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THE CASE FOR LEGAL RECOGNITION OF SAME-SEX MARRIAGE

*Pamela S. Katz**

INTRODUCTION

Gay and lesbian unions have been treated like an “elephant in the living room” by our law-making institutions. Everyone knows that they exist—their children are in schools, their deeds are recorded in county offices, their domestic partnership certificates are filed with local clerks, and their battles over custody, visitation and property distribution are witnessed in the courts—yet, every state has refused to recognize gay and lesbian unions, and instead our legislatures and courts skirt around their perimeter. As a result, our legal system has created a patchwork of rules and rights applicable to couples of the same-sex and their children that often vary depending on the county, city, or judicial district in which they reside, or the institution at which they are employed. This inconsistent body of law creates instability, uncertainty and chaos, conditions which are unacceptable in a nation where due process and liberty are paramount values.

By prohibiting the establishment of a family through the means most widely recognized in our culture—i.e., marriage, states effectively prohibit full participation in American society by lesbians and gay men and their children.¹ The family is the most

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¹ See *Same-Sex Marriage in New York, by the Committees on Lesbians and Gay Men in the Profession, Civil Rights, and Sex and Law, with an Addendum*

important organizing unit of our society. For its members—spouses, parents, and children—it provides emotional support, security, commitment, and a sense of belonging. It cannot be disputed that sexual orientation is irrelevant to the enjoyment of these basic human rights. Nothing about sexual preference makes one more or less desirous, capable, or worthy of those rights. For society at large, families provide stability, responsibility for others (especially children), and economic interdependence. The state interest in a stable society is advanced when families are established and remain intact. This is true regardless of the gender of the spouses.

The exclusion of homosexuals from the marriage franchise has tangible consequences that detrimentally impact same-sex couples and their children. These families are denied access to the regime of rules and rights provided by domestic relations laws, including the right to equitable distribution and spousal maintenance upon dissolution of the union, and the right to visitation for the non-natural parent of the child.² In addition, certain pension rights and income tax advantages under federal law are not available to those who are not “spouses” under the law.³ In New York, for example, non-legal spouses do not have rights upon the death of their life

by the Committee on Matrimonial Law, 52 THE RECORD 343, 357-64 (Association of the Bar of the City of New York ed., 1997) (listing the benefits of marriage). The United States General Accounting Office compiled a report on the benefits associated with civil marriage that identified 1049 federal laws in which benefits, rights and privileges are contingent upon marital status. U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. B-275860, LETTER REPORT 1-2 (1997) (responding to a request by the House in connection with the enactment of the Defense of Marriage Act).

² *In re Alison D. v. Virginia M.*, 572 N.E.2d 27, 29-30 (N.Y. 1991).

³ *See, e.g.*, I.R.C. § 401(a)(11) (1994) (providing pension benefits to surviving spouses); I.R.C. §§ 1041, 2056, 2523 (1996) (providing non-taxable transfers to spouses). Certainly, there are some benefits to unmarried cohabitators under federal income tax law. *See* I.R.C. § 1 (1999) (providing income tax rates that in some instances penalize married couples); I.R.C. § 32 (1999) (setting out credits that require married couples to file joint returns); I.R.C. § 151(c)(2) (1999) (denying deductions for personal exemptions to married dependents); I.R.C. § 219(g) (1999) (limiting retirement savings deductions for certain married individuals).

partners, so that when one's partner dies, the relationship is wiped out as if it never existed.⁴

Once gay and lesbian marriages are afforded the same rights and responsibilities as heterosexual marriages, their unions will be established, maintained, and dissolved according to a set of rules developed in accordance with a consistent and thoughtful public policy. Working, living and having children within a secure and caring family unit will cease to become a guessing game requiring a stack of legal documentation and a thick skin. The whole cloth of marriage will replace the confusing patchwork that exists today.

This Article will make the case for ending the uncertainty and *ad hoc* decision-making that has enormous consequences for gay and lesbian individuals and their children. First, the Article considers the basis for the existing public policy on marriage and the realities that militate for change. Next, the Article considers substantive due process jurisprudence and the right to marry under the United States and New York State Constitutions, and concludes that the right to marry for people choosing partners of the same sex is a logical application of an existing fundamental right. The Article then considers the Equal Protection Clauses of the United States and New York State Constitutions and applicable federal and state case law. It examines the ban on same-sex marriage as a form of gender discrimination that must be afforded heightened scrutiny or, in the alternative, as a form of sexual orientation discrimination that may be given heightened scrutiny. Finally, the Article examines the "state interests" that have been, or may be, posited to support a ban on same-sex marriage, and concludes that, even under rational basis scrutiny, the governmental interests are not rationally advanced by the prohibition of same-sex marriage.

It is important to be clear that permitting civil same-sex marriage is not equal to endorsing homosexuality. Rather, it is a

⁴ See, e.g., N.Y. PUB. HEALTH LAW § 4301(2) (McKinney 1985 & Supp. 1999) (denying non-spouses the right, without explicit directives from the decedent, to make decisions about the burial or disposal of the decedent's remains); N.Y. EST. POWERS & TRUSTS LAW §§ 4-1.1, 5-1.1-A (McKinney Supp. 1999) (denying non-spouses the right to intestate succession or right of election); N.Y. C.P.L.R. 4504(c)(1) (McKinney 1992) (denying non-spouses the right to waive the doctor-patient privilege of decedent for litigation purposes).

recognition of the realities of today's families, and a response to the need for a coherent and consistent public policy. Approximately eight to ten million children in America are born into families with a gay or lesbian parent.⁵ Acknowledging that these parents have established a legal relationship for the purpose of granting rights and developing procedures would not mean that the state is approving homosexuality, just as laws regulating the dissolution of marriage do not signify a governmental preference for divorce. Government must act to fill the void—to recognize that there is an elephant in the living room and to confront it.

I. PUBLIC POLICY ON MARRIAGE

In a democracy, it is the people who drive public policy, as public policy ideally reflects the will of the people. Yet, the actions and reactions of the courts, legislatures, and government agencies regarding a particular issue, such as same-sex marriage, powerfully influence how the public will view the issue, assign judgments, and direct public policy. As a result, this process of formulating public policy is circular. It creates a situation where social facts that should contribute to the policy, and are known to the public, but not necessarily recognized by government, are ignored and are left out of the circle. Consequently, the policy itself may bear little relationship to the social facts related to the issue—i.e., the policy is driven by “myth” rather than by empirical fact. One seeking to change the policy must “demythologize” more than “disprove” it.⁶ The policy of all fifty states to prohibit civil marriage between people of the same-sex is based on narrow, discriminatory and unrealistic myths of the family and of gay and lesbian unions.

⁵ *In re Alison D.*, 572 N.E.2d at 30 (Kaye, J., dissenting) (citing Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and other Nontraditional Families*, 78 GEO. L.J. 459, 461 n.2 (1990)).

⁶ CYNTHIA DANIELS, *AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* 100 (1993).

A. *The Myths*

The myths about gays and lesbians and their families are widespread and rather unflattering. Homosexuals are more severely stigmatized than any other group in America.⁷ Homosexuals have been viewed historically as mentally ill, sexually deviant, or immoral. They are systematically discriminated against in the military, immigration, housing, and employment.⁸ Our government, through its laws, has in many cases sought to protect historically unpopular, outcast, or politically powerless groups, such as African-Americans and women, who are stigmatized and harmed on the basis of their status as part of a group. Yet, homosexuals continue to be the victims of *de jure* discrimination.⁹

Outdated attitudes and ideas of homosexuals that cast them as immoral, deviant, and unworthy are confirmed and perpetuated by a state when it refuses to treat them equally under the law. Like the struggle for equal rights for African-Americans and women, the struggle for equal rights for gay men and lesbians is one that, in the end, is countered by arguments involving morals, which is shaky grounding for public policy.

The fact that morals are an inadequate basis for public policy is evidenced by the fact that government has been seriously misled by its perceptions of popular morality in the past. For example, now-disdained government actions that required racial segregation, outlawed miscegenation, required forced sterilization of “mental defectives,” and prohibited women from working in certain occupations were justified by a concept of morality that states saw as held by, and applicable to, all “decent” people.¹⁰

⁷ Alan Wolfe, *The Homosexual Exception*, N.Y. TIMES, Feb. 8, 1998, § 10 (Magazine), at 46-47.

⁸ Stacey Lynne Boyle, Note, *Marital Status Classifications: Protecting Homosexual and Heterosexual Cohabitators*, 14 HASTINGS CONST. L.Q. 111, 126 (1986).

⁹ J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2360 (1997).

¹⁰ See *Loving v. Virginia*, 388 U.S. 1, 1-12 (1967) (evaluating a Virginia law that prohibited miscegenation); *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 (1954) (examining laws of Kansas, Delaware and South Carolina that required racially

However, traditional concepts of morality have been tempered by modern realities. In fact, consensual sexual acts between homosexuals, once widely criminalized, have been decriminalized in a majority of states either legislatively or through successful court challenges.¹¹ Thus, it has become apparent that when government seeks to dictate private morality (as opposed to regulate public conduct through laws that prohibit public lewdness, for example), it inevitably tramples on the constitutional rights of some individuals, in this case, gay men, lesbians and their families.¹²

B. *The Realities*

Nonetheless, the realities of gay and lesbian families are often obscured by the myths and the traditional concepts of morality. This moralizing, or attempt to dictate private morality, has ignored the reality that many lesbians and gay men currently are living with a partner.¹³ As many as eight to ten million children are born into

segregated public schools); *Buck v. Bell*, 274 U.S. 200, 207 (1927) (examining a Virginia law that required forced sterilization of “mental defectives”—i.e., those “probable potential parent[s] of socially inadequate offspring”); *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896) (upholding a Louisiana statute requiring separate but equal accommodations on trains); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 131 (1872) (evaluating a state’s refusal to admit women to the bar).

¹¹ Twenty-five states have repealed anti-sodomy statutes, and five of those statutes, including New York’s, *see, e.g., People v. Onofre*, 415 N.E.2d 936, 973 (N.Y. 1980), have been declared unconstitutional despite the fact that *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), held that anti-sodomy laws were valid under the United States Constitution. CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION ch. 10, at 900-01 (6th ed. 1996 & Supp.). Recently, in Georgia, the state whose statute was upheld in *Bowers*, the state’s anti-sodomy statute was overturned on the basis of the Georgia Constitution. *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998).

¹² *See infra* Part IV.D, discussing the constitutionality of government action regulating private and public morality.

¹³ Janet Lever, *The 1995 Advocate Survey of Sexuality and Relationships: The Women*, ADVOCATE, Aug. 22, 1995, at 27 [hereinafter Lever, *Lesbian Sex Survey*]; Janet Lever, *The 1994 Advocate Survey of Sexuality and Relationships: The Men*, ADVOCATE, Aug. 23, 1994, at 23 [hereinafter Lever, *The 1994 Advocate Survey*]. In a survey of nearly 2600 lesbians, 70% said they would

families with a gay or lesbian parent.¹⁴ Studies show that unmarried cohabitators—homosexual and heterosexual—generally act as a family unit in their economic, social, and emotional behavior.¹⁵ In recognition of these realities, there has been tremendous progress around the world and in America in promoting equal rights for gay men and lesbians generally, and same-sex families in particular.

Specifically, on May 20, 1999, the Supreme Court of Canada took the bold step of striking down provisions of Ontario's Family Law Act ("FLA") concerning spousal support that excluded same-sex couples from the definition of those who could receive the benefit of such support.¹⁶ The FLA affords a spouse, man or woman, who cohabits with the other for three or more years the right to petition for support if the relationship dissolves.¹⁷ Same-sex couples were not able to seek spousal support when their long-term, conjugal relationships ended. In *M. v. H.*, a lesbian couple challenged the FLA under Canada's Charter of Rights and Freedoms ("Charter").¹⁸ The Supreme Court of Canada struck down the support provision of the FLA finding that its exclusion of individuals involved in same-sex relationships violated the Charter's requirement of equal protection and equal benefit of the law without discrimination.¹⁹ This holding reflects what is now the law of the land in Canada: gays and lesbians must be guaranteed the same basic rights as other citizens.²⁰

Other nations also have made efforts in promoting equal rights for homosexual couples. In fact, the trend of legal developments in

marry their partner if same-sex marriage were legal. Lever, *Lesbian Sex Survey*, *supra*, at 27. Fifty-nine percent of gay men surveyed said they would marry their partner; 26% said maybe. Lever, *The 1994 Advocate Survey*, *supra*, at 24.

