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Eliminating the Exception? *Lawrence v. Texas* and the Arguments for Extending the Right to Marry to Same-Sex Couples

BY TYLER S. WHITTY*

I. INTRODUCTION

While matrimony has traditionally been a fundamental concept in our society, the significance of a legally recognized marriage was often ignored and forgotten. Such may no longer be the case, however, as there has been a renewed level of interest of late in both the institution of marriage and its definition. The right to marry has been under the social microscope before, but never has it been so magnified as during the debate concerning whether to recognize same-sex marriages in the United States. Indeed, while hundreds of thousands of troops continued to fight an unpopular war in the Middle East, it was same-sex marriage which became one of the driving topics in the 2004 presidential debate.\(^1\) Predictably, though, the debate achieved no consensus or final resolution. While some states have begun to independently shape the definition of marriage through state constitutional amendments, the debate will likely continue until it is resolved on a national level, either by the United States Supreme Court or by an amendment to the United States Constitution.

When considering the same-sex marriage debate, it is essential to be clear about the core underlying principles: first, the right to marry has enjoyed a clear and longstanding heritage in this country, both socially and legally; and second, the recognition of same-sex marriage would not involve the creation of a new fundamental right, but rather an extension of the preexisting right to marry. Though both sides of this marriage "controversy" have ardently and passionately argued their stances, both (the opposition in particular) have failed to address or even recognize this second concept. Since the Supreme Court's decision in *Lawrence v. Texas*,\(^2\) such passive ignorance may be difficult to avoid, as those that oppose same-sex marriage may now find that their justifications for denying the right to marry are in uncertain and troubled waters. As a practical matter, *Lawrence* may eventually prove insignificant in the

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legal clashes that lie ahead, but it at least suggests that the Court is more willing to recognize same-sex marriage now than ever before.

The eventual recognition of same-sex marriage is by no means a certainty. At a minimum, it will require a multitude of social, ethical, and legal considerations. Though all are necessary components to an informed discussion of this issue, this note will focus principally on the legal implications of Lawrence v. Texas. In no way does this discount the importance of these other considerations; it simply highlights the fact that same-sex couples have garnered their most substantial footing on the legal front. Ultimately, the purpose of this note is to refresh the arguments for same-sex marriage in light of the legal developments in 2003 and 2004. Primarily, this note will analyze the effects of the Supreme Court’s holding in Lawrence v. Texas on the arguments for and against same-sex marriage. Part II briefly points out the many benefits of being legally married. Part III discusses the Supreme Court’s general recognition of the right to marry, and Part IV examines the almost uniform ban on same-sex marriage in the United States. Part V is devoted to the arguments in favor of recognizing same-sex marriage as a fundamental right under the Due Process Clause. Part VI analyzes whether any of the common justifications for prohibiting same-sex marriage could withstand heightened scrutiny. Finally, Part VII considers the legacy of such developments as the Massachusetts Supreme Judicial Court’s recognition of same-sex marriage in Goodridge v. Department of Public Health, as well as the surge of same-sex marriage ceremonies in San Francisco and elsewhere.

II. THE BENEFITS OF MARRIAGE

To fully understand why those that passionately support same-sex marriage do so, one must understand the significance of a legal marriage. The substantial role that marriage has traditionally played in Western society is undeniable. The relevance of the marriage ceremony—more importantly, the legal recognition of the rights and privileges of marriage—extends far beyond the ritualistic and symbiotic union of two individuals. In fact, a marriage is very closely comparable, from a legal

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3 See infra notes 10–20 and accompanying text.
4 See infra notes 21–31 and accompanying text.
5 See infra notes 32–39 and accompanying text.
6 See infra notes 40–102 and accompanying text.
7 See infra notes 103–139 and accompanying text.
9 See infra notes 140–144 and accompanying text.
standpoint, to a contractual relationship in which two individuals share a
great number of obligations to one another while at the same time
deriving a mutual benefit from the relationship. While the contract
allegory is somewhat dry and harsh, the legal and financial benefits
resulting from a lawful marriage are unquestionable.\(^\text{10}\)

The list of “advantages” associated with the institution of marriage,
none of which are available to same–sex partners, is seemingly endless.\(^\text{11}\)
The following excerpt details only a select few of the benefits of being
married:

Same–sex partners are excluded from insurance awards, social
security benefits, public pensions, worker's compensation, income tax
benefits, and estate tax benefits. They cannot contract to sue for
wrongful death of a spouse, to receive compensation given to families
of crime victims, or to be appointed conservator or guardian of an
invalid family member. Nor can they contract the right to make health
care decisions for a family member or even to visit a loved one in a
hospital or prison. Furthermore, exclusionary zoning laws, restrictive
statutory provisions, and narrow judicial constructions of the meaning
of “family” discriminate against same–sex couples in their efforts to
secure housing.

