts. This "New Judicial Federalism" is part of the federal retrenchment of civil liberties during the Burger and Rehnquist Court eras.<sup>21</sup> This development, coupled with a greater societal acceptance of homosexual relationships, may lay the groundwork for successful state court challenges of denials of marriage licenses to same-sex couples.

#### A. *Social Conditions Fostering Eventual Recognition of Same-Sex Unions*

Changes in recognition of same-sex unions at the municipal level demonstrate evolving legislative and judicial attitudes toward homosexuality. New York City and San Francisco are examples of two cities evidencing a liberal trend in defining relationships.

In *Braschi v. Stahl Associates*,<sup>22</sup> the New York Court of Appeals held that the New York City Rent and Eviction Regulations entitled the gay lover of a recently deceased man to protection from eviction.<sup>23</sup> The regulations provided that upon the death of a rent-control tenant, the landlord may not dispossess the surviving spouse or other family member who had been living with the tenant. The court had to decide whether a gay life partner fit within the ambit of

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20. See NATIONAL RESEARCH COUNCIL, *THE SOCIAL IMPACT OF AIDS IN THE UNITED STATES* 219-38 (1993) [hereinafter *SOCIAL IMPACT OF AIDS*]; see also Michael L. Clozen & Carol R. Heise, *HIV-AIDS and the Non-Traditional Family: The Argument for State and Federal Judicial Recognition of Danish Same-Sex Marriages*, 16 *NOVA L. REV.* 809, 810-11 (1992).

21. See Ronald K. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: State Constitutional Individual Rights Decisions*, in *CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY*, 641-49 (David M. O'Brien ed., 1991) (discussing general trend of state court interpretation of state materials and methods of integrating state and federal constitutional law). See generally Priscilla Painton, *One Nation, Very Divisible*, *TIME*, Oct. 8, 1990, at 76 (discussing newfound liberalism of state supreme courts in era of federal conservatism in context of Florida right-to-die case).

22. 543 N.E.2d 49 (N.Y. 1989).

23. New York City Rent and Eviction Regulations, N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d) (1984).

"family." The court took an expansive view of the term, commenting:

[c]ontrary to all of these arguments, we conclude that the term family . . . should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of 'family' and with the expectations of the individuals who live in such nuclear units. . . .<sup>24</sup>

The *Braschi* decision must be interpreted within the context of the AIDS epidemic to understand the court's analysis and final result.<sup>25</sup> As pointed out in the National Research Council's study, "Braschi's lawyers believed that the many accounts in newspapers and on television of gay partners taking care of a partner with AIDS were likely to have made sympathetic impressions on the judges, impressions that could be helpful as the court decided how expansively to interpret the term 'family.'"<sup>26</sup>

In San Francisco, similar changes took place in the willingness to grant recognition to same-sex relationships; in San Francisco, however, the changes occurred among the voters rather than the judiciary. Voters approved an

24. *Braschi v. Stahl Assoc.*, 543 N.E.2d at 53-54.

25. SOCIAL IMPACT OF AIDS, *supra* note 20, at 232-33. The *Braschi* case was one of many heard in New York courts involving the rights of surviving partners of AIDS victims. Many of the cases involved apartment succession to a same-sex partner after the death of a partner tenant for whom the claimant cared during the illness. Although Miguel Braschi sought to keep his partner's long-term illness out of the case, it was obvious in the court documents that his partner had died of AIDS. The case was highly publicized and helped dispel stereotypes of gay promiscuity.

26. *Id.* at 233. Negating the myth of gay promiscuity, a 1991 survey found that 70% of gay women and 50% of gay men were, in fact, currently involved in long-term, committed relationships. See Juliene Scocca, *Society's Ban On Same-Sex Marriages: A Reevaluation of the So-Called 'Fundamental Right' of Marriage*, 2 CONST. L. J. 719, 720 (1992) (citing Brent Hartinger, *A Case for Gay Marriage*, COMMONWEAL, Nov. 22, 1991, at 681). The *Braschi* decision had a direct legal impact on rights of same-sex couples in the state of New York. The Division of Housing and Community Renewal issued new regulations to cover rent control apartments, expanding the category of "relatives" protected from eviction under rent control to include any persons "who can prove emotional and financial commitment and interdependence," with the tenant. SOCIAL IMPACT OF AIDS, *supra* note 20, at 235. The new guidelines included findings of fact on the AIDS crisis and its effect on homelessness. Many life partners of individuals who died of AIDS lost their homes upon the deaths of the tenants. Most were forced onto the streets after having spent extended periods of time caring for their sick mates; many were sick themselves. The new regulations noted that between 124,000 and 235,000 people in New York had become infected with AIDS. Of this group, the great majority were gay men or members of low-income groups. These two groups were most likely to live in nontraditional households and were, therefore, in peril of losing their homes. *Id.* at 235. Immediately after *Braschi* was decided, then-mayor Ed Koch announced the recognition of domestic partnerships. By executive order, he expanded city employee bereavement leave policy to include similar leave for same-sex partners as for traditional spouses. Exec. Order No. 123 (1989) (New York City Mayor Ed Koch) (*cited in* SOCIAL IMPACT OF AIDS, *supra* note 20, at 236). City employees who wished to take advantage of such leave simply had to file the name of their domestic partner with the city. These policy changes were discussed prior to *Braschi*, but positive public response to the decision expedited their implementation. *Id.*

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ordinance allowing unmarried persons to register with the city as domestic partners.<sup>27</sup> An introductory section of the ordinance stated that its purpose was to "create a way to recognize intimate committed relationships, including those who [sic] are otherwise denied the right to identify the partners with whom they share their lives."<sup>28</sup> The eventual passage of the amended ordinance was the result of eight years of political struggles during which the AIDS crisis worsened in San Francisco. Despite extensive protest, the ordinance eventually passed with a wider margin than any other voter initiative on the ballot.<sup>29</sup> Yet, because domestic partnership registration does not provide the same degree of benefits for same-sex partners as marriage, many viewed the significance of the ordinance as largely symbolic.<sup>30</sup>

As events in New York and San Francisco demonstrate, the AIDS crisis permitted heterosexual citizens to identify sympathetically with homosexual committed life partners and encouraged a desire to foster stable, monogamous heterosexual and homosexual relationships.<sup>31</sup> The desire to foster stable relationships explains the favorable reception of measures to recognize gay relationships by the judiciary in New York and the voters in San Francisco. In addition, due in part to societal recognition of the AIDS crisis, sixteen other municipalities established mechanisms for registration of domestic partnerships.<sup>32</sup> Large metropolitan centers promise some potential for recognition for homosexual unions.

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27. *Id.* at 221.

28. *Id.* at 227-28.

29. *Id.* at 229. The AIDS crisis increased the political awareness and participation of gay citizens, which contributed to the eventual passage of the ordinance. Lesbians and gay men exercised political clout and strenuously lobbied for the recognition of their rights, where before many had hidden their orientation and had resorted to adult adoption or contract to obtain legally enforceable rights. *Id.* at 222-23. AIDS also affected opinions in the heterosexual community. As discussed by the National Research Council,

For people outside the gay and lesbian communities, AIDS . . . altered the meaning of the domestic partnership issue. In San Francisco, many people knew and most had read about gay men who were providing care for a dying partner. They had heard about and seen pictures from the 'Names Project,' the quilt pieced from panels commemorating those who died of AIDS. For many, their image of the gay male community had expanded beyond hedonism to include tenderness, self-sacrifice, and suffering. With familiarity, they became more responsive to claims of a need to recognize gay partners than they had been in 1982.

*Id.* at 223-24.

30. *Id.*

31. See Closen & Heise, *supra* note 20, at 810-11.

32. The first domestic partnership ordinance went into effect in Berkeley, California in 1984. Other cities to pass such ordinances include West Hollywood, California; Los Angeles, California; Laguna Beach, California; Washington, D.C.; Tacoma Park, Maryland; Ann Arbor, Michigan; Minneapolis, Minnesota; Ithaca, New York; Seattle, Washington; and Madison, Wisconsin. In addition, Santa Cruz, San Mateo, and Alameda Counties in California and Travis County in Texas have extended domestic partnership benefits to city employees. For a thorough discussion of these city and county domestic partnership ordinances, including citations and substantive provisions, as well as the policy goals and general implications of such ordinances, see Craig Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992) [hereinafter *A More Perfect Union*].

However, municipal domestic partnership ordinances cannot be regarded as promising national recognition for same-sex relationships in the United States. A 1989 poll revealed that 69% of Americans disapprove of legal recognition of homosexual marriage.<sup>33</sup> New York and San Francisco have large homosexual populations and a disproportionate share of AIDS cases which forced the population of each municipality to confront issues of same-sex partnerships.<sup>34</sup>

Public opinion and political efforts in the nation at large<sup>35</sup> indicate that the judiciary is the best hope for gay couples to achieve marital status. Recent events in Colorado illustrate this point. In May of 1992, petitions to amend the Colorado Constitution sparked controversy because they expressly declared that homosexuality could not serve as the basis of suspect class status in the state. The proposed amendment was approved by voters in November 1992 by a margin of 53.4% to 46.6%.<sup>36</sup> As passed, the amendment read:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or

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33. Closen & Heise, *supra* note 20, at 809 (citing Walter Isaacson, *Should Gays Have Marriage Rights?*, TIME, Nov. 20, 1989, at 101).

34. As evidence that not all regions are favorable locations for some form of recognition for domestic partners, a recent opinion by Georgia's Attorney General declared that municipal ordinances enacting domestic partnerships would violate the state constitution. The Georgia Constitution in a section titled "Limitations on special legislation" reads "(a) laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law . . . (c) No special law relating to the rights or status of private persons shall be enacted." GA. CONST. art. III, § 6, ¶4. The Attorney General wrote, "Municipal ordinances which create the status of domestic partnership are violative of constitutional and statutory provisions precluding municipal legislation relating to legal status and relationship; thus, group health insurance coverage provided pursuant to such ordinances is violative of the public policy of this state." 1993 Op. Att'y Gen. No. 93-26.

35. The comparison of cases in same-sex marriage litigation from the 1970s to the 1990s demonstrates a number of social and legal changes in the way these constitutional challenges are brought forth and handled by the courts. The most important shift in recent same-sex marriage litigation is the focus on state courts and state legal materials. This shift is also evidenced more broadly in all political struggles for gay rights. Fewer lobbying efforts have been directed at the federal government and more have been aimed at state and local entities. While public opinion has become more accepting of homosexual lifestyles in certain geographic areas, such acceptance is almost entirely limited to large urban settings, which tend to be politically distinct from their surrounding environs. Same-sex relationships, and marriage in particular, are not generally accepted to the extent necessary for recognition by majoritarian political entities. A recent *Newsweek* poll found that 53% of Americans do not consider homosexuality an acceptable lifestyle and 45% feel that homosexuality is a threat to the American family. *Job Rights for Homosexuals Backed in Poll*, N.Y. TIMES, Sept. 10, 1992, at 10. Sixty-nine percent of Americans disapprove of legally sanctioned homosexual marriages. See Walter Isaacson, *Should Gays Have Marriage Rights?*, TIME, Nov. 20, 1989, at 102. A more recent poll disclosed that 56% of Americans oppose making same-sex marriages legal. *Marriage—The Toughest Battle Lies Ahead*, HUM. RTS. CAMPAIGN Q., Winter 1996, at 16.

36. *Evans v. Romer*, 882 P.2d 1335, 1338 (Colo. 1994).

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claim any minority status quota preferences, protected status or claim of discrimination.

This Section of the Constitution shall be in all respects self-executing.<sup>37</sup>

The amendment may have far-reaching effects on the lives of homosexuals. It may make discrimination against gay citizens of Colorado permissible by prohibiting them from raising the issue of sexual orientation as grounds for special protection. The passage of this amendment illustrated the power of the voting public: a small majority enacted a constitutional provision forbidding certain actions by all of the political branches.

The Colorado Supreme Court declared the amendment unconstitutional. The court held that measures prohibiting policies and laws designed to eliminate discrimination on the basis of sexual orientation abridged the fundamental right to participate equally in the political process and were therefore properly subject to strict scrutiny analysis.<sup>38</sup> In so doing, the court asserted that there were improper methods of advancing moral beliefs.

As this episode suggests, the judiciary may hold the most promise for the recognition of same-sex marriages given its prescribed role as protector of the interests of the minority. Robert Burt has commented, “[T]he outcome of [majority vs. minority] hostilities cannot legitimately rest on majority rule; judicial deference to majoritarianism in the context of polarized politics is inconsistent with the original aspirations of the founders . . . .”<sup>39</sup> Courts have a greater ability to protect minority interests than the executive and legislative branches.<sup>40</sup>

### B. *New Judicial Federalism*

Legal scholars assert that “a structure is beginning to emerge in which state supreme courts are interpreting state constitutional provisions more broadly than the Supreme Court interprets similar federal provisions.”<sup>41</sup> The “New

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37. *Id.* (quoting COLO. CONST. amend. 2 (1992)).

38. The state alleged that even if the Colorado amendment violated the Fourteenth Amendment to the U.S. Constitution, it was per se valid because it was within the sphere of power of Colorado’s voters under the Tenth Amendment. In response to this argument, the Colorado court asserted, “[s]tates have no compelling interest in amending their constitution in ways that violate fundamental federal rights.” *Id.* at 1350. The Colorado Supreme Court also explicitly rejected the protection of public morality as a compelling state interest, *id.* at 1347, and the defendants’ assertions that antidiscrimination laws actually endorsed homosexual conduct. The court stated, “[w]e are of the opinion . . . that antidiscrimination laws make no assumptions about the morality of protected classes—they simply recognize that certain characteristics, be they moral or immoral—have no relevance in enumerated commercial contexts.” *Id.* at 1347. The United States Supreme Court granted certiorari in the case, and a decision is expected in 1996.

39. ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 356 (1992).

40. The importance of the judiciary in attaining recognition for homosexual relationships is discussed *supra* notes 35-39 and accompanying text.

41. Ronald F. Wright, *A Post-Webster Reminder About Delegation and Regulation*, in *ABORTION AND THE STATES: POLITICAL CHANGE AND FUTURE REGULATION* 120 (Jane B. Wishner ed., 1993).

Judicial Federalism” has increased the likelihood of state recognition of same-sex marriages.<sup>42</sup>

Many constitutional scholars agree that “state constitutional law was . . . eclipsed by the activism of the Warren Court”<sup>43</sup> with its expansive interpretation of federal standards for individual rights. The subsequent Burger and Rehnquist Courts have retrenched individual liberties granted during the Warren court era. As explained by David M. O’Brien:

Federal-state court relations . . . have evolved rather dramatically in the last thirty years with the changes in the composition and direction of the Supreme Court. In the 1950s and 1960s, when state supreme courts tended to be much more conservative than the Warren Court, relations were often especially acrimonious . . . . By contrast, in the 1970s and 1980s the direction of the Burger and Rehnquist Court’s policymaking moved in more conservative directions, while some state supreme courts became far more protective of individual rights. Although not outright reversing some of the most controversial and landmark Warren Court rulings, the Burger and Rehnquist Courts refused further extensions and achieved retrenchment in a number of areas. More liberal state supreme courts accordingly refused to follow the rulings of the Court when interpreting individual rights under state constitutional law.<sup>44</sup>

The newfound willingness of state courts to create rights not yet recognized by the federal government may be the best hope for the recognition of same-sex marriages.

