1991

Same-sex Marriage: A Review

Adrienne K. Wilson
NOTE

SAME-SEX MARRIAGE: A REVIEW

INTRODUCTION .............................................. 539
I. BRIEF HISTORY OF MARRIAGE ...................................... 541
II. THE PURPOSE OF MARRIAGE ...................................... 542
III. THE BENEFITS OF MARRIAGE ...................................... 546
IV. THE FOURTEENTH AMENDMENT ...................................... 548
   A. Heightened Scrutiny ........................................... 549
      1. Marriage as a Fundamental Right ......................... 550
      2. Homosexuality as a Suspect Classification ............... 551
         a. Immutability .............................................. 552
         b. Derogatory Stereotyping .................................. 554
         c. Historical Discrimination ................................. 555
         d. Exclusion from the Political Process ...................... 556
      3. Normative Justifications for Strict Scrutiny ............... 557
         a. Process Justification ....................................... 557
         b. Instrumental Rationality ..................................... 558
         c. Public Values Theory ....................................... 559
   B. Heightened Rationality .......................................... 559
CONCLUSION ................................................ 561

INTRODUCTION

On January 25, 1991, the Minneapolis City Council approved an ordinance providing for domestic partnership registration. In so doing, Minneapolis joined a growing number of municipalities which grant domestic partnership status in lieu of marriage to nontraditional couples, including same-sex couples.


2. Domestic partnership ordinances have been adopted in at least two dozen cities across the United States, including Los Angeles, Berkeley, West Hollywood, and Laguna Beach, California, New York City (by executive order of the mayor) and Ithaca, New York, Seattle, Washington, Madison, Wisconsin, and Tacoma Park, Maryland. Longcope, Gay Couples Fight for Spousal Rights, Boston Globe, Mar. 4, 1991, at 38 (LEXIS, Nexis library, Current file) [hereinafter Longcope, Spousal Rights].

A myriad of benefits are bestowed by the state on legally married couples. These benefits include parenting and custody rights, health care for partners and dependents, bereavement leave, tax benefits, inheritance and property rights, pensions and social security. Domestic partnership registration does not give registered partners the legal benefits of marriage. However, domestic partner registration provides public recognition of important private relationships and a mechanism through which the private sector can extend benefits.

Interestingly, municipalities have taken the lead in the recognition of same-sex relationships, an issue ignored by the states and denied by the courts. In Minnesota, same-sex marriages were prohibited in

3. The Minneapolis ordinance includes two resolutions: one supporting sick and bereavement leave for city employees; the other supporting a mayoral task force exploring diversity in Minneapolis families. Letter to the Editor of Timothy Rose, Media Advocate, Gay and Lesbian Community Action Council, Minneapolis, Minnesota printed in L.A. Times, Mar. 4, 1991, at B4, col. 3 (LEXIS, Nexis library, Current file).

Ordinances in other cities, such as those in Berkeley, West Hollywood and Laguna Beach, California, Seattle, Washington, Ithaca, New York, Madison, Wisconsin, and Tacoma Park, Maryland, extend full benefits and medical insurance to city employees. Longcope, Spousal Rights, supra note 2, at 38.

Denmark's law grants same-sex couples all but a few of the rights and responsibilities enjoyed by married heterosexuals. Homosexual families will not be recognized by the state Lutheran Church and they will not be allowed to adopt children. It was feared that allowing adoption "could stop Third World countries [from] making adoptive children available to Danish families." Isherwood, Denmark Legalizes Homosexual Marriages, Proprietary to the United Press International, May 26, 1989 (LEXIS, Nexis library, Current file). The new law "provides that registered partners will automatically inherit from each other, have the duty to support each other, be taxed as married couples and have the same access to social services as if they were married." Id. Official divorce proceedings will be required for dissolution. Id.

4. See, e.g., Paper Includes Gay Couples on What Was Wedding Page, N.Y. Times, Mar. 22, 1991, at A20, col. 3 (LEXIS, Nexis library, Current file). The Minneapolis Star Tribune announced its policy to include announcements of domestic partnerships on what had been its wedding and engagement page. The name of the page was changed from "Weddings" to "Celebrations." The spokeswoman for the newspaper, Bette Fenton, stated that the change was a "'natural response' to a new Minneapolis city ordinance allowing domestic partners to register their relationships with the city." Id.

5. A Bronx hospital, Montefiore Medical Center, for instance, now provides health benefits to homosexual employees and their partners if they can show that their living arrangements are similar to those of married couples. Bronx Hospital Gives Gay Couples Spouse Benefits, N.Y. Times, Mar. 27, 1991, at 1, col. 2 (LEXIS, Nexis library, Current file). Consumer United Insurance Company of Washington, licensed to do business in all but five states, provides a plan in which domestic partners may be named on policies. Firemen's Insurance Company of Washington has recently announced a plan that extends home ownership and renters' coverage to domestic partners of policyholders. Longcope, Spousal Rights, supra note 2, at 38. Official registration of domestic partnerships would encourage these private developments.
1971 by the Minnesota Supreme Court decision in *Baker v. Nelson*.

Dismissed by the United States Supreme Court for lack of federal question, *Baker* stands today as a leading decision in this area and has been relied on by several jurisdictions in ruling against same-sex marriages.

This Note acknowledges the failure of the courts to extend constitutional protections to a traditionally invisible and historically underrepresented group—homosexual individuals—who have been denied the option of marriage, an institution protected by the Constitution as a fundamental right for heterosexual couples. This Note discusses the history, the purpose of, and the benefits that flow from marriage. The Note then examines the various constitutional theories that courts may use in examining legislation that adversely affects homosexuals.