Moreover, same–sex couples are excluded from employee family
health care, group insurance, discounted “family rates” in assorted
organizations, and the ability to hold real estate by the
entirety.\(^\text{12}\)

Arguably the most recognizable area in which married couples are
afforded different treatment is in the realm of intestate inheritance and
the general protection provided to a surviving spouse. Whether in the
form of a personal exemption\(^\text{13}\) or inheritance rights,\(^\text{14}\) the surviving

\(^{10}\) A detailed analysis of the extent of the benefits and burdens arising from marriage
is well beyond the scope of this note. For a summary analysis of these “benefits and
burdens,” especially how they would relate to a homosexual couple, see David L.
Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of

\(^{11}\) For an extensive listing of over 1049 rights enjoyed by married couples, but
denied to same–sex couples as compiled in a 1997 GAO report, see http://


(granting a $15,000 personal exemption which would otherwise be taken out of the gross
intestate estate).

\(^{14}\) See, e.g., § 392.020 (granting to the surviving spouse half of the decedent
spouse’s surplus real and personal intestate estate).
spouse is generally entitled to some portion of his or her deceased spouse's intestate estate. The same is not true with same-sex partners. Same-sex partners could hypothetically live together for thirty years, completely devoted to one another and sharing almost every characteristic of a married couple, and yet neither individual would receive any portion of the other's estate if they were to die intestate. Instead, they are driven to such measures as adopting one another in order to inject themselves into the other's inheritance scheme.15 "Because it is irrevocable, adult adoption is the most drastic of the many legal strategies designed to circumvent the illegality of same-sex marriage. Yet, as long as same-sex marriage is illegal, adoption is the only solution that creates a bona fide family relationship . . . ."16

Marriage also includes intangible benefits. Though it is not often mentioned alongside the list of tangible benefits denied to same-sex couples, the ability for two individuals to commit themselves to one another, especially in the eyes of the public, is a very real benefit. To deny same-sex couples the right to marry is to publicly chastise their relationship and can be "interpreted as denoting the inferiority"17 of homosexuals and same-sex partners. It is appropriate to assume that such improper connotations should not be tolerated, and certainly should not be enforced by state and local governments. Yet, that has been the reality in the United States for some time.

Only Vermont, through its legislative recognition of civil unions, has made a substantial effort to guarantee to same-sex partners the same rights and responsibilities granted to heterosexual married couples.18 While Vermont has taken a positive step forward, no other state has even come close. In fact, a number of states have even drastically regressed in the most recent general election. Eleven states passed constitutional marriage amendments to their respective constitutions to ban same-sex marriage.19 The conclusion to be drawn from these results is that a very

16 Id. at 75.
17 Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954). Brown was decided on equal protection grounds, but the lesson provided by the Court is easily applicable here. The majority decision recognized that separating a class of people has certain psychological effects, and the same holds true when same-sex couples are denied a privilege enjoyed by opposite-sex couples solely based on their chosen lifestyle. See id.
19 The states include Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Oregon and Utah. Stevenson Swanson, Amendments to Ban Practice Pass Handily in all 11 States, CHI. TRIB., Nov. 3, 2004, at 8, available at 2004 WL 97456041.
small portion of same-sex couples will enjoy the benefits of marriage. There were approximately 594,391 same-sex households in the United States as of 2000. Considering the brief list of marital rights and benefits provided above, it is disheartening to think that some states will deny these rights and benefits to well over a million people simply because of a choice in lifestyle, or a mere sexual preference.

III. THE FUNDAMENTAL “RIGHT” TO MARRY

The Due Process Clauses of the Fifth and Fourteenth Amendments protect certain procedural and substantive liberties of individuals. Like many constitutional doctrines, substantive due process jurisprudence has undergone many changes over time. Since abandoning its 1905 holding in *Lochner v. New York*, the Court has struggled to define what rights are indeed protected under the Due Process Clause. However, the Supreme Court has consistently held that the right to marry is in fact a fundamental, if not the most fundamental, right. In *Griswold v. Connecticut*, arguably the Court’s most famous decision regarding the

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21 U.S. CONST. amend. V.