No federal court has ruled on the issue of same-sex marriage, and in *Bowers v. Hardwick*,<sup>45</sup> the Burger Court refused to expand the right of privacy to include homosexual practices, leaving an abyss to be filled by state courts and state legal sources. Because the *Bowers* court explicitly refused to recognize a right for homosexuals to engage in consensual sexual relationships, federal doctrine offers little promise for same-sex marriage litigation.<sup>46</sup> State

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42. State courts occasionally disregard Supreme Court decisions, but rarely do they assert independent grounds for such rulings. The Supremacy Clause of the United States Constitution creates uniformity in interpretation between federal and state courts. See U.S. CONST. art. VI. The clause requires that state courts conform to federal law in all decisions that address federal questions. It does not dictate, however, that state and federal law must be identical. “So long as the protections embraced within the state documents do not sink into the quicksand below the firm foundation of federally protected rights, the states are free to grant their citizens greater civil liberties and civil rights than those guaranteed by the federal government.” Yvonne Kauger, *Reflections on Federalism: State Constitutions’ Role As Nurture of Individual Rights*, 1991 EMERGING ISSUES STATE CONST. L. 107.

43. Howard, *supra* note 4, at 6.

44. DAVID M. O’BRIEN, CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY 628-29 (1991).

45. 478 U.S. 186 (1986) (upholding Georgia sodomy law).

46. *But cf.* *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995) (holding Georgia attorney general’s decision to withdraw job offer to female attorney after learning she planned to engage in marriage ceremony with her lesbian partner was subject to strict scrutiny because it violated federal constitutional right of intimate association). This case offers some promise of eventual federal recognition of certain rights for same-sex partners. However, the strict scrutiny applied by the Eleventh Circuit did not relate directly to the issue of marriage, but to privacy rights in one’s personal life and one’s employment

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courts are the proper arena for future litigation.

### C. *The Promise Fulfilled: Evidence of State Court Independence in the Privacy Context*

Two recent state court decisions concerning individual sexual autonomy demonstrate both the trend in state court independence and the increased recognition and respect granted to homosexual relationships. Both holdings were grounded in state legal materials and rejected the result of the U.S. Supreme Court in *Bowers*.

In *Commonwealth of Kentucky v. Wasson*,<sup>47</sup> the Supreme Court of Kentucky held that a state statute making illegal “deviate sexual intercourse with another person of the same sex”<sup>48</sup> violated the state constitution’s right of privacy.<sup>49</sup> The court stated that “the guarantees of individual liberty provided in our 1891 Kentucky Constitution offer greater protection of the right of privacy than provided by the Federal Constitution as interpreted by the United States Supreme Court.”<sup>50</sup> The proscription of homosexual sodomy was unconstitutional under the state’s right to privacy because “immorality in private which does not ‘operate to the detriment of others,’ is placed beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution.”<sup>51</sup>

In 1995, the Fifth Circuit Court for Davidson County, Tennessee, found that “private sexual conduct between consenting adults is protected from government regulation or interference by the privacy rights guaranteed by the Constitution of Tennessee.”<sup>52</sup> In *Campbell v. Sundquist*, the court found a statute making it a crime to “engage in consensual sexual penetration . . . with a person of the same gender” to be unconstitutional.<sup>53</sup> The court based its holding on the “hostility expressed in the Constitution of Tennessee to the interference with the personal freedoms of the people of this state unless that

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opportunities.

47. 842 S.W.2d 487 (1992).

48. KY. REV. STAT. ANN. § 510.100 (Baldwin 1994).

49. Like the federal right to privacy, the right to privacy in Kentucky is implicit.

50. 842 S.W.2d at 491.

51. *Id.* at 496. The Commonwealth argued that such activity was immoral and that cultural and historical traditions supported the proscription. The defendants argued that the right to privacy outweighed any of these alleged state interests. The Kentucky Supreme Court chastised the state for asserting that because both the state and federal privacy guarantees are implicit rather than explicit, they should offer the same degree of liberty protection. The court admonished

Such is not the formulation of federalism . . . [u]nder our system of dual sovereignty, it is our responsibility to interpret and apply our state constitution independently. We are not bound by decisions of the United States Supreme Court when deciding whether a state statute impermissibly infringes upon individual rights guaranteed in the State Constitution . . . .

*Id.* at 492.

52. *Campbell v. Sundquist*, No. 93C-1547, slip op. at 2-3 (5th Cir. Ct. Tenn. Davidson County, Feb. 2, 1995) (order granting summary judgment).

53. TENN. CODE ANN. § 39-13-510 (1994).

interference is absolutely necessary to protect the public welfare."<sup>54</sup> The court also explicitly stated that "[i]t is inconsistent with the state constitutional right of privacy and liberty to prohibit behavior based on majoritarian morality."<sup>55</sup>

The Kentucky and Tennessee cases exemplify the growing independence of state courts in this era of New Judicial Federalism. Few courts have expanded the sexual autonomy rights of same-sex couples beyond the minimal level of protection granted by the federal judiciary.<sup>56</sup> However, these cases demonstrate the greatly diminished reliance on federal doctrine in some state courts and a potential unwillingness to conform to the Supreme Court's traditional and historical interpretation.

The decisions of the Kentucky and Tennessee courts may also suggest a liberalization of views of same-sex relationships on the state benches. A litigation strategy reliant on state legal resources may hold promise, given that the states traditionally have regulated marriage. As stated by the Washington Supreme Court in *Singer v. Hara*, "[s]ubject to constitutional limitations, the state has exclusive dominion over the legal institution of marriage and the state alone has the 'prerogative of creating and overseeing this important institution.'"<sup>57</sup> Some recent cases hint that marriage may be defined more broadly under state regulation than at the federal level.

State supreme courts have recognized equal protection claims in the context of same-sex marriage. One state court in *Baehr v. Lewin*,<sup>58</sup> has demonstrated independence in interpreting its state equal rights amendment to guarantee equality to homosexuals. In *Dean v. District of Columbia*,<sup>59</sup> a dissenting judge discussed the equality principle in the context of homosexual rights, promising greater enforcement of the principle in future litigation. Before analyzing the evolution in interpretation of the right to marriage and equal protection at the federal and state level, however, the viability of anchoring legal rights in state constitutions must be evaluated in light of the ease with which state constitutions can be amended.

### III. STATE CONSTITUTIONAL AMENDMENTS: A HOLE IN THE THEORY?

In the context of this analysis, the ability to amend a state constitution is important because such action "enables the People to 'overrule' judicial

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54. *Campbell v. Sundquist*, No. 93C-1547, slip op. at 3.

55. *Id.* This opinion is likely largely the result of regional influence. The Tennessee court relied on *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992), in refusing to find sufficient justification for the statute simply because the prohibited conduct was immoral and antimajoritarian. *Id.* at 6-7.

56. For state opinions which adhere to the degree of sexual autonomy granted to homosexuals at the federal level, see *State v. Neal*, 500 So. 2d 374 (La. 1987); *Neville v. Kelly*, 430 A.2d 570 (Md. 1981); *State v. Gray*, 413 N.W.2d 107 (Minn. 1987); *State v. Walsh*, 713 S.W.2d 508 (Mo. 1986).

57. *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. 1979).

58. 852 P.2d 44 (Haw. 1993).

59. 653 A.2d 307 (D.C. 1995).

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decisions.”<sup>60</sup> Before asserting that particular state constitutional provisions promise recognition for same-sex relationships, the viability of such assertions must be assessed in light of current majoritarian disapproval of same-sex unions.<sup>61</sup>

One of the founding fathers’ primary concerns was insulating federal government operations from majoritarian impulses.<sup>62</sup> Fear of the tyranny of the majority prompted the drafting of Article V to require approval of a supermajority of three-fourths of the states for constitutional revision.<sup>63</sup>

Each state constitution contains its own version of Article V that details procedures for proposing and ratifying amendments. Amending state constitutions is a far easier task than amending the U.S. Constitution because forty-nine states require only a majority of the citizens voting in an election to ratify an amendment.<sup>64</sup> In addition, seventeen states allow amendments to originate with the public, requiring no legislative deliberation on proposals to

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60. Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 156 (1995).

61. Majoritarian disapproval of homosexual marriages is illustrated by the recent wave of legislation to ban recognition of same-sex unions in almost every state following the announcement of the Hawaii Supreme Court’s opinion in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). See David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, N.Y. TIMES, Mar. 4, 1996, at A13. However, to date such measures have passed in only four states: Georgia, Idaho, South Dakota, and Utah. Similar measures have failed in Colorado, Indiana, Kentucky, Maine, Maryland, Mississippi, New Mexico, Rhode Island, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Telephone Interview with Evan Wolfson, Director of Lambda Delta (Apr. 8, 1996).

62. James Madison argued that people must be protected against their own “fickleness and passion.” Madison observed that the majority “might under sudden impulses be tempted to commit injustice on the minority.” Hans Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 720 n.44 (1994) (quoting 4 THE FOUNDER’S CONSTITUTION 123 (Philip B. Kurland & Ralph Lerner eds., 1987)).

63. Article V requires that proposed amendments to the federal Constitution be approved by two-thirds of both houses of Congress or by a constitutional convention called by two-thirds of the state legislatures. Amendments must thus originate in either the federal or state legislatures. A supermajority of three-fourths of the states is required to ratify an amendment. For a different opinion on the legal requirements for amending the Constitution, see Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) (arguing public can petition for constitutional convention and voter majority can ratify constitutional amendment).

64. The exception is Delaware, in which an amendment to the Constitution is ratified only if approved by two-thirds of each house of the legislature in two consecutive sessions, between which the prospective amendment and the voting record of each member is published. DEL. CONST. art. XVI, § 1. For a comprehensive tabulation of the methods of amending state constitutions, see 1994-95 THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 21-22 tbl. 1.2 (1994) [hereinafter BOOK OF THE STATES] (cited in Baker, *supra* note 5, 60, at 143 n.2). Of course, requiring the smallest possible percentage of voters to approve a measure may in some instances facilitate the enactment of constitutional provisions favorable to a minority. Simple majority requirements were interpreted as troublesome by some citizens in California who disapproved of measures designed to grant added legal protections to homosexuals. Initiatives were placed on the ballot to require supermajority referenda approval of any measures designed to prevent discrimination on grounds of sexual orientation or HIV status. See Comment, *Restraints on Homosexual Rights Legislation: Is There a Fundamental Right to Participate in the Political Process*, 28 U.C. DAVIS L. REV. 445, 447 nn.6-7 (1994). A similar municipal initiative in Riverside, California, was found unconstitutional by a California Court of Appeals. *Id.*, citing *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr.2d 648 (Ct. App. 1991).

alter the state constitution.<sup>65</sup>

While constitutional amendment by a simple majority may subject minority rights to the whim of the voting public,<sup>66</sup> the greatest danger exists in states which provide for constitutional amendment by public initiative. When amendments must originate or be approved by two-thirds of the legislature,<sup>67</sup> they are less susceptible to majoritarian impulses.<sup>68</sup> Thirty-three states require the approval of a two-thirds majority of each house of the legislature for any constitutional amendment to be submitted to the public for ratification.<sup>69</sup> Although legal, political, and psychological barriers decrease the likelihood of amending a state constitution by initiative or other method to undo state recognition of same-sex marriage,<sup>70</sup> the seventeen states which provide for

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65. The seventeen states are Arizona, Arkansas, California, Colorado, Florida, Illinois, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. BOOK OF THE STATES, *supra* note 64, at 24 tbl. 1.3.

66. For a discussion of constitutional revision by a simple majority as actually favoring the passage of provisions protective of minority rights, see Baker, *supra* note 5, 60, at 155-58.

67. See generally BOOK OF THE STATES, *supra* note 64.

68. It was for this reason that the founding fathers designed the federal government in the form of a republic rather than a direct democracy. In Madison's view, a republican form of government would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations." David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 20 (1995) (quoting James Madison, THE FEDERALIST No. 10, at 61 (Jacob E. Cooke ed., 1961)).

69. Although public initiatives have proven to be susceptible to majoritarian expressions of disapproval of minority lifestyles, particularly in the context of homosexual rights, relatively few such measures have achieved success with the voters.

Initiative amendments statistically have a much lower likelihood of ratification than legislatively proposed amendments. The approval rating for amendments stemming from the legislature has been calculated to be between 47% and 69%, while the approval rating of initiative amendments has been measured as between 21% and 48%. These statistics stem from a study of eight states between 1898 and 1978. See DAVID MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 72 (1984) [hereinafter DIRECT LEGISLATION].

For a proposed amendment that was ratified by the public, see COLO. CONST. art. II, §30(b) (prohibiting state and its cities and counties from enacting any legislation designed to protect homosexuals from discrimination or grant them rights on the basis of sexual orientation). For a similar provision that failed, see STATE OF OREGON, OFFICIAL 1992 GENERAL VOTER'S PAMPHLET, MEASURE NO. 9 (preventing state or government subdivisions from granting protective status to homosexuals), cited in Seth Hilton, *Restraints on Homosexual Rights Legislation: Is There A Fundamental Right to Participate in the Political Process?*, 28 U.C. DAVIS L. REV. 445, 446 n.2 (discussing Oregon measure and other antihomosexual initiatives on ballots in Idaho, Alachua County, Florida, and Maine and indicating failure of such initiatives to make it onto ballot in Arizona, Florida, Michigan, Missouri, Nevada, Ohio, and Washington).

70. See TIP H. ALLEN & COLEMAN B. RANSONE, JR., CONSTITUTIONAL REVISION IN THEORY AND PRACTICE 16 (1962). Political and legal barriers explain why amendments originating in the legislature are less successful avenues for ratifying amendments harmful to the interests of a minority group. *Id.* at 19-20. Common legal barriers against amendments include approval by a two-thirds majority of both houses of the legislatures and approval by a majority of those voting in the election. A political barrier may be "the tendency of individuals and groups afforded some special status or protection in the existing constitution to oppose changes in the document." *Id.* at 16. Elected officials who observe the mobilization of a strong special interest group become less likely to advocate the change. The voting public may also be dissuaded from supporting the measure because the signals of community leaders often direct the public vote. See ELMER E. CORNWELL, JR., ET AL., STATE CONSTITUTIONAL CONVENTIONS: THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES 49 (1975). Controversial

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direct public amendment of the constitution will be regarded as potentially unfriendly sites for same-sex marriage litigation.