I. Brief History of Marriage

Family law as we know it, including marriage, developed from English canon and common law. The Anglo-Saxon form of marriage came into being during the feudal period.

The formal marriage ceremony developed during the eighteenth century. Through passage of Lord Hardwicke's Act, the English Parliament required a church ceremony, publication of banns and a license to achieve valid marital status. The Act's aim was the abolition of "Fleet" marriages that were being performed by imprisoned clergy in Fleet Prison and which were considered a public scandal.

In early America, marriage was regulated by civil authorities, and informal or common law marriages were recognized. During the early pioneer period, it was often difficult to locate a civil officer or clergy member to perform a formal marriage ceremony. Marriage


9. *Id.*


12. *Id.*

13. See *id.* at 65.
licenses were difficult to obtain due to the distance between settlements and the difficulties of travel. As a result, common law marriage became widely recognized. 14

Early American family law was influenced by church doctrine. Nineteenth and twentieth century United States Supreme Court decisions exhibit a strong Christian influence concerning marriage and divorce. 15

Today, marriage is regulated by individual state statutes. 16 Despite the absence of express prohibitions, state legislators apparently expressed their intent to prohibit same-sex marriages by using words of heterosexual implication, such as “husband and wife” and “bride and groom.” 17 For instance, the Minnesota Supreme Court, in Baker v. Nelson, 18 concluded that, in the absence of an express prohibition of same-sex marriages, “[i]t is unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would have used the term [marriage] in any different sense [than between heterosexual couples].” 19

II. THE PURPOSE OF MARRIAGE

The controversy over same-sex marriages revolves around the


16. See generally Minn. Stat. ch. 517 (1990). The Minnesota statute, in defining marriage as a civil contract, provides:

Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage may be contracted only when a license has been obtained as provided by law and when the marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom one or both of the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted, shall be null and void.

Id. § 517.01.

17. Sullivan, Same Sex Marriage and the Constitution, 6 U.C. Davis L. Rev. 275, 277 n.19 (1973) [hereinafter Sullivan, Same Sex Marriage].

18. 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810 (1972). Baker involved the marriage application of two males. A district court clerk refused to issue the license because the applicants were of the same sex. On appeal, the Minnesota Supreme Court determined that chapter 517 of the Minnesota Statutes does not authorize same-sex marriages. The court further held that chapter 517 does not offend the first, eighth, ninth and fourteenth amendments to the United States Constitution.

19. Id. at 311, 191 N.W.2d at 186.
many private and public purposes of a marital relationship. "The policy favoring marriage is 'rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.'" Embodied within the marital relationship "is a voluntary public commitment of two people to accept certain socially imposed obligations toward each other . . . . Yet, above all else, the bond of the relationship is the mutual love and respect each of the partners has for the other." Thus, the marriage relationship promotes individual values as well as community values.

The public benefit of marriage is important to same-sex couples seeking social acceptance of their relationships. In addition, public expression of commitment through marriage triggers state recognition and state protections. State recognition and protection promotes "a sense of belonging to the community through mutual public identification." The long list of entitlements and legal protections granted to married couples attest to the value society places on marriage. However, prohibition of same-sex marriages pre-


22. Buchanan, Same-Sex Marriage: The Linchpin Issue, 10 U. DAYTON L. REV. 541, 542 n.8 (1985) [hereinafter Buchanan, Linchpin]. The author asserts that marriage promotes many individual values, five of which are:

(1) generosity or the spirit of sacrificial giving; (2) fidelity or the honoring of commitments; (3) integrity or the creation of trust; (4) self-respect or the assurance of personal worth; (5) sustained joy.

Id.

23. See Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests, 81 MICH. L. REV. 463, 472-91 (1983). Community values are promoted because "it is primarily through family bonds that both children and parents learn the attitudes and skills that sustain an open society." Id. at 472.


25. Lewis, From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage, 97 YALE L.J. 1783, 1798 (1983) [hereinafter Lewis, Moral Discourse]. But see Friedman, The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family, 3 BERKELEY WOMEN'S L.J. 134, 143 n.58 (1987-88) [hereinafter Friedman, Necessity for State Recognition] (citing D. Altman, The Homosexualization of America, The Americanization of the Homosexual 185-90 (1982) (Because marriage is unavailable to same-sex couples, these couples are able to develop less oppressive and more adaptable relationships.)).

26. See Friedman, Necessity for State Recognition, supra note 25, at 155. Professor Friedman provides a list of government protections for married couples.
cludes same-sex couples from enjoying the personal and legal benefits afforded heterosexual couples through marriage.

Somewhat antiquated ideas and values are frequently advanced as the purpose of marriage and are sometimes used as a justification for allowing only heterosexual marriages. The encouragement of procreation is one such justification.27

In 1942, the United States Supreme Court, in Skinner v. Oklahoma,28 noted that the state has a basic interest in encouraging reproduction because “procreation [is] fundamental to the very existence and survival of the race.”29 However, in light of evolving attitudes toward marriage in our society, courts are unlikely to fashion constitutional protections regarding the institution of marriage based solely on the encouragement of and ability to procreate.30

States do not require heterosexual couples to prove their capacity or willingness to procreate before granting them a marriage license. Because childless same-sex couples are “similarly situated” as childless heterosexual couples, states cannot logically deny same-sex couples marriage licenses based on an inability to procreate.31

Encouragement and promotion of the traditional family unit has been advanced as a reason for denying same-sex couples the right to marry.32 The family unit provides each partner with companionship,
emotional and psychological support and basic health care. The state, in turn provides benefits which reward family stability and childrearing.33

In fact, many same-sex couples can and do raise children. Same-sex couples can provide the necessary shelter and care as well as create a satisfactory psychological environment.34 Nevertheless, same-sex unions are denied the economic advantages and privileges of marriage which heterosexuals raising children enjoy.35