22 U.S. CONST. amend. XIV, § 1.

23 The Court has not always been, nor is it today, in agreement as to what specific substantive liberties are protected by the Due Process Clause. In fact, some justices refuse to acknowledge any right as “fundamental” that is not “deeply rooted” in the text of the Constitution. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 507–27 (1965) (Black, J., dissenting) (“Connecticut’s law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written . . . .”). However, the majority’s decision in *Lawrence* acknowledges the notion that there are unenumerated rights protected by the Constitution. As *Lawrence* indicates, the extent of the actual liberties protected is always in flux, albeit sometimes at an unhurried pace. See *Lawrence*, 539 U.S. at 564–66 (discussing Supreme Court decisions that have recognized various rights which are not expressly delineated in the Constitution, nor necessarily deeply rooted (i.e. the right to have an abortion)).

24 *Lochner v. New York*, 198 U.S. 45 (1905), overruled in part by *Ferguson v. Skrupa*, 372 U.S. 726 (1963) and *Day–Brite Lighting, Inc. v. Missouri*, 342 U.S. 921 (1952). Although long discarded, the *Lochner* doctrine is arguably the most famous doctrine in substantive due process jurisprudence. Under *Lochner*, the Supreme Court essentially granted itself the power to review legislative enactments for reasonableness, necessity, and arbitrariness (or, as some described, the power to be a “super-legislature”). *Griswold*, 381 U.S. at 482. *Lochner* was eroded and eventually abandoned by the Court, in large part to preserve the validity of an influx of New Deal legislation. See generally *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
right to privacy, Justice Douglas noted that the institution of marriage was "a right of privacy [that is] older than the Bill of Rights—older than our political parties, older than our school system." Consequently, the Supreme Court expressed its desire to protect that right. Whether it be a divorcée who wishes to remarry but is delinquent on child support payments, or even prison inmates who wish to marry one another, the Supreme Court has gone to great lengths to protect the institution of marriage from undue infringement.

The Court first acknowledged marriage as a fundamental right in *Loving v. Virginia*. The Court in *Loving* overturned the convictions of a male Caucasian and an African-American female who were convicted under a miscegenation statute that forbade interracial marriages. While the bulk of the Court's opinion relied on the Equal Protection Clause, the Court went on to hold that "the [fundamental] freedom to marry or not marry a person of another race resides with the individual and cannot be infringed by the State." A decade later, the Supreme Court reiterated that notion in *Zablocki v. Redhail*, stating that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."

The fight is no longer to convince the Court that marriage is a fundamental right; rather, today's fight is whether a government can deny that right on an arbitrary basis such as a couple's sexual orientation. That particular basis is arbitrary indeed, for why is it that convicted felons have a protected right to marry, yet law abiding homosexuals are denied a legal recognition of their marriage?

**IV. THE CURRENT PROHIBITION OF SAME-SEX MARRIAGE**

With the possible exception of Massachusetts, the prohibition of same-sex marriage is a legal certainty in the United States. Those in favor of continuing this prohibition have put much effort into their cause; the enactment of the Defense of Marriage Act ("DOMA") is a pertinent

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25 *Griswold*, 381 U.S. at 486.

26 See *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that a statute prohibiting marriage to individuals who are delinquent in their child support payments violates their right to marry).

27 See *Turner v. Saftley*, 482 U.S. 78 (1987) (ruling that inmate marriage prohibition was "not reasonably related" to any state interest).

28 *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is . . . fundamental to our very existence and survival.").

29 U.S. CONST. amend. XIV, § 1.

30 *Loving*, 388 U.S. at 12.

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example. The DOMA not only codified the federal definition of marriage as the “legal union between one man and one woman as husband and wife,” but it also sought to give the states authority not to recognize same-sex marriages, or other similar unions, even when valid in other jurisdictions that do permit them. While this latter provision raises many unresolved constitutional issues regarding the Full Faith and Credit Clause, it has already made a significant impact in the fight against same-sex marriage. In fact, a large majority of states have adopted “junior DOMAs” purporting to deny recognition of same-sex unions from other jurisdictions.

Certain jurisdictions, such as Vermont, have tried to appease same-sex couples as a means of continuing the ban on same-sex marriage. Civil unions are an example of this movement. They confer upon same-sex couples many, if not all, of the benefits associated with marriage. However, same-sex couples are still denied the enjoyment of a right that is available to heterosexual couples. While civil unions are a step in the right direction, they still permit an inference of inferiority based on sexual orientation. These civil unions “continue[] to relegate same-sex couples to a different status . . . . The history of our nation has demonstrated that separate is seldom, if ever, equal.”

