

**DEFENDING MARRIAGE:
A LITIGATION STRATEGY TO OPPOSE SAME-SEX
"MARRIAGE"**

I. INTRODUCTION

In many conservative circles it seems that homosexuality is becoming one of the least talked about issues in America. Silence, or at least ambivalence, from Christian circles is in a sense understandable. After all, who can really understand homosexuality? Where does it come from and why does it afflict certain people who claim they would just as soon be straight than suffer the stigmatism of being "gay"? Christians may realize that homosexuality violates both Scripture and nature, yet many fear being labeled bigots by judging someone for something they themselves cannot explain. Many denominations have had bitter conflicts over the issues of gay membership and clergy and often end up splintering as a result.¹ The issue can become complicated when a Christian attempts to reconcile showing the love of Christ to the individual while condemning the act as grave sin.² Although the vast majority of the world's religions stand opposed to homosexuality, many

¹ See Edward Pratt & Julie Kay, *Battleground: Homosexuality Issues Becoming Contentious for Some Denominations*, MORNING ADVOC. (Baton Rouge), June 23, 2001, at F1 (explaining how acceptance of homosexuality has caused rifts in many mainline denominations).

² For this author's point of view, see CATECHISM OF THE CATHOLIC CHURCH §§ 2357-59 (1994) (internal citations omitted):

Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that "homosexual acts are intrinsically disordered." They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved.

. . . This inclination, which is objectively disordered, constitutes for most of them [homosexuals] a trial. They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided. . . .

. . . By the virtues of self-mastery that teach them [homosexuals] inner freedom, at times by the support of disinterested friendship, by prayer and sacramental grace, they can and should gradually and resolutely approach Christian perfection.

churches have fallen prey to the notion that homosexuality should be accepted, despite Scripture's clear prohibition.³

Normally those who are opposed to same-sex marriage are referred to as "opponents." This Note consciously does not use that term because those who support marriage do not simply oppose same-sex marriage. Opposition is simply the natural result of true advocacy of marriage. Thus, this Note uses the term "marriage advocates" to describe those who believe in the Judeo-Christian ethic of one man and one woman becoming one flesh. Anyone who truly views marriage this way will naturally be opposed to same-sex marriage not because of an irrational hatred of homosexuals, but rather for a love of what marriage the Sacrament and institution really is.

In recent years, while marriage advocates have remained ambivalent, advocates of same-sex marriage have become all the more determined and sophisticated. In truth, marriage advocates are being defeated without putting up much of a fight. Although it is true that to date no state allows members of the same sex to marry,⁴ same-sex marriage advocates have been successfully chipping away at marriage⁵ by enacting domestic partnership ordinances and repealing sodomy laws nationwide. Currently, political subdivisions in 27 states have enacted domestic partnership ordinances⁶ and 37 states have repealed their sodomy statutes.⁷ The proliferation of these ordinances is in no small part due to the efforts of a powerful, sophisticated, and very determined alliance between two liberal powerhouses. Lambda Legal Defense and Education Fund and the American Civil Liberties Union have led the

³ See Marriage Law Project, *Major World Religions on the Question of Marriage* (2001), at <http://marriagelaw.cua.edu/religion.htm> (last updated Jan. 2001) (In the U.S. 98.2% of those in the five major religions affirm marriage, while 1.7% support same-sex marriage. Worldwide, 99.9% affirm marriage, while .1% support same-sex marriage.); cf. Pratt & Kay, *supra* note 1, for Scripture references, see *Genesis* 19:1-29, *Romans* 1:24-27, 1 *Corinthians* 6:10, 1 *Timothy* 1:10.

⁴ Vermont came close by enacting a judicially imposed "civil unions" statute. VT. STAT. ANN. tit. 15, §§ 1201-07 (2001). This Act was in response to the Vermont Supreme Court's ruling in *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) and endows same-sex partners with all the "benefits, protections and responsibilities under law" of marriage while the state retains the requirement that a valid marriage be between a man and a woman. VT. STAT. ANN. tit. 15, at § 1204(a) (2001).

⁵ Upon the advice of a friend, I stopped using the term "traditional marriage" altogether, since traditional marriage is the only kind the world has known since the book of Genesis.

⁶ See Lambda Legal Defense and Education Fund, *Partial Summary of Domestic Partner Benefits Listings* at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=21> (last updated Aug. 1, 2001).

⁷ See Lambda Legal Defense and Education Fund, *State-by-State Map of Sodomy Laws* at <http://www.lambdalegal.org/cgi-bin/iowa/states/sodomy-map> (last visited Apr. 2, 2002).

fight for gay rights, devoting an enormous amount of resources to the effort.⁸

Same-sex marriage advocates have thus far been successful in their quest for the higher ground, while marriage advocates have apparently conceded much of the fight due to the unpleasantness of the subject matter. Same-sex advocates have done well in playing the *Loving* card,⁹ in an attempt not only to make homosexuality's *immutability* commonly accepted, but also to make resistance to a radical homosexual agenda tantamount to bigotry.¹⁰ As Hadley Arkes has observed:

There may be atavistic moral reflexes, drawn from a Christian past, but they seem readily matched these days by the reflexes of a newer sensibility that is wary of anyone who seems "judgmental." Gay marriage may seem wrong, but in the new scale of things there seems something harsh or tacky about the people who would argue about the matter in public. And so the political matrix: The judges advance the interests of gay rights at every turn, and those who resist them are labeled as the fanatics.¹¹

Same-sex marriage advocates have neutralized conservative Christians, their most staunch adversary, while advancing their cause with covert techniques.¹² Their influence and strategy become eerily menacing when one takes a comparative look at the amount of academic literature published by each side. From 1990 to 2000, same-sex marriage advocates have written approximately 114 law review articles to marriage advocates' 37.¹³ Many will dismiss this imbalance as simply harmless academic bemusing from ivory towers afar, but "academic

⁸ See Lambda Legal Defense and Education Fund, at <http://www.lambdalegal.org> (last visited Apr. 2, 2002); American Civil Liberties Union, Lesbian and Gay Rights Project, at <http://www.aclu.org/issues/gay/hmg1.html> (last visited Apr. 2, 2002).

⁹ David Orgon Coolidge, *Playing the Loving Card: Same-sex Marriage and the Politics of Analogy*, 12 *BYU J. PUB. L.* 201 (1998) (Coolidge coined the phrase "playing the *Loving* card," referring to the attempts of same-sex marriage advocates to claim for themselves the same sort of invidious discrimination at issue in *Loving v. Virginia*, 388 U.S. 1 (1967)).

¹⁰ Calling the quest for same-sex marriage radical may seem radical itself.

¹¹ Hadley Arkes, *A Culture Corrupted*, 67 *FIRST THINGS* 30, 33 (1996).

¹² See MATTHEW A. COLES, *TRY THIS AT HOME: A DO-IT-YOURSELF GUIDE TO WINNING LESBIAN AND GAY CIVIL RIGHTS POLICY: AN ACLU GUIDEBOOK* (1996). This book is a blueprint for winning gay rights and dedicates a chapter to "Dealing with Religion." *Id.* at 106-11. It also advises covert techniques, citing one such example: "Organizers in Flint, Michigan, are convinced that if there had been a public debate over the [gay rights] ordinance, they would have lost because of the opposition of conservative churches." *Id.* at 107.