Although direct citizen initiative amendments have been shown to operate against rights for alternative lifestyles, citizen initiatives have a much lower passage rate than those with legislative origins.<sup>71</sup> In states that require legislative origins for amendments, the process is less susceptible to majoritarian impulses, such as a desire to circumvent judicial approval of same-sex marriages. Furthermore, the single issue of same-sex marriage is unlikely to mobilize voters to repeal state provisions banning gender discrimination even if such provisions are found to guarantee a right of same-sex marriage. Finally, a state judiciary could find a proposed constitutional amendment to violate other constitutional provisions on several grounds. The passage of state constitutional provisions circumscribing the rights of same-sex partners is not likely to abridge substantive federal guarantees because federal equal protection, privacy, and fundamental rights have not been interpreted to afford guarantees for homosexuals.<sup>72</sup> However, particular amendments generally designed to affect political liberties of gay and lesbian individuals may be interpreted as impermissibly circumscribing a fundamental federal right to political participation.<sup>73</sup> A new amendment to ban same-sex marriage could also conflict with a state constitutional provision barring discrimination on the basis of sex.<sup>74</sup> Thus, state and federal constitutional challenges could be made against a proposed amendment designed to “overrule” a judicial recognition of a right of same-sex marriage. In sum, the state constitutional amendment

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amendments are thus more likely passed through the citizen initiative method existing in seventeen states. In the states without citizen initiative amendments, the political and legal barriers are often too substantial to ratify a proposal designed to limit the rights of a particular minority.

Even in states with citizen initiative constitutional amendments, psychological barriers can inhibit constitutional revision, in that citizen voters generally recognize the significance of a proposed constitutional change. DIRECT LEGISLATION, *supra* note 69, at 73 (commenting on decreased likelihood of policy revision through constitutional amendment but noting its more secure legal standing). American political culture believes that a constitution is superior to statutes and should, therefore, be harder to revise. CORNWELL ET AL., *supra*, at 8. Political observers Tip Allen and Coleman Ransone have observed “a tendency of [American] people to display romantic and almost reverent attitudes toward a state constitution,” and described such attitudes as “a significant impediment to reform.” ALLEN & RANSONE, *supra*, at 17. Measures that will substantially alter the policy of an existing provision face the inertia of the status quo, making it difficult to pass the most controversial provisions. CORNWELL, ET AL., *supra*, at 187.

Constitutional barriers also limit the revision of state documents. A constitutional amendment must accord with other provisions of the state constitution as well as the federal Constitution. The constitutional requirements for a valid amendment implicate the judiciary in monitoring the process, especially when amendments are passed through citizen initiative. David Magleby has commented that “[t]he courts play a vital role in the direct legislation process. They not only balance competing rights and liberties but are the ‘traffic cops’ over the procedures and practices of direct legislation.” Magleby, *supra* note 68, at 46.

71. See *supra* note 69 and accompanying text.

72. See discussion of federal rights, *infra* text accompanying notes 75-104.

73. See *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), and *supra* text accompanying note 38.

74. See *infra* note 125 and accompanying text.

process need not dissuade legal strategists from arguing for a right of same-sex marriage based on state sources. Recent judicial opinions demonstrate an evolution in the jurisprudence of the right to marriage which promises eventual recognition of same-sex unions anchored in state constitutional provisions.

#### IV. AN ANALYSIS OF LEGAL CLAIMS

The right to privacy has been defined as the right not to have one's life dictated by the state, which "exists because democracy must impose limits on the extent of control and direction that the state exercises over the day to day conduct of individual lives."<sup>75</sup> This notion of privacy as a right of personal autonomy in making choices about personal or family life free from coercion<sup>76</sup> carries the most importance for self-definition within society. It is not clear, therefore, that the right is implicated where the state does not ban a certain type of interpersonal relationship, but instead merely refuses to sanction it by law.

Same-sex litigants desiring permission to marry are demanding that the state assert its power over their lives in pronouncing them partners. Yet, a right of privacy in marriage thus far applies only to existing legal marriages. In *Griswold v. Connecticut*,<sup>77</sup> Justice Douglas was especially concerned that under the provisions of a law banning the use of birth control by both married and unmarried couples, the police would be instructed to "search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives."<sup>78</sup> He commented, "[t]he very idea is repulsive to the notions of privacy surrounding the marriage relationship."<sup>79</sup> In analyzing this opinion, Earl Maltz concluded that "even viewed in isolation, *Griswold* cannot be viewed as establishing a right to enter into marriage; instead, Justice Douglas' opinion focused only on the special protection to be given to the interests of those already married."<sup>80</sup>

Similarly, *Loving v. Virginia*<sup>81</sup> cannot be read to establish a right based in privacy to choose one's spouse without limitation. In *Loving*, the Supreme Court held unconstitutional a Virginia statute prohibiting interracial marriage. While Chief Justice Warren's opinion referred to marriage as "one of the

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75. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 805 (1989).

76. John M. Devlin, *State Constitutional Autonomy Rights in an Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived From Federal Sources*, 1990 EMERGING ISSUES IN STATE CONST. L. 195, 199-200.

77. 381 U.S. 481 (1965).

78. *Id.* at 485-86.

79. *Id.*

80. Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949, 950 (1992).

81. *Loving v. Virginia*, 388 U.S. 1 (1967).

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‘basic civil rights of man,’ fundamental to our very existence and survival,”<sup>82</sup> the core holding of the case hinged on an equal protection, rather than a fundamental rights analysis. The Court held that the ban on interracial marriages was racial discrimination, and therefore violated the Equal Protection Clause of the Fourteenth Amendment.

*Zablocki v. Redhail*<sup>83</sup> arguably established marriage as a fundamental right, although the holding in this case was also based ultimately upon equal protection. The statute at issue in *Zablocki* forbade marriage for residents who were under court order to support minor children unless they proved they were complying in all respects with the order. The Court held that the statute violated equal protection. Justice Marshall asserted that

[b]y reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which regulates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.<sup>84</sup>

Justice Marshall’s opinion for the Court conceded that there was in fact a “fundamental character” to the right to marry,<sup>85</sup> but the fundamental character of the right is within legitimate regulatory control of state laws so long as the regulations meet the demands of equal protection. Conversely, same-sex marriage litigants need not prove a fundamental right to marry to establish unequal state regulation as unconstitutional.

### A. *The 1970s Litigation*

In the early 1970s, three challenges to bans on same-sex marriage were brought in the states. All three claims were based wholly or partially on federal law and all three failed to win a right of same-sex marriage. These cases demonstrate that federal law does not support an absolute right to a marriage of one’s choosing.

In *Baker v. Nelson*,<sup>86</sup> litigants failed to succeed with a two-pronged argument asserting a fundamental right to marry and equal access to that right. The Minnesota Supreme Court held that denying an application for a marriage license by two males was constitutional. As stated by the court, “Minn St. c. 517,<sup>87</sup> which governs ‘marriage,’ employs that term as one of the common usage, meaning the state of union between persons of the opposite sex.”<sup>88</sup> The

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82. *Id.* at 12 (quoting *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535, 541 (1942)).

83. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

84. *Id.* at 386.

85. *Id.*

86. 191 N.W.2d 185 (Minn. 1971).

87. MINN. STAT. ANN. §§ 517.01-517.08 (1970).

88. *Baker v. Nelson*, 191 N.W.2d at 185-86 (citations omitted).

court's opinion centered on the understanding that due process guarantees do not authorize a court to reinterpret the meaning of marriage plainly conveyed by legislation and accepted in society.<sup>89</sup> In soundly denying that petitioners possessed a fundamental right to marry, the court concluded that denying marriage licenses to same-sex couples did not violate the Equal Protection Clause of the Fourteenth Amendment, explaining that "there is no irrational or invidious discrimination . . . 'Abstract symmetry' is not demanded by the Fourteenth Amendment."<sup>90</sup>

In *Jones v. Hallahan*,<sup>91</sup> petitioners claimed that the state's denial of a marriage license deprived them of three basic constitutional rights: the right to marry, the right of association, and the right of free exercise of religion.<sup>92</sup> Much like the Minnesota court, the Supreme Court of Kentucky concluded that; in the absence of gender-specific language in the statute, marriage "must . . . be defined according to common usage"<sup>93</sup> . . . Appellants are prevented from marrying, not by the statutes of Kentucky or the refusal . . . to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined."<sup>94</sup> In looking to traditional definitions of marriage, the court found "no constitutional sanction or protection of the right of marriage between persons of the same sex."<sup>95</sup>

The Supreme Court of Washington decided the first marriage license case in which both state and federal constitutional claims were asserted, and again concluded that an equal protection argument attached to a fundamental right to marriage could not succeed under current constitutional doctrine. In *Singer v. Hara*,<sup>96</sup> the Washington Supreme Court held that the gender-neutral language of the Washington marriage statutes<sup>97</sup> did not *prima facie* make same-sex marriages permissible,<sup>98</sup> and banning such unions did not violate state<sup>99</sup> or

89. *Id.* The court also noted that *Griswold* was inapposite for this case because it dealt only with the privacy inherent in a state-sanctioned husband-wife relationship. *Id.* at 186.

90. *Id.* at 187. The court found this case fundamentally different than *Loving v. Virginia*, stating that there was a "clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Id.* Thus, the Minnesota Supreme Court regarded the sex of the applicants for the marriage license as the fundamental issue, not the nature of the right sought.

91. 501 S.W.2d 588 (Ky. 1973).

92. Petitioners also argued they had been subjected to cruel and unusual punishment. The court did not discuss this argument or the freedom of religion claims at length, stating only that no constitutional violation had taken place.

93. *Jones v. Hallahan*, 501 S.W.2d at 589, citing KY. REV. STAT. ANN. §§ 402.020(4), 402.210 (Michie 1970). The court quoted numerous dictionary definitions of marriage limiting the relation to male and female couples. *Id.*

94. *Id.*

95. *Id.*

96. 522 P.2d 1187 (Wash. 1974).

97. WASH. REV. CODE ANN. § 26.04.010 (West 1961).

98. The court found that the current gender-neutral language of the statute was passed with the sole intent to eliminate different age requirements for males and females to marry. *Singer v. Hara*, 522 P.2d at 1189. The court noted that the statute that referred to the affidavits required for the issuance of a marriage license plainly referred to the "male" and the "female." *Id.*

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federal equal protection. Appellants argued that the intention of the recently adopted state equal rights amendment<sup>100</sup> was to make sex an impermissible legal classification. The court, however, asserted that the traditional understanding of marriage was a legal union between one man and one woman.<sup>101</sup> Because marriage licenses were being equally denied to both homosexual men and women, the state was not discriminating on the basis of sex.<sup>102</sup> The court took an extremely limited view of the state equal rights amendment:

The ERA does not create any new rights or responsibilities . . . It merely insures that existing rights or responsibilities, or such rights and responsibilities that may be created in the future, which previously might have been wholly or partially denied to one sex or to the other, will be equally available to members of either sex.<sup>103</sup>

The Washington court, like the Minnesota and Kentucky courts before it, decided against an equal protection argument predicated upon a fundamental right of marriage.

The federal cases discussing a fundamental right of marriage and the three challenges to the prohibition of marriage between same-sex couples in the 1970s together establish that the right of privacy, a right wholly concerned with limitations on government power, does not compel government recognition of marriage. The failure to perform marriages for same-sex couples does not deny them the pleasure of personal relationships of their choosing. It simply fails to award them state-sanctioned benefits.<sup>104</sup> Regardless of the arguably fundamental nature of the right to marry, a privacy argument for public proclamation

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99. WASH. CONST. art. I, § 3.

100. WASH. CONST. art. XXXI, § 1. ("Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.") The provision was approved by voters and became effective December 7, 1972.

101. *Singer*, 522 P.2d at 1191-92.

102. *Id.* at 1191. This argument paralleled that used by the Commonwealth of Virginia in *Loving v. Virginia*: banning interracial marriages was not discriminatory on the basis of race because marriage licenses for interracial couples were denied equally to whites and blacks. *Loving v. Virginia*, 388 U.S. 1, 7 (1967). The *Singer* court rejected this similarity:

[A]lthough appellants suggest an analogy between the racial classification involved in *Loving* . . . and the alleged sexual classification involved in the case at bar, we do not find such an analogy. The operative distinction lies in the relationship which is described by the term 'marriage' itself. . . . In *Loving* . . . the parties were barred from entering into the marriage relationship because of an impermissible racial classification. There is no analogous sexual classification . . . Appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.

*Singer*, 522 P.2d at 1192.

103. *Id.* at 1194.

104. See, e.g., Alexander M. Bickel, *Concurring and Dissenting Opinions*, PUB. INTEREST, 25-26 Winter (1971) (arguing that homosexual relations conducted in confines of bedroom must be protected on grounds of privacy, but homosexual relationships do not warrant affirmative legal approval by the state because such sanctioning would "intrude[ ] upon us all . . .").

of marriage does not accord with the understanding of privacy as a limit upon the proper power of the state.

State courts in the 1970s same-sex marriage cases concluded that plaintiffs were denied access to marriage not because of who they were but because of the nature of marriage itself. The state judges thus were able to skirt the more difficult issues of the role of marriage in contemporary society and the level of protection to which homosexuals desiring to engage in marriage were entitled under equal protection doctrine.

### B. *Recent Opinions Eliciting New Promise*

Two state courts have heard challenges to the prohibition of same-sex marriages in the 1990s.<sup>105</sup> The Hawaii Supreme Court decided *Baehr v. Lewin* and the District of Columbia Court of Appeals handed down *Dean v. District of Columbia*. Neither opinion validated marriages between same-sex partners, yet each demonstrated new approaches by state judiciaries in evaluating these cases.

In *Baehr v. Lewin*,<sup>106</sup> the Supreme Court of Hawaii held that banning same-sex marriages under Hawaii law<sup>107</sup> was subject to strict scrutiny analysis based on the equal rights amendment in the state constitution.<sup>108</sup> The Hawaii Supreme Court held that the state equal protection clause was more expansive than its federal counterpart.<sup>109</sup> It noted that the "power to regulate

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105. Although the District of Columbia Court of Appeals is not a state court, it is termed such for the purposes of this discussion because it fulfills the role of a state supreme court within the District. The primary differences are the lack of multiple state legal sources and an independent state constitution in which the court can ground its rulings.

106. 852 P.2d 44 (Haw. 1993). For an indepth discussion of the reasoning of this opinion, see Note, *Baehr v. Lewin: Questionable Reasoning; Sound Judgment*, 11 J. CONTEMP. HEALTH L. & POL'Y 589 (1995) (agreeing with decision but arguing analysis unsound).

107. HAW. REV. STAT. ANN. § 572-1 (1988).

108. *Baehr v. Lewin*, 852 P.2d at 50; see HAW. CONST. art. I, § 5, "No 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 because of race, religion, sex or ancestry." The Hawaii Supreme Court rejected plaintiffs' argument that their state constitutional right of privacy was violated. The court recognized that it had full power to expand the state constitution's right of privacy beyond federal standards, yet found no reasonable basis for doing so. *Baehr*, 852 P.2d at 55-56. The language of the state constitutional right to privacy was so similar to the federal right that "no 'purpose to lend talismanic effect' to abstract phrases such as 'intimate decision' or 'personal autonomy' can 'be inferred from [article I, § 6] any more than . . . from federal decisions.'" *Id.* at 57. Thus, the court concluded

[W]e do not believe that a right to same-sex marriage is 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 that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental right to same-sex marriage arising out of the right to privacy or otherwise.

