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Loving in the New Millennium: On Equal Protection and the Right to Marry

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I. INTRODUCTION

A little over thirty years ago, the United States Supreme Court struck down Virginia’s anti-miscegenation law in *Loving v Virginia.* Subsequent Supreme Court cases have helped to clarify both *Loving* in particular and the right to marry jurisprudence more generally, although some unanswered questions still remain, such as whether the United States Constitution protects the right to marry a same-sex partner. Recently, some courts have suggested that same-sex marriage bans implicate constitutional guarantees. These decisions have spurred commentators to reexamine the *Loving* line of cases in an attempt to establish the outer contours of the right to marry.

Some judges and commentators suggest that *Loving* provides no support for the claim that the Constitution protects the right of same-sex couples to marry. However, their analyses tend to involve such strained and implausible interpretations of the decision and have such unpalatable results that these analyses bolster rather than undermine the very position that they are designed to refute. In addition, these analyses almost systematically either ignore or mischaracterize subsequent developments in the right to marry jurisprudence and subsequent explanations offered by the Court of what *Loving,* itself, means. While the Court has not made clear whether the right to marry includes the right to marry a same-sex partner, the Court has made clear that the right to marry is not nearly as limited as these commentators imply.

These disagreements about how to interpret the *Loving* line of cases implicate fundamental questions about what the substantive due process and

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1. *388 US 1 (1967).*


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equal protection guarantees of the United States Constitution protect and about what kinds of state interests must be asserted or established if those protections are to be overridden. At stake here is not only whether same-sex marriages are protected by the Constitution. Rather, the outcome of these disagreements will help to shape the constitutional protections that all citizens enjoy.

Part II of this Article discusses Loving and the developing right to marry jurisprudence, concluding that the right to marry is much broader than many commentators are willing to admit. Part III of this Article discusses the Court’s developing equal protection jurisprudence in the specific context of challenges to marital regulations. This part suggests that those arguing that same-sex marriage bans should be upheld because such bans do not implicate issues of race mischaracterize both Loving and the jurisprudence that has developed since then. The Article concludes that the best reading of Loving and the subsequent right to marry cases suggests that same-sex marriage bans violate the equal protection guarantees of the Fourteenth Amendment of the United States Constitution.

II. LOVING AND THE RIGHT TO MARRY

Loving v Virginia has recently received increased scholarly attention, in part because it helped to change “a morally indefensible status quo” and in part because of two court decisions suggesting that same-sex marriages might be constitutionally protected. The interpretations of Loving offered in the secondary literature differ in important ways. The merits of these views can only be assessed after a consideration of: (1) the facts of the case, and (2) the jurisprudence regarding the power of the states to decide: (a) the conditions under which their domiciliaries might marry, and (b) whether to recognize a marriage validly celebrated in another jurisdiction.

A. THE LOVING CASE

Loving v Virginia involved an interracial couple domiciled in Virginia, Mildred Jeter and Richard Loving, who were validly married in the District of Columbia and who then moved back to Virginia to live. The Lovings were

4. See Baehr, 852 P2d 44; Brause, 1998 WL 88743.
charged with and convicted of violating Virginia’s anti-miscegenation law. They each received a suspended sentence, contingent on their leaving the state and not returning together for twenty-five years. They moved to Washington, D.C. About four years later, they challenged Virginia’s “comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages.”

The statutory scheme at issue in Loving involved: (1) a statute making it a crime for an interracial couple domiciled in Virginia to leave the state to marry, intending to return to Virginia to live; (2) a statute making it a crime for a white person in the state to marry someone who was not white; and (3) a statute establishing that interracial marriages would be treated as null and void. The Lovings’ convictions were based on the Evasion Statute and on the statute criminalizing the attempt to marry a partner of a different race. The United States Supreme Court reversed those convictions, reasoning that “restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” The Court suggested that under the United States Constitution “the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”

B. THE IMPLICATIONS OF LOVING

Loving raises a variety of questions. For example, under what conditions, if any, can a state preclude two individuals from marrying? Certainly, Loving does not establish that the Constitution precludes states from enacting any marital regulations whatsoever. As the Court subsequently explained in Zablocki v Redhail, “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.” However, as the Zablocki Court also explained, “When a statutory classification

6. Id at 3.
7. Id.
8. Id.
9. Id at 3-4.
10. See id (discussing Va Code Ann § 20-58 (1960)).
11. See id (discussing Va Code Ann § 2-59 (1960), which described the penalty for attempting to intermarry).
12. See id at 4 n 3 (describing Va Code Ann § 20-57 (1960)).
14. See text accompanying note 11.
15. See Loving, 388 US at 12.
16. Id.
17. Id.
19. Id at 386.
significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” Thus, the Court is suggesting both that: (1) some marital regulations are permissible, and that (2) regulations imposing a substantial burden on the right to marry will be examined closely by the Court to assure that the asserted state interests are in fact sufficiently important and that the means to achieve those interests are sufficiently narrowly tailored to the promotion of those ends.

Further analysis of Zablocki and other decisions2 is required before their implications for the same-sex marriage debate can be made clear, although the analyses of Loving that some commentators offer obscure rather than illuminate the implicated issues. For example, some writers seem to focus on Virginia’s criminalization of the Lovings’ marriage,2 as if the decision should merely be understood to invalidate statutes that criminalize attempts to marry a partner of a different race. However, such a reading can make no sense of the Loving Court’s point that “restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” On the contrary, such a reading would suggest that states can restrict the right to marry solely on the basis of race as long as they do not in addition adopt criminal statutes to help assure that such restrictions are observed.

Suppose that one were to compare two statutory “schemes,” one involving all of the criminal laws at issue in Loving and the other involving a statute that simply precluded individuals of different races from marrying but neither criminalized attempts to marry someone of a different race within the jurisdiction nor criminalized attempts to do so in a different jurisdiction. Certainly, the two statutory schemes would differ in an important way—in one, a domiciliary would risk criminal penalties by attempting to marry his partner, whereas in the other the individual would “merely” be precluded from marrying the person whom he wanted to make his lifelong spouse. Yet, it would be an amazing reading of Loving (one that might risk the imposition of

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20. Id at 388.
22. But see David Orgon Coolidge, Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy, 12 BYU J Pub L 201, 219 (1998) (suggesting that a crucial difference between Loving and Baehr was that the commission of a felony was at issue in Loving but not at issue in Baehr); Lynne Marie Kohm, Liberty and Marriage—Baehr and Beyond: Due Process in 1998, 12 BYU J Pub L 253, 256 (1998) (“Under the Due Process Clause, people who are married or are interested in being joined in marriage have a constitutional liberty interest that must be recognized when state proceedings are instituted against them. This is what happened in Loving.”).
professional sanctions\textsuperscript{24}) to suggest that \textit{Loving} stood for the proposition that states could preclude interracial couples from marrying as long as the state did not in addition criminalize the attempt.

A variation of the above misinterpretation of \textit{Loving} has been offered by other commentators who suggest that the Due Process Clause "does not require states to sanction certain relationships,"\textsuperscript{25} but instead merely "protects an individual from state intervention."\textsuperscript{26} On this view, \textit{Loving} would have been decided differently if only the state of Virginia had not tried to intervene by charging the Lovings for attempting to intermarry, but instead had merely sent the Lovings a polite letter informing them that the state did not recognize their marriage.\textsuperscript{27} Yet, as the \textit{Zablocki} Court made clear, "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."\textsuperscript{28} Thus, for example, a state that did not criminalize the attempt to marry someone of another race but merely refused to recognize such unions would nonetheless be violating the United States Constitution. Further, the \textit{Zablocki} Court also made clear that although \textit{Loving} "arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."\textsuperscript{29} Thus, in the context of marital regulation, the Due Process Clause imposes a greater obligation on the states than merely to refrain from threatening to impose criminal sanctions on certain individuals who attempt to marry—it imposes an affirmative obligation on the states not to prohibit such unions.\textsuperscript{30}

Some commentators attempt to distinguish between the constitutional issues posed by the refusal of some states in the 1960's to recognize interracial marriages and the constitutional issues posed by the current refusal of states to recognize same-sex marriages in the following way: they suggest that when \textit{Loving} was decided, some but not all states permitted interracial couples to

\textsuperscript{24} Comments made by Justice Scalia in a different context would seem apropos here. See \textit{United States v Virginia}, 518 US 515, 594-95 (1996) ("Any lawyer who gave that advice to the Commonwealth ought to have been either disbarred or committed.").