¹³ Marriage Law Project, *Bibliography of Law Review Articles Relating to the Issue of Same-Sex "Marriage,"* at <http://marriagelaw.cua.edu/Bibliogr.htm> (last visited Feb. 16, 2002). See also Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 *BYU L. REV.* 1, apps. a & b (listing articles, essays, notes, and comments either supporting or opposing same-sex marriage).

strategizing in arcane law reviews can have astonishingly significant consequences. Workplaces across the country, for instance, have been reshaped by innovations in the law of sexual harassment that began as improbable academic theorizing."¹⁴

Although a charge of complicity would be too harsh, marriage advocates have often not been worthy adversaries. The cause is too important to concede. As this Note will detail, the importance of marriage and the effects of same-sex marriage cannot be overstated.

Although same-sex advocates will always press their case in state legislatures and the halls of public opinion, there is little doubt that the real challenge for gay rights takes place in America's courtrooms. Because judges have become potent agents of social change, they have become a particularly effective and salient weapon for groups with minority (especially radical minority) opinions.¹⁵ Through *City of Boerne v. Flores*,¹⁶ the Supreme Court made clear that their interpretation of Constitutional matters is *supreme*. "Simply put, *Boerne* strikes a blow for judicial supremacy at the expense of congressional prerogative, and ultimately the people's right to govern themselves, by claiming authoritative constitutional interpretation as solely the Court's domain."¹⁷ If cases like *Baker v. Vermont*¹⁸ shed any light on this issue, the trend of courts unwilling to share the responsibility of constitutional interpretation with their co-equal branches applies to the states as well.¹⁹

The purpose of this Note is to provide a general foundation upon which a defense of marriage can be made. Part I focuses on constitutional claims to same-sex marriage at both the state and federal levels. So far, the federal Constitution has not proven fruitful for same-sex marriage advocates. They have had much greater success in state courts dealing with nebulous state constitutions and sometimes more

¹⁴ Robert F. Nagel, *Playing Defense in Colorado*, FIRST THINGS, May 1998, at 34, 36.

¹⁵ See *The End of Democracy? The Judicial Usurpation of Politics*, FIRST THINGS, Nov. 1996, at 18, 18 ("The government of the United States no longer governs by the consent of the governed . . . [T]he judiciary has in effect declared that the most important questions . . . are outside the purview of 'things of their knowledge.'").

¹⁶ 521 U.S. 507, 535 (1997) (striking down the Religious Freedom Restoration Act (RFRA), which was Congress's attempt to return cases involving the Establishment Clause to the pre-*Smith* standard of strict scrutiny with regard to Establishment Clause cases). RFRA was struck down despite the ambiguity of the Establishment Clause's application and Congress's strong view that Establishment Clause cases should be afforded strict scrutiny.

¹⁷ Jay Alan Sekulow & John Tuskey, *City of Boerne v. Flores: The Justices Know Best*, 2 NEXUS 51, 53 (1997).

¹⁸ 744 A.2d 864 (Vt. 1999).

¹⁹ *Id.* (Although *Baker* is a good example of judicial fiat, it was not the coup d'etat advocates hoped for since civil unions are still not the equivalent of legal marriage.).

ideologically motivated judiciaries. Part I will detail how and to what degree same-sex advocates have been successful in state courts and how to best counter their arguments. Part I will also argue why the legislature is best equipped to regulate the institution of marriage as opposed to the judiciary.

Part II deals primarily with social science evidence against same-sex marriage. If used with prudence and wisdom, social science evidence can effectively counter claims that attempt to advance same-sex marriage, showing the ill effects that would most likely result from state recognition of these unions. This section analyzes the effects of same-sex parenting as well as the health risks and instability of same-sex relationships.

It is important to confess that this Note is broad but not always deep. Its purpose is to provide an overview of litigation techniques to defend marriage. Although it covers the major arguments made against marriage, others, many of whom are referenced in the footnotes of this work, have covered these topics in greater depth. What this Note does give is a two-front defense of marriage. The first front is based on law while the second is based on social science.

It is important to remember that the issue of homosexuality is highly politically charged. Judges' ideological backgrounds can have more influence on gay rights cases than most other cases. A well-crafted defense must be mindful of the impact of every move. It is important to remain well reasoned and dispassionate. Once labeled as a *homophobe*, a marriage advocate's argument will have little chance of success.

II. CONSTITUTIONAL CLAIMS TO SAME-SEX "MARRIAGE"

Same-sex marriage advocates normally rely primarily on the constitutional guarantees of due process and equal protection to advance their cause. Federal claims of both due process and equal protection have generally been easy to combat. Fortunately, the Supreme Court in *Washington v. Glucksberg*²⁰ realigned its due process jurisprudence by "emphasiz[ing] the importance of examining our nation's history and tradition in determining fundamental rights."²¹ Marriage enjoys a rich history and tradition, while same-sex marriage can point to no existing history or tradition. Thus, claims brought under a federal right to due process should fail – unless, of course, the Court were to take the drastic step of reversing several of its opinions and completely changing the face of how it decides due process cases.

²⁰ 521 U.S. 702 (1997).

²¹ See Lynne Marie Kohm, *Liberty and Marriage—Baehr and Beyond: Due Process in 1998*, 12 BYU J. PUB. L. 253, 273 (1998).

Federal claims of equal protection should suffer the same fate as due process claims. For all the hysteria produced by *Loving*²² analogists (who attempt to equate invidious racial discrimination with opposition to same-sex marriage), the analogy is good for little more than political posture and pressure.²³ In truth, every court that has addressed the issue has rejected the right to same-sex marriage under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.²⁴

A. Due Process Under the Federal Constitution

Since the Supreme Court's realigning of its due process jurisprudence in *Washington v. Glucksberg*,²⁵ due process claims have become much more easy to analyze and apply.²⁶ The Court in *Glucksberg* corrected the Ninth Circuit's misunderstanding of due process analysis²⁷ in an apparent attempt to retreat from an overbroad privacy right.²⁸ The *Glucksberg* Court developed a two-prong test for analyzing due process claims. Because the due process clause of the Fourteenth Amendment applies strict-scrutiny only to fundamental rights, the first prong requires a court to narrowly define the right at issue.²⁹ In *Glucksberg*, the Court corrected the Ninth Circuit by declaring that the right at issue was the right to assisted suicide specifically and not "the traditional right to refuse unwanted lifesaving medical treatment" generally.³⁰ Likewise, in the case of same-sex marriage, the asserted right is specifically the right to *same-sex* marriage, not marriage in general. To define the right at issue as marriage in general would be too broad and not a "careful description," pursuant to the *Glucksberg* analysis.³¹

²² *Loving v. Virginia*, 388 U.S. 1 (1967).

²³ Coolidge, *supra* note 9, at 213 (describing the use of the *Loving* analogy in political editorials, speeches, and advertisements preceding *Baehr*).

²⁴ See Robin Cheryl Miller, Annotation, *Marriage Between Persons of Same Sex*, 81 A.L.R. 5TH 1 (2001) (summarizing same-sex marriage cases decided to date).

²⁵ 521 U.S. 702 (1997).

²⁶ This generalization excludes abortion jurisprudence. See *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (declaring that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"). The *Casey* decision affirmed the basic holding of *Roe v. Wade*, 410 U.S. 113 (1973), that a woman has a *fundamental* right to abortion, despite our nation's lack of history and tradition of a right to abortion. 505 U.S. at 869.

²⁷ The Ninth Circuit in *Glucksberg* was understandably applying the *Casey* standard. See *Casey*, 505 U.S. at 851.