Ironically, the state's interest in promoting family stability is actually undermined by depriving same-sex couples of marital rights. Forbidding marriage discourages formal commitment to a lasting, stable relationship.36 Allowing same-sex marriages would, arguably, promote the same social goals strived for in heterosexual marriages.37

One argument given for forbidding same-sex relationships is "morality." This argument, however, "presents the thorny question of the legitimacy of state enforcement . . . ."38 Does the state have the right to encourage "moral" behavior among its citizens?39 Some scholars believe a common morality is as necessary to society's continued existence as a stable government.40 These commentators argue that, if the majority believes that a certain act is immoral, they have a prima facie right to prohibit that behavior.41 These scholars


35. O'Donnell, supra note 33, at 47.


37. LeFrancois, The Constitution and the "Right" to Marry: A Jurisprudential Analysis, 5 Okla. City U.L. Rev. 507, 552-55 (1980). Same-sex marriages advance important social goals because (1) marital intimacy and stability are promoted, (2) population growth is not a rational state interest, and (3) same-sex couples are equally as competent to raise children as are heterosexual couples. Id.

38. Note, Developments in the Law, supra note 34, at 1289.


40. See Sartorius, The Enforcement of Morality, 81 Yale L.J. 891, 892, 892 n.6 (1972) (noting that professors Hart and Dworkin support this proposition). But see infra notes (discussing that sexual orientation is not indicative of morality).

41. Id. at 893. Some argue that governmental interests are protected by uniformly denying marriage licenses to same-sex couples. These arguments are, for the most part, variations of the morality argument. First, the government's approach toward homosexuality should be one of treatment and rehabilitation rather than tolerance and legalization. Second, the government should seek to prevent an increase
conclude that society may prohibit behavior that brings about significant change in social institutions upon which society places a high value.42

III. THE BENEFITS OF MARRIAGE

Same-sex couples are significantly disadvantaged because they are unable to legitimize their relationships through marriage.43 They are denied government benefits, for example, that accompany marriage. Same-sex couples cannot file joint federal and state tax returns,44 and they are ineligible for gift and estate tax benefits,45 Social Security Old Age Survivors and Disability Insurance benefits,46 and inheritance rights.47 Furthermore, courts frequently up-

in homosexuality among adolescents. Third, the issuance of marriage licenses to same-sex couples is in direct conflict with state statutes outlawing homosexual acts. Note, Legality, supra note 30, at 580-81.

Because the causes of homosexuality are in dispute, whether “treatment is necessary, desirable, or successful and whether a same-sex marriage prohibition has any bearing on adolescent sexual identity and development is still indeterminable.” See id. at 581 n.39, 582; see also Comment, Homosexuals’ Right to Marry: A Constitutional Test and a Legislative Solution, 128 U. Pa. L. Rev. 193, 198 (1979) [hereinafter Comment, Right to Marry]; Friedman, Necessity for State Recognition, supra note 25, at 156-57.

Legalizing same-sex marriages creates a potential conflict with existing state law. However, many state statutes that criminalize homosexual conduct have been repealed or are not routinely enforced. See Note, Legality, supra note 30, at 581-82, 82 n.42 (estimating there are 20 convictions for every six million arrests); Lewis, Moral Discourse, supra note 25, at 1800 n.95 (“Twenty-five states have decriminalized homosexual sodomy in the past fifteen years.”). But see Doe v. Commonwealth’s Attorney for Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), aff’d, 425 U.S. 901 (1976) (upholding Virginia statute making sodomy a crime when applied to homosexual relations between adult males); State v. French, 460 N.W.2d 2, 11 (Minn. 1990) (upholding a landlord’s refusal to rent a house to an unmarried tenant who planned to live with a member of the opposite sex).

42. Lord Devlin, supra note 39, at 989.


44. I.R.C. § 6013(a) (1990) provides that “[a] husband and wife may make a single return jointly of income taxes under Subtitle A . . . .” See also Comment, Right to Marry, supra note 41, at 194 n.32. (The Internal Revenue Service accepts the state’s definition of marriage because marital status is defined under state law.).

45. See I.R.C. § 2056 (1990); see also I.R.C. § 2523 (1990) which provides in part: (a) Allowance of deduction.—Where a donor transfers during the calendar year by gift an interest in property to a donee who at the time of the gift is the donor’s spouse, there shall be allowed as a deduction in computing taxable gifts for the calendar year an amount with respect to such interest equal to its value.

Id.

hold challenges by relatives when homosexual individuals attempt to provide for their partners through wills. 48

Same-sex couples are denied benefits that are granted to similarly situated married heterosexual couples. For example, in Coon v. Joseph, 49 a male plaintiff sought recovery for emotional distress suffered after witnessing the assault of an "intimate male friend." 50 The court held that a "close relationship," which is necessary to justify imputing foreseeability of emotional distress to tortfeasors, did not include the "significant, stable and exclusive" relationship plead by plaintiff. 51 The court stated that a sufficiently close relationship to warrant recovery was that which existed between a parent and child, a husband and wife, and between a woman and man who have established a valid common law marriage in a state which allows such marriages. 52

The Eighth Circuit Court of Appeals, in McConnell v. Nooner, 53 addressed the denial of increased Veterans benefits to a party involved in a same-sex relationship. 54 A male co-plaintiff petitioned the Veteran's Administration for increased benefits on the grounds that the other male co-plaintiff was a dependent spouse. 55 In light of the federal statute providing that the validity of marriage must be determined by the law of the jurisdiction where the parties were married, spouse); Id. § 416(b) (defining wife); Id. § 416(c) (defining widow); Id. § 416(f) (defining husband); Id. § 416(g) (defining widower); see also id. §§ 416(h)(1)(A), 416(h)(1)(B) (determination of family status).