\textsuperscript{25} Kohm, \textit{Liberty and Marriage—Baehr and Beyond}, 12 BYU J Pub L at 257 (cited in note 22).

\textsuperscript{26} Id.

\textsuperscript{27} See Coolidge, \textit{Playing the Loving Card}, 12 BYU J Pub L at 219 (cited in note 22) (distinguishing between what was at issue in \textit{Loving} and what was at issue in \textit{Baehr} by pointing out that in the latter, "no one was charged with a felony; the State simply sent them a polite letter and returned their marriage applications").

\textsuperscript{28} \textit{Zablocki}, 434 US at 384.

\textsuperscript{29} Id.

\textsuperscript{30} The claim is not that the state can have no marital restrictions whatsoever—presumably, it is constitutionally permissible for the state to prevent parent and child from marrying and even to impose criminal sanctions on those engaging in incest. The claim is merely that in cases where the state is prohibited from intervening, the state may also have an affirmative obligation to allow the union.
marry, whereas no state currently permits same-sex couples to marry.\textsuperscript{31} However, that point hardly establishes that the United States Constitution does not protect same-sex marriage. Indeed, in the not-too-distant future when some states recognize such marriages, commentators who currently trumpet the importance of no state’s recognition of such unions will probably suddenly discover that the uniform lack of recognition is not a constitutionally significant factor after all. Rather, these commentators will instead discover the importance of allowing the states to “perform their role as laboratories for experimentation,”\textsuperscript{32} notwithstanding that the experimentation will involve “one of the vital personal rights essential to the orderly pursuit of happiness”\textsuperscript{33} and notwithstanding that the same argument might have been made at the time \textit{Loving} was decided in an attempt to justify permitting the states to prohibit interracial marriages.

That some but not all states permitted interracial marriages does not support the claim that interracial marriages implicate federal constitutional guarantees; on the contrary, it suggests that the United States Constitution neither requires nor prohibits the recognition of such marriages, since states were allowed to enact the marital regulations that they saw fit.\textsuperscript{34} Yet, as the \textit{Loving} Court made clear, states are prohibited by the United States Constitution from preventing interracial couples from marrying, longstanding past practices involving the prohibition of such unions notwithstanding. Thus, at least for purposes of the current discussion, the important point is that prior to \textit{Loving} the lack of uniformity suggested that states had the power to decide whether to permit interracial couples to marry, whereas after the decision it was clear that the states had no such power.

Indeed, it is ironic that same-sex marriage opponents admit that when \textit{Loving} was decided some states permitted interracial marriages while others did not. Many of these same commentators suggest that same-sex marriages should not be recognized because they are not “deeply rooted in the common law traditions of the American people" or “essential to the very concept of ordered liberty.”\textsuperscript{35} Yet, given the number of states prohibiting interracial marriage at the time that \textit{Loving} was decided, it would seem difficult to argue that interracial

\textsuperscript{31} See Coolidge, \textit{Playing the Loving Card}, 12 BYU J Pub L at 220 (cited in note 22) (pointing out that there “is no place for same-sex couples to go to get married”).


\textsuperscript{33} See \textit{Loving}, 388 US at 12.

\textsuperscript{34} See id at 7 (The Virginia Supreme Court pointed out that “marriage has traditionally been subject to state regulation without federal intervention.”).

\textsuperscript{35} See, for example, Lynn D. Wardle, \textit{A Critical Analysis of Constitutional Claims for Same-Sex Marriage}, 1996 BYU L Rev 1, 28 (1996).
marriage met those standards. As the Kentucky Supreme Court pointed out, 
"miscegenation was an offense with ancient roots."  
If one suggests that interracial marriage is constitutionally protected 
because marriage itself is what is deeply rooted in the common law traditions 
and thus it is not necessary for interracial marriages in particular to be rooted 
in those traditions," then one offers a way that same-sex marriage might be 
thought deeply rooted in the common law traditions, since the same analysis 
might be offered to explain why those marriages should be protected. Further, 
just as it might be argued that the recognition of interracial marriage is 
essential to the concept of ordered liberty because the concept of ordered 
liberty requires at the very least that something as fundamental as the right to 
marry not be denied on specious grounds, the same argument might be made 
concerning same-sex marriages. 

C. INTERSTATE RECOGNITION OF MARRIAGE 

It is not maintained here that the fact that no state currently recognizes 
same-sex unions is without legal significance. On the contrary, that does have 
legal significance. For example, because no state recognizes such unions, no one 
has standing to challenge the constitutionality of the Defense of Marriage Act 
(DOMA), which is constitutionally vulnerable on a number of grounds. Further, 
as a separate point, the inability to challenge DOMA makes it more 
difficult for the Court to make clear that Congress has mischaracterized the 
conditions under which states must recognize marriages validly celebrated in 
sister states. 

An examination of Loving illustrates why the feared “evil” prompting 
DOMA—namely, that domiciliaries of a state prohibiting same-sex marriages 
might marry in a different state that permitted the celebration of such 
marriages and then return to their domicile demanding recognition of their 

37. See, for example, Kohm, Liberty and Marriage—Baehr and Beyond, 12 BYU J Pub L at 269 (cited in note 22). See also Wardle, A Critical Analysis, 1996 BYU L Rev at 29 (cited in note 35) ("Although the Constitution does not mention the word marriage, marriage is undeniably deeply imbedded in the traditions of our nation and essential to the ordered liberty of nations. Indeed, marriage status is the ultimate example of long-established, highly preferred public status. It is official, formal, publicly endorsed, and powerfully protected."). 
38. See US Const, Art III, § 2 (imposing case or controversy requirement). 
union as a matter of Full Faith and Credit—an inaccurately characterized existing law. Even without the passage of DOMA, states would not have been forced by the Full Faith and Credit Clause to recognize such unions. However, to see why this is so, it will be necessary to distinguish some of the different interstate marriage recognition issues raised by Loving.

Virginia’s refusal to recognize the Lovings’ marriage and imposition of criminal sanctions for their attempt to marry in a jurisdiction in which such unions could be legally celebrated might seem subject to legal challenge on a variety of grounds. For example, it might be thought that:

1. Virginia was precluded by the Full Faith and Credit Clause from refusing to recognize a marriage validly celebrated in another jurisdiction.
2. Virginia’s imposition of criminal sanctions against the Lovings was what made the relevant statutes constitutionally offensive.
3. Virginia was precluded from preventing the Lovings from marrying without having a sufficiently compelling reason to justify that marital prohibition.

In Loving, there was no suggestion that Virginia was forced by the Full Faith and Credit Clause to recognize the Lovings’ marriage merely because that union had been validly celebrated in the District of Columbia. Indeed, one might have expected the Court to have pursued that tack were it viable, given the Court’s then-recent refusals to hold that interracial marriage bans violated the United States Constitution. For example, about a decade earlier, the Court had refused to hear a case challenging Virginia’s anti-miscegenation statute, allegedly because no federal issues were implicated. Further, a mere three years before Loving was decided, the Court explicitly refused to address whether interracial marriage bans were unconstitutional. Thus, if the Court could have

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41. Members of Congress passed the Defense of Marriage Act at least in part because they mistakenly believed that a domicile state would be forced to recognize a marriage of its domiciliaries validly celebrated elsewhere, regardless of local law. See Strasser, Loving the Romer Out for Baehr, 58 U Pitt L Rev at 304-05 n 163 (cited in note 40). For a discussion of why that is a mistaken view, see Strasser, Baker and Some Recipes for Disaster, 64 Brooklyn L Rev at 329-34 (cited in note 40).
42. See generally Mark Strasser, Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It’s Due, 28 Rutgers L J 313 (1997).
43. See note 41.
44. For the suggestion that Virginia’s imposition of criminal sanctions was what made its actions constitutionally offensive, see text accompanying notes 22-24.
45. See text accompanying note 20 (suggesting that marital statutes must be closely tailored to support important state ends).
46. See Naim v Naim, 350 US 985 (1956) (denial that federal question was presented in Virginia’s anti-miscegenation law).
47. In McLaughlin v Florida, 379 US 184 (1964) (striking down Florida’s statute punishing interracial cohabitation more severely than intraracial cohabitation), the Court explicitly refused to comment on
avoided the issue by appealing to the Full Faith and Credit Clause, one would have expected the Court to have done so.