²⁸ See Kohm, *supra* note 21, at 273 ("The Supreme Court's recent decision in *Glucksberg* signals a retreat from *Casey*'s broad language concerning liberty and the limits of government action. *Glucksberg* emphasized the importance of examining our nation's history and tradition in determining fundamental rights").

²⁹ *Id.* at 264.

³⁰ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

³¹ *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

The second prong of the *Glucksberg* due process analysis requires inquiry into whether the asserted right is “deeply rooted in this Nation’s history and tradition.”³² It is at this point that careful description of the asserted right is important; marriage *is* deeply rooted in our nation’s history and tradition. However, there simply is no history and tradition of *same-sex* marriage in this country.³³ Hence, no court in the country has found that the due process clause of the Fourteenth Amendment requires recognition of same-sex marriage.³⁴ Fortunately, case law regarding the fundamental right to marriage is strong. *Zablocki v. Redhail*³⁵ is relied upon for the proposition that marriage is inextricably linked to procreation as a social foundation³⁶. Although *Zablocki* found “the right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause,”³⁷ courts have held that the right to *same-sex* marriage is not “deeply rooted in this Nation’s history and tradition” and therefore not analyzed under strict scrutiny.³⁸ Even the court in *Baehr* conceded that the fundamental right to marriage is reserved only to individuals of the opposite sex:

Applying the foregoing standards to the present case, we do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.³⁹

This quote is particularly interesting considering that it came from a court that seemed to be itching to grant a right to same-sex marriage. The court in *Baker v. Nelson* said it best when it explained that marriage, “as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”⁴⁰ Same-sex marriage can claim no such pedigree although

³² *Id.* at 720.

³³ For a thorough analysis of due process claims to same-sex marriage in light of *Glucksberg*, see Kohm, *supra* note 21; see also *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (finding a history and tradition of state proscription of homosexual conduct).

³⁴ See Miller, *supra* note 24.

³⁵ 434 U.S. 374 (1978).

³⁶ See Miller, *supra* note 24, at 6.

³⁷ *Id.* at 384.

³⁸ See e.g., *Dean v. District of Columbia*, 653 A.2d 307, 331 (D.C. 1995); *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993); *Singer v. Hara*, 522 P.2d. 1187, 1197 (Wash. Ct. App. 1974).

³⁹ *Baehr*, 852 P.2d at 57. An interesting aspect of this opinion, however, is that the court noted that same-sex marriage is not *presently* considered fundamental, insinuating that our Nation’s history and traditions are subject to change. *Id.* at 56.

⁴⁰ 191 N.W.2d 185, 186 (Minn. 1971).

some have tried. This is the point at which marriage advocates must be careful. Easily dismissing the argument that this country has no history and tradition of same-sex marriage could be costly if a court were to foreclose the issue on a state constitutional due process ground, moving beyond the Court's analysis in *Glucksberg* to a broader scope of protection. Judges bent on social engineering may stretch to find history and tradition, even if from a fictitious era. John Boswell was a leader in stretching medieval history (particularly regarding the Church) to be embracing of same-sex marriage.⁴¹ "Boswell purportedly discovered that same-sex marriages had existed within Christian Europe, particularly before the thirteenth century."⁴² Even the most ardent same-sex marriage advocates have largely discredited Boswell's work.

Many reviewers originally greeted Boswell's work as unassailable. As time passed, however, especially since Boswell's death, his work seems to have lost much of its luster. A second look has been taken, not least by homosexual advocates unwilling to have their case made sloppily, and by now a great deal of Boswell's edifice lies in ruins.⁴³

However, William Eskridge, another leading same-sex marriage advocate, keeps the embers of Boswell's work burning brightly,⁴⁴ while distancing himself from Boswell's illusory conclusions.⁴⁵ Because same-sex marriage advocates are using Eskridge's work in legal briefs,⁴⁶ marriage advocates need to be prepared to give a counter-argument.

Eskridge's conclusions are best rebuffed by Peter Lubin and Dwight Duncan's analysis of his work.⁴⁷ Their work has dissected Eskridge's claims and has found them wanting at best. Eskridge capitalizes on

⁴¹ See JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994) (describing his theory that friendship ceremonies of the ancient church were endorsements of same-sex marriage); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

⁴² Peter Lubin & Dwight Duncan, *Follow the Footnote or the Advocate as Historian of Same-Sex Marriage*, 47 CATH. U. L. REV. 1271, 1273 (1998).

⁴³ *Id.* at 1273-74; see also Robin Darling Young, *Gay Marriage: Reimagining Church History*, FIRST THINGS, Nov. 1994, at 43, 44 (rebuffing Boswell by describing the friendship tradition (of which she has taken part) as simply a spiritual union between friends). Interestingly, subsequent to the publishing of Boswell's book, not even the most ardent advocates of same-sex marriage have endorsed Boswell's position, which Darling calls "not only a failure, but an embarrassing one." *Id.* at 48.

⁴⁴ See generally, WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996); Eskridge, *supra* note 41.

⁴⁵ ESKRIDGE, *supra* note 44, at 223 n.37 (conceding that criticism of Boswell's assertions that same-sex marriage ceremonies were recognized by early Christians is "fair but not conclusive" and stating that allegations of misinterpretations have "been repeatedly and persuasively made against Boswell's earlier work").

⁴⁶ See Lubin & Duncan, *supra* note 42, at 1324 (citing Eskridge's work in Brief for Appellants, *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) and Plaintiff's Memorandum of Law, *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999)).

⁴⁷ *Id.* at 1275.

much anecdotal evidence from obscure cultures, drawing inference upon inference.⁴⁸ In the end, it is almost as if he expects the reader to glean the impression that modern society is the anomaly, regressive in its lack of cultural understanding and sensitivity. He seems to assert that somehow we have lost our way and become an intolerant society. As Lubin and Duncan point out, Eskridge plays fast and loose with language. No one will argue that homosexuality has not existed.⁴⁹ But to say that homosexuality existed, or even that there were same-sex unions, and to say that same-sex marriage was socially or otherwise sanctioned is to say two completely different things.

Eskridge maintains that the "intolerant" West needs to understand that same-sex marriage is not "so unnatural or dysfunctional as to be unheard of." This is a red herring. To the contrary, no one has ever argued that same-sex marriages are "unheard of." Rather, it has been argued only that the world's major civilizations, and most of its minor ones, have not conferred upon same-sex unions the status of marriage as that has been understood in each of those civilizations. In fact, many civilizations are familiar with some famous same-sex "marriages" in history, including those of such self-indulgent and crazed rulers as Nero and Elagabalus.⁵⁰

The use of Nero as poster-boy for same-sex marriage is an especially significant stretch. Eskridge says that "[t]he marriages of emperors such as Nero stand as examples of publicly celebrated same-sex marriages in imperial Rome."⁵¹ It seems that Nero's *marriages* were hardly *celebrated* in any rational meaning of the word.

Besides abusing freeborn boys and seducing married women, he debauched the Vestal Virgin Rubria. The freedwoman Acte he all but made his lawful wife, after bribing some ex-consuls to perjure themselves by swearing that she was of royal birth. He castrated the boy Sporus and actually tried to make a woman of him. He married him with all the usual ceremonies, including a dowry and a bridal veil, took him to his house attended by a great throng, and treated him as his wife.⁵²

⁴⁸ See, e.g., Eskridge, *supra* note 41, at 1419-20. Eskridge begins his story with an example of a Native American emissary to Washington D.C. from the Zuni community and a woman from an Igbo tribe in Eastern Nigeria. Lubin and Duncan point out that instead of citing the world's major civilizations, Eskridge makes reference to less significant ones, such as the Zuni tribe of West Africa. He then "can operate with impunity, knowing that few will take the trouble to refute that which would require special effort . . . Bullied by footnotes, the reader's critical faculties surrender without a fight." Lubin & Duncan, *supra* note 41, at 1276-77.