*Id.*

109. *Id.* at 65-66.

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marriage is a sovereign function reserved exclusively to respective states.”<sup>110</sup> By depriving plaintiffs of the status of marriage because of their sex, the state denied them a number of rights and benefits.<sup>111</sup> By its plain language, “the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex.”<sup>112</sup>

As support for this principle, the court turned to a concurrence by Justice Powell in the Supreme Court’s decision in *Frontiero v. Richardson*,<sup>113</sup> which subjected sex-based classifications to strict judicial scrutiny. Later case law lowered the level of protection for sex-based classifications to intermediate scrutiny. However, in Justice Powell’s concurrence in *Frontiero*, he argued that the court need not establish sex-based classifications as suspect, because if the Equal Rights Amendment then before the states were to pass, strict scrutiny analysis would be applicable to gender-based discrimination. The Hawaii court noted,

[t]he Powell group’s concurring opinion . . . permits but one inference: had the Equal Rights Amendment been incorporated into the United States Constitution, at least seven members (and probably eight of the *Frontiero* Court) would have subjected statutory sex-based classifications to “strict” judicial scrutiny.<sup>114</sup>

The Hawaii court concluded that because a state-level equivalent of the Equal Rights Amendment had been added to the state constitution, gender was subject to strict scrutiny in the state of Hawaii. The court held that the marriage statute, on its face, discriminated based on sex against the applicant couples in the exercise of the civil right of marriage.<sup>115</sup> State regulation of marriage was subject to constitutional restraints and the right to marry could be denied only for compelling reasons.<sup>116</sup>

In *Dean v. District of Columbia*,<sup>117</sup> the District of Columbia Court of

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110. *Id.* at 58.

111. *Id.* at 59.

112. *Id.*

113. 411 U.S. 677 (1973).

114. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

115. *Baehr*, 852 P.2d at 61. The court noted that Lewin’s reliance on *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), failed to establish the scope of plaintiffs’ rights because that case focused only on federal claims. The court also noted that *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973), did not address plaintiffs’ claims because no questions of equal protection or state constitutional provisions were raised by the plaintiffs in *Jones*. The Hawaii court cautioned against legal conclusions based upon the traditional definition of a relationship and noted that “constitutional law may mandate, like it or not, that customs change with an evolving social order.” *Baehr*, 852 P.2d at 63. Similarly, the *Baehr* court rejected the Supreme Court of Washington’s reasoning in *Singer v. Hara*, 522 P.2d 1187 (Wash. 1974), that appellants were not denied a marriage license because of their sex but because of the nature of marriage itself. *Id.*

116. To overcome a presumption of unconstitutionality, the state must demonstrate that the denial furthers compelling state interests and is narrowly tailored to avoid unnecessary abridgments of constitutional rights. The case is set for trial in late 1996.

117. 653 A.2d 307 (D.C. App. 1995). The opinion of the court was per curiam and consisted of only four lines. *Id.* at 308.

Appeals held that the federal constitutional rights of due process and equal protection had not been abridged by the District's banning of same-sex marriages.<sup>118</sup> Judge Ferren's fifty-six page opinion concurring in part and dissenting in part did, however, contain significant materials for future same-sex marriage litigation.<sup>119</sup> Ferren did not find a traditional right to same-sex marriage to be fundamental or rooted in a privacy guarantee,<sup>120</sup> but, like the Hawaii Supreme Court, he found that the proscription of same-sex marriage implicated equal protection concerns.

Ferren's analysis centered on whether appellants' had been denied equal protection.<sup>121</sup> Ferren concluded that a trial was necessary to determine whether same-sex couples comprise a suspect or quasi-suspect class, thereby entitling them to either strict or intermediate scrutiny.<sup>122</sup> He did not look to sex-based classification but to sexual orientation classification. Ferren suggested that homosexuals *per se* may be a protected group.<sup>123</sup>

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118. Because the Fourteenth Amendment does not apply to the District of Columbia, the appellants' Equal Protection claim stemmed from the Fifth Amendment.

119. *Id.* at 308-64.

120. Although the D.C. marriage statute, D.C. CODE ANN. § 4-43, was expressed in neutral terms, its language and legislative history demonstrated that same-sex marriages were intended to be prohibited. Judge Ferren interpreted the term "marriage" in the statute in a traditional manner; he did not view same-sex marriage as a fundamental right. *Dean*, 653 A.2d at 314 (Ferren, J., concurring in part and dissenting in part).

121. *Id.* at 309.

122. *Id.* at 358. Two concurrences, however, relied on traditional views of marriage from the 1970s: "[I]f two people are incapable of being married because they are members of the same sex and marriage requires two persons of opposite sexes . . . then I do not see how it makes any difference that the District of Columbia, or any agency of its government, discriminates against these two appellants by refusing to allow them to enter into a legal status which the sameness of their gender prevents them from entering in the first place." *Id.* at 361 (Terry, J., concurring). "Surely, if only opposite-sex marriage is a fundamental right, the state may give separate recognition solely to that institution through a marriage act as here." *Id.* at 364 (Steadman, J., concurring).

123. *Id.* at 325. One of the most innovative sections of Ferren's opinion is a discussion of the fundamental difference between adjudicative and legislative facts. Ferren defined adjudicative facts as those that describe the events that occurred between the relevant parties. *Id.* at 323. He stated that legislative facts are "patterns of social, economic, political, or scientific behavior or other data that a court inevitably uses to inform and shape the policy judgments it often has to make in deciding newly-presented questions of law." *Id.* at 324. The adjudicative facts are sufficient to dispose of the case by summary judgment only if they answer a series of questions in a manner that precludes plaintiffs from a judgment in their favor as a matter of law. Ferren asserted that certain questions of law had to be answered before granting summary judgment to defendants, including whether members of the allegedly protected class (homosexual couples) are entitled to greater constitutional protection against discriminatory treatment than members of other groups, and, depending on the level of protection required, whether the law has unfairly discriminated against members of the allegedly protected class. *Id.* at 324.

This question brought Ferren back to the court's all-important role as a legislative fact-finder. Ferren discussed the importance of determining legislative facts, social facts in particular, in deciding questions of constitutional law. *Id.* at 324-25. Ferren noted that the legislative facts upon which judges rely are often not immutable but change as society changes. *Id.* at 330. Thus, as societal attitudes regarding homosexuality change, judicial determinations regarding the level of constitutional protection of homosexuals as a class may alter. Ferren asserted that a finding that homosexuals comprise a constitutionally protected class would not dictate the result in this case, but would simply determine the burden of proof on the state to justify prohibition of homosexual marriages. *Id.* at 335.

To determine whether homosexuals constitute a suspect class for purposes of Equal Protection,

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With regard to the status of homosexuals under the equal protection clause, Ferren stated, "I am not comfortable opining about a subject so elusive, and so controversial, as to the nature, causes, preventability, and immutability of homosexuality without benefit of a trial record with the right kind of expert testimony, subject to cross-examination."<sup>124</sup> Ferren's opinion indicates a trend in considering social and scientific data and evolving standards of morality when determining whether same-sex relationships should be sanctioned by the state.

### V. TRENDS IN LITIGATION: MAKING THE PROPER CHALLENGE

The legal analysis of these cases indicates that the most promising elements for future same-sex marriage litigation are claims based upon equal protection, rather than a "fundamental" right of marriage, and challenges rooted in state constitutional, rather than federal, provisions. State constitutional equal rights amendments that bar discrimination based upon sex,<sup>125</sup> and state constitution-

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Ferren concluded that the court must look to history of purposeful discrimination; presence of deep-seated prejudice and stereotypes that do not reflect class members' abilities; presence of an immutable trait that bears no relationship to individuals' abilities to contribute to society; and political powerlessness. *Id.* at 344-51.

Judge Ferren concluded that "[d]iscrimination against homosexuals has been pervasive in both the public and the private sectors." *Id.* at 344-45 (citing *Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989) (en banc) (Norris, J., concurring)). In finding that homosexual couples are subject to debilitating stereotypes, Ferren offered many sources discussing the stereotype of promiscuity among homosexuals that likely contributes to society's failure to recognize their commitments to personal relationships. *Id.* at 345. Ferren concluded that the court must weigh current scientific evidence on whether homosexuality is a genetic predisposition before determining whether homosexuality is an immutable characteristic. *Id.* at 346. Ferren found that ample evidence existed to support the political powerlessness of homosexuals, focusing on the discrimination that causes many lesbian and gay men to hide their true sexual orientation. *Id.* at 349. Ferren noted that fact-finding judgments would also include any compelling government interests in prohibiting same-sex marriage. *Id.* at 358.

124. *Id.* at 356.

125. Sixteen state constitutions contain an equal rights amendment. Some state constitutional provisions list discrimination on the basis of sex alongside other impermissible bases such as race and religion. Other provisions discuss sex-based discrimination in an independent section. The provisions read as follows: "No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin." ALASKA CONST. art. I, § 3; "Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex." COLO. CONST. art. II, § 29; "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability." CONN. CONST. art. I, § 20; "Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section." HAW. CONST. art. I, § 3; also, "No person shall be deprived of life, liberty or property without due process of law, nor be denied equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." HAW. CONST. art. I, § 5; "The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts." ILL. CONST. art. I, § 18; "In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry, and from arbitrary, capricious or unreasonable discrimination based on age, sex, or physical condition." LA. CONST. art. I, § 12; "Equality of rights under the law shall not be abridged or denied because of sex." MD. CONST. art. 46;

al privacy provisions that grant expansive individual autonomy are two of the most important liberty guarantees upon which to base a claim.<sup>126</sup> State supreme courts have found both such provisions to grant broader civil liberties protections than their federal counterparts.

### A. *Unsuccessful Claims*

The existence of a right of privacy in a state constitution may be an important legal source in same-sex marriage litigation. In the past, challenges to the proscription of same-sex marriages based upon a right to privacy<sup>127</sup> failed because the privacy right did not establish a right to same-sex marriage

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"Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." MASS. CONST. pt. I, art. I; "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." MONT. CONST. art. II, § 4; "[E]quality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin." N.H. CONST. pt. I, art. 2; "[E]quality of rights under the law shall not be denied on account of the sex of any person." N.M. CONST. art. II, § 18; "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. I, § 28; "No otherwise qualified person shall, solely by reason of race, gender, or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state." R.I. CONST. art. I, § 2; "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative." TEX. CONST. art. I, § 3a; "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." WASH. CONST. art. XXXI, § 1; "Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction." WYO. CONST. art. I, § 3. Just as the Louisiana provision grants protection only from "unreasonable" sex-based discrimination, the California provision is limited to the business context. "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." CAL. CONST. art. I, § 8. This provision would offer little assistance to plaintiffs seeking state-sanctioned same-sex marriage.

126. The five independent, enumerated privacy clauses in state constitutions read as follows: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." ALASKA CONST. art. I, § 22; "All people are by their nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1; "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." FLA. CONST. art. I, § 23; "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." HAW. CONST. art. I, § 6; "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." MONT. CONST. art. II, § 10.

In addition, six other states include a right of privacy in a provision designed to limit searches and seizures. These clauses are found in Arizona: art. II, § 8; Hawaii: art. I, § 7; Illinois: art. I, § 6; Louisiana: art. I, § 5; South Carolina: art. I, § 10; and Washington: art. I, § 7. Other state supreme courts, including Kentucky and Tennessee, have found an implied or penumbral right of privacy in the state constitution that is broader than the right implied at the federal level. Additionally, some states protect a right of privacy by statute. *See, e.g.*, WIS. STAT. ANN. § 895.50 (West 1993) (stating relief for violation of recognized right to privacy).

127. *See* Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Singer v. Hara, 522 P.2d 1187 (Wash. 1974).

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at the federal level. A federal right of privacy often included a privilege to engage in personal or sexual relationships of one's own choosing, yet it did not create an affirmative duty for the state to sanction personal alliances. Likewise, a state constitution privacy clause does not create a duty to sanction same-sex marriages. It may, however, compel respect for individual liberty and autonomy in decision-making.

On the other hand, state laws that criminalize sodomy reflect a lack of personal and relational autonomy. Currently, private and consensual sodomy is criminalized in twenty-four states. With the recent decisions in Kentucky and Tennessee, however, this number may more accurately be twenty-two.<sup>128</sup> The mere existence of such statutes in a large number of states constitutes an initial barrier to be overcome before same-sex marriages would be approved in those jurisdictions.

The fundamental right to marriage claim, like the privacy claim, is unlikely to achieve recognition of same-sex marriages. According to constitutional jurisprudence, a fundamental right is one which is explicitly or implicitly guaranteed by the Constitution.<sup>129</sup> The notion of fundamental rights originated with the right of privacy in *Griswold*.<sup>130</sup> In that case, the Court described a fundamental right as one which is "older than the Bill of Rights."<sup>131</sup> In *Palko*

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128. Private, consensual sodomy is a criminal offense in the following states: Alabama, ALA. CODE § 13A-6-65(a)(3) (1975); Arizona, ARIZ. REV. STAT. ANN. §§ 13-1411, 13-1412 (1978); Arkansas, ARK. CODE ANN. § 5-14-122 (Michie 1987); Florida, FLA. STAT. ANN. § 800.02 (West 1984); Georgia, GA. CODE ANN. § 16-6-2 (1982); Idaho, IDAHO CODE § 18-6605 (1979); Kansas, KAN. STAT. ANN. § 21-3505 (1974); Kentucky, KY. REV. STAT. ANN. § 510.100 (1975) (declared unconstitutional under state constitution privacy analysis in *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992)); Louisiana, LA. REV. STAT. ANN. §§ 14:89, 14:89.1 (West Supp. 1982); Maryland, MD. ANN. CODE art. 27, §§ 553-54 (Supp. 1982); Michigan, MICH. COMP. LAWS ANN. §§ 750.158, 750.338, 750.388(a)-(b) (West 1981); Minnesota, MINN. STAT. ANN. § 609.293 (West Supp. 1982); Mississippi, MISS. CODE ANN. § 97-29-59 (1972); Missouri, MO. ANN. STAT. § 566.090 (Vernon 1982); Montana, MONT. CODE ANN. § 45-5-505 (1981); Nevada, NEV. REV. STAT. § 201.190 (1979); North Carolina, N.C. GEN. STAT. § 14-177 (1981); Oklahoma, OKLA. STAT. ANN. tit. 21, § 886 (West 1983); Rhode Island, R.I. GEN. LAWS § 11-10-1 (1981); South Carolina, S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1977); Tennessee, TENN. CODE ANN. § 39-2-612 (1982) (declared unconstitutional in *Campbell v. Sundquist*, No. 93C-1547, slip op. (5th Cir. Ct. Tenn. Davidson County, Feb. 2, 1995) (order granting summary judgment)); Texas, TEX. PENAL CODE ANN. § 21.06 (West 1974); Utah, UTAH CODE ANN. § 76-5-403 (1983); Virginia, VA. CODE ANN. § 18.2-361 (Michie 1982). The statutes in Arkansas, Kansas, Kentucky, Missouri, Nevada, and Texas only criminalize sodomy between persons of the same sex. It should additionally be noted that the District of Columbia criminalized private, consensual sodomy between adults until 1993, when a repeal law was passed by the D.C. Council and signed by then Mayor Sharon Pratt Kelly. This occurred in May and was subject to a sixty-day review period by Congress. Congress took no action and the law was repealed officially in September. In addition, it should be noted that the Montana sodomy law was struck down by District Court Judge Jeffrey Sherlock on February 16, 1996; however, the decision may be appealed by the state attorney general. See *Big Sky Victory*, ADVOC., Apr. 2, 1996, at 14.