Not only was there no suggestion that Evasion Statutes in general were unconstitutional, but there further was no suggestion in Loving that Evasion Statutes that impose a criminal penalty are constitutionally offensive. While the Court reversed the conviction at issue, it did so because of the particular content of that statute rather than because such statutes as a general matter are constitutionally offensive. So, too, when the Court examined a Wisconsin statutory scheme in Zablocki that both limited the right to marry and imposed criminal sanctions against those seeking to evade the restriction, the Court invalidated the restriction because of its particular content rather than holding, for example, that Evasion Statutes were unconstitutional per se.

States had and continue to have Evasion Statutes. Currently, states tend not to criminalize the attempt to evade local law by marrying elsewhere, but

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48. By the same token, there was no suggestion in Zablocki that the state's criminalization of attempts to evade the marital regulation at issue, see Zablocki, 434 US at 375 (“persons acquiring marriage licenses in violation of the section are subject to criminal penalties”), was constitutionally offensive.

49. See Loving, 388 US at 12 (restricting right on the basis of race violates the Equal Protection Clause).

50. See 434 US at 375 (“[Wis Stat §§ 245.10(1), (4), (5)(1973)] provides that members of a certain class of Wisconsin residents may not marry, within the State or elsewhere, without first obtaining a court order granting permission to marry. The class is defined by the statute to include any "Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment." The statute specifies that court permission cannot be granted unless the marriage applicant submits proof of compliance with the support obligation and, in addition, demonstrates that the children covered by the support order "are not then and are not likely thereafter to become public charges").

51. See id at 375 (“persons acquiring marriage licenses in violation of the section are subject to criminal penalties”). The statute applied to Wisconsin domiciliaries who sought to marry within the state or outside of the state in violation of the prohibition. See id at 375 n 1.

52. Id at 387 (“The statutory classification at issue here, . . . clearly does interfere directly and substantially with the right to marry.”).

53. See, for example, 750 Ill Comp Stat 5/216 (West 1993) (“If any person residing and intending to continue to reside in this state and who is disabled or prohibited from contracting marriage under the laws of this state, shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state.”); Wis Stat Ann § 765.04 (1) (West 1993) (“If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts a marriage prohibited or declared void under the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state.”).

54. However, some states make it a crime to issue a marriage license to individuals known to be prohibited from marrying or to officiate at a wedding of such individuals. See, for example, 750 Ill Comp Stat 5/219 (West 1993) (“Any official issuing a license with knowledge that the parties are thus prohibited from intermarrying and any person authorized to celebrate marriage who shall knowingly celebrate such a marriage shall be guilty of a petty offense.”); Mass Gen Laws Ann Ch 207 § 50 (West 1998) (“Any official issuing a certificate of notice of intention of marriage that the parties are prohibited by section
instead "merely" refuse to recognize the marriage validly celebrated outside of the domicile.\textsuperscript{55} However, the fact that states tend not to criminalize marital evasion attempts hardly establishes that the imposition of criminal penalties for such an offense is somehow unconstitutional. Indeed, notwithstanding that the Supreme Court struck down the marital regulations at issue in \textit{Loving} and \textit{Zablocki}, both Virginia and Wisconsin continue to have statutes that criminalize certain attempts to evade local marital law.\textsuperscript{56}

Traditionally, states have been given much leeway with respect to setting the conditions under which their domiciliaries might marry. Had the Court held that Virginia had to give full faith and credit to the marriage validly celebrated in the District of Columbia, the Court would have severely undermined the \textit{general} power of the states to establish marital regulations for their domiciliaries. Thus, had the Court so ruled, Virginia domiciliaries could have avoided \textit{any} local marital regulation as long as there was another state that did not impose the regulation at issue. Further, had the Court held that the Full Faith and Credit Clause required Virginia to recognize the marriage validly celebrated in the District of Columbia, the Court might also have felt obliged to hold that Marriage Evasion Statutes\textsuperscript{57} are unconstitutional on the theory that what the Constitution "precludes the government from commanding directly, it also precludes the government from accomplishing indirectly."\textsuperscript{58} Of course, this is all speculation, because the Court has never held

\begin{itemize}
\item \textsuperscript{55} See Harold P. Schombert, Note, \textit{Baehr v. Lewin: How Far Has the Door Been Opened? Finding a State Policy for Recognizing Same-Sex Marriages}, 16 Women's Rts L Rep 331, 341 (1995) ("In those states that have used marriage evasion statutes, . . . the usual penalty is to void the marriage in the forum state."). In addition, some states have enacted legislation intended to bolster other states' Evasion Statutes by saying that marriages that might validly be celebrated within the state will nonetheless be void if contrary to the law of the couple's domicile. See 750 I1 Comp Stat 5/217 (West 1993) ("No marriage shall be contracted in this state by a party residing and intending to continue to reside in another state or jurisdiction if such marriage would be void if contracted in such other state or jurisdiction and every marriage celebrated in this state in violation of this provision shall be null and void."); Mass Gen Laws Ann Ch 207 § 1I (West 1998) ("No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.").
\item \textsuperscript{56} See Wis Stat Ann § 765.30 (West 1993) (penalty for going outside of the state to marry in order to circumvent state marriage laws); Va Code Ann § 20-40 (Michie 1995) (penalty for going out of state to marry someone within prohibited degrees of consanguinity).
\item \textsuperscript{57} The Commissioners have withdrawn approval of the Uniform Marriage Evasion Act. See the Uniform Marriage and Divorce Act 1970 § 210 cmt (amended 1973), 9A ULA 176 (1973). While the withdrawal of approval might suggest that such Acts are unwise as a policy matter, it does not at all establish that such acts are unconstitutional.
\item \textsuperscript{58} \textit{Rutan v Republican Party of Illinois}, 497 US 62, 78 (1990). See also \textit{Cooper v Aaron}, 358 US 1, 17 (1958) ("In short, the constitutional rights of children not to be discriminated against in school admission
that the domicile at the time of the marriage's celebration is forced to recognize that union as long as it is validly celebrated elsewhere. Both before and after the passage of DOMA, states could refuse to recognize their domiciliaries' same-sex marriages validly celebrated elsewhere, as long as those marriages could not be celebrated within the domicile and as long as that prohibition itself does not offend constitutional guarantees.

In *Loving*, the Court neither cast doubt on the general power of states to determine the conditions under which their domiciliaries might marry nor cast doubt on the power of states to pass Evasion Statutes, but instead suggested that states were prohibited from restricting marriage on the basis of race. Because the Virginia statute involved "invidious racial discrimination," the Court held that the statute at issue violated the Equal Protection Clause of the United States Constitution.