⁴⁹ For early examples, see *Genesis* 19:1-29; *Romans* 1:24-27; *1 Corinthians* 6:10; *1 Timothy* 1:10.

⁵⁰ Lubin & Duncan, *supra* note 42, at 1276.

⁵¹ ESKRIDGE, *supra* note 44, at 23.

⁵² Lubin & Duncan, *supra* note 42, at 1314 (quoting SUETONIUS, *THE LIVES OF THE TWELVE CAESARS* 258 (Joseph Gavorse ed. & trans., 1931)).

This example was somehow omitted from Eskridge's work. Before long, Eskridge's narrative becomes little more than a thinly veiled attempt to rewrite history. But it is important to keep in mind that courts are being asked to listen to same-sex advocates' version of history. Eskridge's material has been cited as historical evidence in briefs to courts deciding same-sex marriage cases.⁵³ So if the argument is made, marriage advocates must be prepared to counter any such historical distortion.

The work of Boswell, and later Eskridge, attempts to fit a square peg into a round hole by trying to make a tenuous and conjectural historical finding⁵⁴ fit within the due process analysis of *Glucksberg*. They seem to be saying, "They want history and tradition? Okay, we'll give them history and tradition." By drawing on the work of Lubin, Duncan, and others, these claims can easily be rebuffed and even used to discredit the entirety of a petitioner's claims.

Same-sex marriage advocates stand on shaky ground when they rest on due process claims of the Fourteenth Amendment. However, overconfidence in this area could be a pitfall, particularly when a plaintiff frames his case completely on state law. As the justices of the Hawaii Supreme Court reminded us, state courts can do anything they want regarding the due process clauses of their state constitutions, and their decisions are completely unreviewable.⁵⁵ So if they want to expand the *history and tradition* prong of the due process analysis to the history and tradition of the world, and not just the United States, or the Western World, they are free to do so. An activist court looking for an excuse to sanction same-sex marriage could take the work of Eskridge and Boswell and run if not given a counter-argument.⁵⁶

Courts should be cautioned to exercise prudence when extending due process protection to asserted rights. A court analyzing a due process claim should be reminded of the caution extended by the *Glucksberg* Court:

By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field,"

⁵³ See Lubin & Duncan, *supra* note 42, at 1324 (citing Eskridge's work in Brief for Appellants, *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) and Plaintiff's Memorandum of Law, *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999)).

⁵⁴ *Id.* at 1312-13 (asserting that Eskridge and Boswell did indeed 'find' their history of same-sex marriage).

⁵⁵ See *infra* text accompanying note 74.

⁵⁶ See Kohm, *supra* note 21, at 275 ("The last hope for *Baehr* and same-sex marriage advocates in the quest for due process and liberty in same-sex marriage is the power of subjective elements and judicial discretion that the Supreme Court used in *Roe* and *Casey* and distinguished in *Glucksberg*.").

lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.⁵⁷

B. Equal Protection Under the Federal Constitution

Same-sex marriage advocates making an equal protection argument try to embrace *Loving* while distancing themselves from *Bowers v. Hardwick*.⁵⁸ *Loving* put an end to Virginia's miscegenation laws, striking a blow against codified prejudice and bigotry, while affirming the foundational importance of marriage.⁵⁹ In short, *Loving* was about invidious racial discrimination. Same-sex marriage advocates love to play what David Coolidge has called the "*Loving* card,"⁶⁰ claiming for homosexuals the same type of invidious discrimination at issue in *Loving*. As far as legal relevance is concerned, the *Loving* analogy is hollow because a refusal to grant same-sex marriage does not treat similarly situated people differently. Laws forbidding same-sex marriage have neither the purpose nor effect of discriminating against men or women because *no* man may marry another man, nor may *any* woman marry another woman. But when it comes to political relevance, *Loving* can be priceless for same-sex advocates. "In one fell swoop one can invoke race, civil rights, and the freedom to marry while simultaneously painting one's opponents as the Bull Connors of [today]."⁶¹

An equal protection analysis of the right to same-sex marriage is not overly complex. However, same-sex marriage advocates have been successful in complicating the issue with a flawed equal protection philosophy.⁶² They argue that it is not fair to deny a couple a marriage license and all the trappings of marriage simply because they are of the same sex.⁶³ The underlying principle behind this argument seems to be that states must apply the law absolutely (or radically) equally. But in truth, state legislatures often make distinctions in the law, denying

⁵⁷ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)).

⁵⁸ 478 U.S. 186, 196 (1986) (upholding states' right to criminalize homosexual sodomy).

⁵⁹ *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

⁶⁰ Coolidge, *supra* note 9, at 204. ("Indeed, those advocating 'same-sex marriage' are not making a legal argument; instead, they are 'playing the *Loving* card.'").

⁶¹ *Id.* at 201.

⁶² For same-sex advocates leading success stories, see *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) (ruling on the state constitution's equal rights clause); *Brause v. Bureau of Vital Statistics*, 1998 WL 88743, at *1 (Alaska Super. Ct.1998) (ruling on the state's equal protection clause); *Baker v. Vermont*, 744 A.2d 864, 870(Vt. 1999) (ruling on the state's common benefits provision).

⁶³ See, e.g., Christine Jax, *Same-Sex Marriage—Why Not?*, 4 WIDENER L. SYMP. J. 461, 485 (1995) ("It is undeniably unfair to allow some citizens to marry while requiring others to remain single.").

benefits to some while granting them to others. Marriage laws, for instance, not only require a couple to be of the opposite sex, but also impose age requirements,⁶⁴ consanguinity requirements,⁶⁵ requirements of a mental and even physical capacity,⁶⁶ and proscriptions against polygamy or polyandry.⁶⁷

If it were a broad notion of absolute or radical equality that courts ought to apply, many government programs would need to be systematically exterminated. That is, if we make absolute or radical equality the aim of equal protection instead of treating similarly situated individuals equally, the government would violate equal protection any time it granted a benefit to one while withholding it from another. Beyond marriage law, graduated income tax systems arguably discriminate based on income, treating people unequally. Welfare provisions are also unequal. One citizen is able to receive payments from state coffers while another is denied those benefits. Medicaid payments are yet another example. States are free to provide Medicaid for some ailments while withholding payment for others.⁶⁸ A state obviously has the authority to make rational distinctions based on its resources, goals, and authority under its police powers. To deny the state this right and duty in the name of absolute or radical equality would be pure sophistry. What states may not do is make these distinctions based on suspect or quasi-suspect classifications without a compelling reason or when the state lacks any rational basis for what it is doing.

Race is the quintessential example of a suspect classification.⁶⁹ Alienage may also be included as a suspect class.⁷⁰ These classifications are subject to strict scrutiny, which requires that the legislation must be

⁶⁴ See 1 CONTEMPORARY FAMILY LAW § 2:37 (Lynn D. Wardle et al. eds., 1988) ("All states have [an] . . . age restrictions on marriage."); see also *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (holding that age and sex discrimination in statutory rape laws is constitutional).

