

## THE DEFENSE OF MARRIAGE ACT: WILL IT BE THE FINAL WORD IN THE DEBATE OVER LEGAL RECOGNITION OF SAME-SEX UNIONS?

Gay marriage is not a radical step; it is a profoundly humanizing, traditionalizing step. It is the first step in any resolution of the homosexual question -- more important than any other institution, since it is the most central institution to the nature of the problem, which is to say, the emotional and sexual bond between one human being and another. If nothing else were done at all, and gay marriage were legalized, ninety percent of the political work necessary to achieve gay and lesbian equality would have been achieved. It is ultimately the only reform that matters.<sup>1</sup>

Gay marriage might just reinfuse the beleaguered institutions of marriage and family with fresh enthusiasm, reality, and life, restoring them to their proper character as a serious and important means for humans to achieve intimacy, stability, and shelter from the storms of life.<sup>2</sup>

On the 21st of September 1996, President Bill Clinton signed the Defense of Marriage Act (DOMA)<sup>3</sup> into law.<sup>4</sup> Many conservative

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1. ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 185 (1995).

2. MICHAEL NAVA & ROBERT NAWIDOFF, *CREATED EQUAL: WHY GAY RIGHTS REALLY MATTER TO AMERICA* 148 (1994).

3. DOMA was introduced by Congressman Bob Barr in the House of Representatives on May 7, 1996, as H.R. 3396, and by Senator Don Nickles in the Senate on May 8, 1996, as S. 1740. DOMA, a relatively short act, reads:

§ 1738C. Certain acts, records, and proceedings and the effect thereof (new section to be added to Title 28 of the United States Code).

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such a relationship.

family advocacy organizations across the United States breathed a sigh of relief,<sup>5</sup> trusting that this federal law will end the national debate and legal challenges instigated by homosexual activists seeking national legal recognition of marriages performed in the state of Hawaii. Although DOMA is arguably constitutional,<sup>6</sup> it will only prove a temporary impediment to the burgeoning movement by certain homosexual advocates demanding unimpeded exercise of a fundamental right to marry. The pronouncement of an individual's fundamental right to marry by the United States Supreme Court, though intended to protect the institution of marriage, may ultimately prove to be the tool used to redefine it radically. Even if DOMA has purported to define conclusively the institution of marriage as a "legal union of one man and one woman,"<sup>7</sup> thirty years of ambiguous

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§ 7 Definition of "marriage" and "spouse" (amendment to Chapter 1 of Title I of the United States Code).

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is husband and wife.

4. Defense of Marriage Act, Pub. L. No. 104-199, § 3 (a), 110 Stat. 2419, 2419 (1996). This note will focus primarily on the second paragraph of the Defense of Marriage Act (DOMA) that defines the institution of marriage for purposes of federal legislation.

5. Carl Weiser & Kirk Spitzer, *House Votes to Let States Refuse to Recognize Same-Sex Marriages*, GANNETT NEWS SERVICE, July 12, 1996. In this article, Lou Sheldon, chairman of the Traditional Values Coalition, called the vote for DOMA "a defining moment for the American family at the close of this millennium. It appears that the Congress has put to rest the homosexual marriage issue, voting nearly 80 percent of its members in support of the heterosexual ethic of one man and one woman." *Id.*

6. *Cf.*, Lynn D. Wardle, *Concerning S. 1740: A More Perfect Union -- Federalism in American Marriage Law*, 1996 WL 10829470 (July 11, 1996), with Cass R. Sunstein, *Statement to Congress on S. 1740*, 1996 WL 10829449 (July 11, 1996).

7. *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974). DOMA uses the same definition as a Washington Court of Appeals decision to describe marriage. In *Singer*, the court held that a Washington statute that proscribed the grant of marriage licenses to same-sex couples did not violate the state constitutional provision that provided that "equality of rights and responsibilities under the law shall not be denied or abridged on account of sex." *Id.* at 1190. *Singer* was decided four years before the Supreme Court defined the right to marry as a fundamental right in 1978. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

substantive due process decisions concerning marriage will likely undercut Congress' effort.<sup>8</sup>

This Note analyzes whether DOMA will actually defend or protect the institution of marriage, as traditionally defined. This Note will first examine the Hawaii case that catalyzed the passage of this law. It will then examine how the language of fundamental rights, considered sacred to the American legal structure, was gradually co-opted into the judiciary's notions about marriage. The fundamental right to marriage will be discussed according to the U.S. Supreme Court's interpretation of the nature of marriage and its relation to the public good. The impact of recent Supreme Court decisions, especially concerning the nature of ordered liberty and the right to privacy, will be examined in order to determine whether homosexuals might be successful in their quest for legal recognition of same-sex unions as marriage. Finally, the Note will briefly investigate the war currently being waged against DOMA -- and marriage -- in the cultural arena. The Note will suggest that a cultural counter-offensive for the "hearts and minds" of the American populace -- which promotes the time-honored view of marriage -- may be the proper strategy to defend marriage, rather than passing more laws or securing favorable judicial decisions.

## I. THE SPAWNING OF DOMA: TROUBLE IN PARADISE

In late 1991, Nina Baehr and her lesbian lover sought the issuance of a marriage license from Mr. Lewin, a clerk at their local courthouse in Hawaii. The denial of this license to Ms. Baehr set the stage for a lawsuit that was unsuccessful at the district and appeals court levels. Baehr ultimately appealed the decision to Hawaii's highest court. In 1993, the justices of the Hawaii Supreme Court, in *Baehr v. Lewin*,<sup>9</sup>

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8. The authority to legislate on issues concerning familial and marital relationships has traditionally been left to the individual states. Sen. Don Nickles, Statement to Congress on S. 1740, 1996 WL 10830370 at \*1 (July 11, 1996). DOMA applies strictly to "marriage" as expressed in federal regulations. *Id.* Under DOMA, the states retain their ability to define the type of marriages that they will legally recognize. *Id.* at \*2.

9. 852 P.2d 47 (Haw. 1993). The Hawaii Supreme Court remanded this case to the trial court because it believed that denial of marriage licenses to same-sex couples appeared to violate the state constitutional guarantee of equal protection under the law.

required that the State show a compelling purpose for discriminating between heterosexual and homosexual couples when granting marriage licenses.<sup>10</sup> A year later, the Hawaii legislature passed a law outlawing same-sex marriages based on the compelling state interest in encouraging procreation. DOMA was drafted in anticipation that the State would not meet its burden of persuasion, resulting in the "legalization" of homosexual unions as marriage in Hawaii. DOMA was passed in an attempt to protect the other forty-nine states from mandatory recognition under the Full Faith and Credit Clause of the Constitution of same-sex union ceremonies legally performed in Hawaii.<sup>11</sup>

On December 3, 1996, the district court in Hawaii ruled on remand that homosexuals did have a right to marry under Hawaii's equal protection clause.<sup>12</sup> The enforcement of this decision has been stayed pending a final decision by the Hawaii Supreme Court.<sup>13</sup> The history of fundamental rights language -- used in the context of marriage -- played a crucial role in stimulating a previously inconceivable interpretation by our nation's legal system.

## II. HISTORY OF RIGHTS LANGUAGE IN REFERENCE TO MARRIAGE

For centuries, the law has recognized marriage as something that is essential and fundamentally important to the stability of society and the propagation of the human race. However, it was only after two centuries of American jurisprudence that the right to marry was designated by the U.S. Supreme Court as a fundamental right. Prior to

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10. *Id.* at 68.

11. Cheryl Wetzstein, *Gays Wait at the Altar with Hawaii "Marriage" Law on Appeal*, WASH. TIMES WEEKLY EDITION, Dec. 15, 1996, at 13.

12. *Baehr v. Miike*, No. 91-1934, 1996 WL 694235, at \*1 (D. Ct., Dec. 3, 1996). Judge Kevin Chang, in his written opinion, rejected the State's primary argument that gay unions were not entitled to legal recognition due to their unsuitability as parents. *Id.* at 18. Judge Chang believed several of the plaintiff's experts who presented studies that showed homosexual parents could "create stable family environments and raise healthy and well-adjusted children." *Id.* at 7. Any discussion concerning the actual nature of marriage was conspicuously missing from the State's argument and Judge Chang's written opinion. *Id.* at 3, 18-20.

13. Wetzstein, *supra* note 11, at 13.

its 1978 decision in *Zablocki v. Redhail*,<sup>14</sup> the Court had begun to gradually incorporate rights language into its definition of the ageless institution.

In 1884, the U.S. Supreme Court insisted that principled and wholesome legislation was based on the idea of family which “[sprang] from the union for life of one man and one woman in the holy estate of matrimony.”<sup>15</sup> Four years later, the Supreme Court described the process of marriage as “creating the most important *relation* in life” and as “having more to do with the morals and civilization of a people than any other institution.”<sup>16</sup> In 1923, the Court decreed that a right to marry existed under the “liberty clause” of the Fourteenth Amendment’s Due Process Clause.<sup>17</sup> About twenty years later, the Court deemed the right to marry as one of the “basic civil rights of man” and “fundamental to the very existence and survival of the race.”<sup>18</sup> The Supreme Court, in *Loving v. Virginia*,<sup>19</sup> struck down 16 states’ miscegenation laws, characterizing the freedom to marry as “[historically] one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>20</sup>

In *Loving*, the Court stopped short of designating the right to marry as a fundamental right. The *Loving* Court expanded the freedom of choice to marry to include an individual of another race and denied the state any authority to infringe upon this freedom.<sup>21</sup> In

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14. 434 U.S. 374 (1978).

15. *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). In *Ramsey*, the Court upheld a federal act that outlawed the practice of bigamy in the territorial United States.

16. *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (emphasis added). In *Maynard*, marriage was described as “the foundation of the family and of society, without which there would be neither civilization nor progress.” *Id.* at 211.

17. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The “individual” nature of this right was emphasized in the Court’s majority opinion, and included the right to establish a home and raise children under the same “liberty clause.” *Id.*

18. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The Court stopped short of calling marriage a fundamental right. It followed the decision in *Meyer* and viewed any impingement of the right to marry as a deprivation of liberty without due process of law. *Id.* It is important to note that this case focused on the constitutionality of a state-directed sterilization of habitual criminals. *Id.* at 536. Marriage was not an issue in *Skinner*, it was mentioned, however, due to its inherent connection to procreation. *Id.* at 541.

19. 388 U.S. 1 (1967).

20. *Id.* at 12.

21. *Id.*

1965, the Supreme Court appeared to include the right to marry within its newly created "right of privacy," a right the Court surmised to have predated the Bill of Rights and which could properly be designated as fundamental.<sup>22</sup> It is important to note that the Court had not yet clearly stated that the right to marry was itself a fundamental right, but rather included it under the penumbra of familial rights created by "the right to privacy."<sup>23</sup>

Finally in 1978, in *Zablocki v. Redhail*, the Supreme Court appeared to define the right to marry as a fundamental right.<sup>24</sup> In *Zablocki*, a Wisconsin resident challenged a state statute which forbade all residents who were responsible for court-ordered child support from marrying without prior court approval.<sup>25</sup> The plaintiff claimed that this restriction violated his right to privacy under the Equal Protection and Due Process Clauses.<sup>26</sup>

In deciding that marriage was a fundamental right based on substantive due process analysis,<sup>27</sup> the Court ruled that since the Wisconsin statute significantly interfered with the appellant's fundamental right to marry, the burden of proof shifted to Wisconsin.<sup>28</sup> Wisconsin then had the burden of demonstrating that its statute was based on a "sufficiently important state interest" and "was closely related to effectuate only those interests."<sup>29</sup> The Court also stated that

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22. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id.*

23. *Id.*

24. *Zablocki*, 434 U.S. at 386. In its holding, the Court said it was "reaffirming the fundamental character of the right to marry," however, the Court stressed that it was not ruling that "every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny." *Id.*

25. *Id.* at 376-77. Appellant brought this class action under 42 U.S.C. § 1983. *Id.* The appellant challenged the statute as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and sought declaratory and injunctive relief. *Id.*

26. *Id.* at 379. Specifically, the statute was attacked on the grounds that it deprived appellant, and the class he sought to represent, of equal protection and due process rights secured by the First, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution. *Id.*

27. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 667 (1980).

28. *Zablocki*, 434 U.S. at 383.

29. *Id.* at 388. The test expressed in *Zablocki* appears to be as stringent as the "compelling state interest" burden of proof mandated by the Court when a state violates a

the right to marry “is of fundamental importance for all individuals.”<sup>30</sup> *Zablocki* stopped short of designating the right to marry as an absolute fundamental right; however, the Court neglected to describe adequately the limits on the exercise of the right, particularly those proscribed by the intrinsic nature of marriage.<sup>31</sup>

DOMA’s proponents face a difficult hurdle in overcoming the state’s burden of persuasion laid out in *Zablocki*, especially considering that the jurisprudence of the last 30 years has redefined all liberty interests under the Due Process Clause. According to the Court, all liberty interests must not be limited by their impact on society, but broadened to encompass each individual’s conception of his own moral universe.<sup>32</sup> Under *Zablocki*, DOMA supporters -- as well as states which are presently passing legislation expressly to deny legal protection to same-sex unions -- will have to demonstrate that these limitations are “reasonable regulations that do not significantly interfere with decisions to enter the marital relationship.”<sup>33</sup>

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fundamental right emanating from a liberty interest found in the Fourteenth Amendment’s Due Process Clause. *Id.*

30. *Id.* at 384. Although this phrase has been used to signify that this right to marry was a fundamental right which encompassed all persons, the Court did not actually make this connection until later in the decision. The Court stressed that the right to marry was a fundamental right in order to uphold the plaintiff’s right to marry against a state statute which proscribed his marriage until he paid overdue child support. Throughout the decision, the Court emphasized that the State had other options in motivating the father to pay that did not “interfere directly and substantially with the right to marry.” *Id.* at 386-87.

31. Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 29 n.111. Wardle notes that the Court took great care to avoid declaring that the right to marry was a fundamental right. *Id.*

32. See *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (stating that liberty interest under the Fourteenth Amendment includes the right to define one’s own concept of meaning and existence).

33. *Zablocki*, 434 U.S. at 386. Several states including Arizona ((ARIZ. REV. STAT. ANN. § 25-101 (c) (West Supp. 1996)), California ((CAL. [Family Law] CODE § 300 (West 1994)), Indiana ((IND. CODE ANN. § 31-7-1-2 (Michie 1987)), Minnesota ((MINN. STAT. ANN. § 517.01 (West 1990)), Nevada ((NEV. REV. STAT. § 122.020 (1995)), North Carolina ((N.C. GEN. STAT. § 51-2 (1996)), North Dakota ((N.D. CENT. CODE § 14-03-01 (1991)), Oregon ((OR. REV. STAT. § 14-106-010 (1995)), Virginia ((VA. CODE ANN. § 20-45.2 (Michie 1995)), and Wyoming ((WYO. STAT. ANN. § 20-1-101 (Michie 1977)) had statutes expressly limiting the legal recognition to heterosexual unions prior to the debate over DOMA. The Wyoming statute reads, “Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential.” § 20-

III. SAME-SEX MARRIAGE LITIGATION BEFORE *BAEHR*

Many state and federal courts have dealt with the issue of legal recognition of same-sex marriages before *Baehr*; each time they soundly rejected the proposition.<sup>34</sup> In *Baker v. Nelson*,<sup>35</sup> the Minnesota Supreme Court upheld the trial court's decision to deny the issuance of a marriage license to a homosexual couple.<sup>36</sup> The petitioners argued unsuccessfully that by denying them a marriage license, the state deprived them of liberty and property without due process.<sup>37</sup> Additionally, the petitioners argued that they were deprived of a fundamental right guaranteed by the Ninth Amendment to the United States Constitution.<sup>38</sup> The Supreme Court of Minnesota relied on historical precedent in restricting the definition of marriage to the "union of man and woman" and in refusing to allow the use of the Due Process Clause for the "restructuring [of marriage] by judicial legislation."<sup>39</sup> The court, in distinguishing *Baker* from *Loving*, argued that restrictions on the issuance of marriage licenses based on sex versus race were clearly proper based on both "common sense" and "constitutional" sense.<sup>40</sup> *Baker* preceded the decision in *Zablocki* by seven years; hence, the petitioners never argued that they were denied a fundamental right guaranteed by the right of privacy implicitly found in the Constitution by the U.S. Supreme Court.<sup>41</sup> The Court denied

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1-101. Several additional states have passed similar legislation since the initial decision in *Baehr*. *E.g.*, ALASKA STAT. § 25.05.11 (a), 25.05.013 (Michie 1996), DEL. CODE ANN. tit. 13, § 101 (a), (d) (1996), and MICH. COMP LAWS § 551.2-551.4 (1996).

34. *See, e.g.*, *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); and *Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974). All these cases, except *Dean*, preceded the ruling in *Zablocki*. In *Dean*, the issue of a homosexual's fundamental right to marry under substantive due process concepts was not discussed.

35. 191 N.W.2d 185 (Minn. 1971).

36. *Id.*

37. *Id.* at 186.

38. *Id.*

39. *Id.*

40. *Id.* at 187. These "senses" will not always be an effective deterrent in the heat and passion of judicial and political activism.

41. *Baker* relied heavily upon *Griswold* and ignored the caveat provided by the Supreme Court's decision in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). *Baker* focused on the familial and marital language accompanying the "right of privacy" proposed in

*certiorari* to an appeal by Baker. Thus, the question of whether homosexuals have a fundamental right to marry under the right to privacy remains unanswered.<sup>42</sup> This could be the issue on which DOMA stands or falls.

#### IV. *BAEHR V. LEWIN*: DO HOMOSEXUALS HAVE A FUNDAMENTAL RIGHT TO MARRY?

*Baehr v. Lewin*<sup>43</sup> is the first state case to examine whether homosexuals have a fundamental right to marry under both the Due Process and Equal Protection Clauses of a state constitution. The Hawaii Supreme Court justices in *Baehr* quickly dismissed the Due Process question, based on historical precedent, tradition, and an implicit reading of the right to marry in *Zablocki* as reserved solely for opposite sex unions.<sup>44</sup> In its analysis, the justices relied on Justice

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*Griswold*, but did not reconcile *Eisenstadt*'s individualistic shift in the right to privacy. *Eisenstadt*, and various cases such as *Roe* and *Casey* which build upon its individualistic notions of freedom of choice, may not go unnoticed by future courts which review the constitutionality of legally recognized same-sex unions.

42. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972). With DOMA and *Zablocki* defining the right to marry as fundamental, the Court may decide that the review of the constitutionality of such a law is now pertinent.

43. 852 P.2d 44 (Haw. 1993).

44. *Id.* at 55-57. The justices concluded that because no state recognized same-sex unions as marriage when *Zablocki* was decided, the Court "was obviously contemplating" that the fundamental right to marriage would be restricted to unions between men and women. *Id.*

Goldberg's concurring opinion in *Griswold v. Connecticut* to rule that a homosexual couple had no fundamental right to marry.<sup>45</sup>

The Hawaii judges used *Zablocki* as its primary source in deciding to remand the case to the district court because *Zablocki* purportedly provided the "most detailed discussion of the fundamental right to marriage."<sup>46</sup> *Zablocki* failed, however, to discuss the nature of marriage or its relation to the public good when it defined the right to marry as fundamental. In *Zablocki*, the Court also never explicitly stated that the right to marry another member of the same sex was a completely separate fundamental right from the right the Court established.<sup>47</sup> The *Baehr* court stated that *Zablocki's* allusion to the fundamental rights of procreation, childbirth, and child rearing in conjunction with the right to marry implicitly indicates that marriage is exclusive to a man and a woman.<sup>48</sup> Future courts reviewing this issue may find this reasoning unpersuasive due to technological "advances" in the area of sexual reproduction. For example, two homosexual men could hire a surrogate mother and achieve the end of child-rearing or a committed union of lesbians might be equally successful via invitro-

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45. *Id.* at 57. Justice Goldberg described the tests used to determine if rights were fundamental: judges were not to look "at personal and private notions," but to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring). For Justice Goldberg, the inquiry revolved around whether the denial of this right would violate "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* Goldberg was referring specifically to the right to marriage itself, and he did not indicate -- as did the *Baehr* court -- that the right to marry a homosexual was a separate and distinct right. *Baehr*, 852 P.2d at 57. The *Baehr* court assumed this without taking into account the effect of the *Eisenstadt* decision -- where *Goldberg* also concurred in the judgment -- had on *Griswold's* notion of the right of privacy (from which it deduced that the right of marriage existed). *Eisenstadt's* view of the right to privacy -- as applying to each individual and not just with the familial context -- does not square with the *Baehr* court's view of how the right of privacy might shape the right to marriage. *Id.*

46. *Baehr*, 852 P.2d at 56.