Yet, it should not be thought that the Court will only strike down a marital statute on equal protection grounds if it discriminates on the basis of race. In *Zablocki*, the Court held that the Wisconsin marital statute violated equal protection guarantees, notwithstanding that race was not implicated in the challenged classification. While the Wisconsin statute arguably also implicated due process guarantees, the *Zablocki* holding should have laid to rest the suggestion that only marital statutes discriminating on the basis of race will be held to violate the Equal Protection Clause. Nonetheless, in part because of the emphasis on equal protection in *Loving* and in part because some courts have suggested that same-sex marriage bans implicate equal

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59. Constitutional guarantees might well be implicated if the scenario were somewhat different. Suppose that a couple marries in their domicile according to local law but then a few years later moves to a new jurisdiction that does not recognize such unions, and the latter state refuses to recognize the marriage. For a discussion of this scenario, see generally Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U Cin L Rev 339 (1998).


61. See id at 12 (statute violates Equal Protection Clause). The Court also made clear that the statute violated the Due Process Clause. See id (statute violates Due Process Clause).

62. See *Zablocki*, 434 US at 382 ("We agree with the District Court that the statute violates the Equal Protection Clause.").

63. See id at 392 (Stewart concurring in the judgment) ("I think that the Wisconsin statute is unconstitutional because it exceeds the bounds of permissible state regulation of marriage, and invades the sphere of liberty protected by the Due Process Clause of the Fourteenth Amendment."); id at 400 (Powell concurring in the judgment) ("The Wisconsin measure in this case does not pass muster under either due process or equal protection standards.").

64. But see text accompanying notes 69-83.

65. In *Loving*, the Court discussed the equal protection issues for most of the opinion. See *Loving*, 388 US at 1-11.
protection guarantees, some commentators have concentrated on the racial aspect of Loving's equal protection analysis in an attempt to show why Loving is allegedly irrelevant insofar as same-sex marriage is at issue.

III. LOVING AND EQUAL PROTECTION

The competing interpretations of Loving's equal protection analysis emphasize different factual elements of the case or different aspects of the opinion itself. Regrettably, some interpretations focus on particular facts without regard to the role that those facts played in the opinion or in the Court's reasoning, thereby mischaracterizing both the decision itself and the part it has played in the developing right to marry jurisprudence. For example, some commentators suggest that the statute at issue in Loving was unconstitutional because it limited the options of white people, whereas other commentators suggest that the statute was unconstitutional because it specifically implicated race. However, even on the most charitable reading of these interpretations, these commentators conflate what sufficed to make the statute unconstitutional with what was required to make it unconstitutional. Because of this conflation, these interpretations can neither account for the right to marry jurisprudence that has developed since Loving nor even the Court's own comments about what Loving itself represents. The best understanding of Loving and the right to marry jurisprudence as it has developed since then suggests that same-sex marriage bans implicate federal equal protection guarantees and that states will have great difficulty in offering the requisite justifications for those statutes.

A. TREATING THE RACES UNEQUALLY

Some commentators suggest that the statute at issue in Loving was unconstitutional because the "Virginia statute did not treat the races equally; it more strictly limited white persons' marriage options." Yet, such an analysis is potentially misleading in a few different respects. First, insofar as this suggests that the Court's concern was that whites in particular were being treated unfairly, there is nothing in the opinion to support that view, since the Court's unfairness concern was that the

66. See, for example, Bahr, 852 P2d at 64; Brause, 1998 WL 88743 at *6.
67. See, for example, Jay Alan Sekulow and John Tuskey, Sex and Sodomy and Apples and Oranges—Does the Constitution Require States to Grant a Right to Do the Impossible?, 12 BYU J Pub L 309, 324 (1998).
68. See, for example, Wardle, A Critical Analysis, 1996 BYU L Rev at 80 (cited in note 35) (suggesting that the central issue in Loving is invidious discrimination on the basis of race).
69. Sekulow and Tuskey, Sex and Sodomy and Apples and Oranges, 12 BYU J Pub L at 324 (cited in note 67).
statute was "designed to maintain White Supremacy." Second, this interpretation might be thought to imply that the Court would have upheld the statute if only the marital options of whites had been no more severely restricted than the options of members of other races, a view belied by the Court's comments in the opinion itself.

Suppose that Virginia had passed a different statute. Suppose that in an attempt to "preserve the racial integrity of its citizens" and to prevent the "obliteration of racial pride," the state of Virginia had banned all interracial marriages rather than only those involving whites. One infers that these commentators would suggest that such a statutory scheme would pass constitutional muster, because the marital options of the races would have been limited equally. Yet, such a suggestion is inconsistent with the Loving opinion itself. First, the focus of such an analysis is on the marital options of the race rather than of the individual, thereby undercutting the Loving Court's recognition that the freedom to marry is "one of the vital personal rights essential to the orderly pursuit of happiness." Second, the analysis cannot plausibly account for the Loving Court's having found "the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races" and even assuming an equal application of the statute. Thus, those who focus on the limitations of whites' options when explaining Loving offer a misleading characterization in several respects.

B. WHICH CLASSIFICATIONS REQUIRE CLOSE EXAMINATION?

The above discussion is about why the statute at issue in Loving involved invidious discrimination rather than about whether it did. Yet, the state of Virginia denied that its marital statutes imposed unequal burdens and denied that the statutes were unconstitutional, arguing that "because its miscegenation statutes punish equally both the white and the Negro participants in an

70. Loving, 388 US at 11.
71. See id at 7 (quoting Naim v Naim, 87 SE2d 749, 756 (1955)).
72. Id.
73. A separate issue would involve how the different races were defined, since "white person" would only apply "to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasian blood shall be deemed to be white persons." See id at n 4. However, the rules for other races were less strict. This might be relevant insofar as one is examining whether the state is really worried about the "corruption of blood," see id at 7, of all of its citizens.
74. Id at 12 (italics added).
75. See id at 11 n 11.
76. Id at 8.
interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race." The Court did not dispute the state's characterization of the statute, but instead rejected "the notion that the mere 'equal application' of a statute is enough to remove the classification from the Fourteenth Amendment's proscription of all invidious racial discrimination." The Court made clear that when a statute employing racial classifications is at issue, "the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment traditionally required of state statutes drawn according to race."

The Court distinguished Loving from other kinds of cases in which no minority was being targeted, suggesting that in the latter "the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures." The Loving Court's approach is important to consider because it suggests the approach that should be used insofar as the constitutionality of a statute precluding same-sex marriage is at issue.

C. DISCRIMINATION ON THE BASIS OF SEX

A same-sex marriage ban might be phrased in any of a number of ways. For example, a state might suggest that marriages between individuals of the same sex are invalid, that marriages between individuals of the same gender are void, or that only marriages between a man and a woman are valid. Each of these statutes classifies on the basis of sex or gender. A separate question is

77. See id.
78. But see Allison Moore, Loving's Legacy: The Other Antidiscrimination Principles, 34 Harv CR-CL L Rev 163 (1999) ("Loving involved a law that was in fact neutral as between black and white persons who married interracially—punishing them equally for miscegenation.").
80. Id at 9.
82. Id at 9.
83. See Ala Code § 30-1-19 (1998) ("A marriage contracted between individuals of the same sex is invalid in this state."); Ark Code Ann § 9-11-109 (1998) ("Marriage shall be only between a man and a woman. A marriage between persons of the same sex is void.").
84. Del Code Ann Tit 13 § 101 (a) (Supp 1996) ("A marriage is prohibited and void . . . between persons of the same gender.").
85. See Alaska Const, Art 1, § 25 ("To be valid in this State, a marriage may exist only between one man and one woman.").
whether the statute involves invidious discrimination, but it at least should be clear that the above formulations are sex-based or gender-based classifications.  

When commentators suggest that same-sex marriage bans do not discriminate on the basis of gender, they might mean: (a) the basis of the classification is something other than sex or gender, for example, orientation, or (b) while the basis of the classification is sex or gender, the classification is not invidious and hence should not be thought of as "discrimination." These claims must not be conflated, because they mean different things and because the test to determine whether in fact the Constitution permits the classification at issue might depend on which was being asserted.

Suppose that a different statute were at issue, namely, one that only precluded individuals with a same-sex orientation from contracting same-sex marriages. Individuals who did not have a same-sex orientation would be allowed to marry someone of the same sex and thus, for example, receive government benefits that they would not otherwise be able to receive. Because the state would want to assure that only certain same-sex couples married, it might require each member of the couple to sign an affidavit that he or she either had an opposite-sex orientation or no sexual orientation.