⁶⁵ See CONTEMPORARY FAMILY LAW, *supra* note 64, §§ 2:04, 2:12 (all states proscribe incestual marriage, to varying degrees).

⁶⁶ See 4 AM. JUR. 2D *Annulment of Marriage* §§ 27-33 (2000).

⁶⁷ See *Reynolds v. United States*, 98 U.S. 145 (1878).

⁶⁸ See B. GUY PETERS, AMERICAN PUBLIC POLICY: PROMISE AND PERFORMANCE 520 (1999) (describing state's prerogative in prioritizing ailments covered by Medicaid funds).

⁶⁹ See *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192-93 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

⁷⁰ See *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Oyama v. California*, 332 U.S. 633, 640 (1948); Kevin Aloysius Zambrowicz, Comment, "To Love and Honor all the Days of Your Life": A Constitutional Right to Same-Sex Marriage?, 43 CATH. U. L. REV. 907, 935-36 (1994) (determining suspect classification is based on a list of factors which include: "(1) a long history of discrimination as a class; (2) possession of a characteristic that bears no relation to ability to perform or contribute to society; (3) being marked by a badge of opprobrium; (4) relegation to a position of political powerlessness; and (5) possession of an immutable characteristic that is either inherent or uncontrollable").

the least restrictive means of advancing a compelling state interest.⁷¹ An intermediate level of scrutiny declares that sex and illegitimacy are a quasi-suspect class, requiring a state to show an important government interest that is substantially related to the classification.⁷²

The Supreme Court has consistently held that homosexuality is neither a suspect nor quasi-suspect class but, instead, is analyzed under the rational basis test, requiring only that the state action be rationally related to a legitimate government interest.⁷³ Because same-sex advocates have had such little success in federal court, they have begun to craft their complaints in such a way as to avoid federal court. In *Baehr v. Lewin*,⁷⁴ the plaintiff “framed the case entirely as a claim under Hawaii law, to make it immune from transfer or appeal to the federal courts.”⁷⁵ As the court noted in *Baehr*, “there is no doubt that [a]s the ultimate judicial tribunal with *final, unreviewable* authority to interpret and enforce the Hawaii Constitution, we are free to give broader privacy protection than that given by the federal constitution.”⁷⁶ All three of the successful cases for same-sex marriage have been decided under state constitutional provisions.⁷⁷ Federal judges will be much less apt to stretch due process law to encompass a right to same-sex marriage. If a homosexual plaintiff is careless enough to plead a federal claim, the first step in defending marriage is to remove the case to federal court.

C. State Courts With a Compelling Interest

The courts that have granted recognition to same-sex marriage (or marriage-like relationship) between homosexuals have embraced the radical equality argument, basing their decisions on equal protection,⁷⁸ equal rights,⁷⁹ or the common benefits⁸⁰ provisions of their own state

⁷¹ See, e.g., Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205, 210-11 (1993) (giving a description of strict and intermediary scrutiny in equal protection analysis).

⁷² See *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *United States v. Virginia*, 518 U.S. 515 (1996).

⁷³ See *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986); *Romer v. Evans*, 517 U.S. 620, 631-34 (1996).

⁷⁴ 852 P.2d 44 (Haw. 1993).

⁷⁵ David Orgon Coolidge, *Same Sex Marriage: As Hawaii Goes . . .*, FIRST THINGS, Apr. 1997, at 33, 34.

⁷⁶ 852 P.2d at 57 (quoting *State v. Kam*, 748 P.2d 372, 377 (Haw. 1988)) (emphasis added).

⁷⁷ See *id.* (ruling on the state constitution's equal rights clause); *Brause v. Bureau of Vital Statistics*, 1998 WL 88743, at *1 (Alaska Super. Ct. 1998) (ruling on the state's equal protection clause); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (ruling on the state's common benefits provision).

⁷⁸ *Baehr*, 852 P.2d at 69-82.

⁷⁹ *Brause*, 1998 WL 88743, at *5-6.

constitutions. In each case, these courts have subverted the will of the people by judicially mandating same-sex marriage benefits.

For example, in *Brause v. Bureau of Vital Statistics*,⁸¹ an Alaska trial court found that the state constitution's requirement of equal protection made it a fundamental right to choose one's life partner and even to have a non-traditional family.⁸² The court required the state to show a compelling reason for its proscription of same-sex marriage.⁸³ The court also held that, rather than being about homosexuality, the state's marriage law discriminated on the basis of sex.⁸⁴

The Hawaii Supreme Court made a similar finding in *Baehr v. Lewin*⁸⁵ when it twisted its way around the equal protection question by finding that, like the Alaska court, the case was about sex discrimination, not homosexuality. "Before the Hawaii Supreme Court decision in *Baehr v. Lewin*, courts had uniformly rejected the *Loving* analogy between miscegenation and heterosexual marriage."⁸⁶ The court stated that "in this opinion, it is irrelevant, for purposes of the constitutional analysis germane to this case, whether homosexuals constitute a 'suspect class' because it is immaterial whether the plaintiffs . . . are homosexuals."⁸⁷ Because the court analyzed Hawaii's marriage law as discrimination on the basis of sex, the court required the state to show a compelling interest for its prohibition. The case was remanded to the trial court which found that the state had no compelling interest. On appeal, the Hawaii Supreme Court affirmed that decision.⁸⁸

Most courts that have decided the question have concluded that the issue is about homosexuality, not sex discrimination.⁸⁹ Hawaii's

⁸⁰ *Baker*, 744 A.2d at 870.

⁸¹ *Brause*, 1998 WL 88743, at *6.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* The court gave the following example: "If twins, one male and one female, both wished to marry a woman and otherwise met all of the [marriage] Code's requirements, only gender prevents the twin sister from marrying under the present law."

⁸⁵ *Baehr v. Lewin*, 852 P.2d 44, 54 n.14 (Haw. 1993).

⁸⁶ *Wardle*, *supra* note 13, at 76.

⁸⁷ *Baehr*, 852 P.2d at 58 n.17.

⁸⁸ *Baehr v. Miike*, 910 P.2d 112, 116 (1996). "The Hawaii legislature eventually foreclosed the issue when it amended its constitution to read "The legislature shall have the power to reserve marriage to opposite-sex couples.'" HAW. CONST. art. I, § 23 (2001).

⁸⁹ *See, e.g.*, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). The court held that:

The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination. Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor

marriage law had neither the purpose nor effect of discriminating against men or women, which means it treated similarly situated people the same. This is inapposite to the Virginia miscegenation law at issue in *Loving*, which forbade whites from marrying blacks. Blacks were free to marry any other race but whites. Similarly, whites could marry any race but blacks. In reality, the law discriminated against whites and blacks while not discriminating against other races. Therefore, similarly situated people *were* treated differently. Also, and most importantly, the Virginia statute was clearly aimed at race and was a pure example of invidious discrimination, triggering strict scrutiny. As the Minnesota Supreme Court noted in *Baker v. Nelson*:

The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. *Loving* does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.⁹⁰

Marriage cannot be mimicked or faked. A man and a man or a woman and a woman cannot make a marriage in any natural, historical, or rational sense. Marriage is not just one more in the panoply of relationships. No other combination but man and woman involves the unique sexual complementarity of the one-flesh union upon which the survival of the human race depends.⁹¹ The court in *Baker*, as with most courts that have addressed the issue, recognizes the uniqueness of marriage and the fundamental difference between the sexes.