¹⁴ *In re Alison D. v. Virginia M.*, 572 N.E.2d 27, 30 (N.Y. 1991) (Kaye, J., dissenting) (citing Polikoff, *supra* note 5, at 461 n.2).

¹⁵ Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1128-37 (1981).

¹⁶ *M. v. H.*, No. 25838, 1999 Can. Sup. Ct. LEXIS 28, at *134-40 (Can. May 20, 1999).

¹⁷ Family Law Act, R.S.O., ch. F.3, § 29 (1990) (Can.).

¹⁸ *M.*, 1999 Can. Sup. Ct. LEXIS 28, at *43.

¹⁹ *Id.* at *133-40. See also Constitution Act, 1982 (79) Part I (§ 15(1), in force April 17, 1982)).

²⁰ *M.*, 1999 Can. Sup. Ct. LEXIS 28, at *73, 88-89, 93.

many other countries has been heading toward allowing same-sex marriages.²¹ France recently became the largest European nation to legalize same-sex marriages.²² Under the law, homosexuals may register their unions at courthouses and receive most of the rights allotted to heterosexual married couples.²³ Same-sex marriage, or its legal equivalent, has been recognized by various other countries.²⁴ For example, Denmark, Sweden, and the Netherlands currently permit civil ceremonies that provide same-sex couples most of the rights associated with marriage.²⁵ In Hungary, the legislature has recognized mutually owned purchases and acquisitions of same-sex couples.²⁶

In the United States, various states and localities are also making progress toward promoting equal rights for same-sex couples. Eleven states, including New Jersey, Connecticut, Massachusetts and Vermont have enacted laws prohibiting sexual orientation discrimination.²⁷ Twenty-four states have blocked anti-gay marriage bills in the wake of the Hawaii Supreme Court's decision to apply strict scrutiny to the State's prohibition on same-sex marriage.²⁸ In Rhode Island, pro-marriage legislation has been

²¹ Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimize a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 736-37 (1998).

²² Charles Trueheart, *Gay Unions Legalized in France; Unmarried Couples Win Equal Rights*, WASHINGTON POST, Oct. 14, 1999, at A14.

²³ *Id.*

²⁴ NAN HUNTER ET AL., *THE RIGHTS OF LESBIANS AND GAY MEN: THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS* 78 (3d ed. 1992).

²⁵ *Id.*

²⁶ Wardle, *supra* note 21, at 737.

²⁷ Lambda Legal Defense Fund and Education, *States, Cities and Counties Which Prohibit Sexual Orientation Discrimination* (visited Nov. 16, 1999) <<http://www.lambdalegal.org/cgi-bin/pages/states/antidiscrimi-map>>.

²⁸ American Civil Liberties Union Freedom Network, *Statewide Anti-Gay Marriage Laws* (last modified Jan. 1998) <<http://www.aclu.org/issues/gay/gaymar.html>>. See *infra* notes 107-13 (discussing the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)). New York is one of those states that has *blocked* anti-gay marriage bills. *Id.* However, as of January 1998, 25 states and the federal government passed anti-gay marriage laws to block recognition of out-of-state marriages between individuals of the same-sex. *Id.*

introduced for same-sex couples.²⁹ Moreover, there have been successful court challenges that have secured the recognition of constitutional rights for same-sex couples in Alaska³⁰ and Hawaii.³¹

Domestic partnership registries also have been implemented in many states and localities, including New York (Albany, Ithaca, New York City, Rochester), California (Sacramento, San Francisco, Los Angeles, West Hollywood, Berkeley, Santa Cruz, Laguna Beach, Long Beach, Palo Alto), and Maryland (Baltimore, Takoma Park).³² Forty-three municipal and state governments have

²⁹ See Lambda Legal Defense and Education Fund, *Rhode Island: Marriage Law* (visited Nov. 16, 1999) <<http://www.lambdalegal.org/cgi-bin/pages/issues/-record?record=39>> (noting pro-marriage legislative proposals for same-sex couples).

³⁰ *Brause v. Bureau of Vital Statistics*, No. 3AN-95-8562 CI, 1998 WL 88743, at *4-5 (Alaska Super. Ct. Feb. 27, 1998) (finding that the choice of a life partner is fundamental and subject to right of privacy protection). *But see* S.J. Res. 42, 20th Leg., 2d Legis. Sess. (Alaska 1998) (enacting a constitutional amendment adding a new section to article I of Alaska's Constitution that states "[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman"). Alaska's constitutional amendment was approved by the State legislature in May of 1998, *see* House J. 3785, 20th Leg., 2d Sess. (Alaska 1998); Senate J. 4157, 20th Leg., 2d Sess. (Alaska 1998), and ratified by Alaskans in November of 1998. *See* Cheryl Weltzstein, *Gays Can't "Marry" 2 States Say*, WASH. TIMES, Nov. 5, 1998, at A16.

³¹ *Baehr v. Lewin*, 852 P.2d 44, 59-60 (Haw. 1993) (holding that the Equal Protection Clause of the Hawaii Constitution is violated when the State's law denies a marriage license to applicants solely on the ground that they are of the same sex, unless the State satisfies strict scrutiny and shows that its law furthers compelling state interests and is narrowly drawn), *reconsidered and clarified, in part*, 875 P.2d 225 (Haw. 1993) (remanding the case to the circuit court to determine whether there was a compelling state interest for prohibiting same-sex couples from obtaining marriage licenses). *But see* *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at *4-8 (Haw. Dec. 9, 1999) (taking judicial notice that the Hawaii legislature passed an amendment to article I of the Hawaii Constitution that provides the legislature the power to reserve marriage to opposite-sex couples and recognizing that the State's law denying marriage licenses to same-sex couples was *now* "out of the ambit of the [State's] equal protection clause . . . [i]n light of the marriage amendment, [which required the court to find that the law] must be given full force and effect").

³² Lambda Legal Defense and Education Fund, *States and Municipalities Offering Domestic Partner Benefits and Registries* (last modified Oct. 25, 1999)

extended domestic partnership benefits or recognition to their employees so that same-sex couples and their families are included within the groups afforded benefits.³³

In addition, the Conference of Delegates of the State Bar of California in 1989 endorsed an amendment to California's law to permit lesbian and gay couples to marry.³⁴ In 1999, the Civil Rights Committee of the New York State Bar Association approved a report supporting legalization of same-sex marriage in New York.³⁵

New York, a national leader in protecting individual rights, is a prime example of a state that has been moving forward in its recognition of equal rights for gay men and lesbians and their families. Notwithstanding this progress, it has failed to confront directly the fact that same-sex unions exist. Nevertheless, the myth of the "traditional" family, upon which this failure to confront same-sex unions is based, occasionally has been shattered and replaced by a realistic legal standard.

For example, the New York State Court of Appeals overturned the State's anti-sodomy law, with respect to private, consensual homosexual acts, as a violation of the federal right to privacy.³⁶ The New York State Court of Appeals and New York's lower courts have generally acknowledged same-sex unions when doing

<<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=403>>.

The other states and localities with domestic partnership registries include: the District of Columbia; Washington (King County, Olympia, Seattle, Tumwater); Wisconsin (Madison, Milwaukee); Georgia (Atlanta); Michigan (Ann Arbor, East Lansing); Colorado (Boulder, Denver); Massachusetts (Boston, Cambridge, Provincetown, Springfield); and North Carolina (Chapel Hill). *Id.*

³³ American Civil Liberties Union Freedom Network, *Domestic Partnerships: List of Cities, States and Counties* (visited Nov. 16, 1999) <<http://www.aclu.org/issues/gay/dpstate.html>>.

³⁴ HUNTER ET AL., *supra* note 24, at 75-76.

³⁵ See *Committee on Civil Rights Minutes of Meeting*, at 3 (New York, N.Y., Jan. 26, 1999) (approving *Legalizing Same-Sex Marriage in New York State: A Report in Support from the Civil Rights Committee of the New York State Bar Association* with selected revisions by Professor Katz and adopting it as revised by the Committee by a vote of 9-0) (on file with author).

³⁶ *People v. Onofre*, 415 N.E.2d 936, 938-39 (N.Y. 1980). The United States Supreme Court later interpreted the right to privacy more narrowly and upheld Georgia's anti-sodomy law. *Bowers v. Hardwick*, 478 U.S. 186, 191-96 (1986).

so would further the intent of the legislature in a particular case.³⁷ In fact, New York is one of five states to offer domestic partnership benefits to state employees.³⁸ Former Governor Mario Cuomo and Governor George Pataki have issued Executive Orders to prohibit discrimination on the basis of sexual orientation in state employment, and to provide benefits to unmarried domestic partners of state employees.³⁹ The State has promulgated regulations to implement housing and adoption laws recognizing gay and lesbian relationships and, in the case of adoptions, to prohibit adoption agencies from rejecting adoption petitions solely

³⁷ *In re Jacob*, 660 N.E.2d 397, 399 (N.Y. 1995) (validating second parent adoption); *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49, 53-54 (N.Y. 1989) (holding that a long-term partner in a committed relationship with the decedent has the right of succession to a rent control apartment); *Stewart v. Schwartz Bros.-Jeffer Mem'l Chapel*, 606 N.Y.S.2d 965, 966 (Sup. Ct. 1993) (permitting funeral arrangements to be made by life partner of the deceased); *In re Camilla*, 620 N.Y.S.2d 897, 903 (Fam. Ct. 1994) (permitting biological mother's life partner to adopt child and become second parent); *Zimmerman v. Burton*, 434 N.Y.S.2d 127, 129 (Civ. Ct. 1980) (finding that a life partner has succession rights to rent control apartment). *But see In re Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (denying visitation rights to a former life partner of a parent of minor child); *In re Cooper*, 564 N.Y.S.2d 684, 685 (Sur. Ct. 1990), *aff'd*, 592 N.Y.S.2d 797, 798 (App. Div. 1993) (prohibiting the life partner of deceased to inherit under New York's Estate, Powers, and Trusts Law); *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 288 (Sup. Ct. 1996), *appeal transferred*, 674 N.E.2d 335 (N.Y.), *appeal dismissed*, 666 N.Y.S.2d 835, 837-38 (App. Div. 1997) (upholding Ithaca's denial of a marriage license to a gay couple).

³⁸ The Civil Service Employees Association representing most state employees reached an agreement with the state to include domestic partnership benefits in its contract. N.Y. COMP. CODES R. & REGS. tit. 9, §§ 4.28(1), 5.33 (1996). *See also* Lambda Legal Defense and Education Fund, *New York State Law* (visited Nov. 16, 1999) <<http://www.lambdalegal.org/cgi-bin/pages/states/-record?record=32>> (noting that the agreement reached by the Civil Service Employees Association includes domestic partnership benefits).

³⁹ N.Y. COMP. CODES R. & REGS. tit. 9, §§ 4.28, 5.33. The recognition of gay and lesbian families of only state employees, and no other employees, on a statewide basis highlights the *ad hoc* and arbitrary nature of New York's current scheme. A proposal is pending in New York City that would require the City to treat unmarried domestic partners the same as those who are married. Dan Barry, *Giuliani Asks City to Extend Rights to Unmarried Couples*, N.Y. TIMES, May 12, 1998, at A1.

on the basis of homosexuality of the prospective adoptive parent(s).⁴⁰ In addition, local legislation in Albany, New York City, and Ithaca have established domestic partnership registries, and thirteen cities, towns, and counties in New York have enacted “civil rights ordinances, policies, or proclamations prohibiting sexual orientation discrimination.”⁴¹

Even though many states in America and the governments of foreign nations have made progress in recognizing modern realities and in establishing laws that protect the rights of gays and lesbians, the existence of these *ad hoc* legal standards highlights the flaw in the nationwide public policy of non-recognition of same-sex unions. If you happen to work for the state, your life-partner and children can receive your employer-provided benefits. If not, they are out of luck. If you are the child of a lesbian couple with the savvy and wealth to use the courts to maneuver a “second parent” adoption, you have the right to support and care from both parents. If not, you lose. Public policies generally should promote stability, consistency and fairness. With respect to families, public policy should seek to further family stability and child welfare. Currently, the system does not work to these ends. This flaw in nationwide public policy is especially troubling when individual rights guaranteed by the federal and state constitutions are violated as a result of that policy.