It might seem that a state requirement of such an affidavit would itself "raise serious constitutional questions." Yet, it is not as if requiring the production of an affidavit as a condition for being allowed to marry is unprecedented—Wisconsin, for example, imposes such a requirement in certain situations.

The statute described above would not involve express discrimination on the basis of sex, since the explicit basis of classification would instead involve sexual orientation. Of course, that would not end the possibility of an equal

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86. But see text accompanying notes 103-08 and 189-90 (discussing different claims that such statutes do not involve a sex-based classification in the relevant sense).

87. See Sekulow and Tuskey, Sex and Sodomy and Apples and Oranges, 12 BYU J Pub L at 323 (cited in note 67) ("The obvious rejoinder to this argument is that state marriage laws treat men and women alike: Billy may no more marry Bobby than Sue may marry Linda. Thus, these laws discriminate against neither men nor women."); Anita K. Blair, Constitutional Equal Protection, Strict Scrutiny, and The Politics of Marriage Law, 47 Cath U L Rev 1231, 1238 (1998) ("Sex discrimination simply does not enter into Hawaii's marriage law—women and men are treated precisely the same.").


89. See Adams v Howerton, 486 F Supp 1119, 1125 (C D Cal 1980), affd, 673 F2d 1036 (9th Cir 1982). The Adams court believed that a state's requiring individuals to reveal their plans regarding children might implicate privacy concerns. See id.

90. See Wis Stat § 765.03 (West 1993) ("marriage may be contracted between first cousins where the female has attained the age of 55 years or where either party, at the time of application for a marriage license, submits an affidavit signed by a physician stating that either party is permanently sterile").
protection challenge on the basis of sex. For example, if the state precluded all individuals from marrying a same-sex partner regardless of the sexual orientation of the parties, express provisions of the statute notwithstanding, then an applied challenge to the statute on the basis of sex-discrimination might be appropriate.91

A separate question is whether the state could justify permitting some but not other same-sex couples to marry. Presumably, it would not suffice as a justification were the State to suggest that it had enacted that regulation because it had wanted to punish individuals with a same-sex orientation,92 since the Court has already made clear that where a statute "seems inexplicable by anything but animus toward the class that it affects, it lacks a rational relationship to legitimate state interests."93

Perhaps the state would argue that it was imposing such a restriction because it wanted to make sure that sodomitical relations did not take place. Of course, for the majority of states, such a justification would hardly be convincing, since the fact that they do not criminalize sodomy belies the claim that its prevention is an important state objective.94 Further, since many of the states criminalizing sodomy criminalize both same-sex and different-sex sodomy,95 one would expect those states to impose the same restriction on all couples, for example, by requiring them to sign an affidavit suggesting that they had no inclination to engage in sodomitical activities in the future. Finally, since it seems likely that the right to have marital, consensual, sodomitical relations is protected by the right to privacy,96 it is not at all clear that the state could impose a no-sodomy condition on those who wished to marry.97 For all of these reasons, it seems unlikely that the prevention of sodomy would be viewed as a sufficient justification for such a statute.98

91. In Baehr, the plurality suggested that the Hawaii statute at issue, "on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex," see Baehr, 852 P.2d at 64, thus suggesting that a statute might be vulnerable either because of its express provisions or because of how it was applied.
92. But see Romer v Evans, 517 US 620, 644 (1996) (Scalia dissenting) (suggesting that animus against this particular group is constitutionally permissible).
93. See id at 632.
94. As of January 21, 2000, the ACLU website http://www.aclu.org/issues/ga/sodomy.html listed fourteen states that criminalize both same-sex and opposite-sex sodomitical relations and five states that criminalize only same-sex sodomitical relations.
95. See id.
96. See Bowers v Hardwick, 478 US 186, 218 (1986) (Stevens dissenting) ("our prior cases thus establish that a State may not prohibit sodomy within 'the sacred precincts of marital bedrooms'").
97. Commentators' claims to the contrary notwithstanding, see Wardle, A Critical Analysis, 1996 BYU L Rev at 35 (cited in note 35), Bowers v Hardwick did not hold that the state could prohibit sodomy altogether. The Court did not address whether marital sodomy was protected because that issue was not before the Court. It is thus difficult to see why Bowers would be an insurmountable hurdle for the constitutional
Many would suggest that it would be absurd to have the statute described above that allowed some but not other same-sex couples to marry, although the explanations for why that was true might vary radically. Some would claim that it makes no sense to allow any same-sex couple to marry, arguing that the purposes of marriage could not be served if the marital partners were of the same sex. Others would suggest that exactly the wrong same-sex couples would thereby have been precluded, arguing those same-sex partners whose union would have served the purposes of marriage would be precisely those who would have been precluded from marrying. In any event, the same-sex marriage bans that have been enacted do not allow certain but not other same-sex couples to marry; instead, they prohibit “same-sex marriages on the part of professed or non-professed heterosexuals, homosexuals, bisexuals, or asexuals.” It is precisely because all parties, regardless of sexual orientation, are prohibited from marrying someone of the same sex that the Baehr plurality held that the Hawaii statute “on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants’ sex.”

Professor Richard F. Duncan argues that notwithstanding that a same-sex marriage ban facially discriminates on the basis of sex, it involves “an eminently reasonable distinction drawn on the basis of sexual orientation.” He seems not to appreciate that given that such a statute nonetheless precludes a man from marrying another man and a woman from marrying another woman...
without regard to the sexual orientations of the parties, the statute is not narrowly tailored. He also seems not to appreciate how the constitutionality of such a statute is undercut if the very reason that such marriages are precluded involves a desire to impose a burden on and maintain the inferiority of a particular class. Laws of that kind "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." The Romer Court has already made clear that a statute that "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else" will not pass constitutional muster.

When holding that the state's same-sex marriage ban implicated equal protection guarantees, the Baehr plurality did not hold that the classification at issue was invidious or unconstitutional. Instead, it remanded the case to give the state an opportunity to establish that the statute was "justified by compelling state interests" and that the "statute ... was narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights." By remanding the case, the Baehr plurality made clear that the fact that the state had chosen to enact a statute containing a sex-based classification did not establish that the statute was constitutionally infirm. That issue was left for a trial court to determine. Nonetheless, the plurality's holding that the statute involved a sex-based classification was significant because the state was thereby required to carry a "heavy burden of justification" when making its argument at the trial court level.

When a sex-based classification is under examination, several issues must be addressed, including: (1) whether burdens are imposed on one sex that are not imposed on the other, and (2) even if not, whether the statute is closely

104. Id at 241 ("Marriage laws apply the same equal standard to each gender—neither men nor women may marry a person of the same gender").
105. See Craig M. Bradley, The Right Not to Endorse Gay Rights: A Reply to Sunstein, 70 Ind L J 29, 34 (1994) ("A ban on same-sex marriages is not perfectly tailored to further the governmental interest in not giving homosexual relationships legal recognition, since it forbids people of the same sex from entering into a legally recognized 'marriage' regardless of their sexual proclivities (or lack of same)").
106. See Duncan, From Loving to Romer, 12 BYU J Pub L at 239 (cited in note 103) (discussing the "radical and dangerous agenda" of those who allege the "equal goodness of homosexuality and heterosexuality").
107. See Romer, 517 US at 634.
108. Id at 635.
109. See Baehr, 852 P2d at 67.
110. Id.
111. Id.
113. In Baehr v Miike, 1996 WL 694235 (Hawaii Cir Co), a Hawaii trial court determined that the state had failed to meet its burden. See id at *21.
114. See id at *19.
tailored to promote sufficiently important state interests. Thus, even if it could be established that a particular sex-based classification did not impose an unfair burden on one of the sexes, that would not suffice to establish the constitutionality of the classification.