An additional distinction between *Loving* and *Baehr* is that in *Loving*, the penalty for marrying someone of the forbidden race was a felony punishable by prison time. "In Hawaii, no one was charged with a felony; the State simply sent them a polite letter and returned their marriage applications."⁹² "Before the Hawaii Supreme Court decision in *Baehr v. Lewin*, courts had uniformly rejected the *Loving* analogy

offensive under the *Griswold* rationale, the classification is no more than theoretically imperfect. We are reminded, however, that "abstract symmetry" is not demanded by the Fourteenth Amendment

Id. at 187. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Id.* at 187 n.4 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

⁹⁰ *Id.* at 187.

⁹¹ See Jay Alan Sekulow & John Tuskey, *Sex and Sodomy and Apples and Oranges—Does the Constitution Require States to Grant a Right to Do the Impossible?*, 12 *BYU L. REV.* 309, 319 (1998) ("[G]enital intercourse literally makes two people one in a way that no other act can. How is this so? No man or woman can reproduce by him or herself; only the mated pair can perform the single function of reproduction.")

⁹² Coolidge, *supra* note 9, at 219.

between miscegenation and heterosexual marriage⁹³ and have analyzed same-sex marriage challenges under a rational basis test rather than strict scrutiny.

D. A Rational Basis

The Supreme Court has consistently scrutinized laws that affect homosexuals under the rational basis test. The Court in *Bowers* declared that a state could criminalize sodomy on the “presumed belief” of the majority that “homosexual sodomy is immoral and unacceptable.”⁹⁴ The Court’s decision in *Romer v. Evans*⁹⁵ did not detract from the holding of *Bowers*. *Romer* struck down Colorado’s Amendment 2⁹⁶ because it withdrew legal protection from homosexuals only. The ultimate effect of Amendment 2 was “to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures.”⁹⁷ *Romer* was not the victory many same-sex marriage advocates initially claimed it to be.⁹⁸

Although media and academic spin doctors have proclaimed *Romer* as a landmark victory for gay rights, the reality is that the opinion written by the Court is hardly a Magna Carta for homosexuals. The Court did not reverse *Bowers v. Hardwick*. It did not find any new fundamental rights lurking in the penumbras of the written Constitution. It did not hold that homosexuals are a suspect or quasi-suspect class under the Equal Protection Clause. It did not hold that moral disapproval of homosexual conduct is invidious. It did not hold that it is illegitimate or irrational for government to make distinctions designed to discourage homosexuality. Most emphatically, it did not say anything that calls in question laws rejecting homosexual marriage. It *did* apply the lowest level of scrutiny—the rational basis test—to laws disadvantaging homosexuals and explicitly held that such laws will be upheld so long as they are “narrow enough in scope

⁹³ Wardle, *supra* note 13, at 76-77.

⁹⁴ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

⁹⁵ 517 U.S. 620 (1996).

⁹⁶ Colorado Amendment II stated:

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

COLO. CONST. art. II, § 30b (2001).

⁹⁷ *Evans v. Romer*, 854 P.2d 1270 1285 (Colo. 1993).

⁹⁸ See Linda Greenhouse, *Gay Rights Laws Can't be Banned, High Court Rules*, N.Y. TIMES, May 21, 1996, at A1.

and grounded in a sufficient factual context” for the Court to ascertain that there exists “some relation between the classification and the purpose it served.”⁹⁹

In short, *Romer* held that Amendment 2 was overbroad and had no rational relationship to the asserted government interest. Much has been written about the *Romer* Court’s willingness to trump the collective will of the citizens of Colorado.¹⁰⁰ But at the end of the day, *Romer* still stands for the proposition that laws that affect homosexuality are scrutinized under the rational basis test. So in a certain respect, *Romer* can be seen as a Trojan Horse for gay rights advocates. This is especially true if it is judged in tandem with the Sixth Circuit’s decision in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, which held that a law similar to Amendment 2 was constitutional, even in light of the Supreme Court’s decision in *Romer*.¹⁰¹ Cincinnati enacted Charter Amendment XII, which prohibited special class status from being granted “based upon sexual orientation, conduct or relationships.”¹⁰² The case was originally upheld by the Sixth Circuit, appealed to the Supreme Court, and then vacated and remanded with instructions to the Sixth Circuit to reconsider its decision in light of *Romer*.¹⁰³ The Sixth Circuit distinguished Cincinnati’s Charter Amendment XII from Colorado’s Amendment 2 stating that, “[i]n stark contrast, Colorado Amendment 2’s far broader language could be construed to exclude homosexuals from the protection of every Colorado state law, including laws generally applicable to all other Coloradans”¹⁰⁴ Amendment XII instead simply “prevented homosexuals, as homosexuals, from obtaining special

⁹⁹ Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, The Culture War, and Romer v. Evans*, 72 NOTRE DAME L. REV. 345, 347-48 (1997) (quoting *Romer*, 517 U.S. at 631).

¹⁰⁰ See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

¹⁰¹ *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 301 (6th Cir. 1997).

¹⁰² *Id.* at 291. Article XII reads in its entirety:

No Special Class Status May Be Granted Based Upon Sexual Orientation, Conduct or Relationships.

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

CINCINNATI CITY CHARTER, art.XII (2001).

¹⁰³ *Equality Found. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), *vacated by* 518 U.S. 1001 (1996).

¹⁰⁴ *Equality Found.*, 128 F.3d at 296.

privileges and preferences."¹⁰⁵ The Sixth Circuit found that there was a rational basis for Cincinnati's ordinance prohibiting special treatment from being given to homosexuals.

E. The Effects of an Overactive Judiciary on the State's Ability to Regulate Marriage

One pragmatic and significant effect of same-sex marriage is its consequence for a state's ability to deny state-sanctioned marriage to other forms of relationships. Acting pursuant to its police powers, a legislature may make changes to the state's marriage requirements. For example, it may lower the minimum age without parental consent from eighteen to seventeen if it deems this change best for its citizens. The legislature's decision would be rooted in its duty to provide for the health, safety, and welfare of its citizens. But if a court changes the minimum age from eighteen to seventeen, it would not be acting within its police powers, since it has none. It would most likely be acting on the principle of equity or personal autonomy. A court may find that to allow eighteen year-olds to marry while restricting seventeen year-olds is unfair because there is little difference between the capacity of an eighteen year-old and a seventeen year-old. A court would then have little basis to restrict sixteen year-olds from marrying. In doing so, a court would destroy the legitimacy of other marriage restrictions while at the same time making itself final arbiter of marriage law.

Similarly, if the courts allow same-sex marriages, what basis would there be to prohibit polygamous or incestuous relationships? Or, to take it a step further, what basis would there be to prohibit marriage between man and animal? In truth, there would be none.

If one removes th[e] core concept [of marriage as the union of man and woman], . . . [i]nstead of a unique community, marriage becomes one more relationship. And why should this relationship be so special? If it has no necessary connection to children, or even to sex, what makes it different from an ordinary friendship? Friendships are multiple; why limit marriage to two persons? Sexual relationships can be multiple; why promote exclusivity? Relationships can come and go, and reasonably so; why promote permanence? If marriage is a freely chosen relationship unconnected to sex, children, exclusivity or permanence, why have legal marriage at all?¹⁰⁶

¹⁰⁵ *Id.*; see also Robert F. Bodi, Note, *Democracy at Work: The Sixth Circuit Upholds the Right of the People of Cincinnati to Choose Their Own Morality in Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 32 AKRON L. REV. 667 (1999).

¹⁰⁶ David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623, 639 (2001).