47. In 1978, the gay rights movement had not begun a vigorous campaign for legal recognition of same-sex unions. COLLIER'S ENCYCLOPEDIA 217 (44th ed. 1993). Thus, the *Zablocki* Court probably did not deem it necessary to expressly limit this fundamental right to unions comprised of a man and a woman. Based on the prevailing cultural or political climate, this definition was not disputed. *Id.*

48. *Baehr*, 852 P.2d at 56.

fertilization or artificial insemination.<sup>49</sup> Additionally, *Zablocki* mentioned the fundamental right to abortion, which is not exclusive to the marital relationship, within the same list of rights associated with the right to marry. This statement by the Court puts *Baehr*'s implicitly derived definition of marriage --exclusively between a man and a woman -- on shaky ground.<sup>50</sup>

The justices also interpreted language in Supreme Court cases -- such as *Palko v. Connecticut*<sup>51</sup> -- to decree that the plaintiff had no fundamental right to marry.<sup>52</sup> According to the *Baehr* court's reading of *Palko*, "only rights that are implicit in the concept of ordered liberty can be deemed fundamental."<sup>53</sup> The *Baehr* court then found an implicit right to same-sex marriage in the concept of ordered liberty.<sup>54</sup> The *Baehr* court also reasoned that declining to recognize a separate and distinct right to a same-sex marriage would not "violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions."<sup>55</sup> As with its dismissal of plaintiff's due process claim, the Hawaii court again made its decision prematurely. Its view of liberty is much better defined than the indiscernible and evolving stand of the nation's highest court. What

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49. Kevin A. Zambrowicz, *To Love and Honor All the Days of Your Life: A Constitutional Right to Same-sex Marriage?*, 43 CATH. U. L. REV. 907, 923 (Spring 1994). Zambrowicz contends that invitro-fertilization and artificial insemination give same-sex couples the ability to procreate. Therefore, they fall under the fundamental right protection afforded by *Zablocki*. *Id.*

50. Abortion is by no means limited to a marital relationship and does not necessarily involve conception involving direct sexual contact between a man and a woman. A lesbian, artificially inseminated with sperm from an unknown donor, could choose to abort her child if he or she did not turn out to be what the mother anticipated: a baby free from physical or mental defects. By including abortion among the list of "fundamental" rights that indicate that marriage is reserved to opposite-sex couples, the *Baehr* justices have weakened their implicit argument.

51. 302 U.S. 319 (1937).

52. *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993).

53. *Id.* This was a faulty reading of *Palko*. The *Baehr* court used a previous Hawaii Supreme Court's interpretation of *Palko*, which said "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty. . . ." *State v. Mueller*, 671 P.2d 1351 (Haw. 1983) (emphasis added). The *Baehr* court chose to equate the two concepts in designing its fundamental rights formula. *Baehr*, 852 P.2d at 57.

54. *Baehr*, 852 P.2d at 57.

55. *Id.*

the U.S. Supreme Court considers “ordered liberty” is increasingly difficult to ascertain since the landmark 1992 *Planned Parenthood v. Casey*<sup>56</sup> decision.

In *Casey*, the Supreme Court described liberty in a manner that completely removed it from the realm of moral boundaries or familial relations and into the nebulous universe of personal autonomy.<sup>57</sup> The Court mandated constitutional protections for personal decisions concerning issues of marriage because they were some of the “choices central to personal dignity and autonomy” and “to the liberty protected by the Fourteenth Amendment.”<sup>58</sup> The Court further described the limitless expanse of this constitutionally protected doctrine: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the state.”<sup>59</sup> Hawaii -- as well as other states -- will have great difficulty meeting this burden of proof. Each state will have to demonstrate that the Supreme Court’s ever-expansive conception of the liberty interest does not include the right to choose one’s marital partner.<sup>60</sup> By withholding legal recognition

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56. 505 U.S. 833 (1992).

57. Cf. Pope Leo XIII, *On the Nature of Liberty*, (June 20, 1888) <<http://www.listserv.american.edu/catholic/church/papal/leo.xiii/113libet.txt>>, at 5. In this encyclical, the author describes the true liberty of human society as “not [consisting of] every man doing as he pleases, for this would simply end in turmoil and confusion, and bring on the overthrow of the State; but rather in this, that through the injunctions of the civil law, all may more easily conform to the prescriptions of the eternal law.” *Id.*

58. *Casey*, 505 U.S. at 851.

59. *Id.* This reasoning is quite similar to one of Justice Brennan’s dissenting opinions, in which he argued for the right of a man to assert parental rights over a child conceived during an adulterous relationship. Brennan reasoned that “it is absurd to assume that we can agree on the content of those terms [family and parenthood] and destructive to pretend that we do. In a community such as ours, ‘liberty’ must include the freedom not to conform.” *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

60. *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting). Justice Blackmun appeared to argue for this very proposition in *Bowers*:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many “right” ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.

from same-sex unions, one might argue that the state infringes upon the homosexual's right to define his own existence, thereby denying him the exercise of a fundamental right.<sup>61</sup>

The *Casey* Court also instituted an "undue burden" test, which limited the extent a state regulation could venture into proscribing the exercise of liberty under the Due Process Clause.<sup>62</sup> According to this test, any state or federal regulation which "has the purpose or effect of placing a substantial obstacle in the path" of someone seeking to exercise a constitutionally protected liberty interest constitutes an undue burden and must be struck down.<sup>63</sup> The "liberty interest" implicated in *Casey* was the woman's choice to terminate her pregnancy.<sup>64</sup> If the Supreme Court requires that DOMA meet the undue burden test, the law will certainly fail.<sup>65</sup> If a homosexual's sole option under DOMA is marriage to a person of the opposite sex, the Supreme Court could strike it down if it emphasizes the liberty interest espoused in *Casey*. This restriction would arguably be a substantial obstacle to the homosexual exercising his *fundamental right* to marital choice<sup>66</sup> and is antithetical to the homosexual being allowed to define his own universe.<sup>67</sup> The Hawaii justices ignored the definition of

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*Id.*

61. Christopher J. Keller, *Divining the Priest*, 12 LAW & INEQ. 483 (1994). Keller argues that *Casey*, as well as *Roe*, recognize the right of a man or woman to be free from government intrusion when "making a moral decision about who they are and how to construe their most intimate personality through sexuality." *Id.* at 504.

62. *Casey*, 505 U.S. at 874.

63. *Id.* at 877.

64. *Id.* at 838.

65. This can also be applied to any state law which proscribes the legal recognition of same-sex unions as marriage.

66. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE, 567, 568 (1995) (Wolfson seizes on the language of "marital choice" and claims there is no constitutional basis for a "different sex restriction"). Wolfson is the director of the Marriage Project for the Lambda Legal Defense and Education Fund.

67. One author stresses that all homosexual relationships are based on "the autonomy of self and the freedom of the other." JANE RULE, LESBIAN IMAGES 5 (1975). This comports nicely with the idea of the radically individualistic approach to defining fundamental rights and liberty interests put forth in *Casey*.

liberty in *Casey* when they dismissed the plaintiff's due process claim, but future courts will have to address this issue.

Those who hope for DOMA's continued viability should examine how certain courts have already interpreted the *Casey* view of liberty. In *Compassion in Dying v. Washington*,<sup>68</sup> the Seattle District Court Judge struck down a Washington law, which criminalized euthanasia, because it violated the Fourteenth Amendment by restricting a person's liberty. The court emphasized that "[t]here is no more profoundly personal decision, nor one which is closer to the heart of personal liberty than the choice which a terminally ill person makes to end his or her own suffering and hasten an inevitable death."<sup>69</sup> On rehearing *en banc*, the U.S. Court of Appeals for the Ninth Circuit upheld this decision.<sup>70</sup> The Ninth Circuit stressed that it would use a balancing test in deciding whether the state's interests outweigh the individual's liberty interests, specifically whether a "substantial justification" for rejecting a claimed liberty interest existed.<sup>71</sup> The Court of Appeals decided that an individual right to die did exist and that this liberty interest outweighed the state's interest in its prohibition.<sup>72</sup>

This pattern of analysis -- especially the judiciary's outright rejection of tradition and judicial precedent -- is disturbing. It should also be a source of concern when judges reconsider whether protection for same-sex unions is encompassed under the fundamental right to marry.<sup>73</sup> If matters of death are so profoundly personal as to invoke the doctrine of due process for a liberty interest, nothing prevents judges from applying this logic to equally important matters of life, such as the right to marry. The issue of ever-expansive liberty interests defined in *Casey* -- and its resultant effect on the fundamental right to marry -- was not considered by the *Baehr* court.

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68. 850 F. Supp. 1454 (W.D. Wash. 1994).

69. *Id.* at 1461.

70. *Compassion in Dying v. Washington*, 79 F.3d 790 (1996). The Ninth Circuit Court of Appeals also relied heavily on the *Casey* Court's description of personal choices under the Fourteenth Amendment. *Id.* at 801.

71. *Id.* at 799.