47. See section 525 of the Minnesota Statutes which provides in part:

When any person dies, testate or intestate, (1) The surviving spouse shall be allowed from the personal property of which the decedent was possessed to which the decedent was entitled at the time of death, the wearing apparel, and, as selected, furniture and household goods not exceeding $6,000 in value, and other personal property not exceeding $3,000 in value, subject to an award of property with sentimental value to the decedent's children under section 525.152 . . . . (3) If there be no surviving spouse, the minor children shall receive the property specified in clause (1) as selected in their behalf.

MINN. STAT. § 525.15 (1990).

48. See Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. REV. 187, 192; Sherman, Undue Influence and the Homosexual Testator, 42 U. Pitt. L. REV. 225, 267 (1981) (Homosexuals are more likely to receive testamentary challenges than heterosexuals who bequeath portions of their estate to a lover or spouse.).


50. Id. at 1273, 237 Cal. Rptr. at 875.

51. Id. at 1274, 237 Cal. Rptr. at 876.

52. Id.

53. 547 F.2d 54 (8th Cir. 1976). Interestingly, the plaintiffs in this action are the same as in Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810 (1972). While the case was pending in the Minnesota Supreme Court, Baker and McConnell were granted a marriage license from the Blue Earth County Court Clerk. A minister then performed a marriage ceremony for them.

54. McConnell, 547 F.2d at 55.

55. Id.
the court held that same-sex marriages are prohibited under Minne-
sota law and thus the increased benefits were denied.56

Yet another example of discrimination in the disbursement of ben-
etfits is demonstrated in Adams v. Howerton.57 A male United States
citizen and a male alien were "married" by a minister in Colorado.58
The court denied a petition for classification of the alien as an imme-
diate relative of the United States citizen. The court stated that a
homosexual marriage did not qualify the alien as the citizen's spouse
under Section 201(b) of the Immigration and Nationality Act.59

Recently, there has been some movement by the courts in the di-
rection of granting benefits to same-sex couples. In July 1989, the
New York Court of Appeals, in Braschi v. Stahl Associates Co.,60
ruled that a homosexual couple that had lived together in a long-term re-
lationship may be considered a family under the state's rent-control
regulations.61 The Braschi court held that a surviving partner of a
deceased tenant-of-record was entitled to maintain occupancy of the
apartment as the surviving spouse or family member of the de-
ceased.62 However, the courts generally have not been hospitable to
the claim that a long-term same-sex relationship is analogous to a
marriage.

IV. THE FOURTEENTH AMENDMENT

During the 1960s, the equal protection clause of the fourteenth
amendment63 was used to attack legislation that had an adverse im-
 pact on minority groups. "The clear and central purpose of the
Fourteenth Amendment was to eliminate all official state sources of
invidious racial discrimination."64 The fourteenth amendment has
been successfully used to attack discrimination based on color, na-

56. Id. (relying on Baker, 291 Minn. at 310, 191 N.W.2d at 185).
57. 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982).
58. Id. at 1038.
59. Id.
61. Id. at 214, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.
62. Id.
63. The equal protection clause of the fourteenth amendment provides:
All persons born or naturalized in the United States, and subject to the juris-
diction thereof, are citizens of the United States and of the State wherein
they reside. No State shall make or enforce any law which shall abridge the
privileges or immunities of the citizens of the United States; nor shall any
State deprive any person of life, liberty, or property, without due process of
law; nor deny to any person within its jurisdiction the equal protection of
the laws.
U.S. CONST. amend. XIV, § 1.
64. Loving v. Virginia, 388 U.S. 1, 10 (1967). See Comment, Constitutional Aspects
of the Homosexual's Right to a Marriage License, 12 J. FAM. L. 607, 610 (1967) [hereinafter
Comment, Constitutional Aspects] (using reasonable classification requires persons in
similar circumstances to be treated alike); United States v. Carolene Products Co.,
tionality, alienage and race. Clearly, the fourteenth amendment is a useful tool for vindicating individual rights.

When a fundamental right or a suspect class is not involved, and if a mere rational relationship to a legitimate state end exists, a statute will pass constitutional muster. A law challenged under this rational basis standard is reviewed in light of four factors: (1) the law is presumptively valid; (2) the law does not need to be "mathematically precise, and some incidental inequities will be tolerated"; (3) judicial review based on legislative purpose is not required if the law is "rational"; and (4) the challenger must prove the statute unreasonable. In other words, the Court will invalidate a law "'only if no grounds can be conceived of to justify [the law].'" In addition, the courts afford state legislatures broad discretion. Thus, the rational basis standard acts as a rubber stamp because the challenged law is virtually always upheld.

**A. Heightened Scrutiny**

Despite the difficulty of invoking fourteenth amendment protection, same-sex unions may qualify for constitutional protection because marriage is considered a fundamental right. The key question arising under the fundamental rights analysis is whether marriage as a fundamental right encompasses both heterosexual and same-sex unions. Same-sex marriage as fundamental right would trigger a strict scrutiny standard of judicial review for statutes affecting same-sex unions.

---

304 U.S. 144, 153 n.4 (1938) (Equal protection clause protects "discrete and insular minorities" from prejudice or indifference by the majority.).


66. Comment, Homosexuals' Right to Marry, supra note 41, at 610.

67. Id. at 35-36.


70. Ohio Bureau of Employment v. Hodory, 431 U.S. 471, 491-92 (1977) (Supreme Court will not impose its views as to the wisdom of a state statute so long as the statute is rationally related to a legitimate state interest.)