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34 28 U.S.C. § 1738C (2004). This section is arguably the most controversial of the DOMA. Many commentators suggest that the DOMA may in fact be invalid due to its inconsistencies with the Full Faith and Credit Clause. See e.g., Mark Strasser, Legally Wed: Same Sex Marriage and the Constitution 127-58 (1997). The actual statutory language states:

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

28 U.S.C. § 1738C.

35 U.S. CONST. art. IV, § 1.

36 See, e.g., K.R.S. § 402.005 (Michie 1999) (“one man, one woman” definition of marriage); § 402.020 (prohibition of same-sex marriages); § 402.040(2) (“marriage between members of the same sex is against Kentucky public policy”); §402.045(1)–(2) (“A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky” and “[a]ny rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts.”).

37 Opinions of the Supreme Court Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004).
In addition to DOMAs and the recognition of civil unions, the prevention of the legal recognition of same-sex marriage can be seen elsewhere. Recently, constitutional amendments became a popular means of prohibiting same-sex marriage. In the general election of 2004, voters in eleven states approved constitutional amendments banning same-sex marriages. While this is certainly significant at a state level, it is arguably more significant in a federal sense because it adds to the preexisting pressures on Congress for an analogous federal constitutional amendment. President George W. Bush has even lent his support to such an amendment, stating that “[m]arriage is a sacred institution between a man and a woman. If activist judges insist on redefining marriage by court order, the only alternative will be the constitutional process. We must do what is legally necessary to defend the sanctity of marriage.”

A federal amendment would surely eliminate any constitutional arguments for the recognition of same-sex marriage. Such a measure would be drastic and damaging as a policy matter. When the trend has been to make efforts to reduce discrimination against gays and lesbians, an amendment such as this would not only curb such efforts, it may even perpetuate discrimination.

V. THE RECOGNITION OF SAME-SEX MARRIAGE AS A FUNDAMENTAL RIGHT

A. What Does It Mean to Be “Fundamental”?

In classifying marriage as a fundamental right, one must be careful not to overstate the extent of that right. Simply put, the current legal status in the United States suggests that marriage is not a fundamental right for everyone. It is true that there are a number of restrictions on marriage besides the prohibition of same-sex marriage—for example, there are prohibitions on incestuous marriages and marriages between children and adults. However, the prohibition of same-sex marriage is of particular curiosity because the sole ground for denying legal

38 See, e.g., H.J. Res. 56, 108th Cong. (2003). This proposal seeks to define marriage in the United States as only between one man and one woman.
39 Rose Arce, Massachusetts Court Upholds Same-Sex Marriage, CNN (Feb. 4, 2004), available at http://www.cnn.com/2004/LAW/02/04/gay.marriage/index.html (quoting President George W. Bush as he responded to the Supreme Judicial Court of Massachusetts’s rejection of anything less than the right to marriage for same-sex individuals).
40 See, e.g., K.R.S. § 402.010 (prohibiting incestuous marriages); § 402.020(f) (prohibiting marriage including an individual under the age of 16).
recognition of a same-sex marriage is the sexual orientation of the individuals. In essence, society, state legislatures, and judiciaries specifically are able to "pick and choose the citizens [to whom will be granted] the fundamental right to marry."

Much of the fight over the recognition of same-sex marriage, or any right for that matter, as a fundamental right revolves around the meaning of the word "fundamental." Such a classification is crucial because the "Supreme Court has held that some liberties are so important that they are deemed to be 'fundamental rights' and that generally the government cannot infringe them unless strict scrutiny is met; that is, the government's action must be necessary to achieve a compelling purpose." It is true that fundamental rights enjoy certain protections under the Due Process Clause, but that reveals nothing about how fundamental rights are established.

B. Classifying a Right As "Fundamental"

The process of classifying a right that has not previously been considered "fundamental" is not clearly defined. It is, however, typically an uphill battle. The only certainty in these cases is that the Court must undertake an objective analysis of the right, arising from its obligation to "define the liberty of all, [and] not to mandate its own moral code."