72. *Id.* at 838.

73. *Id.* at 803.

*Baehr*'s rapid dismissal of the fundamental rights issue was premature; however, it will certainly be resurrected in future attacks on DOMA and state statutes which proscribe the legal recognition of same-sex unions.<sup>74</sup> Evan Wolfson, the plaintiff's counsel in *Baehr*, has already indicated that the fundamental rights argument will be used in future litigation for homosexual marriage rights.<sup>75</sup> Additionally, *Baehr* expressly limited its decision to declaring that there is no fundamental right to a same-sex marriage "under article I, section 6 of the *Hawaii Constitution*."<sup>76</sup> The issue of whether such a right exists under substantive due process interpretations of the United States Constitution remains an unanswered, but looming question. Finally, as long as the idea of fundamental rights remains a concept without discernible or widely accepted boundaries, those advocating legal recognition of same-sex unions will find this ambiguity a useful tool in their crusade. Simply defining certain elements of a valid marriage in a federal law is not the ultimate solution. Our culture must be reminded of the true nature of marriage and convinced of its essential role in maintaining the stability of society.

## V. THE FUNDAMENTAL RIGHT TO MARRIAGE

Marriage is an institution which transcends the idea of rights theories. It is cheapened by applying the language of rights without a proper understanding of the nature of the marital institution. The institution of marriage has survived numerous generations and civilizations without the paternal protection of the state.<sup>77</sup> Was the

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74. Barbara J. Cox, *Same-Sex Marriages and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1032, 1041. Cox argues that the *Baehr* court erred in asking whether there was a fundamental right to homosexual marriage, rather than a fundamental right to marry which should include same-sex couples. *Id.*

75. Wolfson, *supra* note 66, at 574. Wolfson indicates that the Hawaii Supreme Court's final decision will not dissuade him from using other substantive constitutional guarantees such as the right of privacy and the right of personal liberty. *Id.*

76. *Baehr v. Lewin*, 852 P.2d, 44, 57 (Haw. 1993) (emphasis added).

77. Divergent religions, including Judaism, Christianity, Islam, and Buddhism, may not always have been in accord concerning the number of wives a husband might marry, but they have always agreed that the wife would be of the opposite gender if the union was to

institution of marriage so deeply threatened in 1978 that the Court needed to proclaim it a fundamental right? At least one justice did not think it was a prudent decision.

Justice Powell, in his concurring opinion in *Zablocki*, advised against designating the right to marry as fundamental because he believed that it would “cast doubt on the network of restrictions states have fashioned to govern marriage and divorce.”<sup>78</sup> Justice Rehnquist agreed with Powell that marriage was not a fundamental right which should trigger the strictest judicial scrutiny -- compelling state interest standard. However, Rehnquist insisted that the Court’s standard of review of state legislation -- which limited marriage -- maintain the burden of proof on the individual challenging the statute and retain the less demanding “rational relationship” test.<sup>79</sup> Under this less-demanding “rational relationship” test, Hawaii would have an immeasurably better chance at defending the constitutional propriety of its marriage laws.<sup>80</sup> In Supreme Court cases involving state or federal statutes which allegedly impinge upon fundamental rights, the government must demonstrate a compelling state interest--the strict scrutiny standard--which justifies the denial of a group’s ability to exercise a fundamental right.<sup>81</sup> The old adage continues to ring true: “‘Strict in theory, fatal in fact.’”<sup>82</sup> That is, the plaintiff is typically

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have any validity. ENCYCLOPEDIA OF RELIGION 218-20 (9th ed. 1987). Many of these religions have existed centuries prior to the establishment of the ecclesiastical courts or the Common Law, each religion stressing the importance of marriage in society and fortifying marriage by converting the culture (instead of relying on the state’s coercive power). *Id.*

78. *Zablocki*, 434 U.S. 374, 397 (1978) (Powell, J., concurring). Justice Powell wrote that this designation subjected any state regulations of marriage -- including bans on incest, homosexuality, and bigamy -- to the “most exacting judicial scrutiny.” *Id.* Powell believed that this higher standard might cast doubt on the legitimacy of these restrictions.

79. *Id.* at 407 (Rehnquist, J., dissenting).

80. See *Talking Points: Same-Sex Marriage, Citizen* (Focus on the Family, Colorado Springs, Co.), June 24, 1996, at 11. The writer of this article does not understand that the homosexual plaintiffs do not have the burden of showing a compelling state interest to “redefine” marriage; rather, the state has the incredibly difficult burden of showing a compelling state interest for denying this fundamental right to homosexual couples. *Id.*

81. See, e.g., *Attorney Gen. v. Soto-Lopez*, 476 U.S. 898, 906 n.6 (1986); *Katzenbach v. Morgan*, 384 U.S. 641, 654-55 n.15 (1966).

82. Gerald Gunther, *The Supreme Court, 1971 Term -- Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

victorious in challenging a law when the state must meet such a strenuous burden of proof in the law's defense. Therefore, although Justice Powell's fears have yet to become reality, any plaintiff challenging DOMA who argues that his fundamental rights under the Due Process Clause have been curtailed will have a much easier time securing victory based on the *Zablocki* decision.<sup>83</sup>

Civil rights are not equivalent to fundamental rights, and the Court's continued inability to distinguish between the two categories is a dangerous threat to DOMA.<sup>84</sup> If marriage is treated as a civil right created by the State<sup>85</sup> -- rather than a fundamental right which preceded civil government and is inherent in the personhood of man -- homosexual rights advocates will have a much more forceful argument that they should not be denied arbitrarily the State's blessing of their unions.

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83. Karst, *supra* note 27, at 671.

84. See Deborah M. Henson, *Will Same Sex-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 600 (1993-94). Professor Henson states:

Many learned jurists have determined that the right to marry is fundamental and the right to create one's own family constellation should be secure from governmental interference. This jurisprudence and the constitutional guarantees on which it is founded preclude any justification for continuing to deny this vital civil right to a distinct minority group which has experienced decades of discrimination.

*Id.* at 600.

85. See Demian, *Marriage: Who is in the way of this civil right?*, (visited Jan. 21, 1997) <<http://www.eskimo.com/~demian/demian-2.html>>. Demian, co-director of the Partners Task Force for Gay & Lesbian Couples, contends that marriage is a civil right which should be granted by the government to homosexuals. *Id.*

VI. FUNDAMENTAL RIGHTS AND CIVIL RIGHTS:  
NOT JUST A MATTER OF SEMANTICS

Rights may be evaluated by determining their origin. Some derive their source from nature, and others are created by acts of the government or laws of man.<sup>86</sup> The former typically are considered “inalienable rights,” that is, rights which are to be protected and defended by the government but which inherently find their source in the personhood of the individual and the dignity of the human being. Man cannot abridge or expropriate these rights, but he can regulate their use for the common good.<sup>87</sup> These rights have boundaries because their exercise by individuals must always be subservient to community rights and the common good.<sup>88</sup> Rights created by the government or established by its laws are called civil rights in that they owe their existence to creation by the state.<sup>89</sup>

One of the difficulties plaguing modern-day jurisprudence is the inability to distinguish between the two categories of rights and the inclination to dilute classical notions of rights by branding almost anything a right. Harvard law professor Mary Ann Glendon has

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86. JOHN F. CRONIN, *SOCIAL PRINCIPLES AND ECONOMIC LIFE* 49 (1959). Cronin states: “Those [rights] rooted directly in human nature are fundamental and may not be abrogated by law or by agreement among men.” *Id.*

87. *Id.* at 47.

88. *Id.* at 50. This hierarchy of rights, so essential to the harmonious ordering of a stable society, is rejected by contemporary rights theories scholars because it blatantly rejects the elevation of the ideologies of individualism and egalitarianism. St. Thomas Aquinas, one of the earliest writers on the nature of fundamental rights, states that “the common good of the individual is subordinate to the good of the many.” ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, II, q. 47, art. 11, ad 3. Aquinas also proposes that “[h]e who seeks the common good of the many consequently seeks his own good as well. . . . [P]rivate good cannot exist without the common good of the family, or the city, or the state.” *Id.* at art. 10.

89. James J. Rogers, *Civil Rights and Liberties in the Vocabulary of the American Founding* (work in progress). Rogers, a professor of Political Science at Texas A&M University, states that at the American Founding, American civil rights and liberties were understood in a way “that drew heavily on classical Christian theism” but that today a “vocabulary of individual autonomy” has slowly replaced the Christian worldview as the prevailing paradigm for judging civil rights. *Id.* at 3. Rogers urges that proper constitutional interpretation of fundamental and civil rights will be impossible until the Supreme Court returns to the Founders’ original paradigm. *Id.* at 2.

studied this phenomenon, stating that it has led ultimately not only to the *impoverishment of political discourse*, but also to the inevitable devaluing of certain time-honored traditions and inalienable rights.<sup>90</sup>

Glendon states:

As various new rights are proclaimed or proposed, the catalog of individual liberties expands without much consideration of the ends to which they are oriented, their relationship to one another, to corresponding responsibilities, or to the general welfare. Convergent with the language of psychotherapy, rights talk encourages our all-too-human tendency to place the self at the center of our moral universe.<sup>91</sup>

The solution, according to Glendon, is neither to abandon our rights tradition nor import another model from another nation.<sup>92</sup> Rather, it is important to rediscover and reestablish the traditional view on rights theories, both in our political dialogue and jurisprudence.<sup>93</sup> This traditional notion does not explain the exercise of rights in isolation, but rather looks at its impact on the general welfare of society, particularly how it affects the basic structure of society, the family.<sup>94</sup> Man does not exist for society, but the inverse is also not completely true. Man is a social creature,<sup>95</sup> with rights and duties based on his individual nature, but the exercise of these rights must take into account much more than how he defines his universe. Under this paradigm, DOMA and other laws which respect the nature of the

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90. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 3 (1991).

91. *Id.* at xi.

92. *Id.* at xii.