Some same-sex marriage advocates see allowing other forms of "marriage" as desirable,¹⁰⁷ while others see it as a natural consequence of allowing same-sex marriage.¹⁰⁸ Regardless, many same-sex advocates concede that allowing same-sex marriage would rob the state of its ability to proscribe other types of relationships such as polygamy and incest.

III. THE USE OF SOCIAL SCIENCE TO DEFEND MARRIAGE

In today's age of judicial restlessness, legal arguments will only go so far. In many ways, judges have become social engineers. Morality has, to a great degree, been replaced by radical equality and empiricism. "Law, as it is presently made by the judiciary, has declared its independence from morality. . . . [M]orality especially traditional morality, and most especially morality associated with religion [is] declared legally suspect and a threat to the public order."¹⁰⁹

Because judges arguably do not give much credence to moral considerations, arguments must have one foot on principle and the other on pragmatism. Lawyers who rely solely on principle may be disappointed for decades to come. The Brandeis Brief¹¹⁰ was the first example of a brief to use social science extensively. Since then, social science has become an increasingly effective litigation weapon.

Some of the most far-reaching and consequential changes in modern legal doctrine have been produced by the clash between contemporary scientific insights and tradition-bound morality As in the integration, abortion, and death penalty contexts, litigants lacking the weapons of legal doctrine, historical protection, or social consensus, have turned to the weapons that are available-information provided by science and social science.¹¹¹

¹⁰⁷ See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 490-91 (1996) ("By ceasing to conceive of marriage as a partnership composed of one person of each sex, the state may become more receptive of units of three or more All desirable changes in family law need not be made at once.").

¹⁰⁸ See David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 1020 (2001) (admitting that upon granting same-sex marriage the state would have to re-think other restrictions such as polygamy and incest).

¹⁰⁹ *The End of Democracy? The Judicial Usurpation of Politics*, *supra* note 15, at 19.

¹¹⁰ See MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, 187-88, 208-10 (1992) (describing the Brandeis Brief in *Muller v. Oregon*, 208 U.S. 412 (1908) as "[c]ontaining two pages of legal argument and ninety-five pages of sociological and economic data about the conditions of working women's lives in factories").

¹¹¹ Patricia J. Falk, *The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation, and Dissemination Efforts*, 41 WAYNE L. REV. 1, 3-5 (1994).

Because their arguments lack legal and historical power, same-sex marriage advocates use social science to compensate.¹¹² However, there is significant social science data available to counter these claims. Because their arguments often rest on precarious and even methodologically flawed analysis, the use of available evidence as a counter-measure can be effective. The use of extra-legal evidence can become a matter of necessity when a court expects the state to satisfy the burden of showing that same-sex marriage would in some way be harmful to a segment of society, as in *Baker v. Vermont*.¹¹³ Even though the same-sex marriage advocates in that case were proposing a fundamental change to the very definition of marriage, the burden of production was on the state to prove that the change would have no ill effects on society.

A. Effects of Same-Sex Parenting on Children

Despite claims to the contrary, evidence suggests that the effects of same-sex parenting on children can be significant. Such evidence can be used to show that a state that sanctions homosexual marriage runs the risk of endangering the well-being of children. Courts should listen carefully to such evidence since children are the most vulnerable members of our society and courts are normally very solicitous in protecting them. The effects of same-sex parenting on child rearing is a subject that can very often turn into a battle of the experts. Same-sex marriage advocates have consistently used social science data to *prove* that there are no differences between same-sex and opposite-sex parenting.¹¹⁴ However, recent compelling studies have shown that there

¹¹² See *id.* at 6 (noting the effective use of social science and science in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) and *Kentucky v. Wasson*, 842 S.W.2d 487 (Ky. 1992), where the Kentucky Supreme Court "explicitly referred to seven expert witnesses, ranging from a cultural anthropologist to a professor of medicine, and extensive *amici curiae* briefs").

¹¹³ 744 A.2d 864 (Vt. 1999). In *Baker*, the court seemed to rule for the plaintiffs because the state failed to show the harmful effects of same-sex marriage-like relationships, especially in regard to child rearing. The state in this case also hurt its cause by previously enacting legislation to allow same-sex couples to adopt, thereby trivializing its argument that same-sex parenting can affect the best interests of the child.

¹¹⁴ See, e.g., Robert Lerner & Althea K. Nagai, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting*, MARRIAGE LAW PROJECT, Jan. 2001, at 6 (quoting J.R. HARRIS, *THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO* 51 (1998) ("[C]hildren with two parents of the same gender are as well adjusted as children with one of each kind."); Judith Stacey, *Virtual Truth with a Vengeance*, 28 CONTEMP. SOC.: A JOURNAL OF REVIEWS 18, 21 (1999) ("[T]hus far the research on the effects of lesbian parenting on child development is remarkably positive and therefore challenging [the concept that fathers are essential to a child's development] . . ."); see also Bonnie R. Strickland, *Research on Sexual Orientation and Human Development: A Commentary*, 31 DEV. PSYCHOL. 137, 139 (1995) ("when differences do emerge, they are most likely in favor of lesbian families"); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on*

are in fact significant differences in children raised by same-sex parents as opposed to opposite-sex parents.¹¹⁵ One such study is notable because same-sex supporters conducted it.¹¹⁶ The authors, Timothy Biblarz and Judith Stacey, concede that few scholars oppose same-sex parenting, so their evidence is consequently very generous toward the same-sex position.¹¹⁷ Biblarz and Stacey dissect 21 of the leading studies on same-sex parenting, all of which purported to show no significant difference between children raised by homosexual parents and those raised by straight parents. The authors found that earlier researchers downplayed differences when they found them and as a consequence stunted research that might further highlight and explain the differences. Whether the differences in these studies is negative of course depends on one's point of view. Biblarz and Stacey hold firm the position that the differences are not necessarily negative.¹¹⁸ Progressive courts may draw the same conclusion. Those who see nothing wrong with homosexuality will not see a greater incidence of homosexuality in children raised by same-sex parents as a negative. At the very least the study shows that the facts concerning same-sex parenting have not been fully disclosed. Courts should be persuaded that the fact that there are significant differences cautions prudence and due deliberateness.

Some of the differences between children raised by homosexual parents and those raised by heterosexual parents are striking and offer empirical evidence for what common sense seems to dictate.¹¹⁹ One study that reported no significant differences, in reality, showed that children raised by lesbian women had a sixty-four percent chance of considering

Children, 1997 U. ILL. L. REV. 833, 844 (citing Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 198 (1995)) (studies "failed to produce conclusive evidence that children of lesbian mothers or gay fathers have significant difficulties in development").

¹¹⁵ Timothy J. Biblarz & Judith Stacey, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159-61 (describing themselves as "personally oppos[ing] discrimination on the basis of sexual orientation," they challenge the predominant claim that sexual orientation of parents does not matter at all and agree "that ideological pressures constrain intellectual development in this field"); Timothy J. Dailey, *Breaking the Ties That Bind: The APA's Assault of Fatherhood*, INSIGHT, Feb. 18, 2000, at 12 (describing same-sex parenting research as "compromised by methodological flaws and driven by political agendas instead of an objective search for truth"); Wardle, *supra* note 114, at 844 ("Most of the studies of homosexual parenting are based on very unreliable quantitative research, flawed methodologically and analytically (some of little more than anecdotal quality), and provide a very tenuous empirical basis for setting public policy.").