Commentators suggest that same-sex marriage bans treat men and women alike—a man is not allowed to marry another man and a woman is not allowed to marry another woman. Yet, this hardly establishes that such a classification passes constitutional muster, just as the analogous claim in Loving—that blacks were not allowed to marry whites and whites were not allowed to marry blacks—did not establish that the Virginia statute passed constitutional muster.

There has been some confusion about the point that just as the “equal” treatment of the races did not constitutionally immunize an interracial ban, so, too, the “equal” treatment of the sexes would not constitutionally immunize a same-sex marriage ban. The claim is not that Loving establishes that “the civil right to marriage must be afforded to same sex couples,” since that case did not involve a challenge to a same-sex marriage ban and thus of course is not authority for that proposition. Thus, because Loving involved a race-based marital classification, the case does not “limit the state’s power to prohibit any person from entering into a same-sex marriage,” just as it does not limit the state’s power to prohibit any person from entering into a marriage with someone of a different religion. However, the fact that a case is not authority for a particular proposition hardly establishes that it is not relevant or in fact very persuasive. For example, Loving strongly suggests that a law barring marriages between individuals of different religions would be unconstitutional, since religion is also a suspect classification.

It is not suggested above that the state’s burden in justifying a marital statute involving a sex-based classification would be as great as it would be were

115. See Zablocki, 434 US at 387.
116. See text accompanying note 104.
117. See Bachr, 852 P2d at 67 (noting that the two claims seemed analogous).
118. See, for example, Wardle, A Critical Analysis, 1996 BYU L Rev at 784-85 (cited in note 35) (“The Loving analogy between antimiscegenation laws and laws allowing only heterosexual marriage fails as a matter of case interpretation and constitutional doctrine . . . Nothing in the Court’s equal protection analysis or language implies disapproval of discrimination against same-sex relations or even hints of any concern about permitting only male-female marriage.”).
119. See Bachr, 852 P2d at 70 (Heen dissenting).
120. See id.
121. Id.
122. See Burlington Northern Railroad Co. v Ford, 504 US 648, 651 (1992) (discussing “suspect lines like race or religion”); City of New Orleans v Dukes, 427 US 237, 303 (1976) (discussing “inherently suspect distinctions such as race, religion, or alienage”).
the statute to involve a race- or religion-based classification. Sex- or gender-based classifications must be subjected to heightened scrutiny, a level of scrutiny that is lower than that which is employed for classifications involving race or religion but higher than that which is employed where economic regulations are at issue. Nonetheless, heightened scrutiny imposes a difficult burden on parties who seek to defend a sex-based classification. As the Court made clear in United States v Virginia, "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."  

D. ON THE FAMILY

Notwithstanding that same-sex couples are not yet able to marry in any state, gays and lesbians are creating "families of choice" in which they establish homes and raise children. Lesbian and gay parents, like other parents, provide home environments in which children can thrive and, like other parents, have a fundamental liberty interest in the care, custody, and management of their children, whether the connection to those children is the result of biology or adoption.

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123. See Kohm, Liberty and Marriage—Baehr and Beyond, 12 BYU J Pub L at 260-61 (cited in note 22) (distinguishing between the kinds of scrutiny to be imposed where race-based rather than sex-based classifications are at issue).

124. See Wardle, A Critical Analysis, 1996 BYU L Rev at 83 (cited in note 35) ("race and gender are not fungible categories because race triggers the strictest standard of judicial scrutiny, whereas gender discrimination invokes an intermediate, albeit heightened, standard of judicial review"). In Baehr, the classification was to be examined with strict scrutiny because sex is a suspect classification under the Hawaii Constitution. See Baehr, 852 P2d at 67.

125. See text accompanying notes 81-82 (discussing rational basis review).

126. Blair, Constitutional Equal Protection, 47 Cath U L Rev at 1234 (cited in note 85) ("The U.S. Supreme Court has insisted, rather, that constitutional equal protection scrutiny, whether applied to race or sex or other classifications, must involve a rigorous examination of the actual purposes and effects of the laws or state actions under challenge.").


128. See id at 531 (citations omitted).


130. See Dean v District of Columbia, 653 A2d 307, 333 (DC App 1995) (Ferren concurring and dissenting) ("we recognize that gay and lesbian couples can and do have children through adoption, surrogacy, and artificial insemination").

131. See Baehr, 1996 WL 694235 at *17 (Lesbian and gay parents can provide children with homes in which they will be happy, healthy and well-adjusted.).


133. See, for example, Ohio Rev Code Ann § 3107.15 (Anderson 1996) (adoptive parent has all of the rights and responsibilities that the biological parent had with respect to the child); Conn Gen Stat Ann § 45a-731 (West 1993) (same); Alaska Code Ann § 25.23.130 (1995) (same).
The existence of lesbian and gay families is legally significant in two very different ways. Their existence: (1) provides the basis for a substantive due process claim that the right to marry a same-sex partner should be recognized as constitutionally protected, and (2) helps to illustrate why the state does not have an exceedingly persuasive justification for precluding same-sex couples from marrying.

A plausible argument can be made for the proposition that the Due Process Clause of the Fourteenth Amendment protects the right of same sex couples to marry. Consider two cases, *Meyer v Nebraska,* 134 in which the Court recognized that the Due Process Clause protects the “right of the individual . . . to marry, establish a home, and bring up children” 135 and *Zablocki,* in which the Court suggested that it “would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.” 136

The *Meyer* Court suggested that the rights to marry, establish a home, and bring up children are fundamental and equally important. 137 The *Zablocki* Court explicitly confirmed both that “the right to marry is of fundamental importance” 138 and that “the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships.” 139 Yet, if indeed lesbian and gay parents have the fundamental right to make decisions regarding their children, and the right to marry is on the same level of importance as that right, then *Zablocki* provides strong support for the constitutional right of lesbians and gays to marry their same-sex partners. 140 As the *Zablocki* Court recognized, the alternative “would make little sense.” 141 Of course, *Zablocki* did not establish the “right to a same sex marriage,” 142 since the Wisconsin regulation instead

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134. 262 US 390 (1923).
135. Id at 399.
137. See text accompanying note 135. See also *Boddie v Connecticut,* 401 US 371, 376 (1971) (“marriage involves interests of basic importance in our society”).
139. Id at 386. See also *Griswold v Connecticut,* 381 US 479, 495 (1965) (Goldberg concurring) (“The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.”).
140. The *Baehr* plurality made clear that commentators will be unable to avoid the force of this argument by simply suggesting that marriage by definition cannot include same-sex couples. See *Baehr,* 852 P2d at 62. See also Mark Strasser, *Legally Wed: Same-Sex Marriage and the Constitution* ch 1 (Cornell 1997) (discussing the definitional preclusion argument).
142. See *Baehr,* 852 P2d at 70 (Heen dissenting).
involved a different marital restriction, but the Zablocki Court's reasoning is nonetheless highly instructive.110

The Baehr court rejected that the right to marry a same-sex partner was protected by the right to privacy.144 Basically, the court reasoned that because "a right to same-sex marriage is [not] 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"145 and that because "a right to same-sex marriage is [not] implicit in the concept of ordered liberty such that neither liberty nor justice would exist if it were sacrificed,"146 due process did not protect such a right. The Baehr court did not seem to appreciate that the same argument might have been used to defeat the claim made in Loving.147

Ironically, the Baehr plurality recognized that the Zablocki Court had linked "the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, abortion, and child rearing on the other."148 However, the court then came up with the surprising conclusion that because "one is simply the logical predicate of the others,"149 same-sex marriages need not be recognized. Yet, if indeed same-sex couples are having and raising children and if indeed the Court was pointing to a logical connection between marriage on the one hand and having and raising children on the other, one would have thought that the Baehr court would have felt logically compelled to recognize the right to marry a same-sex partner.