93. *Id.*

94. For an excellent article discussing the development of fundamental rights through substantive due process over the past thirty years, involving the elevation of individual autonomy versus family stability and longevity, see David Wagner, *The Family and American Constitutional Law*, 1 LIFE LIBERTY & FAMILY 145 (1994).

95. See ANTHONY KENNY, *ARISTOTLE ON THE PERFECT LIFE* 44 (1992) (Aristotle stated that "[t]he solitary enjoyment of goods is insufficient for happiness: humans as social animals need company. . .").

marital institution and its place in the community will pass constitutional muster. However, as evidenced by the decision in *Casey* and the abortion cases, this communitarian view<sup>96</sup> of fundamental rights is gradually losing influence within the judicial community of the United States in favor of a more egalitarian and individualistic approach.<sup>97</sup>

Most of the individuals advocating the propriety of gay marriages and railing against the “mean spiritedness” and purported bigotry of DOMA take a radically different view of fundamental rights. These advocates have explicitly ignored both the nature of the institution of marriage and its overall impact on the general welfare of society.<sup>98</sup> Some opponents of DOMA have labeled the act an unconstitutional obstacle to their enjoyment of a *bundle of legal rights and privileges that married heterosexual couples now enjoy*.<sup>99</sup> These individuals adhere to a notion of active versus passive rights, which have at their core the idea of sovereignty within the relevant portion of their

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96. Gerard V. Bradley, *Remaking the Constitution: A Critical Reexamination of the Bowers v. Hardwick Dissent*, 25 WAKE FOREST L. REV. 501, 508-9 (1990).

97. The American experience and history emphasizes the image of the rugged individual versus the value of community living. This worldview has not been restricted to John Wayne movies, but has increasingly affected the way that courts interpret the law, especially in the arena of fundamental rights and liberties.

98. There are several members of the Supreme Court, past and present, who readily accept this philosophy. Justice Blackmun, in his dissent to *Bowers v. Hardwick*, 478 U.S. 186 (1986), which denied a constitutional right to engage in homosexual sodomy, wrote: “We protect those rights [referring to marriage and family] not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life.” *Id.* at 204 (Blackmun, J., dissenting). Almost a decade later, Blackmun’s reasoning and logic have triumphed in recent court cases involving abortion (*Casey*) and assisted suicide (*Compassion in Dying*). Unquestionably, his reasoning will be a primary force when the propriety of same-sex marriages is again considered by the Court.

99. Henson, *supra* note 84, at 597 (marriage is a vehicle to emotional and financial security with tangible property benefits); Cox, *supra* note 74, at 1047. Ironically, the Hawaii justices share a similar view that the fundamental right to marry carries with it “a multiplicity of rights and benefits that are contingent upon [being married].” Baehr v. Lewin, 852 P.2d 44, 59 (1993). *Cf.*, *supra* note 27, at 649 (author argues that since the legal consequences of marriage increasingly resemble those of other intimate associations in society, marriage laws are losing their relevance to one’s entitlement to government benefits).

universe or “moral world.”<sup>100</sup> Some advocates appeal to classical rights thinkers, such as John Locke and Thomas Jefferson, and conclude that their fundamental rights proceed not from the state, the will of the people, or tradition, but rather from human nature.<sup>101</sup> Consequently, because they view their homosexuality as an intrinsic characteristic of their human nature, they claim they cannot be denied any fundamental rights based solely on that attribute.<sup>102</sup> Moreover, according to these advocates, fundamental rights are not based on transcendent truth; rather, they are based on existing cultural phenomena.<sup>103</sup> It is this dissociation of the fundamental right of marriage from its nature<sup>104</sup> and understanding within the familial and public context that unquestionably is the biggest threat to DOMA. This jurisprudential phenomenon will allow homosexual activists to use fundamental right status not as a shield to protect marriage as traditionally understood, but rather as a sword to carve it into an unrecognizable condition.

## VII. THE NATURE OF MARRIAGE

Some intellectuals have smugly proclaimed that homosexuals are not discriminated against by DOMA or by state laws restricting legal recognition to marriages involving opposite-sex couples. One law professor recently explained, “Homosexuals have the same right to

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100. RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 6 (1979).

101. Keller, *supra* note 61, at 509-10.

102. *Id.* at 511.

103. *Id.* at 512. Keller states that constitutional interpretation should not be based on tradition -- specifically when a previous generation failed to recognize a fundamental right -- but rather “current” constitutional principles should embody fundamental rights discovered in “light of [current] cultural circumstances.” *Id.*

104. See Christine Jax, *Same-Sex Marriage -- Why Not?* WIDENER J. PUB. L., 461, 467 (1995). Ms. Jax argues just this point: The fundamental right of the individual to marry should remain his regardless of the sex of the partner he chooses to marry. She states that the right to marry belongs to “the individuals, not the couples” and that when the state denies same-sex couples the right to marry, it is based solely on the nature of their relationships. Ironically, to Ms. Jax, this appears to be a preposterous proposition, rather than a critical limitation on the exercise of the right. *Id.*

marry as anyone else, as long as it's someone of the opposite sex."<sup>105</sup> Another speaks of homosexuals having the same rights to marry as long as they meet marriage's qualifications.<sup>106</sup> However, who sets the qualifications and who decides when the restrictions are valid? The better question to ask is: "What is the nature of marriage?" When one understands the nature of marriage, one sees that homosexuals are not actually prevented from entering the institution of marriage by any federal or state law but rather because their "own incapability of entering into a marriage as that term is defined."<sup>107</sup> As one scholar puts it:

The traditional view, embodied in state laws which restrict marriage licenses to couples comprised of a man and a woman, is not that homosexuals should not be allowed to marry, implying that while possible, such marriages are prohibited. Instead, the traditional view is that homosexual marriage is impossible. Given this impossibility, public authority should not say that enduring homosexual relationships are marriages.<sup>108</sup>

Unless the nature of the institution is considered, the question lingers: Can the government limit the exercise of a fundamental right, and if so, how?

### *A. DOMA and Its Foes on the Nature of Marriage*

Defining an institution that predates the civil government and all forms of organized religion is no easy task. The drafters of the DOMA define marriage as a "civil union between one man and one

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105. Bernard Dobransky, Regent University Lecture Series, Sept. 10, 1996, Virginia Beach, VA.

106. Answers to Questions About the Defense of Marriage, INSIGHT, July 1996, at 4.

107. Jones v. Callahan, 501 S.W.2d 588, 589 (Ky. 1973).

108. Gerard V. Bradley, *Pluralistic Perfection: A Review Essay of Making Men Moral*, 71 NOTRE DAME L. REV. 671, 694-95 (1996).

woman.”<sup>109</sup> Evan Wolfson, director of the Marriage Project of the Lambda Legal Defense and Education Fund and leader of the movement for legalization of same-sex unions, describes marriage as:

[F]irst and foremost about a loving union between two people who enter into a relationship of emotional and financial commitment and interdependence, two people who seek to make a public statement about their relationship, sanctioned by the state, the community at large, and, for some, their religious community. And that concept of marriage, no more and no less, should hold for gay people seeking to marry.<sup>110</sup>

This overtly egalitarian definition of marriage differs from traditional notions concerning the institution of marriage.<sup>111</sup> It focuses clearly on marriage as an association of two individuals -- albeit a loving one -- which mentions nothing about the state interest in procreation and providing stability for society.

### *B. The Supreme Court on the Nature of Marriage*

The Supreme Court, however, has used similar language to describe the marital union in the era of the “right of privacy,” first

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109. Defense of Marriage Act, Pub. L. No. 104-199, § 3 (a), 110 Stat. 2419, 2419 (1996). It is more than a matter of semantics to label marriage in this fashion instead of as a “civilly recognized union.” The civil law took its principles on marriage from the canon law used in ecclesiastical courts. The ecclesiastical courts, which had exclusive jurisdiction over marriage before the Protestant Reformation of the 16th Century, were bound by the Scriptures and Church tradition not to endow the sacrament of marriage on a union which was antithetical to the nature of marriage. The civil courts have no such guiding force in this relativistic age, often resulting in a default to the judge’s own moral opinions. For additional background on the history of marital jurisdiction, *see Adams v. Howerton*, 486 F. Supp. 1119, 1122-23 (C.D. Cal 1980); *see also* 52 AM. JUR. 2D *Marriage* § 2.

110. Wolfson, *supra* note 66, at 579.

111. David Frum, *The Courts, Gay Marriage, and the Popular Will*, WEEKLY STANDARD, Sept. 30, 1996, at 32. Frum recognizes the danger of egalitarian thinking on traditional notions about the institution of marriage. He states: “[M]arriage is an institution that rests on a recognition of the cultural and biological differences between men and women, and the call for gay marriage is the culmination of the intellectual and political campaign to deny and suppress those differences.”

fashioned in 1965,<sup>112</sup> and further refined by the Court seven years later.<sup>113</sup> In *Griswold v. Connecticut*, the Court opined that marriage was a

coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.<sup>114</sup>

In *Eisenstadt v. Baird*,<sup>115</sup> the Court further defined the marital couple as "two individuals each with a separate intellectual and emotional makeup."<sup>116</sup> Thus, the Supreme Court has denoted the freedom to marry anyone of one's choosing as a fundamental liberty.<sup>117</sup>

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112. *Griswold*, 381 U.S. at 486. In *Griswold*, the Supreme Court struck down as unconstitutional a widely-disregarded anti-contraceptive law based on the substantive due process theory called right to privacy. Although there was no explicit support for their decision in the Constitution, the Court claimed that a penumbra of rights emanating from the First, Fourth, Fifth and Ninth Amendments implicitly protected married couples from the government's intrusion into their important decisions regarding procreation.

113. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). *Eisenstadt* extended the fundamental right to use contraceptives to unmarried couples. The state failed to show a rational basis for discriminating between married and unmarried couples in the use of contraceptives. The state had claimed that distribution of contraceptives would damage valid marital relationships by facilitating extramarital affairs and would also be an impetus to a rise in premarital sexual relationships. The Supreme Court found these arguments insufficient because there was no clear relationship between the means used and the ends desired.