Suspect class status for same-sex unions will also trigger heightened scrutiny judicial review. However, the central issue under the suspect class analysis is whether same-sex couples as a group fall within the definition of a suspect class.

1. Marriage as a Fundamental Right

Fundamental rights are "those rights which have their source, and are explicitly or implicitly guaranteed, in the federal constitution . . . ."73 The Supreme Court generally sustains classifications regarding economic or social welfare legislation if the action is within the realm of legitimate governmental functions.74 Conversely, where civil liberties and rights are at issue, the Court will evaluate whether the classification is constitutionally permissible pursuant to the equal protection guarantee.75

The United States Supreme Court has long recognized that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."76 "There can be no prohibition of marriage except for an important social objective and by reasonable means."77 Furthermore, a state statute impinging on the freedom of intimate association, which includes marriage, requires an important and legitimate justification to withstand constitutional challenge.

The first amendment also safeguards the freedom of association as it relates to marriage. In Griswold v. Connecticut,78 a Connecticut statute making it a crime to use a contraceptive device was struck down because it invaded "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."79 The law was found unconstitutional because it sought "to achieve its goals by means having a maximum destructive impact upon that relationship."80

73. BLACK'S LAW DICTIONARY 674 (6th ed. 1990).
75. Id.
77. Perez v. Lippold, 32 Cal.2d 711, 713, 198 P.2d 17, 18-19 (1948). In Perez, the court stated that "marriage is . . . something more than a civil contract subject to regulation by the state, it is a fundamental right of free men." Id.
78. 381 U.S. 479, 482-83 (1965) (Freedom of association is a peripheral first amendment right, without which "those specific rights would be less secure.").
79. Id. at 485.
80. Id.
2. Homosexuality as a Suspect Classification

Statutes affecting suspect groups are entitled to a heightened or strict scrutiny standard of judicial review. Under a strict scrutiny standard, the state carries a heavy burden of proof and must establish that the statute is necessary to promote a compelling state interest. Given the state's heavy burden, strict scrutiny essentially presumes the challenged statute is unconstitutional and therefore invalid if the classification is based on a suspect class, such as race, national origin or alienage.

A classification consists of individuals who share common characteristics. To be deemed a suspect classification, the common characteristics must be "essential elements of personhood" and must be the basis of discrimination. Personhood is comprised of three separate components: "[I]t must be essential to individual identity, essential to group identity, and essential to society's perception of those identities." A certain group, for instance, may share irrelevant characteristics such as eye or hair color, but not qualify for suspect classification.

The Supreme Court has granted suspect status to classes based on race, alienage, and ancestry. In addition, poverty has also been seen as suspect, and the Supreme Court has not barred additions to the list of suspect status qualifiers. Judicial designation of homosexuality as a suspect class could provide a comprehensive doctri-
nal framework for addressing some of the problems of inequality. If homosexuality is a suspect classification, the state bears a heavy burden if a statute is challenged. The state must show both that the classification is necessary to accomplish a legitimate state interest and that the law promotes a compelling state interest.

The Supreme Court has not established explicit grounds for suspect classification. However, certain common elements seem to exist, including immutability, derogatory stereotyping, history of discrimination and political disadvantage.

a. Immutability

Classifications based on immutable traits are sometimes considered suspect. An immutable trait is one "not capable or susceptible to change: unchangeable, unchanging, invariable, unalterable." Race, for example, is an immutable trait.

Because individuals should not be penalized for something beyond their control, it is not fair to base legal burdens or the receipt of benefits on an immutable characteristic. Concerned with this aspect of fairness, the Supreme Court, in Plyler v. Doe, stated that "legal burdens should bear some relationship to individual responsibility or wrongdoing."

The origins and mutability of one's sexual orientation are unclear. What is clear is that homosexuality is a status and not merely


92. Chaitin & Lefcourt, Suspect, supra note 65, at 36. See, e.g., Loving v. Virginia, 388 U.S. 1, 7-12 (1966) (Racial classification triggered strict scrutiny.); McLaughlin v. Florida, 379 U.S. 184 (1964) (Supreme Court held Florida law invalid because it criminalized unmarried cohabitation only if the parties were of different skin color.); Shapiro v. Thompson, 394 U.S. 618 (1960) (Statute requiring residency for more than one year to qualify for welfare benefits creates suspect class and is void.). But see Buchanan, Linchpin, supra note 22, at 549-72 (discussing a series of secular arguments which support the government's nonrecognition of same-sex marriage as a means narrowly drawn to support a compelling state interest in "protecting and fostering the marriage institution," and thus withstand the even strict scrutiny).

93. Comment, Constitutional Aspects, supra note 64, at 618.

94. Id. at 612.


98. Researchers tend to agree on some theories. Sexual orientation usually develops by age five or six, with conservative estimates having sexual orientation firmly
a chosen activity. A person’s homosexual orientation exists regardless of whether that person has ever engaged in a homosexual act. 99

Generally, sexual orientation is thought to be impervious to change. 100 While sexual behavior may be susceptible to suppression, conversion of a person’s sexual orientation is not strongly substantiated. 101 Sexual orientation, therefore, is distinguishable from sexual activity. 102

Immutability can be further broken down into characteristics which are visible and invisible. Assuming that homosexuality is an unalterable characteristic, it follows that homosexuality can be analogized to other unalterable characteristics, such as race. 103 “[S]exual preference, like skin pigmentation, cannot be changed and, like race, homosexuality is immutable.” 104 Racial groups, however, are also


Further, research suggests that neither individuals themselves, nor their parents control sexual orientation. Lewis, Moral Discourse, supra note 25, at 1799 (“The overwhelming psychiatric evidence demonstrates, however, that homosexuality is not a matter of simple election but rather a deep-seated psycho-social phenomenon established in early childhood years.”).