129. BLACK'S LAW DICTIONARY 674 (6th ed. 1990).

130. *Griswold v. Connecticut*, 381 U.S. 481, 486.

131. *Id.* A more exacting definition came from Justice Goldberg's concurrence. He stated that the determination of whether a right is fundamental does not stem from "personal and private notions," but from

the 'traditions and [collective] conscience of our people' to determine whether a principal is

v. *Connecticut*,<sup>132</sup> “fundamental” rights were defined as “implicit in the concept of ordered liberty.”<sup>133</sup> Under those definitions, same-sex marriage does not pass the constitutional test.

The inapplicability of a “fundamental right” to same-sex marriage litigation is further demonstrated by history. Historical tradition is an essential element in finding a right to be fundamental, as is proof of its acceptance and exercise by a large portion of American society. At this point in American history, same-sex marriage meets neither of these tests. Even if one state court found a right of same-sex marriage, it would not meet national constitutional standards because fundamental rights require belief in, and exercise of, a right by a large group of people across the nation.

As society’s morality has evolved, its perception of the important elements of marriage has changed greatly. The legal claim brought forth by plaintiffs challenging the proscription of same-sex marriage should be one which stresses change. Because marriage has been defined as fundamental for some couples but not for others, the equal protection of the laws is implicated in the changing status of the right.

#### B. *The Promise of an Equal Protection Claim: Evolution of the Legal Standard*

Equal protection, as analyzed by a number of leading constitutional scholars, may be the most effective tool to combat the denial of recognition of homosexual relationships. According to Alexander Bickel, cities, states, and the federal government must exercise

their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulations. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.<sup>134</sup>

Some states have argued that unequal protection of legal status is justified given the nature of homosexuality. Governmental power is thus exerted to the detriment of a minority on the grounds that it is reasonable. Such action must be scrutinized under equal protection doctrine to determine whether, given the

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‘so rooted [there] . . . as to be ranked as fundamental.’ . . . The inquiry is whether a right involved’ is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’

*Id.* at 493 (Goldberg, J., concurring) (citations omitted).

132. 302 U.S. 319 (1937).

133. *Id.* at 325.

134. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 222-23 (1962) [hereinafter *LEAST DANGEROUS BRANCH*].

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nature of the right, the differential treatment is reasonably warranted or whether it is merely the product of unreasonable bias. Bickel thus described the appropriate analysis under the equal protection doctrine:

[T]he balance of moral considerations and felt needs comes out in these instances so as to forbid mere discriminatory choices, while, on the other hand, permitting the legislature to take account of observable differences that relate rationally to some independent purpose, which is itself permissible.<sup>135</sup>

The determination of what constitutes a permissible end is thus at the heart of equal protection analysis.

Cass Sunstein has commented on the significance of the Equal Protection Clause,<sup>136</sup> paying particular attention to the evolving meaning of permissible ends. For Sunstein, the Equal Protection Clause cuts directly at the legality of classifications:

The function of the Clause is to prohibit unprincipled distributions of resources and opportunities. Distributions are unprincipled when they are not an effort to serve a public value, but reflect the view that it is intrinsically desirable to treat one person better than another.<sup>137</sup>

The Equal Protection Clause limits the government's ability to award benefits only to certain groups of citizens. The basic requirement of equal protection is that statutory classifications be related to valid social purposes in present societal conditions.

By contrast, the Due Process Clause is designed to protect substantive, often fundamental rights, and is therefore majoritarian and protective of tradition:

[f]rom its inception, the Due Process Clause has been interpreted largely (though not exclusively) to protect traditional practices against short-run departures. The clause has therefore been associated with a particular conception of judicial review, one that sees the courts as safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history.<sup>138</sup>

The Equal Protection Clause is, however, forward-looking and invalidates longstanding traditions that are recognized as discriminatory in light of changing times and increasing demands of certain groups for fair treatment.<sup>139</sup>

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135. *Id.* at 226.

136. Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127.

137. *Id.* at 128.

138. Cass Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

139. *Id.*

The Equal Protection Clause . . . has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding. The Due Process Clause often looks backward . . . [but] the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure.<sup>140</sup>

The ability of the Equal Protection Clause to adapt its standards to evolving attitudes in society has also been emphasized by the Supreme Court. Justice Douglas, writing for the Court in *Harper v. Virginia Board of Elections*,<sup>141</sup> stated:

the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change . . .<sup>142</sup>

This forward-looking aspect of the Equal Protection Clause is a promising ingredient for same-sex marriage litigation. The remaining question concerns the level of equal protection analysis to be accorded to same-sex couples who have been denied a marriage license. In states that have a state constitutional provision barring discrimination along gender lines, precedent indicates that the level of analysis is likely to be strict scrutiny. In *Frontiero v. Richardson*,<sup>143</sup> Justice Powell, the Chief Justice, and Justice Blackmun found it “unnecessary for the Court . . . to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding,”<sup>144</sup> because the question was to be resolved with the pending passage of the Equal Rights Amendment. In *Baehr v. Lewin*,<sup>145</sup> the Hawaii Supreme Court used similar reasoning in concluding that the state constitution’s equal rights amendment subjected sex discrimination to strict scrutiny. An analysis of the contemporary status of homosexuality under the law, however, demonstrates no current support for strict scrutiny analysis of discrimination on the grounds of sexual orientation.

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140. *Id.*

141. 383 U.S. 663 (1966).

142. *Id.* at 669-70.

143. 411 U.S. 677 (1973).

144. *Id.* at 691-92.

145. 852 P.2d 44 (Haw. 1993).

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### C. *Homosexuals as a Suspect Class*

In order for the proscription of homosexual marriage to be analyzed under an equal protection strict scrutiny test, homosexuals must be determined to constitute a suspect class.<sup>146</sup> As previously discussed, homosexual marriage has not been recognized as a fundamental right at the federal or state level.<sup>147</sup> Changes in society that have contributed to a better understanding of homosexuality may, however, elevate homosexuals as a group to suspect class status.

A review of suspect class status requirements reveals that strict scrutiny may be applicable to homosexuals in light of evolving social conditions and understandings. The five criteria deemed most important in the creation of suspect class status have been enumerated as: (1) a long history of discrimination toward the class; (2) the possession by the class of a characteristic that bears no relation to ability to perform or contribute to society; (3) the mark of a badge of distinction upon the class; (4) the relegation of the class to a position of political powerlessness; and (5) the possession by the class of an immutable characteristic that is either inherent or uncontrollable.<sup>148</sup> In order for homosexuals to constitute a suspect class they must be found to meet all five criteria.

The first is fairly easy to establish; a pattern of discrimination against homosexuals has existed from Biblical days<sup>149</sup> to the modern workplace.<sup>150</sup> Under the second category, many members of the public argue that discrimination against homosexuals on the basis of their ability to contribute to society is warranted because homosexual status allegedly projects a negative image of an individual, decreasing their productivity, efficiency, and revenue.<sup>151</sup> Courts analyzing the requirement of a badge of distinction have concluded that homosexuality does not meet this standard, because it is behavioral rather than visible.<sup>152</sup> It has been asserted that homosexuals can hide their status and thus evade discrimination. However, the longstanding practice of gays living closet

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146. Homosexuals have repeatedly been denied suspect class status at the federal level. *See Bowers v. Hardwick*, 478 U.S. 186 (1986); *High Tech Gays v. Defense Indust. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990).

147. *See supra* text accompanying notes 127-133.

148. *Frontiero v. Richardson*, 411 U.S. 677, 685-86 (1973).

149. *See Genesis* 19:5; *Leviticus* 18:22, 20:13.

150. *See High Tech Gays*, 895 F.2d 563 (holding Defense Department's policy of subjecting all homosexual job applicants for secret and top secret clearance positions to expanded investigations and mandatory adjudications did not violate Fifth Amendment Due Process); *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972) (holding it permissible for University of Minnesota to reject avowed homosexual's application for librarian position).

151. *See, e.g., Gaylord v. Tacoma School District*, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977) (finding schoolteacher's ability impaired by public displays of homosexuality regarded as immoral by society).

152. *See, e.g., High Tech Gays*, 895 F.2d 563.

lifestyles to avoid discrimination has directly contributed to their political powerlessness, the fourth criteria of suspect class status. Because of their minority status, it is difficult for homosexuals to achieve equality of rights through standard political processes. Grassroots support of gay rights seems only to have been achieved in communities with a large number of gay citizens.<sup>153</sup> Only the increasing visibility of the gay community in recent years has contributed power to the gay rights movement.<sup>154</sup> Finally, the immutable characteristic criterion presents the most difficult question because it requires proof of the origin of homosexuality. If sexual orientation could be scientifically proven to be genetic, it would be considered immutable. Opinion in the scientific community is mixed at best, with the majority supporting a social conditioning theory that incorporates a limited genetic predisposition.<sup>155</sup> The lack of agreement in this area leaves the issue of scrutiny unresolved.

The great promise for the eventual recognition of same-sex marriage lies in Judge Ferren's opinion in *Dean v. District of Columbia*.<sup>156</sup> He recognized that some conclusion regarding the cause of homosexuality is required before any more cases can be decided as a matter of law. While more individuals in society are beginning to question whether homosexuality is a naturally occurring biological condition,<sup>157</sup> the idea that sexual orientation does not involve choice has hardly achieved consensus. Until this issue is decided, homosexuals are unlikely to achieve suspect class status. As an alternative, same-sex marriage litigants can attempt to achieve heightened scrutiny for their claims by focusing on sex- rather than sexual orientation-based classifications. State equal rights amendments prohibiting discrimination on the basis of sex currently offer gay rights activists their only hope for heightened scrutiny analysis in same-sex marriage litigation.

#### D. *The Equal Rights Amendment and Original Intent*

As previously discussed, sex-based classifications receive only intermediate scrutiny under federal doctrine. However, in their concurrence in *Frontiero*, the Powell group wrote

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153. See *supra* text accompanying notes 32-34.

154. 1988 census officials estimated that there were 1.6 million unmarried couples of the same-sex living together. See Victor F. Zonana, *Census Will Count 'Unmarried Partners' for First Time*, L.A. TIMES, Feb. 15, 1990, at A38.

155. NATIONAL INSTITUTE OF MENTAL HEALTH TASK FORCE ON HOMOSEXUALITY, FINAL REPORT AND BACKGROUND PAPERS 77 (1972). But for recent evolution in opinion regarding homosexuality, see William Saletan & Nancy Watzman, *Marcus Welby, J.D.: When Doctors Become Judges*, NEW REPUBLIC, Apr. 17, 1989, at 21. The American Psychiatric Association removed homosexuality from the body of its Diagnostic and Statistical Manual as a disease and placed it as a condition in a note in the appendix. *Id.*

156. 653 A.2d 307 (D.C. App. 1995).

157. See Saletan & Watzman, *supra* note 155, at 21.

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There is another . . . reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by Congress and submitted for ratification by the States. If the Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution . . . .<sup>158</sup>

The question remains as to whether such strict scrutiny of sex-based classifications would have been applicable to state marriage regulations.

During debates on the proposed Equal Rights Amendment, the issue of same-sex marriage was raised by friends and foes of the provision. Some concluded that the amendment would not affect the ban on same-sex marriage, and others asserted that it would make the proscription of same-sex marriage unconstitutional.<sup>159</sup> Many opponents of the amendment asserted that same-sex marriage would be constitutionally demanded with the passage of the amendment. They intended these assertions to spark fear in the American public and increase opposition to the amendment. ERA proponents initially responded by endorsing homosexual rights and declaring that the ERA would end discrimination against lesbians and gay men as well as against women generally.<sup>160</sup> This action led to a frenzy of controversy surrounding the amendment and caused some would-be proponents of the measure to withdraw their support.

As opponents continued to insist that the Equal Rights Amendment would legalize homosexual marriages, proponents began strenuously denying that the amendment would affect classifications within the institution of marriage. Those supporting the amendment pointed to 1970s judicial decisions on the issue, specifically *Baker v. Nelson*. They stressed that no fundamental right of homosexual marriage existed in the federal Constitution and none would be created by the amendment.<sup>161</sup> In an article urging citizens of Connecticut to ratify the ERA, Yale Law Professor Thomas Emerson and associate Barbara Lifton asserted that the amendment would not grant new rights to homosexuals.

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158. *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring). See also BURT, *supra* note 39, at 363; Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 583-88 (1973) [hereinafter *Legality of Homosexual Marriage*]. In commenting on the middle tier of judicial review established by the Court in *Craig v. Boren*, 429 U.S. 190, 197 (1976), Burt states, "The Court had invented something more than minimal but less than strict scrutiny: a 'middle tier.' If the Equal Rights Amendment had been subsequently ratified, this jurisprudential innovation would no doubt have disappeared . . . ." BURT, *supra* note 39, at 363.

159. See generally MARY FRANCES BERRY, *WHY ERA FAILED* (1986); JANE MANSBRIDGE, *WHY WE LOST THE ERA* (1986); Thomas Emerson & Barbara Lifton, *Should the ERA Be Ratified?*, 55 CONN. BAR J. 227, 233 (1981).

160. See *Legality of Homosexual Marriage*, *supra* note 158. That Note argued that the ERA would end all sex-based distinctions and would therefore legalize homosexual marriages since gender would become a "prohibited" rather than a "suspect" classification." The Note was used by numerous parties on both sides of the debate, although the Note authors claimed in subsequent interviews to have espoused no particular view.

161. BERRY, *supra* note 159, at 89.

They wrote, “[t]he wording of the ERA and its legislative history make clear that it would not legalize homosexual marriages or otherwise affect laws dealing with homosexual couples. The ERA prohibits discrimination on account of gender, not sexual preference.”<sup>162</sup> As further explained by Mary Frances Berry,

the proponents of the amendment affirmed the view of the cases that prohibiting discrimination on the basis of sex did not mean or imply prohibiting discrimination on the basis of sexual preference. In other words, if a state decided to legalize marriages between men and men, it would be required to legalize marriages between women and women, or vice versa. But otherwise the amendment would have no effect on legalizing sexual preference.<sup>163</sup>

Berry claimed that the amendment “had nothing to do with private conduct but covered only actions by the government.”<sup>164</sup>

The assertions made by ERA proponents against the amendment’s applicability to homosexual marriage suggest that the sex of the parties seeking marriage should be overlooked if they are gay. This view discriminates against homosexuals because it suggests that a gay man or lesbian is not entitled to the same rights as a straight man or woman. In addition, Berry failed to recognize that state action lay at the heart of the marriage issue because it was the government which denied same-sex couples a marriage license. Proponents of the Equal Rights Amendment abandoned the notion that the amendment would have any effect on discrimination against homosexuals. The legislative history and intended effect of the amendment on gay issues remains cloudy and unresolved.