114. *Griswold*, 381 U.S. at 486. Ironically, this nebulous description concerning the nature of marriage may assist homosexual activists in their "cause:" the legal recognition of their unions.

115. 405 U.S. 438 (1972).

116. *Id.* at 453.

117. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974). Here, the Court stated that it had "long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Id.* The Court referenced *Roe*, *Griswold*, and *Loving* as some of the cases which supported this proposition. Nowhere in the decision, which struck down zoning regulations that prevented certain extended family members from living together, did the Court carve out an exception to this principle which would have prohibited homosexuals from choosing to marry members of their gender.

In *Turner v. Safely*,<sup>118</sup> a unanimous Supreme Court relied on the decision in *Zablocki v. Redhail* to strike down a state prison regulation which severely curtailed the inmate's right to marry. In extending the fundamental right to marry to inmates, the Court stressed what it viewed as the four most important attributes of marriage: (1) the "expression of emotional support and public commitment," (2) "the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication," (3) the expectation in their formation that "marriages will eventually be fully consummated [by legal recognition]," and (4) the importance of marriage as a "precondition to the receipt of government benefits . . . property rights (e.g., inheritance rights) and other less tangible benefits (e.g., the legitimization of children born out of wedlock.)"<sup>119</sup>

The importance of marriage, based on both its expression of legitimacy to society and its allowance of access to substantial rights and privileges, is the primary reason homosexual activists trumpet for the seeking to exercise their fundamental right to marry.<sup>120</sup> In *Turner*, the Court viewed the existence of these factors in a relationship as "sufficient to form a constitutionally protected marital relationship."<sup>121</sup> Except for ambiguities in the third factor in *Turner*, the Court will have difficulty differentiating homosexual marriages from inmate marriages based on these four factors.<sup>122</sup>

*Eisenstadt*, and the abortion cases<sup>123</sup> which proceeded from its logic, greatly expanded the right to privacy by embracing and

118. 482 U.S. 78 (1987).

119. *Id.* at 95-96.

120. See Demian, *Most Compelling Reasons for Legal Marriage* (visited Jan. 21, 1997) <<http://eskimo.com/~demian/demian-1.html>> (Author states that the biggest reason to extend legal marriage to same-sex couples is "[o]ver 170 rights and responsibilities" and "[valid] standing in the eyes of the law.").

121. *Turner*, 482 U.S. at 96. The Court applied these factors to the prison scenario but did not expressly limit the test's utility to inmates. *Id.*

122. Mark Strasser, *Domestic Relations Jurisprudence and the Great Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 *FORDHAM L. REV.* 921, 963 (1995).

123. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a woman has a fundamental right to an abortion under the Fourteenth Amendment); *Doe v. Bolton*, 410 U.S. 179 (1973) (holding that a woman's physician can consider all relevant factors in deciding whether to perform an abortion).

prioritizing radical personal autonomy. Following this line of cases, the individual can define himself by his intimate and personal choices, free from all limitations imposed by the state, church, or any other authoritative body, and is burdened only by self-imposed limitations dictated by his own moral universe.<sup>124</sup> The nebulous characteristics that the Court has attached to the marital relationship and the factors it has used to determine the existence of a constitutional right will pose a direct challenge to the validity of DOMA's definition of marriage. Reliance upon notions of "tradition and the collective conscience," versus focusing on the intrinsic nature of marriage in dictating the continual proscription of legally recognized same-sex unions, will likely not be as persuasive to courts which review this question after *Baehr*.

*C. Do Tradition and the Collective Conscience Matter in  
Determining the Nature of Marriage?*

The "tradition and collective conscience" definition of ordered liberty, relied on in *Baehr* to dismiss the fundamental right to marry under the Due Process Clause, was formulated by Justice White in the *Bowers v. Hardwick*<sup>125</sup> decision. Tradition has been viewed as a "living thing," no longer an anchor and beacon of stability for future jurisprudence,<sup>126</sup> but rather a factor to be measured against the full scope of liberty interests which are steadily evolving in a continuum.<sup>127</sup> One same-sex marriage advocate stated: "[Only] mindless traditionalists will [not] allow that some departures from tradition are good and to be applauded."<sup>128</sup>

What then is the appropriate standard for mandating a departure from historical precedent and tradition? According to the same

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124. Wagner, *supra* note 94, at 162.

125. 478 U.S. 186 (1986).

126. Poe v. Ullman, 367 U.S. 497, 542 (1972) (Harlan, J., dissenting). Justice Harlan stated: "[T]radition is a living thing. A decision of the Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound." *Id.*

127. Albright v. Oliver, 510 U.S. 266, 287 (1995).

128. Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L. J. 261, 288 (1995).

source, it should occur if the referenced tradition is based on “mere prejudice.”<sup>129</sup> This argument lumps all forms of discrimination into the evil cesspool of “prejudice” and does not allow for valid discrimination based on experience and conscience. The advocates of legally recognized same-sex unions view the role of judicial interpretation as “an arbiter of moral values” which is independent from a tyrannical majority and instituted to protect historically oppressed minorities from those majorities.<sup>130</sup>

Tradition alone cannot be the sole standard in judging whether something is inherently right or wrong; tradition must be subjected to a moral gauge which tests whether the restrictions associated with it are justified. An unbridled argument for tradition as precedent -- for defining the nature of marriage -- fails when the *Loving* decision is considered. *Loving* overturned a tradition adhered to in certain parts of the United States which prohibited racially-mixed marriages.<sup>131</sup> Additionally, when arguing about marriage, one cannot avoid a discussion about the nature and logic of marriage.<sup>132</sup> This involves a deeper examination than the simple definition provided by DOMA. To talk about the “nature” of something, one must define it. Yet, Hawaii’s Supreme Court dismissed as “tautology” an argument which attempted to determine the existence of a marriage by comparing the plaintiff’s same-sex relationship with the traditional definition of marriage.<sup>133</sup> The traditional view of the nature of marriage --

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129. *Id.*

130. Keller, *supra* note 61, at 508-9.

131. Supporters of legal recognition for same-sex unions are fond of drawing comparisons between *Loving* and their struggle to secure marital rights. See Henson, *supra* note 84, at 571 (author shows that seventeen years prior to the decision in *Loving* (1949), thirty of forty-eight states had statutes prohibiting racially-mixed marriages); Evan Wolfson, *Exclusion from Marriage: Historical Parallels* (visited Dec. 4, 1997) <<http://www.eskimo.com/~demian/wolfson2.html>>; James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 *BYU L. REV.* 93, 116 (1994) (arguing that the same reasons articulated for the unconstitutionality of racially-mixed marriages should be applied to test the current restrictions proscribing the legal recognition of same-sex unions).

132. Hadley Arkes, *Questions of Principle, Not Predictions: A Reply to Macedo*, 84 *GEO. L. J.* 321, 326 (1995).

133. *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993). Historical precedent and tradition will be insufficient to limit the exercise of a fundamental right. The nature of the

restricted to man and woman -- is not correct simply because it aligns with historical tradition and precedent; rather, it is proper because it recognizes the true nature of the institution and of man.

*D. The Transcendent and Time-Honored View  
of the Nature of Marriage*

Western tradition has generally held that there is an objective standard by which the validity of a marriage can be determined.<sup>134</sup> Greek philosopher Aristotle wrote that marriage began with

a union of those who cannot exist without each other, namely male and female, that the race may continue (and this is a union which is formed, not of deliberate purpose, but because, in common with other animals and plants, mankind have a natural desire to leave behind them an image of themselves), and of natural ruler and subject, that both may be preserved.<sup>135</sup>

Marriage, according to third century Roman legal scholars, was a "union of a man and a woman, a union involving a single [or undivided] sharing of life."<sup>136</sup> St. Augustine taught that marriage necessarily involved a man and woman due to the three goods -- fidelity, offspring and sacrament -- which flowed from the relationship.<sup>137</sup> While each of these individuals differed on marriage's

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right must be understood and cannot be divorced from the right. According to one gay rights advocate, Mark Strasser, the traditional definition of anything becomes immaterial when the banner of fundamental rights has been raised. According to this advocate,

courts could not dispose of the relevant issues by appealing to the definition of the term "marriage." Second, even if the description were accurate, the argument would still have very little if any legal weight. Dictionary entries do not justify the abridgment of fundamental rights.

Strasser, *supra* note 122, at 924-925.

134. Mark Lowery, *The Knot that Can't Be Tied*, ENVOY, Jan. 1997, at 38.

135. ARISTOTLE, *POLITICS*, Book 1, chapter 1, *op.cit.*, 1252a, p. 1127.

136. THEODORE MACKIN, *WHAT IS MARRIAGE?* 73 (1982).

137. *Id.* at 129.

ultimate purpose -- for Aristotle, it was ultimately to serve civil society's needs<sup>138</sup> -- each emphasized that the nature of marriage required the union of a man and a woman.

Marriage is something to which husbands and wives align themselves, rather than something that must be conformed to each person's individual notions and desires.<sup>139</sup> One noted Christian theologian and philosopher, Pope John Paul II, describes marriage in the following manner:

[It] is constituted by the covenant whereby "a man and a woman establish between themselves a partnership of their whole life," and which "of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children." Only such a union can be recognized and ratified as a "marriage" in society. Other interpersonal unions which do not fulfill the above conditions cannot be recognized, despite certain growing trends which represent a serious threat to the future of the family and of society itself.<sup>140</sup>

Modern day jurisprudence, heavily influenced by the forces of rationalism and secular relativism, rejects such an objective standard concerning the nature of marriage.<sup>141</sup> Nowhere has this impact been more evident than in the radical changes in our nation's laws concerning marriage.

Our nation's laws no longer reflect the timeless truths which fashioned the laws concerning marriage: that marriage is an indissoluble<sup>142</sup> covenant between a man and a woman before God, and that in marriage, the man and the woman are no longer two

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138. *Id.* at 115.

139. Lowery, *supra* note 134, at 38.

140. Pope John Paul II, *Letter to Families*, (Feb. 22, 1992) <<http://listserv.american.edu/catholic/church/papal/jp.ii/jp2famlt.txt>> at 24.