Several factors such as physiological, biological, hormonal, social or psychological variables, or “multiple interacting with different variances in different individuals” may lead to the development of a particular sexual orientation which an individual cannot control. Note, Application, supra note 69, at 819. See also Comment, Assessing Children’s Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard, 32 UCLA L. Rev. 852, 859 n.35, 859 n.36 (1985) (“Under its current diagnostic system, the American Psychiatric Association does not consider homosexuality a form of mental disease.”).

99. See G. Weinberg, Society and the Healthy Homosexual 70 (1972) (An individual, although abstaining from homosexual conduct, may still be a homosexual; conversely, a person may participate in homosexual activity despite heterosexual orientation.).

100. Chaitin & Lefcourt, Suspect, supra note 65, at 39-40. See Baker v. Wade, 553 F. Supp. 1121, 1129 (N.D. Tex. 1982), appeal dismissed, 743 F.2d 236 (5th Cir. 1984), rev’d on rehe’g, 769 F.2d 289 (1985) (evidence exists indicating that sexual orientation would be difficult and painful, if not impossible, to reverse by psychiatric treatment); see also D.J. West, Homosexuality Re-Examined 266 (1977).


Some psychoanalysts believe therapists merely assist a homosexual in adjusting to his or her sexual orientation. Others claim that after a lengthy and costly process, combined with a strong desire to change, heterosexuality may be achieved. Note, Application, supra note 69, at 817.

But see Comment, Right to Marry, supra note 41, at 206 (Although a close call, sexual preference cannot be viewed as immutable.).

102. Id.


104. Id. at 40.
"visibly identifiable." Visibility, of course, brings to mind physical characteristics or features, features which identify members as belonging to a particular group.

Because the visible or physical characteristics present in race classifications are not readily apparent in homosexuals, the analogy between race and homosexuality is weakened. However, persons of ethnic heritage are automatically entitled to the strict scrutiny standard on grounds of immutability, irrespective of visibility.

Arguably, the same reasoning applies to homosexuals. Because suspect class protection has been extended to classes based on traits which are not necessarily visible, homosexuality might also qualify for suspect class protection. However, immutability is not necessarily required, nor always sufficient to create suspect class status.

b. Derogatory Stereotyping

A second factor considered in granting suspect class protection is whether the group has been the subject of "hostile myths or derogatory stereotypes which have the result of instilling fear or enmity toward such groups in the popular mind." Classes subject to hostile or derogatory stereotyping are usually granted suspect status protection.

Hostility toward homosexuality is pervasive in western society and dates far back into history. In fact, stereotypes are abundant. Derogatory stereotypes include such things as that homosexuals are inclined toward pedophilia, or that homosexuals recruit others, particularly young people, to adopt a homosexual lifestyle. Less hostile stereotypes include the idea that homosexuals predominate in certain professions or that homosexual men are effeminate and lesbians are masculine. Since homosexuals are subject to such
disparaging stereotypes and misconceptions, another element of suspect classification is met.

c. Historical Discrimination

A third element, a history of public or private discrimination, is also a characteristic of groups granted suspect status. A past history of unjustified unequal treatment seems in itself a strong argument for the court to apply strict scrutiny to legislation adversely affecting such a group. However, historical discrimination against a particular class is not alone sufficient to trigger a strict scrutiny standard of review. For example, those who commit crimes have been subjected to a “history of purposeful unequal treatment” because society believes such treatment is justified. Still, the “history of discrimination” factor is emphasized by the Court when determining whether to grant suspect class protection.

A cultural theme of aversion to homosexuals dates back to biblical times. Relying on biblical authority, the Talmudic codes elaborated on the laws against sodomy. By the end of the Middle Ages, homosexuality was “identified with heresy and often punishable by death.”

More recently, discrimination has appeared in the form of homophobia. Discrimination has at times even reached “hysterical proportions.” Although not as harsh, contemporary society continues to maintain a hostile attitude toward homosexuality. Continued discrimination and prejudice suffered by homosexuals provides support for the use of suspect classification for homosexuals.

117. Id. at 577.
118. Comment, Constitutional Aspects, supra note 64, at 614.
119. Note, Application, supra note 69, at 814.
120. J. Ely, Democracy and Distrust 250 n.64 (1980) (For example, the law disadvantages extortionists with good cause.).
121. Chaitin & Lefcourt, Suspect, supra note 65, at 41.
122. See Leviticus 20:13 (“If a man lies with a man as one lies with a woman, both of them have done what is detestable. They must be put to death . . . .”).
123. See Comment, Constitutional Aspects, supra note 64, at 617, 617 n.99.
124. Id. at 618.
125. See Note, Application, supra note 69, at 824 and n.171. (“Homophobia refers, in general, to negative attitudes toward homosexuals or homosexuality based either entirely on prejudice or on experience which is strongly colored by prejudice.”).
126. Id. at 825, 825 n.173 (For example, during the Anita Bryant crusade to reverse a gay rights ordinance in Florida, “Kill a Queer for Christ” bumper stickers were common.).
127. Comment, Constitutional Aspects, supra note 64, at 618.
d. Exclusion from the Political Process

Groups that receive suspect classification usually have “little or no voice in the political process.”

"[H]omosexuals as such are without effective political power." The desire of homosexuals to avoid prejudice may lead some to adopt a heterosexual lifestyle, limiting their ability to participate in political activities on behalf of the homosexual community. Also, many homosexuals are simply “unwilling to work for, advocate, or even be counted in favor of progay legislation.” In reality, this may be a “defensive reaction to the moral opprobrium and discrimination society inflicts upon gays.”

Furthermore, homosexual participation in the political arena may be ineffective because others may refuse to bargain with them. Some legislators, who must answer to those who elected them, may fear their votes will be interpreted as condoning immoral behavior and, thus, become a political liability.