⁴⁰ N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2104.6, 2204.6, 2500.2, 2503.5, 2520.6, 2523.4 (1999) (dealing with succession rights of unmarried life partners); N.Y. COMP. CODES R. & REGS. tit. 9, § 421.16(h)(2) (regulating adoption).

⁴¹ Lambda Legal Defense and Education Fund, *New York State Law* (visited Nov. 16, 1999) <<http://www.lambdalegal.org/cgi-bin/pages/states/-record?record=32>> (listing the local laws prohibiting sexual orientation discrimination: Albany County, LOCAL LAW NO. 1 (1996); Suffolk County, SUFFOLK COUNTY CODE, § 89-1, as amended by LOCAL LAW NO. 5 (1988); Tompkins County, LOCAL LAW C (1991); Albany, ORDINANCE NO. 97.112.92, CITY CODE, ch.1, art. XI (1992); Alfred Village, ORDINANCE, art. II, § I (1974); Brighton, TOWN EMPLOYMENT POLICY; East Hampton, EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT (1985); Ithaca, MUNICIPAL CODE ON HOUSING & FAIR PRACTICE, chs. 28 & 29 (1994); New York City, ADMINISTRATIVE CODE, tit. 8 (1993); Rochester, INTRO. 45 (1983); Syracuse, LOCAL LAW NO. 17 ON FAIR PRACTICE (1990); Troy, 2-20 AFFIRMATIVE ACTION PLAN (1979); Watertown, RESOLUTION ON EQUAL EMPLOYMENT (1988)).

II. DUE PROCESS AND THE RIGHT TO PRIVACY UNDER THE UNITED STATES AND NEW YORK STATE CONSTITUTIONS

A. *The United States Constitution*

The fundamental right to marry is firmly guaranteed by the United States Constitution and includes the right to decide whom to marry.⁴² The Supreme Court has held that “[t]he freedom to

⁴² *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 383-88 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Asserting that same-sex couples have the right to marry does not require analysis of whether there is a fundamental right to homosexual sexual relations—i.e., a gay or lesbian person is not defined solely by the private, consensual sexual acts he or she performs. That question has been decided by the United States Supreme Court. See *Bowers v. Hardwick*, 478 U.S. 186 (1986). However, it is important to note that the *Bowers* Court clearly distinguished the fundamental right to privacy implicated in familial contexts from the non-fundamental right to engage in acts of sodomy. *Id.* at 190-91. In addition, Justice Powell, the swing vote in the 5-4 decision in *Bowers*, later called his vote “a mistake.” Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3. Finally, the New York State Court of Appeals had previously decided the matter differently, affording such conduct the status of a “fundamental right.” *People v. Onofre*, 415 N.E.2d 936, 939-40 (N.Y. 1980). See also *Smith v. Organization of Foster Families*, 431 U.S. 816, 842-44 (1977) (reiterating the Supreme Court’s holding in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)); *Carey v. Population Serv. Int’l.*, 431 U.S. 678, 684-85 (1977) (stating that “[w]hile the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage . . . [and] family relationships”) (quoting *Roe v. Wade*, 410 U.S. 113, 152-53 (1973)); *Moore*, 431 U.S. at 499 (stating that “[the Supreme] Court has long recognized that freedom of personal choice in matters of marriage and family life is one of those liberties protected by the Due Process Clause”); *Paul v. Davis*, 424 U.S. 693, 713 (1976) (stating that “[w]hile there is no ‘right of privacy’ found in any specific guarantee of the Constitution, the Court has recognized that ‘zones of privacy’ may be created by more specific constitutional guarantees and, thereby, impose limits upon government power”); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (stating that “[t]his 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”).

marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁴³ It has likewise continuously affirmed that “[c]hoices about marriage, family life and the upbringing of children are among associational rights [the Supreme] Court has ranked as ‘of basic importance in our society,’ . . . [and they are] rights sheltered by the Fourteenth Amendment against the State’s unwanted usurpation, disregard, or disrespect.”⁴⁴ The right to marry and choose one’s life partner has been considered “quintessentially the kind of decision which our culture recognizes as personal and important.”⁴⁵

However, at one time, courts questioned whether the right to marry could be extended so as to prohibit states from outlawing decisions of individuals regarding whom to marry based upon race. In *Loving v. Virginia*, the Supreme Court considered Virginia’s miscegenation law, which had been enacted on the basis that society viewed interracial marriages as destructive to the moral and social fabric of the state.⁴⁶ The *Loving* Court looked to the United States Constitution as a source of individual rights for those who fell in love and wished to marry and create a family with another human being, and balanced this right against the asserted state interest.⁴⁷ The Court found that the right to marry is a fundamental right which includes the freedom to marry another regardless of his or her skin color.⁴⁸ It did not limit that fundamental right to marry to a list of eligible spouses based upon the perceptions and prejudices of the community. The Court did not hesitate to include

Further support for the fundamental importance of marriage is found in Supreme Court decisions dealing with rights of access to courts in civil cases. *See, e.g.,* *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁴³ *Loving*, 388 U.S. at 12.

⁴⁴ *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). *See LaFleur*, 414 U.S. at 639-40 (stating 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”).

⁴⁵ *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *8 (Alaska Super. Ct. Feb. 27, 1998).

⁴⁶ *Loving*, 388 U.S. at 3, 7.

⁴⁷ *Id.* at 12.

⁴⁸ *Id.*

in the definition of that fundamental right its application to interracial marriages.

Each time new applications of fundamental rights are contested, courts look to see whether the rights are “implicit in the concept of ordered liberty” or are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”⁴⁹ These phrases, sometimes referred to as *Palko* or *Snyder* justifications, have become watchwords of our constitutional faith. They are used alternatively to uphold or to strike down restrictions on individual liberty depending upon the composition and collective ideology of the court and the artfulness of the pleaders in any particular case.

More specifically, whether or not any one liberty interest is consistent with precedents in the substantive due process line of cases almost entirely depends on how it is characterized by the litigants or judges involved. In *Washington v. Glucksberg*, Justice Souter explained this concept in his concurring opinion by stating that:

When identifying and assessing the competing interests of liberty and authority, for example, the breadth of expression that a litigant or a judge selects in stating the competing principles will have much to do with the outcome and may be dispositive. . . . So the Court in *Dred Scott* treated prohibition of slavery in the Territories as nothing less than a general assault on the concept of property. . . . [T]he usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. The “tradition is a living thing” *Poe [v. Ullman]*, 367 U.S. [497] at 542 [1961] (Harlan, J., dissenting), albeit one that moves by moderate steps carefully taken.⁵⁰

⁴⁹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

⁵⁰ 521 U.S. 702, 769-70 (1977) (Souter, J., concurring).

The *Glucksberg* Court, in upholding a state ban on physician-assisted suicide, characterized the liberty interest as “a right to commit suicide which itself includes a right to assistance in doing so.”⁵¹ Loathe to create a “new” fundamental right, it determined that there is no fundamental right thereto.⁵² Instead, the Supreme Court could have chosen, as did the district court,⁵³ to use the respondent’s broader characterization of the liberty interest at stake—the “basic and intimate exercises of personal autonomy” and “self-sovereignty,” recognized as fundamental rights in *Cruzan v. Director, Missouri Dep’t of Health*⁵⁴ and *Planned Parenthood v. Casey*.⁵⁵

Similarly, in *Brause v. Bureau of Vital Statistics*,⁵⁶ the Alaska Superior Court considered the framing of the question essential to the court’s conclusion when it distinguished that portion of Hawaii’s decision in *Baehr v. Lewin* which refused to categorize same-sex marriage as a fundamental right.⁵⁷ Judge Peter Michalski wrote for the *Brause* court:

The Hawaii court could reach such a conclusion because of the question it chose to ask. It is self-evident that same-sex marriage is not “accepted” or “rooted in the traditions and collective conscience” of the people. Were this not the case, *Brause* and *Dugan* and the plaintiffs in *Baehr* would

⁵¹ *Id.* at 736.

⁵² *Id.* at 728.

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

⁵⁴ 497 U.S. 261, 278 (1990) (stating that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment).

⁵⁵ 505 U.S. 833, 857-61 (1992) (recognizing that the concepts of personal autonomy and liberty recognized by the Court in *Roe v. Wade* have not been altered or diminished). In *Roe v. Wade*, the Court characterized the liberty interest generally as personal autonomy, declining to consider whether abortion, the specific matter at hand, was “implicit in the concept of ordered liberty” or “rooted in our traditions.” 410 U.S. 113, 152-54 (1973). If it had applied that narrow characterization, one suspects the result would have been different.

⁵⁶ No. 3AN-95-6562 CI, 1998 WL 88743, at *4 (Alaska Super. Ct. Feb. 27, 1998).

⁵⁷ See *infra* notes 107-112 and accompanying text (discussing *Baehr*, where the Hawaii Supreme Court found a right to same-sex marriage protected under the Equal Protection Clause of the Hawaii Constitution).

not have had to file complaints seeking precisely this right. *The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's life partner is so rooted in our traditions.*⁵⁸

The Alaska court went on to hold that such freedoms are “personal, intimate, and subject to the protection of the right to privacy.”⁵⁹

B. The New York State Constitution

The United States Constitution is not the only foundation of law that courts have leaned upon to recognize an individual's right to marry. State constitutions traditionally have supplemented the United States Constitution to provide citizens of each state additional protections above the floor required by the federal constitution. In fact, the Nation's founding fathers recognized the primacy of states in protecting individual rights and contemplated a role for the states as the principal protectors of individual rights.⁶⁰

Indeed, New York State's constitutional protections supplement the broad protection of the right to privacy contained in the United States Constitution. Although the New York State Court of Appeals has not ruled directly on the constitutionality of the State's prohibition of same-sex marriage, examination of its interpretations of the State Constitution's Due Process Clause and its decisions of first impression dealing with the rights of homosexuals and their

⁵⁸ *Brause*, 1998 WL 88743, at *1 (finding that the prohibition on same-sex marriage violates right to privacy and equal protection under the Alaska Constitution) (emphasis added). *But see* S.J. Res. 42, 20th Leg., 2d Legis. Sess. (Alaska 1998) (enacting a constitutional amendment adding a new section to article I of Alaska's Constitution that states “[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman”).

⁵⁹ *Brause*, 1998 WL 88743, at *4. On this basis, it directed that further hearings be held to determine whether a compelling state interest can be found for Alaska's ban on same-sex marriage. *Id.* at *6. *See also infra* Part IV.C & D, discussing the state interest in barring same-sex marriage.

⁶⁰ GOTTFRIED DIETZE, *THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT* 141-75 (1961) (citing *THE FEDERALIST* NO. 17 (Alexander Hamilton)).

families leads to the conclusion that the New York State Court of Appeals would invalidate the State's prohibition of same-sex marriage, just as the courts in Alaska and Hawaii invalidated that same prohibition in their states.⁶¹

New York's strong tradition of protecting its citizens' liberty is reflected in its 1683 Charter of Liberties and Privileges, in its original 1777 Constitution and in the decisions of its highest court.⁶² The New York State Court of Appeals did

not hesitate when [it] concluded that the Federal Constitution[,] as interpreted by the Supreme Court[,] fell short of adequate protection for our citizens to rely upon the principle that that document defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution, statutes or rule-making authority.⁶³

New York citizens have benefited from a State Constitution in which "fundamental liberties" are defined more expansively, and are thus more widely protected, than those liberties are defined in,

⁶¹ *Brause*, 1998 WL 88743, at *1 (holding that the prohibition of same-sex marriage is a violation of the right to privacy and equal protection under the Alaska Constitution); *Baehr v. Lewin*, 852 P.2d 44, 63-68 (Haw. 1993) (declaring that the denial of marriage licenses to persons who wish to marry a person of the same gender violates the Equal Protection Clause of the Hawaii Constitution), *reconsidered and clarified, in part*, 875 P.2d 225 (Haw.) (remanding the case to the circuit court to determine whether there was a compelling state interest for prohibiting same-sex couples from obtaining marriage licenses). *But see* S.J. Res. 42, 20th Leg., 2d Legis. Sess. (Alaska 1998) (enacting a constitutional amendment adding a new section to article I of Alaska's Constitution that states "[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman"); *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at *4-8 (Haw. Dec. 9, 1999) (taking judicial notice that the Hawaii legislature passed an amendment to article I of the Hawaii Constitution that provides the legislature the power to reserve marriage to opposite-sex couples and recognizing that the State's law denying marriage licenses to same-sex couples was *now* "out of the ambit of the [State's] equal protection clause . . . [i]n light of the marriage amendment, [which required the court to find that the law] must be given full force and effect").