E. HEIGHTENED SCRUTINY

Bracketing whether courts should recognize the right to marry a same-sex partner as protected by due process guarantees, the existence of lesbian and gay families helps to undermine the claim that the state has an exceedingly persuasive justification for its refusal to recognize same-sex marriages. To

143. Marriage serves other additional individual interests that would be at least as important for same-sex couples as for different-sex couples. See Turner, 482 US at 95-96 (cited in note 21) (discussing important attributes of marriage including that such unions "are expressions of emotional support and public commitment," that marriage can have a "spiritual significance" and thus may be "an exercise of religious faith as well as an expression of personal dedication," and that "marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock)").
144. See Baehr, 852 P2d at 57.
145. Id.
146. Id.
147. See text accompanying notes 35-36.
148. See Baehr, 852 P2d at 56.
149. Id.
demonstrate that a sex-based classification withstands constitutional scrutiny, the state must show that the classification serves an important governmental objective and that the discriminatory means are substantially related to the achievement of those objectives.150 However, claims to the contrary notwithstanding,151 the justifications offered for such statutes do not meet the relevant standard. Indeed, the only reason that such statutes might even appear to serve such ends is that commentators have artificially construed the purposes of marriage.

Courts have long recognized that the state has a “compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised.”152 Yet, this interest would not support preventing same-sex couples from marrying, given that they are having and raising children. On the contrary, this would support the right to marry a same-sex partner, since that would lend status and stability to the environment in which the children might be raised.153

When commentators seek to establish why same-sex couples should not be allowed to marry, they sometimes point to the need that children have for a long-term, stable environment.154 Of course, this is a reason that same-sex marriages should be recognized, unless one adds an additional condition, namely, that the long-term, stable environment must involve both of the children’s biological parents.155 However, since children need a long-term stable environment even if that setting does not involve both of their biological parents, there is no legitimate reason to add such a qualifier.

The state has an interest in having children raised in a loving home where they might flourish, even if only one or perhaps neither parent is biologically related to the children.156 Indeed, when the Loving Court suggested that

152. See Adams, 486 F Supp at 1124 (cited in note 89).
153. Same-sex partners are sometimes allowed to adopt the child of their partners to enhance stability for the child, among other reasons. See Adoption of Tammy, 619 NE2d 315, 320 (1993) (“Of equal, if not greater significance, adoption will enable Tammy to preserve her unique filial ties to Helen in the event that Helen and Susan separate, or Susan predeceases Helen.”).
154. See Blair, Constitutional Equal Protection, 47 Cath U L Rev at 1236 (cited in note 87) (“Human children (unlike other animals’ young) require years of care and attention before they are self-sufficient.”).
156. See Mark Strasser, The Challenge of Same-Sex Marriage: Federalist Principles and Constitutional Protections 2 (Greenwood 1999) (“the state has an interest in having healthy and flourishing children produced and raised, even if those children are not raised by both of their biological children.”).
marriage is "fundamental to our very existence and survival," there was no indication in the opinion that the survival of the race was somehow dependent on children being raised by both of their biological parents. Were that the case, one would expect that adoption laws would be quite different from what they in fact are. Not only would states not treat the adoptive parent as the legal equivalent of the biological parent, but states would take a much more active role in discouraging adoptions.

Other commentators offer a different reason that the inability of same-sex couples to produce a child through their union is allegedly relevant to whether they should be allowed to marry. For example, Professor Teresa Stanton Collett points out that same-sex unions "may mirror the commitment, exclusivity, and permanence of marriage, but they can never create new human life." Because such unions would allegedly therefore be "finite and sterile," the state "has no stake in the sexual union of these couples." At the very least, this is a surprising argument, since it implies that the sole reason that the state has a "stake" in the sexual union of couples is that the couple might thereby produce children. Yet, the state would also have a stake in the couple’s sexual union insofar as that might help them stay together, which would provide stability both for the individuals themselves and for any children that they might be raising. Further, Professor Collett’s argument suggests that there is nothing in a marriage outside of the potentially procreative sexual union in which the state has a stake. Yet, that argument fails to include some of the state’s other interests in marriage. For example, the state has an interest in its citizens being happy and productive members of society, and the state’s promoting marriage furthers that interest regardless of whether that family unit involves any children.

As a separate point, the mere lack of a stake in the sexual union would hardly be a reason to prohibit the union. More would have to be shown, for example, that the state has a stake in prohibiting individuals from marrying who could not produce children through their union. Yet, if that really were an important state interest, one would expect the state to require that individuals

158. Professor Wardle seems not to appreciate this point. See Wardle, A Critical Analysis, 1996 BYU L Rev at 80-81 (cited in note 35). Since children can flourish in non-marital settings, recognition of neither same-sex nor different-sex marriage is necessary for the survival of the race. Of course, the argument here is that both types of marriage should be recognized whether or not that recognition is necessary for the survival of humankind.
159. See note 133 and accompanying text.
161. Id.
162. Id.
be able and willing to procreate before allowing them to marry, for example, by
submitting the requisite affidavits. One would never expect a state to impose
as a condition of marriage that the couple not be able to procreate. However,
states do not require the production of such an affidavit, and further, several
states will only allow certain individuals to marry if they can establish their inability to produce children through their union.

Some commentators seem intent on establishing why different-sex marriages are better than same-sex marriages or, perhaps, why heterosexuality is better than homosexuality. Yet, this is an approach that is clearly wrong-headed. First, it seems plausible to suggest that different-sex marriages would be better for some people and that same-sex marriages would be better for others. Even bracketing which kind of marriage or relationship is “better,” it would hardly make sense to preclude individuals from marrying because their marriage would not be optimal. For example, financial difficulties can play an important role in causing marital break-ups and thus it might seem that indigent individuals might not have “optimal” marriages. Yet, in Boddie v Connecticut, the Court struck down Connecticut’s restriction of the ability of indigents to get a divorce, at least in part because that would prevent them from remarrying. Further, the Zablocki Court struck down Wisconsin’s

163. But see text accompanying note 90.
164. Some states only allow those first cousins to marry who cannot reproduce through their union. See Ariz Rev Stat Ann § 25-101(B) (West Supp 1997) (at least sixty-five years old or one is unable to reproduce); 750 Ill Comp Stat Ann 5/212 (4) (West 1993) (at least fifty years old or either party permanently and irreversibly sterile); Ind Code Ann § 31-11-1-2 (Michie 1997) (at least sixty-five years old); Utah Code Ann § 30-1-1 (Supp 1997) (at least sixty-five years old or both at least fifty-five and one cannot reproduce); Wis Stat Ann § 765.03 (West 1993) (female has to be fifty-five years old or either one submits affidavit that party is permanently sterile).
166. See Duncan, From Loving to Romer, 12 BYU J Pub L at 239 (cited in note 103) (discussing “those who seek to use the courts to accomplish a radical and dangerous agenda—the reordering of marriage to reflect the alleged equal goodness of homosexuality and heterosexuality”). But see William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 Va L Rev 1419, 1422-23 (1993) (suggesting that it is precisely this attempt to subordinate gays, lesbians and bisexuals within society that makes same-sex marriage bans constitutionally offensive).
169. Id at 371.
170. Id at 376.
imposition of a financial litmus test for those who wish to marry,\textsuperscript{171} notwithstanding that such marriages might not be “optimal” and notwithstanding the state’s legitimate and substantial interest in promoting the welfare of out-of-custody children.\textsuperscript{172} Marriage involves too important an interest to be denied to all who would not have “optimal” marriages, even if there were objective criteria to determine which unions would qualify.