The movement by the homosexual community toward full rights and public acceptance continues to gain strength, and “its increasing momentum will likely mobilize the homosexual vote.” More homosexuals are openly being elected to public office. Despite progress, however, homosexuals as a group are still politically disadvantaged and are far from being adequately protected in the political arena.

In light of the fact that homosexuality exhibits the factors commonly associated with suspect status, strict scrutiny should be applied to laws affecting homosexuals.


129. Comment, Constitutional Aspects, supra note 64, at 614.
130. Chaitin & Lefcourt, Suspect, supra note 65, at 41.
131. Comment, Constitutional Aspects, supra note 64, at 616.
132. Note, Application, supra note 69, at 826.
133. Id.
134. Id.
137. Comment, Right to Marry, supra note 41, at 204.
138. Id.
139. Id. at 204-05.
3. Normative Justifications for Strict Scrutiny

Ways other than those outlined above exist for a group to obtain suspect class status. The Court, in *Plyler v. Doe*, stated that "[s]everal formulations might explain our treatment of certain classifications as ‘suspect.’" Three different normative approaches may justify suspect class status and a strict scrutiny standard of judicial review for homosexuals.

a. Process Justification

The process justification approach uses the strict scrutiny standard of review as a way to correct imbalances of power and abuse in the political system. According to this theory, the courts and legislatures have a duty to "protect those who can’t protect themselves politically." Legislatures have a duty to refrain from premising legislation on prejudice, stereotypes or caprice. Elected officials also owe a duty to accord the entirety of their constituency equal concern and respect. When the government and governmental officials fail to meet these objectives, the judiciary is called upon to guard against "degradation or the imposition of stigma." Judicial review serves to protect rights of minority groups from harms imposed by the majority. The judiciary’s purpose is to see that society treats each person “as a respected, responsible, and participating member.”

The government should not discriminate on the basis of any factor that is not indicative of a “person’s moral status.” Moral status encompasses one’s “activities, talents, skills and needs” but not one’s sexual orientation.

A decision as to moral irrelevance is essentially a balancing of the correlation between the trait and proper governmental goals on the one hand, and the negative effects from using a particular clas-

140. See *id*. at 828; see also *Note, Marital Status*, supra note 68, at 128-29, 129 n.118.
142. *Id*. at 216 n.14.
143. *Note, Application*, supra note 69, at 828.
144. *Id*.
145. *Id*. at 152.
146. *Id*. at 137.
147. *Id*. at 73.
150. *Id*. at 4, 26.
152. *Id*.
sification on the other. A correlation... almost always exists between a classifying trait and a governmental end sought. Any correlation that exists between homosexuality and a legitimate governmental goal most likely will not outweigh the costs of using that classification. 158

Sexual orientation is simply not relevant to governmental decisions with respect to distributing benefits and imposing burdens on individuals. 154

Judicial applications of process theories are available to politically powerless minorities when a group is the subject of "incorrect stereotypes." 155 The strict scrutiny standard of review applies to laws that disadvantage a politically helpless minority that has been subjected to prejudice. 156

The standard of review for classes subjected to stereotyping differs according to the class. One theory calls for strict scrutiny only if the "class suffers from stigmatizing stereotypes that serve to perpetuate a caste system." 157 A second theory provides that strict scrutiny is allowed only if incorrect stereotypes accompany political powerlessness. 158 This second theory also adds that legislators should not be members of the class in question. 159 Since homosexuals have been subject to first degree prejudice and forms of stereotyping, the general consensus is that homosexuals meet suspect class status and are entitled to the strict scrutiny standard of review. 160

b. Instrumental Rationality

The instrumental rationality theory focuses on the "means chosen to implement legislative ends" to justify a strict scrutiny standard of review. 161 The question is whether the challenged means of the legislation is rationally related to the end sought. 162 The instrumental rationality theory is concerned with improper legislative motives rather than with improper goals. 163 For example, if the classification is more likely than not irrational, the strict scrutiny standard of review is used. 164 The rationality theory further proposes that courts

153. Note, Application, supra note 69, at 831.
154. Id. at 830.
155. Id. at 831.
156. Id. (citing Karst, supra note 148, at 63.).
157. Id.
158. Id. at 831-32 (discussing "we-they" stereotyping).
161. Id. at 832.
162. Id.
163. Id. at 833.
164. Id. See Bice, Rationality Analysis in Constitutional Law, 65 MINN. L. REV. 1, 36 (1980) [hereinafter Bice].
invalidate as irrational any law if the benefits due to invalidation outweigh the costs of "instability, relitigation, and lack of uniformity."\textsuperscript{165}

With respect to homosexual classifications, the instrumental rationality theory justifies the use of strict scrutiny "to the extent that classifications are more likely than not based on erroneous premises or are marginally inefficient."\textsuperscript{166}

c. Public Values Theory

The public values theory uses strict scrutiny as a way to ensure that laws implement only public values.\textsuperscript{167} This theory views the function of the equal protection clause as "prohibit[ing] unprincipled distributions of resources and opportunities. Distributions are unprincipled when they are not an effort to serve a public value, but reflect the view that it is intrinsically desirable to treat one person better than another."\textsuperscript{168} Undoubtedly, distributions that discriminate against homosexuals can be considered unprincipled and therefore unconstitutionally motivated, thus triggering strict scrutiny.