⁶² See PETER J. GALIE, *THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 2* (1991).

⁶³ *Cooper v. Morin*, 399 N.E.2d 1188, 1193-94 (N.Y. 1979).

and protected by, the United States Constitution.⁶⁴ New York always has been, and remains, in the forefront of defining and defending fundamental rights.

This has been demonstrated most clearly through the application of article I, section 6 of the New York State Constitution by New York courts, which provides protection for due process rights and which, by interpretation, provides the fundamental liberties to the people of New York.⁶⁵ The New York State Court of Appeals has been credited with “discovering” substantive due process in an 1856 case, *Wynehamer v. People*.⁶⁶ Since then, the clause has been used by the judiciary as a “flexible tool” to provide protection under an interpretation of right to privacy that goes beyond that afforded by the Fifth and Fourteenth Amendments of the United

⁶⁴ See, e.g., *People v. P.J. Video*, 501 N.E.2d 556, 558 (N.Y. 1987) (holding that the State Constitution imposes more exacting standards for issuance of search warrants than the Fourth Amendment); *People ex rel. Arcara v. Cloud Books*, 503 N.E.2d 492, 494-95 (N.Y. 1986) (holding that the State Constitution provides greater protection for freedom of expression than the First Amendment); *Sharrock v. Dell Buick-Cadillac*, 379 N.E.2d 1169, 1173-75 (N.Y. 1978) (finding that the statutory provisions concerning foreclosure of garageman’s possessory lien constitute state action and violate the Due Process Clause of the State Constitution); *People v. Isaacson*, 378 N.E.2d 78, 82 (N.Y. 1978) (finding that the State Constitution imposes due process limitations on police conduct); *People v. Hobson*, 348 N.E.2d 894, 896 (N.Y. 1976) (finding that the right to counsel under the State Constitution is broader than the Sixth Amendment guarantee).

⁶⁵ N.Y. CONST. art. I, § 6 (stating that “[n]o person shall be deprived of life, liberty, or property without due process of law”). While due process protections were provided by the 1777 Constitution, the clause as it stands now was added in 1821. GALIE, *supra* note 62, at 47.

⁶⁶ 13 N.Y. 378 (1856). In *Wynehamer*, the Court struck down a New York State liquor prohibition law by reading due process to involve more than simply procedure, but the kind or degree of exertion of legislative power invoked. *Id.* at 418.

States Constitution.⁶⁷ This tool has been used to expand the fundamental right to marry for the citizens of New York.⁶⁸

The New York State Court of Appeals has recognized that the New York State Constitution has established a fundamental right to marriage and choice of family life that is expansive and that provides protections beyond those provided by the United States Supreme Court when it applies parallel provisions of the United States Constitution.⁶⁹ In *Cooper v. Morin*, the New York State Court of Appeals rejected the United States Supreme Court's limited substantive due process formulation when considering the right of pretrial detainees to "contact visits" in order to maintain family relationships.⁷⁰ Justice Meyer wrote for the *Cooper* court that "[s]o one-sided a concept of due process we regard as unacceptable."⁷¹ The court's expansive formulation resulted in a holding that invalidated state restrictions on the family that had previously been upheld by the United States Supreme Court under the United States Constitution.⁷²

Importantly, the New York State Court of Appeals has taken the position that the New York State constitutional right to privacy

⁶⁷ GALIE, *supra* note 62, at 49. See *Cooper*, 399 N.E.2d at 1193-94. See also *Rivers v. Katz*, 495 N.E.2d 337, 341-42 (N.Y. 1986) (holding that the New York State Constitution guarantees the right to privacy and protects involuntarily committed mental patients from forcible medication). New York's highest court has interpreted the United States Constitution's privacy protections more broadly than the United States Supreme Court has when it considered New York's anti-sodomy statute, signaling New York's willingness to provide protections to its citizens beyond the minimum level required by the United States Constitution. *People v. Onofre*, 415 N.E.2d 936, 939-43 (N.Y. 1980).

⁶⁸ *Cooper*, 399 N.E.2d at 1195.

⁶⁹ *Id.* at 1194-95. However, the *Cooper* court found that the fundamental right to marry does not imply that the State cannot regulate or even restrict that right in every instance. It simply found that any governmental restriction will be afforded heightened scrutiny by the court—i.e., any restriction must be narrowly drawn to serve a compelling governmental interest. *Id.* Therefore, governmental restrictions on incestual marriages, for example, could be upheld under a public health and welfare rationale. *In re May*, 114 N.E.2d 4, 7 (N.Y. 1953). See *Bowers v. Hardwick*, 487 U.S. 186, 209 & n.4 (1986) (Blackmun, J., dissenting).

⁷⁰ 399 N.E.2d at 1191-92.

⁷¹ *Id.* at 1194.

⁷² Compare *id.*, with *Bell v. Wolfish*, 441 U.S. 520, 561-63 (1979).

and due process protects non-traditional, alternative family living arrangements as well as those arrangements made by conventional, biological families.⁷³ In *McMinn v. Town of Oyster Bay*, an ordinance that restricted housing to “family” members and defined “family” as those related by blood or marriage was challenged by a landlord who contended that the “restrictive definition of ‘family’ contained in the ordinance is facially invalid under . . . the due process and equal protection clauses of the New York State Constitution.”⁷⁴ The New York State Court of Appeals held that the ordinance was facially invalid under the Due Process Clause of New York State Constitution, finding that the government interest in preserving the character of traditional, single-family housing may be met by including non-traditional families as well.⁷⁵

Similarly, a federal district court in New York has interpreted the United States Constitution as providing important protections for non-traditional families. The United States District Court for the Southern District of New York expanded the constitutional definition of “family” under the United States Constitution in a case with important implications for gay and lesbian couples.⁷⁶ Recognizing the “diversity of family constellations in our society” and the extent to which the Constitution already has been interpreted to provide protected liberty interests for members of non-biological and non-legally related or formalized families, the United States District Court for the Southern District of New York found

⁷³ *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240, 1241 (N.Y. 1985). Other state courts have taken that same position. See *Charter Township of Delta v. Dinolfo*, 351 N.W. 2d 831, 833 (Mich. 1984); *City of Santa Barbara v. Adamson*, 610 P.2d 436, 442 (Cal. 1980); *State v. Baker*, 405 A.2d 368, 370 (N.J. 1979). See also *Kirsch v. Prince George’s County*, 626 A.2d 372, 381 (Md. 1993) (holding that restrictions on the renting of residential property to unrelated adults violates the equal protection principles in Maryland’s State Declaration of Rights).

⁷⁴ 488 N.E.2d at 1242.

⁷⁵ *Id.* at 1244. Judge Simons wrote for the *McMinn* court that government may, through zoning, “control types of housing and living and not the genetic or intimate internal family relations of human beings . . . and if a household is the functional and factual equivalent of a natural family[,] the ordinance may not exclude it.” *Id.* at 1243.

⁷⁶ *Rodriguez v. McLoughlin*, 49 F. Supp. 2d 186, 195 (S.D.N.Y. 1999).

a “constitutionally protected liberty interest in the stability and integrity of [the relationship between] . . . a foster mother and a foster child.”⁷⁷ The court based its holding on the “emotional and psychological ties” and the “deeply loving and interdependent relationship” between the persons involved and the “mutual care and support developed in these relationships” as well as their “expectations of permanency.”⁷⁸ It used the state interest in preserving the integrity and stability of families to endow non-traditional families with constitutional significance.⁷⁹ The door is now open for an interpretation that can protect gay and lesbian families, so long as the liberty interest is properly defined.

At the same time, the New York State Court of Appeals has gone out of its way to interpret state statutes so as to recognize the rights of individuals involved in same-sex relationships and their families in order to further interests of public policy. For example, in *In re Jacob*, New York’s highest court interpreted the State’s Domestic Relations Law to permit second parent adoptions so that the unmarried partner of a child’s biological parent could adopt the child without requiring the termination of the biological parent’s rights upon such adoption.⁸⁰ In *Braschi v. Stahl Associates*, the New York State Court of Appeals interpreted rent control laws to permit succession rights to unmarried life partners.⁸¹

⁷⁷ *Id.* at 194. While the issue involved in *Rodriguez* was adult-child relationships, rather than adult-adult relationships, the reasoning of the Court is relevant to both.

⁷⁸ *Id.* at 194-95.

⁷⁹ *Id.* at 195.

⁸⁰ 660 N.E.2d 397, 401-05 (N.Y. 1995). In addition, in *In re Jacob*, the court sought to rectify the injustice created by its decision in *In re Alison D. v. Virginia M.*, in which the court interpreted New York’s Domestic Relations Law to prohibit non-parents from seeking visitation rights with children they raised as part of an unmarried union. *Id.* at 399-400 (citing *In re Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991)).

⁸¹ 543 N.E.2d 49, 53-55 (N.Y. 1989). However, lower courts in New York have been inconsistent on the issue of whether marital rights should be extended to same-sex partners. *See, e.g.*, *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 288 (Sup. Ct. Tompkins County 1996), *appeal dismissed*, 666 N.Y.S.2d 835, 838 (App. Div. 1997) (upholding state action denying marriage license to gay couple); *In re Cooper*, 564 N.Y.S.2d 684, 685 (Sur. Ct. 1990), *aff’d*, 592 N.Y.S.2d 797, 801 (App. Div. 1993) (denying right of election by same-sex partner); *Stewart v.*

Although the New York State Court of Appeals has yet to decide a case challenging New York State's prohibition on same-sex marriage under substantive due process analysis, one lower court has done so. In *Storrs v. Holcomb*, the Tompkins County Supreme Court upheld the denial of a marriage license to a gay couple against the claim that such a denial violates the New York State Constitution's Due Process and Equal Protection Clauses.⁸² In a decision virtually devoid of state constitutional analysis, the *Storrs* court applied *In re Cooper*, a case involving statutory interpretation of New York's Estates, Powers and Trusts Law ("EPTL"), and held that no violation of New York State's Equal Protection Clause had occurred.⁸³ In *In re Cooper*, the petitioner's claim did not assert that the right to privacy gave the petitioner the ability to marry his partner and, thus, the right to the benefits of a

Schwartz Bros.-Jeffer Memorial Chapel, Inc., 606 N.Y.S.2d 965, 968 (Sup. Ct. Queens County 1993) (permitting funeral arrangements for deceased by life partner); *In re Camilla*, 620 N.Y.S.2d 897, 903 (Sup. Ct. Kings County 1991) (permitting second parent adoption).

⁸² 645 N.Y.S.2d 286, 287-88 (Sup. Ct. Tompkins County 1996). In *Storrs*, the plaintiff appealed directly to the New York State Court of Appeals, which transferred the case, *sua sponte*, to the Appellate Division of the Third Department. 674 N.E.2d 335 (N.Y. 1996). The Appellate Division dismissed the claim for failure to join the New York Department of Health as a necessary party. 666 N.Y.S.2d 835, 837-38 (App. Div. 1997). On February 18, 1998, the case was refiled in the Tompkins County Supreme Court. *Storrs v. Holcomb*, No. 98-0164 (N.Y. Sup. Ct. Tompkins County filed Feb. 18, 1998). While two lower courts have considered the validity of same-sex marriages entered into by mistake and voided for that reason, the issue raised by *Storrs*—whether New York State violates the Equal Protection Clause of the Federal or New York State Constitutions by denying marriage licenses to same-sex couples—has not been decided. *See Francis B. v. Mark B.*, 355 N.Y.S.2d 712, 713 (Sup. Ct. Kings County 1974) (involving a woman seeking an annulment on the grounds that her husband, whom she thought was a male, was really a female); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 501 (Sup. Ct. Queens County 1971) (involving a male who married a person he thought was female).