The determination of a right as "fundamental" is, in some respects, as much a constitutional interpretation question as it is a substantive due process question. Interpretation is critical due to the fact that "fundamental rights," in the vast majority of cases, are not mentioned anywhere in the text of the Constitution. This notion of unenumerated fundamental rights has sparked a sharp division between those who insist that the Court must preserve the original intent of the Framers in interpreting the Constitution, and those who suggest that the Court should not be restrained by this original intent. Those that argue the latter (and this would almost necessarily include proponents of same-sex marriage) insist that the "meaning and application of constitutional

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42 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 695 (2001).
44 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 765 (2d ed. 2002) ("The constitutional interpretation debate ... has been primarily about how the Court should decide what rights are fundamental ... ").
45 Id. at 17-19. (discussing the differences between "originalists" and "non-originalists").
provisions should evolve by interpretation ..., [allowing] constitutional interpretation to include norms and values not expressly intended by the framers. To say that the current Court does not consider original intent to some extent would be inaccurate. Indeed, how both "history and tradition" have treated a specific right dramatically influences many current members of the Court. Yet, the inquiry does not stop there.

Neither original intent nor historical treatments of a right are conclusive as to that right's ultimate fundamentality. The Court's decision in Lawrence v. Texas to include homosexual activity as a fundamentally privacy right exemplifies this very point. In writing for the majority, Justice Kennedy noted that laws specifically targeting same-sex individuals did not arise until the twentieth century. The implication was that, had a historical prohibition existed, as there has been with same-sex marriage, there would be little weight left to an argument for homosexual sodomy as a fundamental right. Kennedy arguably overstates the significance of his point. Though homosexuals were not specifically targeted until the twentieth century, there were prohibitions against consensual sodomy, both between heterosexuals and homosexuals, dating back to the sixteenth century. Only twenty years ago the Supreme Court decided Bowers v. Hardwick, which upheld a similar ban on consensual sodomy in Georgia. Yet, the Court overturned that precedent in Lawrence.

A multitude of factors weigh upon the Court in deciding which rights are fundamental, but it cannot be said with certainty which factors will be more persuasive than the others. Rather, it is understood that original intent, history, and tradition may all play a role in the Court's decision making, but the relative weight will vary as each "new" right is presented to the Court.

46 Id. at 18. (footnote omitted).
47 Id. at 765.
48 Proof that the Supreme Court does not always bind itself to the original intent of the Framers is apparent in its handling of capital punishment under the Eighth Amendment. The Court has consistently stressed that "[t]he [8th] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Atkins v. Virginia, 536 U.S. 304, 311–312 (2002) (emphasis added) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
49 Lawrence v. Texas, 539 U.S. 558, 570 (2003) ("It was not until the 1970's that any state singled out same-sex relations for criminal prosecution . . .").
50 Id. at 568.
C. Same-Sex Marriage As a Fundamental Right

The argument for the legal recognition of same-sex marriage requires a clear understanding of the issues. Marriage is, technically speaking, already a fundamental right. The same-sex marriage argument should, ideally, not be one in favor of recognizing a new right, but rather one in favor of extending a preexisting right. "The issue is not ‘[w]hy gay marriage?’ but is instead ‘[w]hy not gay marriage?’" Nonetheless, proponents of same-sex marriage will undoubtedly endure many of the same obstacles that faced supporters of previously unrecognized rights. In addition to procedural issues regarding how the argument in support of same-sex marriage should be framed, substantive issues abound.

1. Original Intent

Original intent presents one of the most substantial obstacles for proponents of same-sex marriage. Same-sex marriage was certainly not recognized at the time the Fifth and Fourteenth Amendment were ratified. Furthermore, both history and tradition seem to side with the opponents of same-sex marriage. However, "[h]istory and tradition are the starting point but not in all cases the ending point of the . . . inquiry." If it were the ending point, then the Court’s recognition that the Equal Protection Clause protects women from gender discrimination is also incorrect. To demonstrate, the Fourteenth Amendment was largely, if not solely, enacted to protect former slaves from racial discrimination. However, this did not prevent the Court in Craig v. Boren, a case involving gender discrimination against males, from explicitly applying a more stringent standard to gender-based discrimination by the government, using the Fourteenth Amendment as its vehicle. The Court cannot, and does not, hide behind a "static"