B. Heightened Rationality

Even if homosexuals are not granted suspect status and the benefit of strict scrutiny judicial review, an "intermediate" level of scrutiny provides an alternative.\textsuperscript{169} The "heightened rationality"\textsuperscript{170} test may provide an alternative standard of review for legislative classifications based on sexual preference. The heightened rationality standard is a "more modest interventionism"\textsuperscript{171} and has been applied in place of the lower standard of rationality.\textsuperscript{172} Legislation is reviewed

\textsuperscript{165}. Note, Application, supra note 69, at 833; see also Bice, supra note 164, at 36; Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 Calif. L. Rev. 1049 (1979) (exploring theory and practice of the rationality requirement).
\textsuperscript{166}. Note, Application, supra note 69, at 833. According to the commentator, "the instrumental rationality theories require courts to accept the government's goals as a given premise." Essentially then, purposeful discrimination is permitted under a rationality theory if the purpose is declared legitimate or beyond the power of the government. \textit{Id.} at 833 n.225.
\textsuperscript{167}. \textit{Id.} at 834.
\textsuperscript{169}. Comment, Right to Marry, supra note 41, at 207.
\textsuperscript{170}. See Reed v. Reed, 404 U.S. 71, 76 (1971) (recognizing that classification must be reasonable and not arbitrary).
\textsuperscript{172}. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (requiring that classifi-
with a type of "graduated, sliding-scale test." 173

Chief Justice Burger, in Reed v. Reed, 174 recognized that while states could justify treating classes of persons in different ways, the classifications must not be unreasonable or arbitrary. 175 The classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ." 176 This test is more flexible than the rigid two-tiered rationality/strict scrutiny approach. 177

The intermediate test, as described by the court in Boraas v. Village of Belle Terre, 178 considers three factors. In deciding whether the classification is substantially related to the object of the statute, the court examines the "nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it." 179

This intermediate standard protects rights that may not be classified as fundamental. It also seeks to protect individuals who are subject to discrimination, even though they are not classified as suspect. 180 Intermediate rationality review is appropriate for classes which come close to meeting the traditional indicia of suspectness. 181

The middle-level test has been generally applied in cases dealing with gender and illegitimacy. 182 Homosexuals are also in need of the "judicial protection offered by the 'heightened rationality' test." 183

With respect to same-sex marriages, if a balancing test under the intermediate approach is used, the state has the burden of showing that its restriction bears a substantial relationship to an important

173. City of New York v. Richardson, 473 F.2d 923, 931 (2d Cir. 1973) (recognizing that the Supreme Court’s two-tiered approach has been giving way to “a more graduated, sliding-scale test”).
175. Id. at 76.
179. Id. at 814.
180. Comment, Right to Marry, supra note 41, at 207.
181. Id. at 209.
182. Id. at 208.
183. Id. at 209.
governmental objective.\textsuperscript{184} The state may take into consideration "matters of legitimate concern" to the state.\textsuperscript{185} "Such legislation, however, must [not] be based . . . on arbitrary classifications of groups . . . ."\textsuperscript{186} If the state's action is "merely a cloak for prejudice and intolerance"\textsuperscript{187} and there is no valid purpose behind the action, the court may not uphold the legislation, especially if the state action is detrimental to a specific class.\textsuperscript{188}

States' prohibition of same-sex marriages does not advance any legitimate state interest. States have attempted to justify the same-sex marriage prohibition on several grounds, including: (1) preventing an increase in homosexuality; (2) supporting state sodomy laws; and (3) promoting family stability, as well as procreation.\textsuperscript{189} However, "[f]or each of these objectives, either the state interest itself is not legitimate or the relationship between that interest and prohibition of homosexual marriage is too attenuated to validate the classification."\textsuperscript{190} Thus, under a heightened rationality analysis, laws prohibiting same-sex marriages would be struck down and same-sex couples would be able to marry, if they so desire.

\textbf{CONCLUSION}

In a November 1989 poll published by \textit{Time} magazine,\textsuperscript{191} individuals were asked whether marriage between homosexual couples should be recognized by law. Sixty-nine percent of those polled said no.\textsuperscript{192} Seventy-five percent of those polled felt that homosexual couples should not be legally permitted to adopt children.\textsuperscript{193}

Public reaction to the grant of benefits to homosexuals received more favorable results. In the \textit{Time} magazine poll, sixty-five percent thought homosexual couples should be allowed to inherit each other's property and fifty-four percent agreed that homosexual couples should be permitted to receive medical insurance and life insurance benefits from a partner's policies.\textsuperscript{194}

While still facing much adversity, same-sex couples are making

\begin{flushleft}
\textsuperscript{184} Craig v. Boren, 429 U.S. 190, 197 (1976).
\textsuperscript{185} Ingram, \textit{Critique, supra} note 24, at 44.
\textsuperscript{186} Perez v. Lippold, 32 Cal.2d 711, 718, 198 P.2d 17, 21 (Cal. 1948).
\textsuperscript{187} See Ingram, \textit{Critique, supra} note 24, at 44.
\textsuperscript{188} Id.
\textsuperscript{190} Comment, \textit{Right to Marry, supra} note 41, at 210.
\textsuperscript{192} Id. at 102
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\end{flushleft}
headway in today's society. Whether same-sex couples will be granted marriage licenses in the future is questionable. Nevertheless, as evidenced by both the *Time* magazine poll and the recent movement by municipalities to grant registered partnership status to same-sex couples, equal access to benefits for same-sex couples may be an achievable goal.

Registered partnerships, however, do not confer all of the benefits that flow from state sanctioned marriage. Legislative enactments conferring full state recognition on same-sex relationships do not seem imminent. The courts, armed with the strict scrutiny standard of review or an intermediate standard of review, have the opportunity to aid in the advancement of the important societal goal of eliminating prejudice and discrimination for all people. Until and unless change comes from the state legislature, or from the state or federal judiciary, same-sex couples must “make do” with small victories at the local level.

*Adrienne K. Wilson*