⁸³ *Storrs*, 645 N.Y.S.2d at 287-88. *In re Cooper* involved an interpretation of the term "surviving spouse" under New York's EPTL for the purpose of a claim to a right of election. 592 N.Y.S.2d 797, 797-99 (App. Div. 1993). The Appellate Division in *In re Cooper* decided that the legislature intended to limit the term "surviving spouse" so as to exclude homosexual life partners. *Id.* at 801.

“surviving spouse” within the definition of the statute.⁸⁴ Therefore, *In re Cooper* contained no analysis of the issue: whether New York State violated individual constitutional rights of a person to marry another person of his or her own choosing. While the *Storrs* court recognized this omission and, in fact, admitted the validity of plaintiff’s substantive due process claim, it declined to make what it called a “very long inferential leap” to decide *Storrs* on that basis.⁸⁵

Yet, the inferential leap referred to in *Storrs* would be short, if one were to look at the commitment demonstrated by the New York State Court of Appeals to an expansive view of substantive due process and fundamental rights. In particular, the New York State Court of Appeals has interpreted the fundamental right to marry embodied in the State Constitution broadly and has recognized an evolving social order, which includes the existence of individuals involved in same-sex relationships and their children.⁸⁶ This short leap would be one that would restore order to the chaos that has beset the courts when they have been called upon to interpret many conflicting legal standards so as to resolve the issues that arise when gay and lesbian families come together, live together, and sometimes break apart.

III. EQUAL PROTECTION OF THE LAW UNDER THE UNITED STATES AND NEW YORK STATE CONSTITUTIONS

New York State’s Equal Protection Clause found in article I, section 11 of the State Constitution was approved at the Constitutional Convention of 1938.⁸⁷ That convention, more than any other before or since, was committed to “positive liberalism” and to a “belief that the state had the obligation to promote the welfare

⁸⁴ *In re Cooper*, 592 N.Y.S.2d at 797-98.

⁸⁵ *Storrs*, 645 N.Y.S.2d at 287.

⁸⁶ See *In re Jacob*, 660 N.E.2d 397, 412-13 (N.Y. 1995); *Braschi v. Stahl Assoc.*, 543 N.E.2d 49, 59 (N.Y. 1989); *Doe v. Coughlin*, 518 N.E.2d 536, 539 (N.Y. 1987); *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240, 1244 (N.Y. 1985); *Cooper v. Morin*, 399 N.E.2d 1188, 1195-96 (N.Y. 1979).

⁸⁷ 2 REV. RECORD OF N.Y. STATE CONSTITUTIONAL CONVENTION 1065 (1938) (citing N.Y. CONST. art. I, § 11).

and protect the rights of as many people as possible.”⁸⁸ The Equal Protection Clause was designed to “embody in our Constitution the provisions of the Federal Constitution which are already binding upon our State and its agencies.”⁸⁹ Over time, the New York State Constitution’s Equal Protection Clause has been interpreted as more progressive and as providing more protection from invidious classifications and discrimination than its federal counterpart.⁹⁰

The failure of the states to recognize marriages between individuals of the same-sex, while recognizing those between men and women,⁹¹ regardless of the respective couples’ child-bearing capacities, child-rearing history, or past conduct in marriage, is unconstitutional because it constitutes status-based discrimination that likely cannot stand under the Equal Protection Clauses of the United States or New York State Constitutions. In effect, the states have found that all homosexuals, as a group, are ineligible to enter into marriage, which deprives them, as a group, of exercising a fundamental right—the right to marry.⁹² No other groups—not

⁸⁸ GALIE, *supra* note 62, at 27.

⁸⁹ 2 REV. RECORD OF N.Y. STATE CONSTITUTIONAL CONVENTION 1065 (1938).

⁹⁰ *See, e.g.*, *People v. Kern*, 544 N.E.2d 1235, 1244-45 (N.Y. 1990) (finding the use of peremptory challenges to exclude jurors of a particular race violates the State’s Equal Protection Clause even though the United States Supreme Court’s decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), expressly declined to decide whether the Federal Equal Protection Clause restricted the exercise of peremptory challenges by defense counsel as well as by the prosecution).

⁹¹ The New York legislature has been silent on the issue. The Department of Health has interpreted the statute to prohibit same-sex marriage. Section 10 of New York Domestic Relation Law, setting forth the requirements for marriage, is gender-neutral. *See* N.Y. DOM. REL. LAW § 10 (McKinney 1999) (stating that “marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential”). Therefore, New York’s marriage law can be applied to same-sex couples without statutory revision.

⁹² Essentially, states are utilizing a classification based on sexual orientation that, by its operation, denies a fundamental right to homosexuals as a group and that should be subject to strict scrutiny. This requires the state to show that a compelling state interest for the classification exists and that such a classification is narrowly drawn to serve that interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

even convicted criminals⁹³ or dead-beat parents⁹⁴—have been constitutionally denied this basic right.⁹⁵ This state-imposed group disability is “incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law.”⁹⁶

When a state acts, using homosexuals as a legislative classification that receives different treatment, its action likely would be invalidated under the Equal Protection Clause even if the fundamental right to marry does not extend to same-sex couples. This is because a legislative classification that withholds important rights or privileges—even if non-fundamental—from a class of persons, while making them available to others similarly situated, violates the Equal Protection Clause.⁹⁷ The attributes of marriage as defined by the United States Supreme Court—i.e., emotional support and public commitment, religious and spiritual significance, physical consummation and entitlement to government or other

See also Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1168-69 (1988) (discussing the definition of a “fundamental right” in the due process and equal protection contexts).

⁹³ *Turner v. Safley*, 482 U.S. 78, 95 (1987) (stating that “the right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration . . . [however, m]any attributes of marriage remain”).

⁹⁴ *Zablocki*, 434 U.S. at 374 (holding that a Wisconsin statute that barred residents from marrying if they had a child not in their custody that they were under an obligation to support was unconstitutional because it violated the Equal Protection and Due Process Clauses of the Constitution).

⁹⁵ Even though denying criminals or dead-beat parents the right to marry arguably would serve some important state interests, such as financial support for children, states have not denied criminals or dead-beat parents the right to marry. *See id.* at 386.

⁹⁶ *Plyler v. Doe*, 457 U.S. 202, 216 & n.14 (1982).

⁹⁷ For example, the non-fundamental right to public education is relevant to alien children in the same way that it is relevant to non-alien children and must be afforded to them. *See Plyler*, 457 U.S. at 223-24, 230 (holding that a Texas statute withholding state funds from local school districts for educating children who were not “legally admitted” violated the Equal Protection Clause, because it imposed a lifetime hardship on a discrete class of individuals who were not accountable for their status in the class, which was not rationally related to furthering some substantial state interest).

benefits—are as relevant and important to homosexual couples as they are to heterosexual couples.⁹⁸ Therefore, equal protection mandates equal treatment of their unions.

Some have argued that the legally relevant distinction between heterosexual and homosexual couples is their respective abilities to procreate.⁹⁹ This distinction, however, must be viewed in light of the fact that an ability or willingness to procreate has never been, nor can it constitutionally be, a condition of marriage.¹⁰⁰ This contention is supported by the fact that many heterosexual couples cannot or choose not to have children, while many homosexual couples can and do elect to undertake the responsibilities of parenthood, either through adoption, surrogacy, or artificial insemination. In fact, New York's policy regarding adoptions specifically protects the rights of homosexual couples to adopt.¹⁰¹ Indeed, because the choice and ability to have children are not limited to heterosexual couples united in marriage, the physical ability to procreate should not be used as a basis for denying marriage to non-heterosexual couples.¹⁰²

⁹⁸ *Turner*, 482 U.S. at 95-96.

⁹⁹ Courts have traditionally held that marriage implies a willingness to procreate. See *Mirizio v. Mirizio*, 150 N.E. 605, 607 (N.Y. 1926); *Miller v. Miller*, 228 N.Y.S. 657, 657 (Sup. Ct. 1928). In addition, avoidance of procreation was seen as grounds for annulment. See *Gerwitz v. Gerwitz*, 66 N.Y.S.2d 327, 329 (Sup. Ct. 1945).

¹⁰⁰ See *Turner*, 482 U.S. at 95 (protecting the rights of inmates to marry even if they cannot engage in sexual relations with their spouse due to their confinement); *M.T. v. J.T.*, 355 A.2d 204, 207 (N.J. Super. Ct. App. Div. 1976) (upholding a marriage solemnized after the woman's successful sex-reassignment operation, despite the fact that transsexuals are sterile). See also 1 ALBA CONTE, *SEXUAL ORIENTATION AND LEGAL RIGHTS* § 17.2, at 603 (1998) (stating that "the ability to bear children is not a prerequisite for male-female marriage"); Edward Veitch, *The Essence of Marriage: A Comment on the Homosexual Challenge*, 5 *ANGLO-AM. L. REV.* 41, 42 (1976) (positing that marriage "can be viewed as no more than an economic partnership which is more plausible nowadays due to the fact of the working wife").

¹⁰¹ N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(h)(2) (1999) (prohibiting qualified adoption agencies from rejecting adoption petitions solely on the basis of homosexuality).

¹⁰² *Dean v. District of Columbia*, 653 A.2d 307, 324 n.20 (D.C. 1995) (Ferren, J., dissenting).

A. Gender Discrimination

The Equal Protection Clauses of the United States and New York State Constitutions are implicated when the state uses its power—the exclusive power to validate marriages—to deny recognition of same-sex unions and, therefore, to discriminate on the basis of gender.¹⁰³ The state commits gender discrimination when it refuses to legitimize a union between a man and a man, or a woman and a woman, in that “but for” the gender of one party, the marriage would be recognized.¹⁰⁴ More specifically, just as the fact that whether state action treats members of each race the same is irrelevant when a state uses a legislative classification

¹⁰³ See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (finding that when the state denies marital status to same-sex couples, it deprives those couples of extensive rights and benefits solely on the basis of sex), *reconsidered and clarified, in part*, 875 P.2d 225 (Haw. 1993) (remanding the case to the circuit court to determine whether there was a compelling state interest for prohibiting same-sex couples from obtaining marriage licenses). *But see* *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at *4-8 (Haw. Dec. 9, 1999) (taking judicial notice that the Hawaii legislature passed an amendment to article I of the Hawaii Constitution that provides the legislature the power to reserve marriage to opposite-sex couples and recognizing that the State’s law denying marriage licenses to same-sex couples was now “out of the ambit of the [State’s] equal protection clause . . . [i]n light of the marriage amendment, [which required the court to find that the law] must be given full force and effect”).

¹⁰⁴ See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (explaining that “if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code’s requirements, only gender prevents the twin sister from marrying under the present law”). *But see* S.J. Res. 42, 20th Leg., 2d Legis. Sess. (Alaska 1998) (enacting a constitutional amendment adding a new section to article I of Alaska’s Constitution that states “[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman”).

One may argue that since the restriction on same-sex marriage impacts men and women equally—i.e., gay men cannot marry nor can lesbian women—then there is no gender discrimination. However, this argument fails to recognize that equal protection attaches to the individual, not the group, so that the individual female who cannot marry because her chosen mate is female is, thus, deprived of her rights.

based on race,¹⁰⁵ the fact that state action treats each gender the same—i.e., all men and all women have the same opportunity to marry—also should be irrelevant when the state uses a legislative classification based on gender. Discrimination on the basis of gender is subject to “heightened” scrutiny, which requires the state to show that the challenged classification is “substantially related to the achievement of an important governmental interest.”¹⁰⁶ It was on the basis of gender discrimination that the Hawaii Supreme Court held in *Baehr v. Lewin* that the State’s prohibition of same-sex marriage was presumptively invalid under the State Constitution.¹⁰⁷

¹⁰⁵ *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (holding that even when all blacks and all whites are punished the same under a state law if members of either racial group intermarry, the law is subject to strict scrutiny analysis under the Equal Protection Clause because the law classifies on the basis of race).