141. *Id.* at 31.

142. See Glenn T. Stanton, *Finding Fault With No Fault*, Focus on the Family, Jan. 15, 1996, at 14 (Author talks about the impact of no-fault divorce laws on the indissoluble nature of marriage).

individuals, but one flesh.<sup>143</sup> Modern law, infused with egalitarian ideals, refuses to acknowledge the mystery of male and female, at times making painstaking efforts to diminish any differences between genders.<sup>144</sup> This view is antithetical to classical Christian teaching which views each of the two sexes as an image of the power and tenderness of God, with equal dignity though in a different way.<sup>145</sup> The ideologies of egalitarianism and relativism and their modern-day prophets once again are challenging the classical understanding of the nature of marriage; this time, they seek to change the participants with the assistance of the legal system.

Marriage is more than a permanent living arrangement that may promote the raising of children; it is a indissoluble covenant which represents God's eternal commitment to his people. This relationship is eternal, unitive, and procreative. Any other relationship, including same-sex unions, should not be recognized by the government because by their very nature they are invalid as marriage. DOMA is a step in the right direction, but alone is insufficient. Its grasp of the mystery of marriage is overly simplistic. Marriage must be viewed in its role as the foundation of the family, and hence in its relationship to the common good. It cannot be viewed in a vacuum.

### VIII. THE RELATION OF MARRIAGE TO THE COMMON GOOD

In addition to considering the nature of marriage, one must also examine how the exercise of the fundamental right of marriage impacts

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143. CATECHISM OF THE CATHOLIC CHURCH, 410 (1st ed. 1994) [hereinafter Catechism]. According to the Catholic Church, "[t]he love of the spouses requires, of its very nature, the unity and indissolubility of the spouses' community of persons, which embraces their entire life: 'so they are no longer two, but one flesh.'" *Id.* (quoting *Matthew* 19:6). No-fault divorce laws, prevalent among the states, are but one example of the eagerness of lawmakers to use legislation to facilitate the breakdown of marriages.

144. *Warren v. State*, 336 S.E.2d 221, 225 (Ga. 1985) (rejecting unity of person in marriage theory); *but Cf. Genesis* 2:24 (New American Standard) ("For this cause a man shall leave his father and his mother, and shall cleave to his wife; and they shall become *one flesh*.") (emphasis added).

145. CATECHISM, *supra* note 143, at 561.

society and the common good.<sup>146</sup> Otherwise, one is apt to buy into the radically autonomous notion of individual rights to which the Court is gradually subscribing. Noted sociologist William Donohue explains the inherent tension between the exercise of individual rights and the common good in the following manner:

It is one thing to say that in a free society there is a common interest in protecting individual rights, quite another to insist that individual rights are the highest expression of the common good. The common good, or the public weal, is not reducible to the rights of the individual or to any individual pursuit. Its meaning derives from its transcendent qualities, that is, from its ability to override the importance of any single individual in society. Not even the cause of civil liberties -- noble as it is -- can always be permitted to override the common good -- not, at least, if freedom is to be maintained.<sup>147</sup>

Andrew Sullivan, a homosexual activist and former editor of the *New Republic*, is one of the rare homosexual activists who recognizes this inseparable connection and is using similar logic in his attempt to woo advocates of traditional marriage in the same-sex marriage debate.

In his testimony before Congress on DOMA, Sullivan explained that allowing legal recognition of same-sex unions as marriage will benefit the common good because it will encourage monogamy among homosexual couples.<sup>148</sup> However, Sullivan refutes this proposition in

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146. Glenn N. Schram, *Pluralism and the Common Good*, 1991 AM. J. JURIS. 119, 119-20.

147. William A. Donohue, TWILIGHT OF LIBERTY: THE LEGACY OF THE ACLU 320 (1994).

148. H. Res. 3396, 104th Cong., 2d. Sess. CONG. REC. H2345 (1996). Mr. Sullivan testified that legal recognition of same-sex unions as marriages would provide much needed stability in gay relationships and reduce their perceived propensity towards promiscuity. He stated:

You [the subcommittee] will be told that [legal recognition of same-sex marriages] is a slippery slope toward all sorts of immoralities and evils, pedophilia, bestiality, but, of course, same-sex marriage is the opposite of those things. The freedom to marry would mark the end of the slippery slope for gay men and lesbians who right

other writings, including his book *Virtually Normal*, in which he claims that the advantage of the inherent “openness” in the contract of homosexual marriages reflects “a greater understanding of the need for extramarital outlets between two men than between a man and a woman.”<sup>149</sup> Evan Wolfson, director of Lambda Legal and Defense Fund’s Marriage Project and the plaintiff’s chief counsel in *Baehr*, argues that it benefits the public good to have committed, caring unions and implicitly argues that heterosexual unions have not been utterly unsuccessful in this regard.<sup>150</sup> Hence, according to his logic, the state should legalize gay marriages since perhaps society will better achieve its goal in encouraging stable family relationships. These arguments are based on untested propositions, and they again miss the underlying point: even if gay unions serve some possible public good, they cannot be recognized as legal marriages. Whether homosexuals will be excellent parents, committed spouses, or responsible neighbors ignores the true issue. The nature of marriage does not allow for the state to extend legal recognition to homosexuals.

Procreation is an additional argument put forward as a compelling state interest to limit legal recognition to unions between a man and a woman.<sup>151</sup> This is a distinct public good that same-sex unions cannot

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now have no institutions to guide our lives and loves, no institution that can act as a harbor in the emotional storms of our lives. . . . [Same-sex marriages] is essentially a conservative measure. It seeks to promote stability, responsibility, and disciplines of family life among people. . . . Why, indeed, would any conservative seek to oppose those very family values for gay people that he or she supports for everybody else?

*Id.* See also Henson, *supra* note 84, at 558 (legally recognizing same-sex unions will encourage monogamy for public health purposes); Michael L. Closten & 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 (1992).

149. Sullivan, *supra* note 1, at 176.

150. *Winning and Keeping Equal Marriage Rights -- What Will Follow Victory in Baehr v. Lewin?*, Legal Summary, (Lambda Legal Defense and Education Fund/The Marriage Project, New York, N.Y.), Nov. 7, 1994, at 7. On the same page, part of the proposed strategy is to “learn how to present [successful homosexual relationship] stories in a positive, warm, and compelling manner” and to cast enemies of homosexual marriages as “[those who have always] been hostile to others’ equal rights and pursuit of happiness.” *Id.*

151. *Baehr v. Lewin*, 852 P.2d 44, 48 (Haw. 1993). The attorneys for Hawaii used this argument unpersuasively.

provide. However, this argument is not conclusive; advocates for legal recognition of same-sex unions counter with the reality of viable options besides natural childbirth such as artificial insemination, the use of a surrogate mother, or adoption.<sup>152</sup> Additionally, some advocates argue that decisions, such as *Griswold*, cast considerable doubt on the state's ability to use procreation as a compelling state interest.<sup>153</sup>

Some defenders of the traditional institution of marriage insist that arguing procreation as the state's primary compelling interest in not recognizing same-sex unions completely misses the mark.<sup>154</sup> They argue that marriage is a good in itself, not simply the means to a public good, *i.e.*, the propagation of the race. In their view, marital acts have their "intelligibility and value intrinsically," and not in their capacity to "facilitate the realization of other goods."<sup>155</sup> They argue that this distinguishes homosexual marriages from heterosexual marriages where procreation is impossible due to sterility or other complications. These natural law advocates recognize the nature of marriage not "as a mere legal convention" -- as DOMA seems to

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152. Zambrowicz, *supra* note 49, at 923; Keller, *supra* note 61, at 499 (homosexual couples can propagate and help sustain the race through methods such as sperm donation or surrogate mothers); Strasser, *supra* note 122, at 960.

153. Macedo, *supra* note 128, at 276. Macedo argues that at least from a natural law perspective, the state has an equal interest in discouraging the use of contraceptives if it desires to promote procreation. According to Macedo: "To the extent that the state exhibits no interest in discouraging the use of contraceptives, it has evidently rejected [the desirability of procreation as a compelling state interest] and must find some other grounds to justify discouraging homosexuality." *Id.*

154. Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L. J. 301 (December 1995). The authors identified a very important point that has been virtually ignored by those fighting for the traditional view of marriage: principled, not pragmatic, arguments must be employed to defend marriage. Otherwise, same-sex advocates will eventually find a way to employ the same arguments for their purposes. For example, the argument in favor of same-sex marriages to encourage monogamous, stable relationships follows this pragmatic line of reasoning. Pragmatic reasoning and justification may lead to the achievement of desirable public goals, but they are insufficient to set any type of limitations or boundaries.

155. *Id.* at 305. The authors readily admit that it is difficult to provide demonstrable evidence of the intrinsic worth of a good such as marriage. Therefore, statistics such as the divorce rate, will always be insufficient. To understand the value of an "intrinsic human good" such as marriage, one must rely on nonquantifiable factors such as inclination and experience. *Id.*

suggest -- "but rather, as a two-in-one flesh communion of persons that is consummated and actualized by sexual acts of the reproductive type."<sup>156</sup> These advocates insist that marriage is, in and of itself, a basic good of society.<sup>157</sup> By divorcing the idea of a fundamental right to marriage from its important relationship to the common good, the case for the legal recognition of same-sex unions is considerably strengthened.

#### IX. WHAT WILL THE COURT DO WITH THE DEFENSE OF MARRIAGE ACT?

Several recent decisions by the Court, coupled with the Court's inability or unwillingness to properly describe the nature of marriage, pose significant danger to DOMA. In *Romer v. Evans*,<sup>158</sup> the Court struck down Amendment 2 which was approved by a majority of Colorado voters. The amendment would have prevented local and city governments from identifying homosexuality as a class of persons to receive special rights and protections under the state civil rights laws.<sup>159</sup> As part of its justification for overturning the amendment, the Court noted that Amendment 2 was "inexplicable by anything but animus toward the class that it affects."<sup>160</sup> Much of the media coverage surrounding the passage of DOMA through Congress and its subsequent signing by President Clinton indicated that the law was an assault on homosexuals' right to marriage, rather than an attempt to protect traditional marriage relationships.<sup>161</sup> Hopefully, the Court -- during judicial review -- will not construe the passage of DOMA as another act of "animus" against homosexuals.