One question remaining is whether the original intent of the proposed amendment should be a deciding factor in current interpretation of the state provisions. The search for original intent of the failed Equal Rights Amendment is particularly complex because the intentions of both its proponents and opponents must be assessed, and as asserted by Alexander Bickel, “[l]egislative motives are nearly always mixed and nearly never professed.”<sup>165</sup>

A court evaluation of what amounts to a constitutionally impermissible distinction on the basis of sex is not limited to the categories of impermissible distinctions at the time of the provision’s passage. Because of the uncertainty of the original intent of the federal Equal Rights Amendment, the applicability to same-sex marriage of a state equal rights amendment is best examined under general equal protection principles. The guarantee of equal protection is the constitutional right least anchored to original intent. As discussed above, both

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162. *Id.*

163. *Id.*

164. *Id.* at 90.

165. LEAST DANGEROUS BRANCH, *supra* note 134, at 214.

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legal scholars and the Supreme Court have commented on the forward-looking nature of the equal protection doctrine.<sup>166</sup>

In addition, the judiciary may apply the equal protection of the laws even if evolving attitudes in society are not yet shared by the majority.<sup>167</sup> The courts may find a distinction impermissible under the equal protection doctrine if a significant number of citizens, other than the judiciary, believe that the distinction is wrongly drawn. Alexander Bickel's comments regarding the role of the judiciary as a leader of opinion are particularly relevant in the context of judicial examination of the prohibition of same-sex marriages. He asserted:

[Restricting] the Court . . . to declaring an existing national consensus . . . would charge the Court with a function to which it is, of all our institutions, least suited. Surely the political institutions are more fitted than the Court to find and express an existing consensus . . . The Court should declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent.<sup>168</sup>

The Supreme Court assumed this role in both *Brown v. Board of Education*<sup>169</sup> and *Loving v. Virginia*.<sup>170</sup> In each of these decisions, the Court declared longstanding racial discriminatory practices unconstitutional under the Equal Protection Clause of the Fourteenth Amendment and supported the view of a minority of citizens.<sup>171</sup> New social conditions and understandings indicated to the Court that racial distinctions had become unconstitutional.

In the category of same-sex marriage, numerous recent societal developments indicate that a significant portion of the American populace has come to question sex-based distinctions for state recognition of marriages. Courts increasingly uphold legal rights for same-sex partners.<sup>172</sup> A growing number of cities recognize domestic partnerships pursuant to executive order or

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166. See *supra* text accompanying notes 134-142.

167. Thus, even if a majority of the voting public of a state were to pass a law banning the recognition of same-sex marriages in their jurisdiction, as discussed by Dunlap, *supra* note 61, the state judiciary could still establish recognition of same-sex marriage based on state constitutional materials. Hawaii is the site of pending antimarriage legislation; however, such a law would not withstand strict scrutiny analysis if no state compelling interest were recognized.

168. LEAST DANGEROUS BRANCH, *supra* note 134, at 239.

169. 347 U.S. 483 (1954).

170. 388 U.S. 1 (1967).

171. See ALEXANDER M. BICKEL, *POLITICS AND THE WARREN COURT* (1965) [hereinafter *POLITICS AND THE WARREN COURT*]. Bickel's discussion of reaction in the South to *Brown* illustrated that some Southerners believed in desegregation but required the Court's pronouncement to legitimize their view. Although the 1954 decision generally surprised officials and the public, "[m]oderate voices . . . remained quiet rather than incur risks by coming to the Court's support, because they relied on the Court itself and on its authority to make the judgment effective." *Id.* at 10. Bickel also stressed the necessity of having public support for the ruling to be implemented successfully. Bickel wrote, "[t]he federal government will have to induce rather than coerce, to help rather than do." *Id.* at 38.

172. See, e.g., *Braschi v. Stahl Assoc.*, 543 N.E.2d 49 (N.Y. 1989). See also one of the earliest cases upholding rights between same-sex partners, *Bramlett v. Selman*, 597 S.W.2d 80, 85 (1980) (holding that constructive trust exists in homosexual relationship and court of equity could not deny relief to person merely because he was homosexual).

municipal ordinance. Antimarrriage statutes have been defeated or withdrawn in a number of state legislatures.<sup>173</sup> Public opinion has also become more supportive of gay rights in general.<sup>174</sup> State courts can cite all of these recent developments as signs that a right of same-sex marriage will soon gain general assent. As explained by Alexander Bickel, circumstances demonstrating a developing opinion in society provide the courts with an opportunity to anticipate society's changing view.<sup>175</sup> Evolving opinion on the issue of same-sex marriage makes it a topic ripe for judicial resolution.

State constitutional provisions prohibiting sex-based discrimination modeled after the federal Equal Rights Amendment do not require that no distinctions be drawn on the basis of sex, but simply subject all such distinctions to strict scrutiny.<sup>176</sup> As discussed above, the reasons for the distinction must be supported by a compelling state interest achieved through narrowly tailored means.<sup>177</sup> The court's evaluation of the state interest and the manner through which it is achieved is balanced against the hardships allegedly created by the distinction. Under an equal protection analysis, the evolving standards of society should affect the court's determination of the appropriateness of the line

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173. The bills were proposed following the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The states in which such a bill was defeated, withdrawn, or killed in the legislature include Indiana, Maine, Maryland, Mississippi, New Mexico, Rhode Island, Virginia, Washington, West Virginia, and Wyoming. Wolfson, *supra* note 61. In addition, a similar measure in Colorado was vetoed by Governor Ray Romer. See Valerie Richardson, *Governor of Colorado Rejects Ban on Same-Sex Marriages: Romer Against Such Unions But Wants Panel to Study Bill*, WASH. TIMES, Mar. 26, 1996, at A3. Governor Romer expressed special concern for discrimination against same-sex couples under current law. *Id.* Romer referred to the anti-marriage law as "mean-spirited and unnecessary." *Id.* Support for same-sex marriage was also evidenced in Hawaii where, in December 1995, a commission appointed by the governor recommended that the legislature recognize same-sex marriages. See David W. Dunlap, *Panel Endorses Same-Sex Marriages*, FRESNO BEE, Dec. 11, 1995, at A6.

174. The percentage of Americans who find homosexuality to be an acceptable lifestyle has risen consistently over the past 14 years, from 34% in 1982, to 38% in 1992, to 44% in 1996. ADVOCATE, Apr. 30, 1996, at 14 (citing USA Today/CNN poll); see also *Job Rights for Homosexuals*, N.Y. TIMES, Sept. 7, 1992, at 10. Seventy-eight percent of Americans favor equal employment opportunities for homosexuals and 66% support inheritance rights and health insurance for gay partners. *Id.* In a public opinion poll of 800 voters conducted in May of 1995, 42% stated that civil rights for gays and lesbians are more akin to equal rights, while only 38% declared that they are more akin to special rights. In addition, 74% of the voters polled stated that they favored preventing job discrimination against gay people. *Marriage—The Toughest Battle Lies Ahead*, *supra* note 35, at 16.

175. LEAST DANGEROUS BRANCH, *supra* note 134, at 239. In addition, the states in which legislation to bar recognition of same-sex marriages is currently pending cannot yet be viewed as hostile sites for gay and lesbian unions. The states with laws still pending consist of Alabama, Alaska, Arizona, California, Delaware, Florida, Hawaii, Illinois, Kansas, Michigan, Missouri, Oklahoma, South Carolina, and Tennessee. The majority of the anti-marriage laws were proposed by conservative factions which do not necessarily represent a majoritarian consensus. Dunlap, *supra* note 61, at A13; see also Wolfson, *supra* note 61. Proponents of same-sex marriages should watch these states closely to see whether the legislation passes, and if it does pass, by what margin. The simple proposition of legislation by persons opposed to same-sex marriage does not undo the support for the right found in other provisions of state law, including the state constitution, and among the public. See, e.g., *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) and text accompanying note 36-38.

176. See, e.g., *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

177. See *supra* notes 106-116 and accompanying text.

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drawn by the state. In the context of same-sex marriage, the supreme courts in states with a constitutional ban on sex-based discrimination should consider the changes in public opinion manifested in polls and judicial decisions in determining whether state interests in prohibiting same-sex marriage are compelling. In so doing, the judiciary would anticipate developing societal opinion on the issue of same-sex marriage rather than substitute its own opinions or delay until a national consensus of opinion existed.

Because the original intent of the Equal Rights Amendment remains unclear, it is not determinative of the provision's applicability to the context of same-sex marriage. However, the general purpose behind the provision makes developing social acceptance relevant to the court's interpretation of the constitutionality of the prohibition of same-sex marriages.

### E. *Analyzing State Interests*

Because litigation founded on a state equal rights amendment claim would result in a strict scrutiny analysis, it is helpful to review and analyze the state interests that would be offered to justify bans on same-sex marriage. State interests presented in litigation since the 1970s have been based upon three fundamental arguments: (1) same-sex marriage is inconsistent with nature, history, and/or the essence of marriage; (2) same-sex marriage is contrary to community values and traditional moral teachings; and (3) same-sex marriage would disrupt settled expectations about the purposes of marriage, such as family-centered procreation.<sup>178</sup> Such arguments are far less likely to succeed under strict scrutiny than intermediate scrutiny.

One of the most common arguments against same-sex marriage is that marriage is understood to provide an appropriate family unit for procreation and the rearing of children.<sup>179</sup> It may be rational in light of such a purpose to disallow same-sex unions because procreation itself cannot occur in same-sex marriages, and children are less likely to be found in such unions. However, numerous homosexuals have children by previous heterosexual relationships.<sup>180</sup> In fact, a significant number of children in America are being raised by a homosexual parent.<sup>181</sup> Furthermore, there is no requirement that

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178. See William N. Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1493 (1993).

179. See *A More Perfect Union*, *supra* note 32, at 1181.

180. In one study of homosexual couples, 52% of homosexual men and 56% of homosexual women had at one time had a child. ALAN BELL & MARTIN WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 391, tbl 17.13 (1978).

181. Increasing numbers of jurisdictions allow second-parent adoptions by the same-sex partner of a child's biological or adoptive parent. States allowing such adoptions include Alaska, California, District of Columbia, Massachusetts, New York, Oregon, and Vermont. THE RIGHTS OF LESBIANS AND GAY MEN 117 n.128 (Nan Hunter et al. eds., 1992).

heterosexual couples be capable or desirous of reproduction.<sup>182</sup> Heterosexual couples may enter into marriage and choose to remain childless. Thus, the state's interest in marriage as a procreative family unit has a weak connection to the denial of same-sex marriage. It is fraught with moral judgments unlikely to withstand a strict scrutiny challenge.

Additionally, a state cannot assert that the denial of homosexual unions will foster heterosexual ones because no proof exists that homosexuals can be "cured" of their sexual orientation. It has been noted that generally, "[h]omosexuals will not reorient their affectional preference and marry a person of the other gender."<sup>183</sup> Thus the denial of same-sex marriages by law in no way serves a state interest in fostering heterosexual unions.

Supporting public morality has also been advanced as an objective. Courts have often been receptive to this claim.<sup>184</sup> However, public morality is constantly evolving. It has been observed that "premarital and extramarital sex were once considered immoral, [yet today] a majority of Americans no longer considers sex outside of marriage inherently immoral."<sup>185</sup> Similarly, there has been an increasing acceptance of homosexuality.<sup>186</sup> Americans may begin wondering whether it is more moral to deny same-sex unions marital status or to make the commitment between same-sex partners binding and recognized by law. Indeed the encouragement of marriage of same-sex couples may in fact serve public morality. Under strict scrutiny analysis, the state's concern for public morality is not achieved through denying same-sex marriages.

A number of the purposes asserted for state regulation of marriage actually favor the recognition of same-sex unions under a compelling interest test. The promotion of stability, the protection of the reasonable expectations of the parties, and the promotion of physical and emotional health,<sup>187</sup> are equally applicable to homosexual and heterosexual partners. These factors are important to an individual's quality of life regardless of their sexual orientation. Under a strict scrutiny analysis, marriage should be granted to all who seek it because it arguably contributes to an individual's well-being as well as societal

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182. See, e.g., *Marks v. Marks*, 77 N.Y.S.2d 269, 270-71 (1948) (holding that inability to procreate cannot be grounds for preventing heterosexual marriage).

183. Cathy Jones, *The Rights to Marry and Divorce: A New Look at Some Unanswered Questions*, 63 WASH. U. L.Q. 577, 622 (1985).

184. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) ("The law . . . is constantly based on notions of morality.").

185. *A More Perfect Union*, *supra* note 32, at 1183 n.94 (citing study that percentage of Americans disapproving premarital sex has declined from 68% in 1973 to 39% in 1985).

186. See, e.g., *Congress Lets Sodomy Pass*, BUFFALO NEWS, Sept. 19, 1993, at A7. Congress declined an opportunity to override a District of Columbia municipal ordinance ending the criminalization of sodomy. Sodomy had been illegal in the capital since 1790. See also LESBIANS, GAY MEN AND THE LAW 87 (William B. Rubenstein ed., 1993). In 1961, sodomy was illegal in all 50 states and the District of Columbia. Today 24 states have sodomy statutes on the books, two of which have been declared unconstitutional by the states' judiciaries.

187. See Jones, *supra* note 183, at 622; *A More Perfect Union*, *supra* note 32, at 1182-83.

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stability.

The only remaining arguments for limiting marriage to heterosexual partners are based upon traditional definitions. The way a term has historically been interpreted or understood is less relevant under an equal protection analysis in light of the forward-looking nature of the right.<sup>188</sup> Equal protection analysis incorporates evolving standards in society; this is especially true under the strict scrutiny test. Current societal conditions, including the AIDS crisis and an evolution in public morality, have changed the definitions of marriage and relationships in general for many Americans. A test under an equal rights amendment would not uphold a denial of marriage under circular arguments such as the definition of the institution or the traditional understanding of the relationship. Under strict scrutiny analysis, moralistic and historical arguments would fail because they do not achieve the threshold of a compelling interest served by the least restrictive means.

### F. *Additional Factors of Import*

A few additional state elements add strength to claims for recognition of same-sex marriage. As previously discussed, a respect for personal autonomy in a state may be evidenced by the existence of a privacy provision in that state's constitution.<sup>189</sup> Such respect also may be indicated by the absence of a law criminalizing sodomy in a state, or by a state supreme court which has declared such a law unconstitutional.<sup>190</sup> In addition to tangible elements in a given jurisdiction, certain intangible judicial and political trends should be added to an analysis of the likelihood of a given state supreme court recognizing a right of same-sex marriage. While the holdings of a state supreme court are dependent upon the law of the state, the manner in which the court interprets the laws is affected by these intangible characteristics. Such trends shall be referred to as judicial and political culture. The judicial and political culture of a given state are highly relevant to the likelihood that the courts of a jurisdiction will recognize a right of same-sex marriage based on state legal materials.