¹⁰⁶ *Craig v. Boren*, 429 U.S. 190, 197 (1976); *People v. Santorelli*, 600 N.E.2d 232, 234 (N.Y. 1992) (Titone, J., concurring); *People v. Liberta*, 474 N.E.2d 567, 576 (N.Y. 1984).

¹⁰⁷ 852 P.2d at 67, *reconsidered and clarified, in part*, 875 P.2d 225 (Haw. 1993). The Hawaii Supreme Court remanded the case to the circuit court to determine whether there was a compelling state interest for the prohibition. 852 P.2d at 74. The circuit court found no compelling state interest for the prohibition and struck it down as a violation of the Equal Protection Clause of the Hawaii Constitution. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *19-22 (Haw. Ct. App. Dec. 3, 1996). On November 3, 1998, Hawaii voters approved an amendment to their State Constitution giving the legislature the power to preserve marriage as a union between opposite sexes. The amendment was placed on the ballot and succeeded largely due to a strenuous lobbying campaign. Dan Foley, *A Loss That Moves Us Forward, Is in the End a Victory* (visited Nov. 16, 1999) <<http://www.hrc.org/campgn98/hiloss.html>>. See *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at *4-8 (Haw. Dec. 9, 1999) (taking judicial notice that the Hawaii legislature passed an amendment to article I of the Hawaii Constitution that provides the legislature the power to reserve marriage to opposite-sex couples and recognizing that the State’s law denying marriage licenses to same-sex couples was now “out of the ambit of the [State’s] equal protection clause . . . [i]n light of the marriage amendment, [which required the court to find that the law] must be given full force and effect”). The Superior Court for the State of Alaska also would have afforded intermediate level scrutiny to the gender classification at issue in *Brause* if it had not invalidated that state’s same-sex marriage prohibition on other grounds. *Brause*, 1998 WL 88743, at *4.

The reasoning underlying the Hawaii Supreme Court's holding illustrates that the state-wide public policy denying legitimacy to same-sex unions is constitutionally unsound. In *Baehr v. Lewin*, three same-sex couples brought suit for injunctive and declaratory relief and sought a declaration that the Hawaii Marriage Law, as applied by the State's Department of Health to deny licenses to same-sex couples, was in violation of the Hawaii Constitution's prohibition of sex discrimination.¹⁰⁸ The Hawaii Supreme Court found in *Baehr* that denying a legally recognized marriage to same-sex couples required "strict scrutiny" analysis under the Hawaii Constitution's Equal Protection Clause, which meant that the State had to show a "compelling state interest" for using gender, an invidious classification, as a basis for affording different treatment.¹⁰⁹ Hawaii's main argument was that no sex-based discrimination had occurred because the generally accepted definition of the word "marriage" includes only the relationship between a man and a woman.¹¹⁰ The *Baehr* court rejected this argument because

¹⁰⁸ *Baehr*, 852 P.2d at 44.

¹⁰⁹ *Id.* at 67. In *Baehr*, the Hawaii Supreme Court applied strict scrutiny, rather than intermediate level scrutiny, because it analogized the Hawaii Constitution's Equal Rights Amendment to the proposed National Equal Rights Amendment ("ERA"), which would have required that gender classifications be afforded strict scrutiny according to a majority of the United States Supreme Court in *Frontiero v. Richardson*, 411 U.S. 677 (1973). *Id.* New York does not have its own ERA, therefore, gender classifications would be given intermediate level scrutiny. See *Craig* 429 U.S. at 197-98 (holding that gender classifications must serve "important governmental objectives and must be substantially related to achievement of those objectives"); *Santorelli*, 600 N.E.2d at 234 (Titone, J., concurring) (finding that gender classifications have to be substantially related to the achievement of an important government objective); *Liberta*, 474 N.E.2d at 576 (stating that statutes that treat male and females differently violate equal protection "unless the classification is substantially related to the achievement of an important government objective").

¹¹⁰ *Baehr*, 852 P.2d at 51. At trial, the state also argued that same-sex couples were not similarly situated with respect to child rearing, and therefore, the denial of access to marriage was not a sex-based classification. On appeal, the Hawaii Circuit Court rejected that argument after hearing from experts called by the parties. The circuit court found that the scientific data, studies, and clinical experience presented showed that children of same-sex couples tend to develop in a normal fashion. *Id.* at 67-80. In fact, the circuit court found that

it was analogous to the rationale used for declaring that interracial marriages were impossible and unnatural, which was rejected by the United States Supreme Court in *Loving v. Virginia*.¹¹¹ Indeed, the *Baehr* court reasoned that whether the State Constitution extended to protect same-sex couples who were denied a legally recognized marriage should be based on an “evolving social order,” and not the “will” of a deity or a traditional definition of the word “marriage.”¹¹² This reasoning led the Hawaii Supreme Court to hold that denying same-sex couples the right to a legally recognized marriage violated the Hawaii Constitution’s Equal Protection Clause.¹¹³

In New York, unlike in Hawaii, the Tompkins County Supreme Court, in *Storrs v. Holcomb*, rejected an Equal Protection challenge to the State’s ban on same-sex marriage.¹¹⁴ The *Storrs* court’s holding was based solely on precedent established in *In re*

children being raised by gay and lesbian couples would benefit from their parents’ marriage, if allowed, because of the protections and benefits that would become available as a result of marriage. *Id.*

¹¹¹ 388 U.S. 1, 12 (1967).

¹¹² *Baehr*, 852 P.2d at 63.

¹¹³ *Id.* at 67. Nevertheless, there are states where challenges to bars of same-sex marriage have been unsuccessful. See *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974). However, these cases were all decided before the groundbreaking decision in *Baehr v. Lewin*. Since *Baehr* has been decided, there has been a successful challenge to state action prohibiting same-sex marriage. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998). *But see* S.J. Res. 42, 20th Leg., 2d Legis. Sess. (Alaska 1998) (enacting a constitutional amendment adding a new section to article I of Alaska’s Constitution that states “[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman”); *Dean v. District of Columbia*, 653 A.2d 307, 336 (D.C. 1995) (distinguishing *Baehr* as being premised on Hawaii’s Constitution and viewing the District of Columbia’s ban on same-sex marriage as valid under rational basis scrutiny). In addition, there is a challenge to state action prohibiting same-sex marriage pending in the Vermont Supreme Court. See *Baker v. Vermont*, No. 98-03 (Vt. filed Jan. 15, 1998).

¹¹⁴ 645 N.Y.S.2d 286, 288 (Sup. Ct. 1996), *appeal transferred*, 674 N.E.2d 335 (N.Y. 1996), *appeal dismissed*, 666 N.Y.S.2d 835 (App. Div. 1997).

Cooper,¹¹⁵ which did not consider treating a ban on same-sex marriage as a gender-based classification under equal protection analysis. Following the precedent established in *In re Cooper*, where the issue of gender classification was not even raised by the petitioner, the *Storrs* court applied the lowest level scrutiny, "rational basis," to the ban on same-sex marriage and found that the "long tradition of marriage, understood as the union of male and female," justifies the classification.¹¹⁶ Consequently, a rehearing of *Storrs*, or a similar challenge to New York's ban, must consider the argument of gender discrimination that carried the day for the *Baehr* court in Hawaii.

B. Sexual Orientation Discrimination

The New York State Court of Appeals, the United States Supreme Court, and the Second Circuit Court of Appeals have not decided whether, under equal protection analysis, sexual orientation is a suspect or quasi-suspect class, which requires laws that classify persons based on sexual orientation to be subjected to heightened scrutiny.¹¹⁷ However, in a notable New York case, *Able v. United*

¹¹⁵ 592 N.Y.S.2d 797, 801 (Sur. Ct. 1990), *aff'd*, 592 N.Y.S.2d 797 (App. Div. 1993).

¹¹⁶ *Storrs*, 645 N.Y.S. 2d at 287.

¹¹⁷ The New York State Court of Appeals specifically refused to decide the standard of equal protection scrutiny for sexual orientation. *See Under 21 v. City of New York*, 482 N.E.2d 1, 10 (N.Y. 1985) (challenging mayoral authority to prohibit contractors with the City of New York from discriminating on the basis of sexual orientation). The court stated, "[w]e need not decide now whether some level of 'heightened scrutiny' would be applied to governmental discrimination based on sexual orientation." *Id.*

The United States Supreme Court has not decided the proper standard of equal protection scrutiny for sexual orientation and considered *Bowers v. Hardwick* on the basis of substantive due process, not equal protection. 478 U.S. 186, 190-91 (1986) (upholding Georgia's anti-sodomy law). The Court also failed to address that question in *Romer v. Evans* because it held that Colorado's Constitutional Amendment facially discriminated against homosexuals and, therefore, could not withstand even the most minimal scrutiny. 517 U.S. 620, 635 (1996). *See also Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) (stating that homosexuals have "traditionally . . . been subjected to strict, or at least heightened scrutiny").

States, the federal district court found that “[h]omosexuals meet the criteria of a group warranting heightened scrutiny under the equal protection clause.”¹¹⁸ In arriving at this conclusion, the district court applied the criteria articulated by the United States Supreme Court in identifying a suspect or quasi-suspect class¹¹⁹—i.e., homosexuals, as a class, have been subjected to historical discrimination and unequal treatment; members of the class suffer from unique social stereotypes; the characteristic identifying the class is immutable;¹²⁰ the trait is irrelevant to the group’s ability to perform or contribute to society;¹²¹ and the group is politically

The Second Circuit Court of Appeals has failed to rule on the issue of the proper equal protection scrutiny for sexual orientation. See *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998) (noting that the Second Circuit was not required to decide which standard of scrutiny was appropriate under equal protection analysis); *Falk v. Secretary of the Army*, 870 F.2d 941, 947 (2d Cir. 1989) (refusing to comment on the military practice of discharging individuals on the basis of sexual orientation).

¹¹⁸ 968 F. Supp. 850, 864 (E.D.N.Y. 1997), *rev’d on other grounds*, 155 F.3d 628, 632-36 (2d Cir. 1998). In *Able*, the issue presented to the district court was whether the military’s “Don’t Ask, Don’t Tell” policy concerning homosexuals in the armed forces, violated the Due Process Clause of the Fifth Amendment. *Id.* at 851, 865. The Fifth Amendment’s Due Process Clause imposes the same constitutional requirements on the federal government as the Equal Protection Clause of the 14th Amendment imposes on the states. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). Nonetheless, on appeal, the Second Circuit Court of Appeals in *Able* upheld the military’s policy, affording extraordinary deference to legislative judgment regarding the military. *Able*, 155 F.3d at 632. The Second Circuit, however, explicitly avoided the question of whether discrimination on the basis of homosexuality should be afforded heightened scrutiny. *Id.* at 632-36.

¹¹⁹ *Able*, 968 F. Supp. at 864.

¹²⁰ The *Able* court found evidence that sexual orientation is, for some, immutable, and for all, it forms a significant part of a person’s identity. 968 F. Supp. at 863. It conceded that the causes of sexual orientation are still in dispute, but found that the United States Supreme Court has never held that immutability is required for heightened scrutiny. *Id.* at 863 (citing *City of Cleburne v. Cleburne*, 473 U.S. 432, 443 n.10 (1985)). In fact, aliens are accorded heightened scrutiny, although alienage is not immutable. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

¹²¹ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (finding that sex is a suspect characteristic that bears no relation to one’s abilities).

powerless.¹²² Thus, government actions classifying persons based on sexual orientation and treating homosexuals, as a class, differently, should be subjected to heightened scrutiny.

Similarly, in *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, the federal district court held that gays, lesbians, and bisexuals comprise a quasi-suspect class, which requires both that any law treating that class differently serve an important governmental interest and that any such law is narrowly tailored to serve that interest.¹²³ In applying that test, the federal district court permanently enjoined a voter-enacted city charter amendment that would have prohibited adoption or enforcement of any protection based on an individual's sexual orientation—i.e., an individual's status or conduct in a homosexual relationship.¹²⁴ The Sixth Circuit Court of Appeals, however, reversed the district court's decision and relied on *Bowers v. Hardwick* to confirm that homosexuals do not constitute a suspect or quasi-suspect class under equal protection analysis.¹²⁵ Accordingly, the Sixth Circuit examined the amendment to the City Charter of Cincinnati prohibiting the enactment of any law affording special class status based upon sexual orientation under rational-basis scrutiny.¹²⁶ Four other federal courts of appeals also have ruled, primarily by reference to the Supreme Court's due process decision in *Bowers*,

¹²² *San Antonio Sch. Indep. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (finding that political powerlessness is among the traditional indicia of suspectness).