Suppose that it were true in some objective sense that families with children were somehow better than families without children and thus that childless marriages would not be optimal. This would hardly be a reason to prohibit the latter and were this any other context such a claim would never be advanced. One can imagine the outcry were someone to introduce legislation limiting marriage to only those who could and would have children.\textsuperscript{173}

\section*{F. THE LOVING ANALOGY}

Same-sex marriage opponents seem not to appreciate that many of the arguments offered in support of such bans might analogously have been made in \textit{Loving}. For example, some commentators imply that because same-sex couples seek to secure their marriage rights through the courts rather than simply allow the legislatures to make the relevant decisions, these couples are disingenuous in their claims of wanting to be treated as (merely) equal citizens.\textsuperscript{174} After all, it is argued, by attempting to get the courts to recognize a right to marry, these couples are attempting to “foreclose an important public debate.”\textsuperscript{175}

Yet, first, there is no reason to think that such recognition would in fact close off debate. For example, \textit{Roe v Wade}\textsuperscript{176} has hardly foreclosed debate about abortion. Second, even were debate thereby foreclosed, that hardly should suffice as a reason to preclude individuals from having their rights recognized in court. Presumably, these commentators would not have claimed that the

\begin{itemize}
\item 171. But see \textit{Zablocki}, 434 US at 404 (Stevens concurring in the judgment) (“Thus, within the class of parents who have fulfilled their court-ordered obligations, the rich may marry and the poor may not.”).
\item 172. See id at 388.
\item 173. See Mark Strasser, \textit{Family, Definitions, and the Constitution: On the Antimiscegenation Analogy}, 25 Suffolk U L Rev 981, 1011-1012 (1991) (suggesting that were there a law passed preventing the elderly from marrying, the law would be declared unconstitutional and the legislators would be thrown out of office).
\item 175. See Blair, \textit{Constitutional Equal Protection}, 47 Cath U L Rev at 1239 (cited in note 87).
\item 176. 410 US 113 (1973).
\end{itemize}
Loving: (1) should not have gone to court but, instead, should only have tried to persuade the Virginia Legislature to allow them to marry, or (2) were seeking special rights by seeking to have their right to marry vindicated in the courts.

Further, these commentators would never claim that the Loving Court should have reached the opposite conclusion so as not to foreclose public debate, notwithstanding that the state of Virginia offered a political process argument, claiming that the Supreme Court should “defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.” The Court wisely rejected the state’s argument, even though doing so overrode the will of the people.

When attempting to establish that what is at issue in the same-sex marriage controversy is different from what was at issue in the interracial marriage controversy, commentators sometimes understate the strength of the opposition to interracial marriage that existed at the time Loving was decided. For example, Professor Duncan suggests that “Loving is a case in which public morality triumphed over social pathology,” as if interracial marriage was in accord with the public morality of the time. Yet, polls in the 1990’s indicate that a substantial number of white Americans disapprove of interracial marriages, and it is clear that attitudes toward intermarriage “have changed dramatically over the last quarter-century.” Thus, a very significant percentage of whites disapproved of such marriages when Loving was decided. It is neither clear that public morality at the time permitted such marriages nor, for that matter, that the current opposition to same-sex marriage cannot be attributed to social pathology. The point here of course is not to suggest that Loving should have been decided differently if in fact interracial marriages contravened the existing public morality—but on the contrary, this is to suggest that public morality is not the appropriate test to decide something that involves such a fundamental interest as the right to marry.

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177. Loving, 388 US at 8.
181. See Strasser, The Challenge of Same-Sex Marriage 7 (cited in note 150) (“It simply will not suffice to say that because this is a democracy, the issue of who may marry whom should be determined by a popular vote. This is a constitutional democracy, where the will of the majority is constrained by the protections that have been guaranteed by federal and state constitutions.”).
Professor Lynn Wardle rejects the comparison between interracial marriage and same-sex marriage because he suggests that this involves a comparison between “legal classifications concerning marriage based on racial characteristics and those based on homosexual conduct.” He seems to be arguing that the former involved regulation of immutable characteristics while the latter involves the mere regulation of behavior. Yet, he seems not to appreciate the force or possible application of his own argument. For example, Virginia might have claimed that it had no interest in punishing anyone because of his or her race. On the contrary, Virginia was merely trying to prevent certain kinds of sexual behaviors, namely, interracial sexual relations, and precisely because behaviors rather than immutable characteristics were at issue its anti-miscegenation statute was constitutionally permissible.

Professor Wardle suggests, “Intuitively, there is a distinction between immutable racial classifications, which are logically irrelevant to legitimate legal policies, and personal sexual behavior choices, which are of substantial social concern, especially regarding marriage.” The state of Virginia might have agreed wholeheartedly and then claimed that because it was merely trying to preclude personal behavioral choices, especially where the institution of marriage was involved, its statute precluding interracial marriage should have been upheld.

Allegedly, same-sex marriage bans are permissible because they are “directly related to one of the fundamental purposes of marriage laws—that is, the regulation of sexual behavior and protection of the basic unit of society—the family.” Yet these are exactly the kinds of arguments that Virginia might have offered. One need only consider how Florida defended its anti-miscegenation statute that punished interracial fornication and adultery more severely than intra-racial fornication. The state claimed merely to want to “prevent breaches of the basic concepts of sexual decency,” a characterization with which the Supreme Court refused to quarrel. Presumably, Virginians shared the view of Floridians that interracial sexual behavior was indecent whether within or outside of marriage. Presumably, both Virginia and Florida might have claimed that their interracial marriage bans were merely protecting their citizens’ understandings of the “proper” family.

183. See id at 82 (“Furthermore, race is an inherent condition, but homosexual behavior is chosen behavior.”).
184. Id (“race is an inherent condition, but homosexual behavior is chosen behavior”).
185. Id at 75.
187. See id.
188. At the time Loving was decided, Florida also had a statute prohibiting interracial marriage. See Loving, 388 US at 6 n 5.
Perhaps the most useful argument for the state of Virginia would be Professor Wardle's claim that "distinctions based on activities or relations are different than distinctions based on immutable traits, and sexual activity may be regulated in many ways to a greater extent than gender classifications." There, he is suggesting that heightened scrutiny is not appropriate where relations, rather than traits, are being regulated. Yet, if indeed same-sex marriage bans do not discriminate on the basis of sex, properly understood, because they instead classify on the basis of behavior or relations, then Virginia presumably should have argued that interracial marriage bans, when properly understood, should not be thought to discriminate on the basis of race but instead on behavior or relations. Were Professor Wardle's analyses convincing, they would cast a whole new light on how *Loving* should have been decided.

**IV. CONCLUSION**

Same-sex marriage opponents offer several arguments in their attempts to show why former interracial marriage bans are not even analogous to current same-sex marriage bans. Yet despite protestations to the contrary, many of the arguments offered to establish the permissibility of same-sex marriage bans might have been analogously offered by the state of Virginia to justify its own interracial marriage ban.

That these arguments might have been used analogously to support antimiscegenation laws should not be thought to establish that such theorists do or even would have supported such bans. On the contrary, it seems clear that these theorists find interracial bans so obviously wrong and same-sex marriage bans so obviously right that they cannot even see the ways in which their current arguments against same-sex marriage were once used to support statutes like the one at issue in *Loving*.

*Loving* is important for a variety of reasons. For example, it makes clear how distinctions can be invidious, notwithstanding their popular acceptance, and why a state's prohibition of something as fundamental as the right to marry should be examined closely to make sure that the reasons articulated are both legitimate and important. When, for example, something like the ability

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190. Professor Wardle suggests that the claim that same-sex marriage bans discriminate on the basis of sex "is based on a pun—the double meaning in colloquial language of sex, referring both to gender and to sexual relations." See id at 86.
to reproduce through the union of the parties is *required* for some to marry, is *ignored* when others wish to marry, and is a *disqualifying* condition when still others wish to marry, it should be clear that a fundamental interest is being denied for specious reasons. While *Loving* of course does not *establish* that the right to marry a same-sex partner is constitutionally protected, it and the subsequent right to marry cases establish the necessity of closely examining the articulated state interests allegedly justifying such a marital prohibition. It is difficult to understand how the reasons thus far articulated to justify same-sex marriage bans could ever withstand the requisite scrutiny. Indeed, the utter speciousness of the reasons offered by many commentators allegedly justifying same-sex marriage bans only serves to bolster the view that the state has no important, legitimate interests in depriving an entire group of such a fundamental right.