Because the judiciary exists in the context of the larger state political system, its views on policy are affected by surrounding political actors. The political culture of a state has been defined as the "particular pattern of orientation to political action in which each political system is embedded."<sup>191</sup>

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188. *See supra* text accompanying notes 136-142.

189. *See supra* note 126 and accompanying text.

190. *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Campbell v. Sundquist*, No. 93C-1547 slip. op. (5th Cir. Ct. Tenn. Davidson County 1995) (order granting summary judgment).

191. DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 109 (3d ed. 1984) (quoted in G. ALAN TARR & MARY C. PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 55 (1988)).

Political culture is an important source in explaining the different habits, perspectives, and attitudes that influence political life in the states.<sup>192</sup> Political scientist Daniel Elazar has identified and defined three major strains of political culture in the states: individualistic, moralistic, and traditionalistic.<sup>193</sup>

The individualistic political culture operates under the model of democracy as a marketplace. This cultural strain is found most commonly in the middle sections of the country.<sup>194</sup> Individual freedom is, in general, the cornerstone of the individualistic political culture. Societies subscribing to it are likely to value minority interests in areas such as personal autonomy. In fact, Elazar asserts that the individualistic political culture has "provided the framework for the integration of diverse groups into the mainstream of American life."<sup>195</sup> This political culture holds the most promise for a validation of same-sex marriages.

The moralistic political culture differs from the individualistic in that its operative model for democratic government is a commonwealth. The moralistic strain is found primarily in the far North, Northwest, and Pacific Coast.<sup>196</sup> In this culture, politics is considered "one of the greatest activities of humanity in its search for the good society- a struggle for power, it is true, but also an effort to exercise power for the betterment of the commonwealth."<sup>197</sup> The moralistic political culture fosters a greater commitment to active government intervention in the economic and social life of the community.<sup>198</sup> The role of the supreme court in a state with a prevalent moralistic culture could be an activist one, but the direction of its policy would vary depending upon the local population's changing definition of the "good society." Thus, in cities like Berkeley and San Francisco, gay political activists and the prevalence of AIDS helped convince fellow citizens that recognition and stabilization of same-sex relationships promoted the good society. Therefore, campaigns for recognition of gay rights were successful at the grass-roots level. In addition, it should be noted that Colorado, the state of the liberal *Evans v. Romer*<sup>199</sup> opinion, has

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192. *Id.* at 110.

193. *Id.* at 115. Each culture is strongly tied to a particular section of the country, although precise measurements for a particular area are difficult. Many states exhibit characteristics of more than one political culture, and invisible regional boundaries, as opposed to state boundaries, often dictate where one cultural strain ends and another begins.

194. *Id.* at 134. Government in individualistic societies serves strictly utilitarian purposes, generally granting its constituents what they demand. Politics is viewed as a means by which individuals may improve themselves socially and economically, but is also seen as a dirty business, best left to professionals willing to soil themselves by engaging in it. The effect of this type of political culture on a court is somewhat dependent upon the agenda of the public and the type of justices on the court. *Id.*

195. *Id.* at 142.

196. *Id.* at 134.

197. *Id.* at 117.

198. *Id.* at 118.

199. 882 P.2d 1335 (Colo. 1994).

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been noted to exhibit a moralistic political culture.<sup>200</sup>

The traditionalistic political culture stems from “an ambivalent attitude toward the marketplace coupled with a paternalistic and elitist conception of the commonwealth.”<sup>201</sup> This culture is dominant in the states of the South. Under the traditional strain, a society tends to accept hierarchy as part of the ordered nature of things, and the purpose of government is generally considered to be maintenance of the existing social order. It is the least likely to validate same-sex marriages because new liberties are seldom created in regions subscribing to traditionalistic culture.

While the legal resources of a state are indispensable in planning litigation for same-sex marriage, targeting a state court which favors judicial innovation is also important. It has been hypothesized that innovation is likely in states with social and political diversity and political competition because they rank high in conflict. Conflict creates a heightened awareness and responsiveness to new social issues.<sup>202</sup> Therefore, a general tendency for judicial innovation is more likely in states with urbanism, a high total state population, a solid educational system, and a stratified system of wealth. In addition, certain political characteristics including high government capability, a previous tendency to innovate, financial support, professionalism, and an active two-party system, increase the likelihood of state supreme court innovation.<sup>203</sup> Thus, a state exhibiting these characteristics is more likely to house a state supreme court willing to experiment in validating same-sex marriage.

Legal culture is also an element of the larger state political context, but is related to a court’s views about its proper policymaking role. The legal culture is defined as “the norms and expectations that govern the legal process in the state and guide the behavior of participants in the process.”<sup>204</sup> The political culture of a state significantly influences its legal culture. As a political institution, the state judiciary tends to reflect “subcultural differences within the

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200. ELAZAR, *supra* note 191, at 118.

201. *Id.*

202. See HENRY R. GLICK, *SUPREME COURTS IN STATE POLITICS: AN INVESTIGATION OF THE JUDICIAL ROLE* 174 (1971).

203. See Mary C. Porter & G. Alan Tarr, *Introduction to STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* viii (Mary C. Porter & G. Alan Tarr eds., 1982).

204. TARR & PORTER, *supra* note 191, at 58.

state's overall political culture."<sup>205</sup> As explained by Henry Glick,

For state supreme courts . . . judges have expectations concerning what constitutes proper behavior on their part toward individuals who occupy other positions and . . . the incumbents of these positions also have expectations regarding what judges should and should not do. The interactions taking place between judges and those in counter-positions linked to the court define the judge's role.<sup>206</sup>

The legal culture determines the degree to which the state judges believe legal differences of opinion must be resolved by the courts and whether the justices on the state's high bench conceive of their roles as ones in which policy is made or in which "hands on" policymaking should be avoided.<sup>207</sup> The judiciaries of states with innovative, active legal cultures are the state benches most likely to recognize a right of same-sex marriage.<sup>208</sup>

#### VI. THE NATIONAL SIGNIFICANCE OF STATE COURT APPROVAL OF SAME-SEX MARRIAGE

Before targeting future sites for same-sex marriage litigation, a brief assessment must be made regarding the significance of success in a single state.<sup>209</sup> Two factors that must be considered in the course of such analysis are choice of laws and sister court influence. Each is a factor in a state's treatment of same-sex marriage in light of its own policy and its respect for the policy of other states. The role of the judiciary as a leader of opinion must also be assessed.

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205. Porter & Tarr, *supra* note 203, at viii.

206. GLICK, *supra* note 202, at 7.

207. Political scientist G. Alan Tarr has identified three separate role orientations for state supreme court justices: law interpreters, law makers, and pragmatists. Law interpreters view the judicial role to be somewhat passive in that it is completely limited by the constraints of the written text. Law makers are activist judges, construing a textual provision to conform to their policy agenda or the overall spirit which they wish to advance. Pragmatists blend passivity and activism depending upon the particular case before the court. On some issues, pragmatists hand down activist decisions, while on others they subscribe to a more passive reading of the law. Many state supreme courts have justices representing all three different role orientations. However, the legal culture of some areas creates a prevalence of one type of justice on the court. In comparing courts, Tarr found a prevalence of law interpreters in the South with its traditionalistic political culture. The Mid-Atlantic region has the largest percentage of lawmakers on state benches. Lawmakers in this region were also accompanied by a large number of pragmatists, the single largest group of judges found across the nation. Therefore, with respect to legal culture, the Mid-Atlantic region is home to the largest number of judges who might be willing to innovate and create a right for same-sex marriage in their state. G. ALAN TARR, *JUDICIAL IMPACT AND STATE SUPREME COURTS* 5 (1977).

208. This observation holds true for states that currently have pending anti-gay legislation.

209. For a more thorough analysis of these issues, see Jennifer G. Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 786 (1995); Joseph 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 (1994); Candace L. Sage, Note, *Sister-State Recognition of Valid Same-Sex Marriages: Baehr v. Lewin—How Will It Play in Peoria?*, 28 IND. L. REV. 115 (1994).

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### A. *Interstate Recognition*

Marriage is an area of human life specifically within the scope of state regulatory powers. Each state has the right to determine who shall be eligible to enter into marriage within its borders as long as such regulation follows constitutional mandates. If one state were to hold that its constitution guaranteed same-sex couples a right to marry, other states would have to determine whether the union would be recognized within their own borders.

The traditional state rule for determining the validity of a marriage performed elsewhere is to rely upon the laws of the state in which it was performed.<sup>210</sup> Two exceptions exist to this general rule. The first exception occurs when the state statute explicitly expresses that the general validation rule is not to apply in other states if the marriage violates their laws. A marriage can also be held invalid in another state if it violates that state's strongly held public policy as declared in the legal materials of the state.<sup>211</sup> Thus, if same-sex partners are married in a state that finds same-sex marriages constitutional, they may be unable to retain their married status if they move to another jurisdiction. If the new state either bans same-sex marriages within its jurisdiction or declares that same-sex marriages performed in the home state violate the new state's laws, the couple will be unable to retain its married status in the new state. The potential obstacles to same-sex marriage are demonstrated by the anti-same-sex marriage legislation currently pending in many jurisdictions.<sup>212</sup>

A small number of states have enacted provisions which specify that marriages performed in other states that violate their laws will not be recognized. Although rarely codified, thirteen states currently have such Marriage Evasion Acts.<sup>213</sup> They were originally designed to prevent the inhabitants of these states from circumventing the marriage laws of their home jurisdiction by going to another for the sole purpose of getting married. Thus, if same-sex marriages continue to be denied in these states and are not held to be required by the federal Constitution, homosexual partners residing in one of these thirteen states will not be able to obtain a valid marriage in another jurisdiction and retain their marital status upon returning to their home state. However, such Marriage Evasion Statutes would be held unconstitutional by

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210. Hovermill, *supra* note 209, at 454; *see also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 283 (1971) ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized [subject to exception] as valid.").

211. Hovermill, *supra* note 209, at 455.

212. *See* Dunlap, *supra* note 61, at A13.

213. These states are Arizona, Connecticut, District of Columbia, Georgia, Illinois, Maine, Massachusetts, Mississippi, North Dakota, Virginia, West Virginia, Wisconsin, and Wyoming. *See* Closen & Heise, *supra* note 20, at 813-14 n.9. Further provisions are pending. *See* Dunlap, *supra* note 61, at A13; Wolfson, *supra* note 61.

a state judiciary which held the state constitution to guarantee a right to same-sex marriage. This is particularly true if the right is anchored in an equal rights amendment subjecting sex-based distinctions to strict scrutiny. As explained by David Dunlap, the pending legislation was proposed by conservatives who "see themselves in a fundamental crusade to preserve the traditional family structure as it has been understood through history."<sup>214</sup> Such arguments based upon history and tradition cannot withstand constitutional analysis under strict scrutiny.

The public policy exemption could be applied to other states if it were established that same-sex marriages violated the state's social and moral standards. A state's public policy is expressed in its court decisions, constitution and legislation. A state could not simply refuse to recognize such marriages; the state's legal materials would have to establish that same-sex marriages explicitly violate its public policy. Joseph Hovermill has explained, "[a] foreign law is not contrary to a state's public policy merely because the state has not legislated on the matter."<sup>215</sup> These sources must prove that validation of same-sex marriages would violate state policy. Thus, states that criminalize sodomy, explicitly prohibit same-sex marriage, or house state courts that have specifically declared there to be no right to same-sex marriage, could refuse to validate same-sex marriages on grounds of public policy.<sup>216</sup>

At this time, a majority of states have not enacted evasion statutes, specifically legislated or ruled against the existence of same-sex marriage, or criminalized sodomy.<sup>217</sup> The question of whether these states would recognize same-sex marriages performed in another jurisdiction would hinge on whether autonomy or sister state comity is a more valued policy in the state. If neither an evasion statute nor any clear public policy demonstrates that same-sex marriages should not be approved, a state may be forced to recognize such unions under the Full Faith and Credit or Equal Protection Clauses.<sup>218</sup>

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214. Dunlap, *supra* note 61, at A13.

215. Hovermill, *supra* note 209, at 456.

216. In any state that passes a currently pending law banning recognition of same-sex marriages within the jurisdiction, recognition would be refused on the grounds of public policy.

217. Despite the legislation pending in many states that would prohibit recognition of same-sex marriages, such measures have only passed in Utah and South Dakota. Dunlap, *supra* note 61, at A13. The end result in the other states remains unclear, "[i]t is too early to predict how many of the measures precluding same-sex marriages will be passed . . . . The conflict in many statehouses will be fierce." *Id.*

218. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other state."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see also* Hovermill, *supra* note 209. For an in-depth discussion of the effect that the Full Faith and Credit clause would have on interstate recognition of same-sex marriages, see Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499 (1995) (arguing that constitutional underpinnings of a national right to same-sex marriage are Full Faith and Credit Clause, right of interstate travel, and fundamental right of marriage).

## Same-Sex Marriages

It can be inferred that once one state recognizes and performs same-sex marriages, others will follow. Horizontal judicial federalism, or sister state court influence, can lead courts to similar results as their neighboring states. This influence is fairly common due to the orientation toward precedent inherent in the American legal system. Reliance upon other state supreme court rulings lends support to legal principles. Regional influence has long been exhibited in the borrowing of precedent, with state courts most often citing opinions contained in the same West regional reporter as those of their own state.<sup>219</sup> Sister court reliance has become more common with the increased activity of the state courts. An example of such regional sister court influence was the Tennessee opinion in *Campbell v. Sundquist*,<sup>220</sup> invalidating that state's laws against sodomy and quoting the Kentucky opinion in *Commonwealth v. Wasson*.<sup>221</sup>

If one state validated same-sex marriages, some neighboring states may recognize the marriages performed in that state within their own jurisdictions; others may sanction marriages between same-sex partners within their own borders. Such has been the recent trend of independent state court legal action coupled with sister state court influence. However, the evasion statutes and public policy of some jurisdictions indicate that same-sex marriages would not necessarily become valid nationally. This likelihood is further lessened by the large number of states in which anti-gay marriage statutes are currently pending. To achieve widespread approval, a federal right to marry someone of the same sex would have to be established. At present, the achievement of a federal right is unlikely. The greatest hope for litigants seeking a right of same-sex marriage is for a decision in their favor in a state supreme court. After recognition in one state, a national trend may become more viable and contribute to federal recognition.

### B. *Power and the Judiciary*

Although this Note focuses on the role and significance of the judiciary in the legal battle for same-sex marriages, the importance of the other branches in the ultimate achievement of the right should be briefly discussed. In order for same-sex couples effectively to gain recognition of a right to engage in marriage, the right must not only be proclaimed by the judiciary but must also be enforced by the other branches of government in the state.<sup>222</sup> A court

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219. TARR & PORTER, *supra* note 191, at 32.