¹²³ 860 F. Supp. 417, 440 (S.D. Ohio 1994), *rev'd*, 128 F.3d 289, 301 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998).

¹²⁴ *Id.* at 449. *See also* *Watkins v. United States Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (en banc) (Norris, J., concurring) (opining that homosexuals comprise a suspect class). State courts have ruled inconsistently on the issue. *See* *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (granting summary judgment dismissing a challenge to the district court's denial of a right to same-sex marriage under the Equal Protection Clause of the United States Constitution based on the definition of marriage). However, Judge Ferren found that summary judgment was improper because sexual orientation may be a suspect or quasi-suspect classification. *Id.* at 336-37 (Ferren, J., concurring).

¹²⁵ 128 F.3d at 292-93, 301 (citing *Bowers v. Hardwick*, 478 U.S. 186, 191-94 (1986)).

¹²⁶ *Id.* at 293, 301.

that the class of individuals who engage in homosexual sexual acts do not comprise a suspect or quasi-suspect class for the purpose of equal protection analysis.¹²⁷

Yet, the failure of the federal courts of appeals to recognize homosexuals as a suspect or quasi-suspect class is misleading because those courts improperly relied on *Bowers* since it was a due process case in which the Supreme Court expressly noted that it was not addressing an equal protection issue.¹²⁸ Even though two of the four courts of appeals recognized that *Bowers* was not dispositive, they still went on to find that the class was not suspect based on their notion that homosexuality is not an immutable characteristic. Notably, that notion entirely ignored a substantial body of scientific research to the contrary.¹²⁹

More importantly, reliance on the reasoning in *Bowers* that homosexuals possess no fundamental substantive due process right to engage in homosexual conduct is unpersuasive.¹³⁰ This is both because that reasoning has been rejected recently by Georgia, where the case originated,¹³¹ and because that reasoning already had been rejected by New York and several other states even before *Bowers* was decided.¹³²

¹²⁷ *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 570-73 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-66 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 102-04 (D.C. Cir. 1987).

¹²⁸ *Bowers*, 478 U.S. at 196 n.8 (stating that “[r]espondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.”).

¹²⁹ *High Tech Gays*, 895 F.2d at 571; *Woodward*, 871 F.2d at 1075. Homosexuality is not a choice or activity—it is an individual characteristic, like the color of one’s skin or eyes, which is immutable. See Boyle, *supra* note 8, at 127 & n.109 (citing J. MONEY AND A. EHRHARDT, *MAN & WOMAN, BOY & GIRL: THE DIFFERENTIATION AND DIMORPHISM OF GENDER IDENTITY FROM CONCEPTION TO MATURITY* 228 (1972)).

¹³⁰ *Bowers*, 478 U.S. at 191-94.

¹³¹ *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998).

¹³² *People v. Onofre*, 415 N.E.2d 936, 941-42 (N.Y. 1980). The other states that had rejected *Bowers* before it was decided include: Kentucky (*Commonwealth v. Wasson*, 842 S.W.2d 487, 491 (Kent. 1990)); Minnesota (*State v. Gray*, 413 N.W.2d 107, 114 (Minn.1987)); New Jersey (*State v. Ciuffini*, 395 A.2d 904, 908 (N.J. Super Ct. 1978)); Pennsylvania

In addition, a finding that homosexuals constitute a suspect or quasi-suspect class warranting heightened scrutiny under equal protection analysis is supported by the fact that other countries already have outlawed discrimination on the basis of sexual orientation.¹³³ In fact, ten foreign nations expressly have forbidden discrimination on the basis of sexual orientation.¹³⁴

Even if gays and lesbians should not be characterized as a suspect or quasi-suspect class, and the prohibition on same-sex marriage is to be analyzed under rational basis scrutiny, a court would be required to examine the classification in light of the Supreme Court's decision in *Romer v. Evans*.¹³⁵ In that case, the Court examined an amendment to the Colorado State Constitution that would have prohibited all governmental action protecting homosexual persons.¹³⁶ This amendment classified individuals on the basis of sexual orientation and was challenged under the Equal Protection Clause of the United States Constitution. The Court held that the amendment was unconstitutional even under rational basis scrutiny because a status-based enactment creating an adverse impact on a disfavored class solely for the purpose of disadvantaging that class violated the Equal Protection Clause.¹³⁷

In applying *Romer*, a court asked to review a state's prohibition on same-sex marriage would be required to formulate a legal basis, other than the "political, cultural, religious and legal consensus" opposed to homosexuality, on which the *Storrs* court relied,¹³⁸ in order to uphold the ban. *Romer* stands for the principle that equal protection means "neutrality where the rights of persons are at

(Commonwealth v. Bonadio, 415 A.2d 47, 51 (Pa. 1980)); and Texas (Morales v. State, 826 S.W.2d 201, 204 (Tex. Ct. App. 1993)).

¹³³ See Wardle, *supra* note 21, at 737-38.

¹³⁴ Wardle, *supra* note 21, at 737-38 (citing KEN THOMASSEN ET AL., ILGA EUROLETTER 45, at 15-18 (Int'l Lesbian & Gay Ass'n ed., 1996) (noting that Canada, Spain, Slovenia, Finland, New Zealand, the Netherlands, Denmark, Sweden, France and Norway prohibit discrimination based on sexual orientation)).

¹³⁵ 517 U.S. 620 (1996).

¹³⁶ *Id.* at 624.

¹³⁷ *Id.* at 633-34.

¹³⁸ *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 287 (Sup. Ct. Tompkins County 1996).

stake” and that one group, gays and lesbians, cannot be precluded from exercising a right because of the animosity of others.¹³⁹ Quoting Justice Harlan’s dissent in *Plessy v. Ferguson*, Justice Kennedy, writing for the majority, advised: “the Constitution ‘neither knows nor tolerates classes among citizens.’ . . . Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake.”¹⁴⁰

IV. GOVERNMENTAL INTERESTS IN PROHIBITING SAME-SEX MARRIAGE

Both substantive due process and equal protection jurisprudence require courts to determine and then weigh the “state interest” upon which a law is enacted, regardless of whether the standard of scrutiny is “strict,” “heightened” or “rational basis.” The state interests in denying homosexuals the right to marry referred to in cases and scholarly writings reveal that those interests are a pretext for a misguided or, frankly, unconstitutional public policy with the sole purpose of disadvantaging homosexuals as a group.¹⁴¹ The reality is that, in some instances, the state interest identified to justify the ban on same-sex marriage would be served by legal recognition of same-sex marriage.

A. Upholding Tradition

In *Storrs v. Holcomb*, the New York supreme court relied on the “long tradition of marriage, understood as the union of male and female” as testimony to a political, cultural, religious and legal consensus contrary to the recognition of same-sex unions.¹⁴² In *In re Cooper*, the appellate division found that the “historic institution” of marriage as a union between a man and a woman is “more

¹³⁹ *Romer*, 517 U.S. at 633-36.

¹⁴⁰ *Id.* at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)).

¹⁴¹ *Id.* at 634.

¹⁴² *Storrs*, 645 N.Y.S.2d at 287.

deeply founded than the asserted contemporary concept of marriage” and even looked to the book of Genesis for support.¹⁴³

Yet, these lower courts ignore the evolution of the law in which most traditional gender-based legal differences in marriage law have been eliminated, either legislatively or judicially, regardless of custom and tradition.¹⁴⁴ With the legal content—rights and responsibilities—of marriage now being gender-neutral, it has been persuasively argued that the legal form of marriages as a union of opposite genders is obsolete.¹⁴⁵ One lower court in New York has questioned “whether, in this era of domestic partnerships and alternative lifestyle education in grammar school, it can still be said that marriage has one . . . meaning which does not include couples of the same-sex.”¹⁴⁶

¹⁴³ 592 N.Y.S.2d 797, 800 (App. Div. 1993) (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (invalidating Oklahoma’s Habitual Criminal Sterilization Act under the United States Constitution’s Equal Protection Clause as denying the right to marry). *See also* *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971) (stating that marriage “is and always has been a contract between a man and a woman”).

¹⁴⁴ *See, e.g.*, *Kirchberg v. Feenstra*, 450 U.S. 455, 455 (1981) (invalidating a state statute giving a husband the right to unilaterally dispose of property jointly held with wife); *Orr v. Orr*, 440 U.S. 268, 282-83 (1979) (striking down an Alabama law providing that husbands and not wives are liable to pay post-divorce alimony as violating United States Constitution’s Equal Protection Clause); *Weinberger v. Weisenfeld*, 420 U.S. 636, 653 (1975) (invalidating a provision of the Federal Social Security Act that denied payment of death benefits to surviving husband in case of the wife’s demise).

¹⁴⁵ The definition of marriage, as a union between opposite genders, has been used to preclude same-sex marriage by some courts, concluding that something that never before existed cannot now be recognized as marriage. However, scholarly studies on the subject provide historical evidence of same-sex marriage. *See* 1 CONTE, *supra* note 100, § 17.2, at 603 (citing JOHN BOSWELL, SAME-SEX UNIONS IN PRE-MODERN EUROPE 53-107, 218-61 (1995); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1435-84 (1993)).

¹⁴⁶ *In re Petri*, N.Y.L.J., Apr. 4, 1994, at 29 (N.Y. Sur. Ct. Apr. 4, 1994) (holding that a surviving gay partner could not inherit without a will or marriage license).

B. Fostering Procreation and Childraising

Historically, procreation has been intertwined with marriage and the state interest in its promotion has been seen as compelling.¹⁴⁷ If procreation and childraising are integral parts of married life then, it is argued, the state interest in those activities precludes recognition of same-sex marriage.¹⁴⁸ Interestingly, the relationship between procreation and marriage has been used on both sides of the balance, as creating a fundamental right that generally cannot be limited¹⁴⁹ and as creating a compelling state interest for limiting a fundamental right.¹⁵⁰

However, the physical ability to procreate has never been a requirement for marriage.¹⁵¹ Not every heterosexual marriage involves procreation and a commitment to procreate is not, nor could it be, a prerequisite to issuance of a marriage license.¹⁵² In

¹⁴⁷ *Skinner v. Oklahoma ex rel. Williamson* 316 U.S. 535, 541 (1942). See *Mirizio v. Mirizio*, 150 N.E. 605, 607 (N.Y. 1926) (stating that procreation is “the foundation upon which must rest the perpetuation of society and civilization”).

¹⁴⁸ This is not the same as asserting that procreation and childrearing are important parts of marriage. The distinction is one of degree, i.e., whether one can marry without the ability or intention to procreate. It is hard to believe that rational policy makers or courts actually could evaluate the integrity or legitimacy of a union based upon the couple’s procreative ability.

¹⁴⁹ *Skinner*, 316 U.S. at 541 (stating that “marriage and procreation are fundamental to the very existence and survival of the race”).

¹⁵⁰ See, e.g., *In re Cooper*, 592 N.Y.S.2d 797, 800 (App. Div. 1993) (stating that society’s interest in marriage for procreation “is more deeply founded than the asserted contemporary concept of marriage”). Moreover, in *Baehr v. Lewin*, the State of Hawaii argued that because procreation was the purpose of marriage, same-sex couples were precluded from marrying. 852 P.2d 44, 63 (Haw. 1993). The *Baehr* Court, however, rejected that argument. *Id.*

¹⁵¹ Veitch, *supra* note 100, at 42. See also *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976) (upholding marriage to a transsexual despite the fact that he was sterile).

¹⁵² In regulating marriage, the state can impose “reasonable regulations that do not significantly interfere with decisions to enter into the marriage relationship . . . [but only so far as they effectuate] sufficiently important state interests.” *Zablocki v. Redhail*, 434 U.S. 374, 386-88 (1978).