¹¹⁶ Biblarz & Stacey, *supra* note 115, at 167 n.7.

¹¹⁷ *Id.* at 161.

¹¹⁸ *Id.* at 162-63.

¹¹⁹ *Id.* at 163 ("It is difficult to conceive of a credible theory of sexual development that would not expect the adult children of lesbian-gay parents to display a somewhat higher incidence of homoerotic desire, behavior, and identity than children of heterosexual parents.").

same-sex relationships, compared to only seventeen percent of those raised by heterosexual mothers.¹²⁰ Another study found that "children of lesbians became active lesbians themselves [at] a rate which is at least four times the base rate of lesbianism in the adult female population."¹²¹ Stacey and Biblarz also noted that "at least 15 intriguing, statistically significant differences in gender behavior and preference among children . . . in lesbian and heterosexual single-mother homes" was found in a 1986 study, yet the study in the end concluded that "no notable differences" were found between the two types of households.¹²² These studies reported other significant differences that were also ignored.¹²³ Instead of pursuing these differences, the authors of essentially all of the studies on same-sex parenting have ignored them. Courts should take heed not to rush into a situation when the effects of their decision remain to be seen. Once a court imposes same-sex marriage on a state, it would not be easily recalled. At the best, these studies show that present research is sorely inconclusive. At worst, the studies prove that there are significant adverse effects of same-sex parenting. Courts should start listening.

B. Destabilizing Effects on Families

Yet another argument against same-sex marriage is the instability and considerable health risks inherent in homosexual relationships. Here, a marriage proponent should be careful not to appear irrational or as having a particular animus toward homosexuals.¹²⁴ Often same-sex marriage advocates will have handpicked the plaintiffs in a same-sex marriage case.¹²⁵ They will be very normal and nice people, making a court wonder why anyone would want to prevent them from marrying. If marriage advocates appear to be making monsters out of the nice, friendly people that same-sex advocates have (if they have done their job) reinforced as apple-pie Americans in their briefs, marriage advocates start at a disadvantage. Many times same-sex couples are

¹²⁰ *Id.* at 170.

¹²¹ Dailey, *supra* note 115, at 24.

¹²² Biblarz & Stacey, *supra* note 115, at 160, 170.

¹²³ *Id.* at 171 ("Adolescent and young adult girls raised by lesbian mothers appear to have been more sexually adventurous and less chaste, whereas the sons of lesbians evince the opposite pattern In other words . . . children (especially girls) raised by heterosexual mothers appear to conform to [traditional gender-based norms].").

¹²⁴ See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (Amendment 2's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

¹²⁵ See Coolidge, *supra* note 9, at 222 (describing how the same-sex marriage advocates in that case had been "planning the case for almost a decade").

very nice and caring people. But this fact does not negate the danger, instability, and unhealthiness of their lifestyle. Courts should be made aware of the instability of the relationships that they are being asked to sanction, and how marriage and family could be affected as a result.

1. Instability of Same-Sex Relationships

Same-sex relationships seem to be plagued with instability and infidelity. A study conducted by a homosexual couple found that out of 156 same-sex couples "only seven had maintained sexual fidelity; of the hundred couples that had been together for more than five years, none had been able to maintain sexual fidelity. The authors noted that the expectation for outside sexual activity was the rule for male couples and the exception for heterosexuals."¹²⁶

Moreover, "a 1978 study found that 43 percent of male homosexuals estimated having sex with five hundred or more different partners and 28 percent with a thousand or more different partners."¹²⁷ Seventy-nine percent of those claimed that over half of those partners were strangers.¹²⁸ Fidelity rates among *committed* homosexual couples also appear to be much less than that of heterosexual couples.¹²⁹ Incidence of violence and incest is also purportedly higher in homosexual families.¹³⁰

2. Health Risks

Contributing to the instability of homosexual relationships could be the significant health risks associated with homosexuality. AIDS poses a significant risk among the homosexual population. "[E]pidemiologists estimate that 30 percent of all twenty-year-old homosexual males will be HIV-positive or dead of AIDS by the time they are thirty [which] means that the incidence of AIDS among twenty- to thirty- year-old homosexual men is roughly 430 times greater than among the heterosexual

¹²⁶ JEFFREY SATINOVER, *HOMOSEXUALITY AND THE POLITICS OF TRUTH* 55 (1996) (citing D. McWHIRTER & A. MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 3 (1984)).

¹²⁷ *Id.* (citing A.P. BELL & M.S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 308-09 (1978)).

¹²⁸ *Id.*

¹²⁹ See Dailey, *supra* note 115, at 20 (citing a 2.7 percent fidelity rate among homosexuals, compared to a 75-90 percent rate among heterosexuals).

¹³⁰ *Id.* at 22 (citing *Violence Between Intimates*, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS (1994) (claiming lowest incidence of domestic abuse in families with married women)); *id.* at 25 (citing P. Cameron & K. Cameron, *Homosexual Parents*, 31 *ADOLESCENCE* 772 (1996) ("Having a homosexual parent appears to increase the risk of incest with a parent by a factor of about 50.")); These statistics should be used with caution, considering their capacity to appear incendiary.

population at large.¹³¹ The Centers for Disease Control (hardly a bastion of right-wing extremists) report that through the year 2000, homosexual men constitute 67.8% of all AIDS cases, while heterosexual contact between both sexes constitutes 5.1%.¹³² The CDC also report high rates of gonorrhea and other sexually transmitted diseases among homosexual men.¹³³

IV. CONCLUSION

It is reverse logic to say that state sanction of same-sex marriage will solidify homosexual relationships, making them more stable and healthy. By officially sanctioning same-sex marriage, the courts would be taking a gamble with marriage as a whole, one of society's most important institutions. The Supreme Court has stressed the importance of marriage to society:

[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.¹³⁴

The Supreme Court has in fact consistently affirmed the importance of marriage to the family and to society.¹³⁵ Courts have also strongly affirmed that same-sex marriage has no history and tradition under the due process analysis and that homosexuality is not a suspect or quasi-suspect class under an equal protection analysis. Tinkering with marriage without first truthfully and completely knowing all the facts could have devastating results. This is especially true when children, the most vulnerable members of our society, are involved.

Major changes to society's major institutions, such as marriage, should be done very deliberately with every aspect subject to scrutiny and debate. These decisions that have the potential to change society so

¹³¹ SATINOVER, *supra* note 126, at 57.

¹³² Center for Disease Control and Prevention, Divisions of HIV/AIDS Prevention, HIV/AIDS Surveillance by Race/Ethnicity, at <http://www.cdc.gov/hiv/graphics/images/L238/L238-4.htm> (last updated Mar. 4, 2002).

¹³³ *Id.*; see also SATINOVER, *supra* note 126, at 55 (citing high incidence of sexually transmitted disease between homosexuals).

¹³⁴ *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885); see also *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (characterizing marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress").

¹³⁵ See *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (describing the right to marry, establish a home, and bring up children as fundamental).

fundamentally should only be made by a fully informed legislature. Otherwise, the fallout may be felt for years to come. The law of unintended consequences dictates that when decisions are rashly made, the effects can so deeply embed themselves in society that their true impact is not felt for decades. "Once torn, the fabric of a vital social institution is difficult to mend. It took thirty years for social scientists to recognize the negative consequences of no-fault divorce. Those who advocate the risky social experiment of redefining marriage should bear the burden of proof to support it."¹³⁶

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¹³⁶ Coolidge & Duncan, *supra* note 106, at 643-44.