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156. *Id.* at 301.

157. *Id.*

158. 116 S.Ct. 1620 (1996).

159. *Id.*

160. *Id.* at 1627.

161. David Lawsky, *Congress Sends Clinton Bill Curbing Gay Marriage*, REUTERS NEWS SERVICE, Sep. 10, 1996; Melissa Healey, *House Backs Curbs on Gay Marriages*, LOS ANGELES TIMES, Jul. 13, 1996, at A1; Carl Weiser & Kirk Spitzer, *House Votes to Let States Refuse to Recognize Same-Sex Marriage*, GANNETT NEWS SERVICE, Jul. 12, 1996. These three news articles are indicative of the media's portrayal of the act's actual purpose and effect.

The *Romer* Court apparently disregarded judicial precedent it laid out in *Bowers*,<sup>162</sup> causing one justice to dissent from the majority opinion stating that it was based on nothing but pure “political will.”<sup>163</sup> *Romer* and *Baehr*, may both foreshadow the increasing tendency of courts at all levels to exercise political will through increased judicial activism -- the proverbial “legislating from the bench” -- versus the wisdom of judicial judgment.<sup>164</sup> *Romer* also raises the concern that traditional religious morality -- implicating such issues such as the prohibition against same-sex unions as marriage -- may not be respected by the Court.<sup>165</sup> These trends can only signal trouble for the continued viability of both DOMA and the institution it attempts to protect. Homosexuality, the dark, hidden secret of yesteryear has “come out of its closet” with its activists asserting political and economic clout. This is not an issue that will simply go away. The Supreme Court will undoubtedly face the issue of legal recognition of same-sex unions as marriage in its next several terms.

## X. THE BATTLE AGAINST DOMA HAS ONLY JUST BEGUN

A major component of the effort to achieve legal recognition of homosexual unions is occurring outside the courtroom and involves a battle for the “hearts and minds” of the American people.<sup>166</sup> This

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162. *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the Court held that no fundamental right to engage in homosexual sodomy existed under the overarching right to privacy, hence, state statutes proscribing that type of conduct were constitutionally valid. If sodomy continues to be illegal in several states, it is difficult to understand how the Court would strike down a validly enacted statute which denied special protection for individuals engaging in criminal behavior.

163. *Romer*, 116 S.Ct. at 1637 (Scalia, J., dissenting).

164. One legal commentator believes that with the addition of two Clinton-appointed justices, Justices Stephen Breyer and Ruth Bader Ginsburg, the Court tends to be “much more skeptical” of attempts to curtail homosexual rights. This may spell the end of *Bowers* or at least for its relevance in future decisions involving homosexual issues, such as the right to marry. STEVEN L. EMANUEL, CONSTITUTIONAL LAW 205 (1996).

165. STEVEN A. DELCHIN, *Scalia 18:22: Thou Shall not Lie with the Academic and Law School Elite; It is an abomination*, 47 CASE W. RES. L. REV. 207, 243 (1996).

166. Several of the television programs in 1995 introduced openly gay characters; and the season’s hottest television series, *Friends*, culminated with a “wedding” ceremony uniting two lesbians. *Friends*: title unknown (NBC television broadcast, Nov. 13, 1995). In the Academy Award-winning film *Philadelphia*, the parents of the homosexual protagonist

effort will be inevitably accompanied by litigation efforts for same-sex marital rights in the courtroom. Evan Wolfson, who refers to the courts as “engines of social change,” is spearheading this movement in the judicial system.<sup>167</sup> Although this role has subjected Wolfson to vigorous criticism by members of his own homosexual community, he and others remain steadfast in their resolve to fight for a right to marry.<sup>168</sup> Wolfson’s response to his critics reveals much about his strategy and the homosexual community’s ultimate interest in securing legal recognition of their unions.

Many homosexuals are interested in the increased societal acceptance and the package of rights and benefits they believe will accompany the legalization of their unions. However, most are not interested in being shackled to the monogamous, lifelong ideal that is now the norm.<sup>169</sup> One critic has chastised Wolfson for attempting to force entrance into “an inherently problematic institution” that will force homosexuals to compromise many of their deeply held ideological views.<sup>170</sup> Wolfson’s response is interesting. He uses a “Trojan Horse” analogy in his defense, claiming that his moderate rhetoric -- insinuating that homosexuals merely want to enjoy the

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openly and heartily welcomed the homosexual relationship of their AIDS-infected son with his partner. All the characters in the movie who opposed homosexuality, from the spineless law partners to the Bible-toting judge, were portrayed as heartless bigots. In October, 1996, ABC’s *Turning Point* aired an hour-long special on four same-sex couples who were preparing for marriage. *Turning Point: Til’ Death Do Us Part* (ABC television broadcast, Oct. 15, 1996). This documentary followed the couples from their initial meeting, through the engagement process, the wedding ceremony, and some into childbirth (via invitro-fertilization). *Id.* The documentary openly encouraged the legal recognition of same-sex unions since there was no rationale for denying it to couples “just like you and me.” *Id.*

167. Wolfson, *supra* note 66, at 570.

168. *Id.* at 568-69.

169. See THOMAS STODDARD, WHY GAY PEOPLE SHOULD SEEK THE RIGHT TO MARRY, LESBIANS, GAY MEN AND THE LAW 398, 399-401 (William B. Rubenstein ed., 1993) (author states that one of the major advantages to pursuing the right to marry is the practical advantages associated with marriage-related benefits).

170. Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535, 1536 (1993). One of Ms. Polikoff’s major problems with the traditional marriage structure is its inherently paternalistic nature; Polikoff believes that the legalization of homosexual marriages would remove the stigma of gender and allow for superior egalitarian authority structures. *Id.*

institution of marriage like heterosexuals -- is part of a tactic to get "within the gates" of the marital institution. Once inside, the other parts of the homosexual activist's vision -- which essentially involve the complete transformation of the institution into undefined, "liberated" relationships -- can be accomplished with little effort.<sup>171</sup> It is indicative of the homosexuals' confidence in their eventual prospects for success that they would be so open about their intentions. However, with a wealth of judicial precedent favoring their viewpoint, they may have a fairly strong argument that even DOMA might not withstand. Recent judicial decisions concerning the nature of marriage and liberty, discussed in this note, will supply ample support to the advocates of legal recognition for same-sex unions as marriage. The passage of DOMA may prove to be a temporary impediment to their cause, but it will by no means be the definitive mandate which will end the debate or the homosexual activists' efforts.

#### X. CONCLUSION

The definition of marriage is not created by politicians and judges, and it cannot be changed by them. It is rooted in our history, our laws, our deepest moral and religious convictions and our nature as human beings. It is the union of one man and one woman. This fact can be respected or it can be resented, but it cannot be altered.<sup>172</sup>

While Senator Dan Coates, one of the co-sponsors of DOMA may be correct ideologically, his optimism for the effectiveness of DOMA in preventing the courts from redefining this fundamental institution is misguided. The problem with Coates' bold assertion is that it denies the reality of judicial decisions handed down from an increasingly liberal Court in the past three decades. In terms of the legislature, it is also noteworthy that several members of Congress condemned Coates'

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171. Wolfson, *supra* note 66, at 601.

172. S. Res. 1740, 104th Cong., 2d Sess., CONG. REC. S4947-48 (1996).

definition as overly constrictive and proceeded to propose their own view.<sup>173</sup>

The Supreme Court has often been careless in arbitrarily defining fundamental rights under the guise of substantive due process. Many Americans agree that marriage is a fundamental institution worthy of honor. Yet, was it in such disarray that it needed the blanket of fundamental right protection? This “protection” may prove to be one of the biggest foes of the traditional institution of marriage and any legislation which purports to protect it. DOMA appears doomed because of its eventual date with judicial review; that is, its definition of marriage versus the new “enlightened” jurisprudence of the Court and the Court’s adherence to substantive due process for social issues.

Although DOMA has succeeded temporarily in defining marriage on the federal level, that level of government has traditionally deferred to the state legislatures in the areas of marriage and family matters. A strategically placed challenge to any of the 26 state laws prohibiting legal recognition of same-sex unions as marriage will likely move the debate into the courts and out of the legislature. Due to marriage’s status as a fundamental right, all states may have the burden of demonstrating a compelling state interest in restricting homosexuals from marrying. It is not likely that all judges -- like the justices in *Baehr* -- will accept the role of tradition and historical precedent as adequate for rendering whether the issue of fundamental rights for homosexuals is a moot point.

The solution to the burgeoning movement advocating the legalization of same-sex unions as marriage is not more legislation or sweeping pronouncements from the Supreme Court. Rather, a battle needs to be fought for the “hearts and minds” of America’s people. The culture needs to be reminded of the beauty, strength, and stability of a committed marriage between a man and a woman. As the culture is converted, it will ultimately inform and shape the law according to eternal truths versus contemporary “pop” philosophies. For the institution of marriage to flourish, it will need cultural, not necessarily

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173. H. Res. 3396, 104th Cong., 2d. Sess. CONG. REC. H6400 (1996). Rep. Patricia Schroeder (D-Co.) was thwarted in her attempt to amend DOMA’s definition of marriage as a “nonadulterous, monogamous relationship” without any mention of sex.

legal support. Our nation must refrain from knee-jerk legal solutions to its societal woes that only cause long-term adverse impacts. The combined effect of the United States Supreme Court's pronouncement of marriage as a fundamental right in *Zablocki*, the Court's nebulous view of rights under the right to privacy, and its skewed, individualistic view of ordered liberty, may prove to be the nails in DOMA's coffin. Hopefully, marriage as traditionally understood, will not suffer a similar fate.

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