Turner v. Safley, for example, the United States Supreme Court held that the fundamental right to marry is retained by inmates in prison even though they have no present ability to procreate.¹⁵³

Traditional reasons for denying the legitimacy of same-sex unions on the basis of procreative ability are obsolete. It is questionable whether the state interest in encouraging procreation still exists. Even if it does, the interest is not furthered by limiting the institution of marriage to heterosexuals. Current concerns about overpopulation, limited resources, and environmental degradation diminish the interest in encouraging procreation. In fact, in response to these concerns, many heterosexual couples choose not to have children.¹⁵⁴ At the same time, for many reasons, not the least of which is the advance in technology, more homosexual couples are having and raising children. Thus, the gender of one or both partners of a couple has become irrelevant to the goal of promoting procreation.

C. *Promoting Family and Social Stability*

Clearly, there is a compelling state interest in a stable society, the foundation of which is the family unit. The promotion of marriage itself has been considered a compelling state interest by the United States Supreme Court.¹⁵⁵ The argument advanced is that the recognition of same-sex marriage would undermine the family and, as a consequence, undermine social stability.

¹⁵³ 482 U.S. 78, 94 (1987). The Supreme Court held that such unions may be subject to reasonable regulation to further legitimate penological concerns. It is on the basis of penological concerns that the Court distinguished *Turner* from *Butler v. Wilson*, which was a case involving a prohibition on marriage for inmates sentenced to life imprisonment because the denial of the right was part of the punishment for the crime. *Id.* at 95 (citing *Butler*, 415 U.S. 953, 954 (1974)).

¹⁵⁴ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, SERIES P-20, NO. 445, MARITAL STATUS AND LIVING ARRANGEMENTS (1990).

¹⁵⁵ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). *See also* Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 578 (1973) (stressing the special constitutional protection afforded to the fundamental relationship of marriage).

First, it must be emphasized that the state's interest in promoting marriage is premised on its legitimate goals in promoting individual happiness and encouraging economic interdependence and responsibility for others, specifically children and spouses. It is decidedly not in the state's interest to protect or advance some stereotypical vision of the model family.

Second, there is no evidence supporting the contention that recognition of same-sex marriage will destroy the family and impact social stability because this contention is based on stereotypes and fear, which is not an appropriate foundation for sound public policy. There have been no indications that Denmark, Sweden, and the Netherlands have experienced any notable decrease in social stability as a result of the fact that those countries have recognized a legal equivalent of same-sex marriage.¹⁵⁶ The New York State Court of Appeals has recognized that a prohibition on same-sex marriage does not protect or advance heterosexuality.¹⁵⁷ In fact, the United States District Court for the Southern District of New York has held that the recognition of non-traditional families serves the state interest in promoting family stability and integrity.¹⁵⁸ Similarly, the recognition of same-sex unions would promote family and social stability by eliminating the patchwork of familial rights and responsibilities and replacing it with sound, predictable, consistent, and reasonable regulations that already are afforded to heterosexual spouses and their children. In addition, even if deterring homosexuality was a legitimate state interest, there is no evidence that prohibiting same-sex unions deters homosexuality, or that recognizing same-sex unions encourages homosexuality. A governmental goal of deterring homosexuality is illegitimate and, even if it were proper, it is unattainable by, and bears no relation to, a state ban on same-sex marriage.

¹⁵⁶ See Wardle, *supra* note 21, at 736-37 (noting that Denmark, Sweden, and the Netherlands have recognized formal registration of same-sex "domestic partnerships," or a legal equivalent of same-sex marriage, for the past 10 years).

¹⁵⁷ *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980). See also Boyle, *supra* note 8, at 132-33 (noting that heterosexual unions do not necessarily advance the state interest in procreation).

¹⁵⁸ *Rodriguez v. McLoughlin*, 49 F. Supp. 2d 186, 194-95 (S.D.N.Y. 1999).

D. *Deterring Homosexual Lifestyles and Preserving Public Morals*

The argument that upholding public morality is the proper basis for state action is subject to continuous debate. Proponents of that argument point to *dicta* in *Bowers v. Hardwick* to support their claim that morality is a legitimate state interest in upholding anti-sodomy laws under rational basis scrutiny.¹⁵⁹ Specifically, the argument advanced is that the state interest in refusing to foster same-sex relationships is legitimate if there is a “societal consensus” opposed to homosexuality.¹⁶⁰

However, subjective responses—e.g., discomfort, prejudice or fear—which some heterosexuals have to the idea of homosexuality, do not constitute a legitimate justification for discrimination against gay men and lesbians, according to the United States Supreme Court’s most recent ruling on gay rights.¹⁶¹ In substantive due process jurisprudence, there is a clear distinction between public and private morality.¹⁶² The New York State Court of Appeals made this distinction perfectly clear in *People v. Onofre* when it struck down New York State’s anti-sodomy statute and stated:

Any purported justification for the consensual sodomy statute in terms of upholding public morality is belied by the position reflected in the *Eisenstadt [v. Baird]* decision in which the Court carefully distinguished between public dissemination of what might have been considered inimical to public morality and individual recourse to the same material out of the public arena and in the sanctum of the private home. There is a distinction between public and

¹⁵⁹ *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986). The Supreme Court did not require a compelling state interest to uphold Georgia’s anti-sodomy law because it found that homosexual sodomy is not a fundamental right under the United States Constitution’s 14th Amendment. *Id.* at 191-92.

¹⁶⁰ *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 287 (Sup. Ct. Tompkins County 1996).

¹⁶¹ *Romer v. Evans*, 517 U.S. 620, 631 (1996) (finding that the proposed amendment actually imposed a disability on homosexuals).

¹⁶² *Onofre*, 415 N.E.2d at 941-42.

private morality and the private morality of an individual is not synonymous with nor necessarily will have effect on what is known as public morality. . . . So here, the People have failed to demonstrate how government interference . . . will do anything other than restrict individual conduct and impose a concept of private morality chosen by the State.¹⁶³

While upholding public morality may sometimes be a legitimate, and even substantial, state interest, private morality is not the proper realm for governmental regulation. Public disapproval of homosexuality, a private matter, is not sufficient to outweigh the fundamental right to marry, nor is it sufficient to justify a class-based discrimination against same-sex marriage.¹⁶⁴

In New York, the morality argument against gay marriage is particularly weak. There is no strong public policy against homosexuality.¹⁶⁵ State regulations prohibit qualified adoption agencies from discriminating against homosexuals as adoptive parents.¹⁶⁶ Executive orders, regulations, and numerous city and local ordinances prohibit discrimination against homosexuals and provide for registration of same-sex unions and benefits to partners.¹⁶⁷ The New York State Court of Appeals has bent over

¹⁶³ *Id.* at 941.

¹⁶⁴ The Uniform Marriage and Divorce Act (“UMDA”), a paradigm marriage validation statute designed to promote stability, predictability, and uniformity among the states, reflects society’s strong preference for validating marriages. UNIF. MARRIAGE AND DIVORCE ACT § 207 (amended 1973). The UMDA only prohibits polygamous and incestual marriages, and where marriage is not specifically prohibited it would validate the union. *Id.*

¹⁶⁵ New York’s anti-sodomy law does not constitute sufficient evidence of a public policy against homosexuality since that law was invalidated by the New York State Court of Appeals. *Onofre*, 415 N.E.2d at 942. Although *Bowers v. Hardwick* found the United States Supreme Court disagreeing with the New York State Court of Appeals on the validity of anti-sodomy laws under the 14th Amendment, sodomy laws have been repealed or declared unconstitutional in a majority of the states. See *supra* notes 131-132 and accompanying text (listing cases holding anti-sodomy statutes unconstitutional).

¹⁶⁶ N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(h)(2) (1999) (stating that “[a]pplicants shall not be rejected solely on the basis of homosexuality”).

¹⁶⁷ N.Y. COMP. CODES R. & REGS. tit. 9, §§ 4.28, 4.28.1 (1995); N.Y. COMP. CODES R. & REGS. tit. 9, §§ 5.23, 5.33 (1996) (Executive Orders

backward to accommodate homosexual unions despite the lack of legislation recognizing those unions.¹⁶⁸

CONCLUSION

Marriage is a favored institution, and this union is given preferential treatment under the laws of the Nation and New York State. Marriage is seen as essential to a stable society. Its emotional, social, legal and financial benefits are equally important to both homosexual and heterosexual couples. The basic human right to emotional support, security and the other intangible aspects of being part of a family are vested in everyone regardless of their sexual orientation. In this regard, the only rational distinction between homosexuals and heterosexuals is that, while some heterosexuals may choose not to marry, homosexuals are, as a class, denied that option.

The right to select a spouse based upon one's own preference despite societal norms or condemnation is a fundamental right. Although society may have disapproved of interracial marriages, as reflected by the actions of the Virginia State Legislature prior to the United States Supreme Court's decision in *Loving v. Virginia*,¹⁶⁹ the right to choose one's partner in marriage cannot

prohibiting discrimination in state employment on the basis of sexual orientation and providing for benefits); N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2104.6, 2204.6, 2500.2, 2503.5, 2520.6, 2523.5 (1999) (rent and eviction regulations recognizing succession rights of unmarried cohabitants). Domestic Partnership Registries are in place in New York City, Albany and Ithaca. American Civil Liberties Union, *States and Cities Offering Domestic Partnerships Registries* (visited Nov. 16, 1999) <<http://www.aclu.org/issues/gay.dpstate.html>>. Anti-discrimination ordinances exist in Albany, Alfred, Brighton, Buffalo, East Hampton, Ithaca, New York City, Plattsburgh, Rochester, Suffolk County, Syracuse, Tompkins County, Troy, and Watertown. *Id.*

¹⁶⁸ *In re Jacob*, 660 N.E.2d 397, 400-01 (N.Y. 1995) (recognizing second parent adoptions by same-sex parents); *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49, 53-54 (N.Y. 1989) (allowing succession rights in rent control apartments before regulations legislatively recognizing those rights were promulgated).

¹⁶⁹ 388 U.S. 1 (1967). At the time, the law in 16 other states disapproved of interracial marriages. *Id.* at 7 n.5. The purported state interest was to prevent "the corruption of blood, . . . a mongrel breed of citizens," and "the obliteration of racial pride." *Id.* at 7.

be subject to governmental interference.¹⁷⁰ For instance, even though society disapproves of parents who fail to support their children, it cannot prohibit individuals who do so from marrying.¹⁷¹ Similarly, the right to same-sex marriage should need no separate *Palko* or *Snyder* justification because marriage is a privacy right involving decision-making, choice, and autonomy—just as the rights affirmed in *Loving*,¹⁷² *Griswold*,¹⁷³ and *Roe*¹⁷⁴ as well as in a host of cases decided by the New York State Court of Appeals, did not need separate justification. “The right to privacy, in constitutional terms, involves freedom of choice, the broad, general right to make decisions concerning oneself and to conduct oneself in accordance with those decisions free of governmental restraint or interference.”¹⁷⁵

The governmental classification of homosexuals who, as a group, may not marry, clearly discriminates on the basis of membership in a group, which is contrary to our history of equality and individualism reflected in the Equal Protection Clauses of the United States and New York State Constitutions. Whether the classification is one that is afforded heightened or rational basis scrutiny still must be determined by the courts, as no precedent currently gives clear guidance. Yet, whatever scrutiny the courts afford, the state interest proffered to justify the ban on same-sex marriage must be carefully examined to see whether it justifies the

¹⁷⁰ See, e.g., *id.* at 12 (holding that a statute restricting a person’s right to choose a marriage partner based on the race of both partners violates the Equal Protection Clause).

¹⁷¹ See *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (declaring a Wisconsin statute prohibiting marriage of individuals in arrears of child support invalid). It is impossible for one to imagine that a court could rule that there is some right implicit in the concept of ordered liberty protecting, specifically, dead-beat parents’ right to marry, yet the Court found that denying dead-beat parents the right to marry was unconstitutional. *Id.*

¹⁷² 388 U.S. at 12 (affirming the right of interracial marriage).

¹⁷³ *Griswold v. Connecticut*, 381 U.S. 479, 485, 499 (1965) (affirming the right of privacy in the marital relationship).

¹⁷⁴ *Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (affirming that the right of privacy includes the right to an abortion).

¹⁷⁵ *In re Doe v. Coughlin*, 518 N.E.2d 536, 539 (N.Y. 1987).

ban, or is merely pretextual, and actually justifies recognition of same-sex unions.