220. No. 93C-1547 (5th Cir. Ct. Tenn. Davidson County 1995) (order granting summary judgment).

221. 842 S.W.2d 487 (Ky. 1992).

222. Examples of promise for legislative and executive enforcement of a right to same-sex marriage are state legislatures that have defeated or tabled the proposed antimarriage laws and Colorado Governor Roy Romer's veto of that state's proposed anti-marriage bill. *See supra* note 173.

decision declaring that the prohibition of same-sex marriage violates an equal rights amendment is only the first step in establishing a right to marriage not divided along lines of gender. A decision establishing a right of same-sex marriage would be significant only if the opinion is put into practice by the state. Interaction between the branches of government is thus necessary to effectuate a constitutional claim for same-sex unions.

In equal protection litigation under a strict scrutiny analysis, such as that which would be used to invalidate a ban on same-sex marriage in a state with an equal rights amendment, a vital interaction occurs between the judiciary and the legislature. The strict scrutiny requirement of a compelling state interest achieved through the least restrictive means affords the government, particularly the legislature, an opportunity to present a court with the purpose and intent behind legislation. The judiciary then must assess the competing interests and the links between interests and policy. State supreme courts have the discretion to remand a case to a lower court to reinitiate the process. The possible interaction between the branches of state government under a strict scrutiny analysis would allow a period of consensus-building vital to the achievement of a right as controversial as that of same-sex marriage. Interaction also gains exposure for the issue and affords an opportunity for the public at large to join in the debate. Support must be created in both branches of government and the public at large for a judicial pronouncement of a right of same-sex marriage to be effectuated in the states.<sup>223</sup> In the words of Alexander Bickel, "The [c]ourt is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own . . . ."<sup>224</sup>

The importance of the judiciary entering into a colloquy with the legislature is presently of heightened importance given the large number of states with pending legislation that would hinder recognition of same-sex marriages. Bickel indicated that the desirable colloquy can result from narrow statutory construction by the courts in which the judiciary asks the legislature explicitly to address the intentions and consequences of a statute or policy.<sup>225</sup> Burt discussed the colloquy in the context of equal protection analysis, noting the value of middle-level scrutiny because of the dialogue it facilitates between the courts and the other branches of government. Whereas the rational basis test nearly always validates legislation and strict scrutiny virtually always invalidates it, middle-level scrutiny affords an opportunity for real input from all of the parties involved and allows a more comprehensive, careful

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223. For a full discussion of the failure to resolve an issue when adequate support is not achieved among the branches of government or the public, see *POLITICS AND THE WARREN COURT*, *supra* note 171, at 3-45 (in school desegregation context); *BURT*, *supra* note 39, at 357-68 (in abortion litigation context).

224. *LEAST DANGEROUS BRANCH*, *supra* note 134, at 239.

225. *BURT*, *supra* note 39, at 361-62.

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assessment by the court.<sup>226</sup> This level of scrutiny could be used either by state courts that disagreed with the Hawaii Supreme Court's conclusion about the level of scrutiny demanded by a state equal rights amendment, or in states that lack a constitutional provision banning sex-based discrimination. Burt explained:

[T]he two-tiered judicial review was never an opening conversational gambit from Court to legislature; it was always the final word from the Court. [M]iddle level scrutiny is admirably suited in many different contexts as a technique . . . for promoting interchange between court and legislature. The question is, then, how a court should recognize the appropriate contexts for applying these techniques. There is a short answer to this question: all disputes which are so polarized that one party regards the other's victory as destructive of equal status and therefore intolerably oppressive.<sup>227</sup>

The circumstances Burt identified would perfectly describe litigation over the prohibition of same-sex marriage in states lacking an equal rights amendment.

However, middle-level scrutiny may not be effective in achieving initial recognition of same-sex marriages. State interests based largely on tradition or morality would most likely be deemed "important" under middle-level scrutiny given the universal acceptance that gender is functionally and visibly distinctive. Only under strict scrutiny can circular arguments based upon history and morality be exposed as unresponsive of the ban. The essence of what Burt describes, however, is exactly the process in which the courts should engage to resolve the issue in the least divisive manner. The polarization of the opposing parties in same-sex marriage litigation requires consensus-building and limited judicial intervention.

Burt's general comments on judicial vindication of the equality principle demonstrate that limited judicial intervention is, in fact, possible even under the strict scrutiny analysis of a state equal rights amendment. Burt described the model for resolving questions of equality as

a particularistic, carefully limited intervention encircled by a boldly stated moral condemnation of majority disrespect toward a vulnerable minority . . . . The equality principle itself demands particularistic, contextually circumscribed, tentatively offered judicial interventions, as opposed to grandstyle moral philosophizing in the interpretationist mode, or agnostic surrender to majority will.<sup>228</sup>

Even under the strict scrutiny requirement of a tight link between alleged state interests and a ban on same-sex marriage, interplay can occur between different branches of government. The state supreme court must simply be

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226. *Id.* at 362.

227. *Id.* at 362, 365.

228. *Id.* at 367-68. Burt goes on to suggest that the Supreme Court should have followed this model when deciding *Bowers v. Hardwick*.

willing to establish the proper level of scrutiny for the challenge and remand the case to the lower courts for a determination of compelling interests.

The decision by the Hawaii Supreme Court in *Baehr v. Lewin*<sup>229</sup> is an example for other state courts that may encounter the same-sex marriage issue in coming years. The court reached a circumscribed, tentative conclusion in declaring that the state constitutional amendment barring discrimination based upon sex brought the ban on same-sex marriage under the rubric of strict scrutiny. Rather than reaching a final resolution of the issue, it remanded the case to the lower court to afford the state an opportunity to reassess and reassert the interests forwarded as compelling to justify the ban.<sup>230</sup> The remand created an opportunity for an appropriate colloquy between the parties to develop. The dialogue can be continued until the case is again appealed to the state supreme court where a final decision will be handed down after an adequate period of discussion. Although this process may not allow speedy resolution and affirmation of constitutional rights, more importantly it creates a binding, enforceable, and carefully reached judgment.

### C. *A Combined Analysis: Targeting Future Litigation*

Proponents of same-sex marriage can examine state legal sources and characteristics to determine the likelihood of successful future litigation. As explained previously, claims based on state law stand a greater chance of success than those based on federal law. The factors identified in this Note as relevant to a successful challenge to a state proscription of marriage are: absence of a sodomy law; a privacy amendment in the state constitution; an equal rights amendment in the state constitution; an individualistic or moralistic political culture; an activist legal culture; a diverse population; and absence of a process for creating state constitutional amendments by direct citizen initiative. An ideal target for same-sex marriage litigation would exhibit some combination of these elements. The state factors pinpoint relevant characteristics because Hawaii, site of *Baehr v. Lewin*, exhibits great promise under this analysis.

The first category, states that do not criminalize sodomy, is the largest group displaying any of the desirable characteristics. Twenty-eight states and the District of Columbia either do not have a statute criminalizing sodomy, or have a state court that has declared the statute to be unconstitutional.<sup>231</sup>

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229. 852 P.2d 44 (Haw. 1993).

230. *Id.*

231. States that do not criminalize sodomy or in which such criminalization has been found unconstitutional are: Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See supra* note 128.

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States that have a privacy provision in their state constitution are smaller in number. The five states with explicit privacy guarantees are Alaska, California, Florida, Hawaii, and Montana. Both Florida and Montana criminalize sodomy, however, illustrating that certain privacy rights may not apply to homosexuals. Other states, however, such as Tennessee and Kentucky, have interpreted their state constitutions to contain an implicit right to privacy, more extensive than the federal right, in striking down a state sodomy law. Therefore, the lack of an explicit respect for individual privacy may not be fatal under the right political and judicial conditions.

The most important of the state characteristics, the existence of an equal rights amendment in the state constitution barring discrimination on the basis of sex, is found in sixteen states.<sup>232</sup> However, the Louisiana equal rights amendment bars only “unreasonable” discrimination based upon sex. Restricting marriage to heterosexual couples may be argued to be reasonable under current law. In addition, sodomy is criminalized in Louisiana. Ten of the states that bar discrimination based on sex do not criminalize sodomy. These are: Alaska, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, New Hampshire, New Mexico, Pennsylvania, Washington, and Wyoming. Alaska and Hawaii also offer explicit privacy guarantees, and Illinois and Washington guarantee some privacy protection in the context of illegal searches.<sup>233</sup>

Finally, an analysis of the states in light of intangible characteristics must be undertaken. I use Alaska, Hawaii, Illinois, and Washington as model states because of their constitutional protections of privacy and prohibitions against sex-based discrimination, as well as their demonstrated respect for individual sexual autonomy in not criminalizing sodomy.<sup>234</sup>

The previous discussion of political culture established that areas exhibiting an individualistic or moralistic culture are most likely to declare a right to same-sex marriage. Individualistic political culture exists primarily in the middle sections of the country, while moralistic culture predominates in the North, Northwest, and Pacific. According to Daniel Elazar, Illinois and Washington exhibit strains of both individualism and moralism;<sup>235</sup> Hawaii exhibits strains of individualism tinged with traditionalism;<sup>236</sup> and Alaska generally adheres to individualistic politics.<sup>237</sup> All of these states except

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232. See *supra* note 125.

233. See *supra* note 126.

234. I use these states as sites for analysis of possible recognition of same-sex marriages despite the fact that Alaska, Hawaii, and Illinois currently have legislation pending which would deny recognition to same-sex unions. Dunlap, *supra* note 61, at A13. Such measures have not yet been passed in any of these states, and even if they were to pass, they could not withstand a constitutional challenge under strict scrutiny. The state constitutional provisions of the five potential sites hold great promise for judicial recognition of same-sex unions anchored in state constitutional provisions.

235. ELAZAR, *supra* note 191, at 118.

236. *Id.*

237. *Id.*

Illinois have exhibited respect for individual autonomy, making a recognition of gay rights in these areas a distinct possibility. Interestingly, no state exhibiting a traditionalistic culture, regarded as the least likely to approve of same-sex marriages, has passed the analysis to this level.

The legal culture of the states is more ambiguous. In a ranking of legal professionalism conducted by Henry Robert Glick and Kenneth Vines in the mid-1970s,<sup>238</sup> Illinois, Hawaii, Alaska, and Washington all ranked very high in legal professionalism. This indicates that the judicial role and function is taken seriously in these states and is viewed as an appropriate arena for conflict resolution. Interestingly, Colorado, the home of the liberal *Evans* opinion that overturned the popularly passed constitutional amendment prohibiting protected status based upon sexual orientation, also ranked high.<sup>239</sup> Only Hawaii has evidenced a strong trend toward innovation in its opinion in *Baehr*. None of these states exists in a part of the country recognized as having a large number of activist judges. However, the Pacific Coast is an area which has diverged from federal interpretations in the years of new judicial federalism, tending to illustrate the existence of pragmatists on the state courts of that region.<sup>240</sup>

Finally, because diversity tends to produce respect for alternative lifestyles, and urban areas have been found to contain the largest population of homosexual individuals, the courts in states with large cities and diverse populations are more likely to be responsive to challenges to discrimination against gay citizens. Of the aforementioned states, Illinois and Washington have the largest urban centers. In addition, Seattle, Washington has enacted a domestic partnership ordinance, indicating a recognition in at least one part of the state of the need to grant rights to homosexual partners. Cities in the other states under analysis have enacted no such measures.

Washington also appears to be a better target for same-sex marriage litigation than Illinois because its state constitution cannot be amended by citizen initiative. In Illinois, proposed constitutional amendments can be ratified through a public vote without ever being deliberated or approved by the

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238. Although this study was conducted approximately twenty years ago, it still carries import for the purposes of this analysis because it traces certain fundamental characteristics that have been existed in various regions since the founding of the nation.

239. HENRY R. GLICK & KENNETH VINES, *STATE COURT SYSTEMS* 12 (1973). Illinois ranked third nationally. Alaska tied with Michigan at sixth. Hawaii tied with Maryland at eight. Colorado and Washington shared position eleven with Wisconsin. The index of legal professionalism was based on five factors in the state court systems: (1) method of selection of judges in all state courts, with states complying to ABA model plans of selection receiving the highest scores; (2) state court organization and approximation to ABA model court structure; (3) judicial administration in the state, with states whose courts had a professional administrator receiving a higher score; (4) tenure of office for judges and approximation to ABA standards; and (5) level of basic salary for judges and approximation to ABA standards. *Id.* at 11.

240. See, e.g., Hans Linde, *First Things First: Rediscovering the States' Bills of Rights*, in *VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS* 237 (Mark W. Cannon & David M. O'Brien eds., 1985).

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legislature. In Washington, ratification of a constitutional amendment requires approval of a supermajority of both houses of the state legislature and approval of a majority of voters. A previous analysis of state constitutional amendment methods demonstrated that direct citizen initiative amendments pose a greater danger of the public "overruling" a judicial decision recognizing same-sex marriage than amendments that must be approved by the legislature.<sup>241</sup> Therefore, judicial recognition of a right of same-sex marriage is more secure in a state such as Washington which does not afford the public the opportunity of constitutional amendment by initiative. In addition, the Washington legislature rejected the anti-marriage bill proposed in that state, while a similar provision is still pending in Illinois. The tabling of the anti-marriage bill offers evidence of a willingness to support potential judicial recognition of same-sex marriages by the other branches of government in Washington.

Through our analysis, Washington appears to be an ideal site for future challenges to proscription of same-sex marriage. Although similar litigation failed in the 1970s, changes in social attitudes about homosexuals and an increased reliance on and independent interpretation of state legal materials make a more liberal decision likely in the 1990s. Tracking characteristics and planning future litigation may be more madness than method, however, because each state in our federal system is a combination of numerous different, and often conflicting, political and legal elements. A similar analysis to target sites for challenging statutes criminalizing sodomy would not have pinpointed Kentucky or Tennessee as potential states for such challenges. An in-depth study of public opinion, legal views of the judiciary, and legal resources within a state must be undertaken before future litigation can be planned which would promise real success for achieving a right to marry for same-sex couples.

## VII. CONCLUSIONS

The proscription of same-sex marriage is an issue which is particularly difficult to resolve in a binding manner through constitutional litigation. Public opinion is strongly divided, with parties on both sides viewing victory as essential in maintaining their respective lifestyles. This Note has presented a view of the best legal claims to be made by parties seeking to validate same-sex marriages, including equal protection claims brought in the state courts based upon state constitutional amendments barring sex discrimination. It has put forth and analyzed a number of state characteristics which increase the likelihood that a state court will resolve the same-sex marriage issue in a manner favorable to homosexual partners. Also presented, and requiring further emphasis, is the fact that a mere judicial pronouncement based upon

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241. *See supra* notes 60-70 and accompanying text.

constitutional principles will not bring about tolerance of alternative lifestyles or protection of minority interests. The state courts must effectively fulfill the role of consensus-builder and leader of opinion, a role traditionally viewed as appropriate for the United States Supreme Court in resolving issues of equality. Only through cooperation with the other branches of government can a state judiciary resolve the same-sex marriage issue in a manner protective of the interests of both the minority and the majority.