52 ESKRIDGE, supra note 41, at 128.
54 U.S. CONST. amend. XIV, § 1. The Equal Protection Clause is mentioned purely to demonstrate a point. Though the Equal Protection Clause is also a potential ground for arguing the validity of same-sex marriage, this note focuses primarily on the Due Process Clause.
55 CHEMERINSKY, supra note 42, at 13 n.46 (citing The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872) (stating that the equal protection clause was meant only to protect racial minorities and never would be extended beyond)).
56 Craig v. Boren, 429 U.S. 190, 197–98 (1977) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").
interpretation of the Constitution\textsuperscript{57} and this has allowed the Constitution to evolve over its existence through judicial interpretation.\textsuperscript{58} This evolution should, in theory, mirror societal and moral evolution. To borrow language from Justice Warren, the Constitution "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{59}

Can it candidly be said that a society that denies two individuals the right to marry based upon their lifestyle choice or their sexual preference is a maturing society that exhibits decency to all its citizens? The only logical answer seems to be in the negative. There are a number of reasons for such an answer, but one of the most persuasive is the noticeable trend toward legalizing same-sex marriage in foreign jurisdictions. For instance, both Belgium\textsuperscript{60} and Canada\textsuperscript{61} have recognized same-sex marriages. Similarly, significant domestic advancements have also occurred. Courts in Alaska,\textsuperscript{62} Hawaii,\textsuperscript{63} Massachusetts,\textsuperscript{64} and Vermont\textsuperscript{65} have all held that a prohibition against same-sex marriage violated their respective state constitutions. To get around these judicial decisions, both Hawaii\textsuperscript{66} and Alaska\textsuperscript{67} amended their constitutions to

\begin{itemize}
\item \textsuperscript{57} Trop v. Dulles, 365 U.S. 86, 101 (1958) (stating that the scope of the Eighth Amendment is not static).
\item \textsuperscript{58} Even judicial review, the very doctrine granting the Supreme Court the power to review and invalidate legislation that violates the Constitution, was a product of the Supreme Court's interpretation. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803).
\item \textsuperscript{59} Trop, 365 U.S. at 101 (discussing the meaning of the Eighth Amendment).
\item \textsuperscript{61} See EGALE Canada, Inc. v. Canada, 2003 D.L.R. Lexis 105, **17 (B.C. Ct. App. 2003). For an extended listing of relevant cases, and the proposed act to legalize same-sex marriage, see Rutgers Law Library-Newark, Same-Sex Marriage: A Selected Bibliography of the Legal Literature, at http://law-library.rutgers.edu/SSM.html.
\item \textsuperscript{63} See Baehr v. Lewin, 852 P.2d 44, 57, 67 (Haw. 1993) (holding that there is no fundamental right to same-sex marriage, but its denial violates Equal Protection).
\item \textsuperscript{64} See Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) ("We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.").
\item \textsuperscript{65} See Baker v. State, 744 A.2d 864, 886 (Vt. 1999) ("[W]e find a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples.").
\item \textsuperscript{66} See HAW. CONST. art. I, § 23.
\end{itemize}
include a more "traditional" definition of marriage. While the Vermont legislature enacted a statute similarly defining marriage as between one man and one woman, it did permit same-sex civil unions which grant many of the same legal benefits as marriage. In addition, there have lately been substantial efforts made to grant marriage licenses to same-sex couples. These efforts have not been focused in one locale; they have occurred in California, New Mexico, New York, Massachusetts, Oregon, and Washington.

These developments, both foreign and domestic, are significant in that they show that the societal perception of same-sex couples is changing. While the majority of the public has generally remained hostile to same-sex marriages, as evidenced by the recent amendments passed in eleven states, the highest courts in four states have acknowledged the constitutional difficulty with denying same-sex marriages. These state court decisions, as well as the efforts of same-sex couples to obtain marriage licenses, likely will not be ignored by the Supreme Court. It is guaranteed that the fiercest opponents of same-sex marriage have surely taken notice.

Though the state constitutions of Alaska, Hawaii, Massachusetts, and Vermont are not identical to the United States Constitution, nor is the Supreme Court bound by the decision of any state court, these state court opinions may be good indicators of how the Supreme Court would respond if these issues were ever brought before it.

2. The "Deeply Rooted" Factor

Constitutional interpretation of substantive due process rights is, in a generic sense, under a noticeable amount of tension. This tension primarily arises from the Supreme Court's attempts to preserve the

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67 See ALASKA CONST. art. I, § 25.
69 See §§ 1202-1207.
70 Alan Cooperman & Dana Milbank, Gay Marriages Proliferate, as Do Arguments; Constitutional Amendment Runs Into Doubts in Senate, WASH. POST, Mar. 4, 2004, at A3.
71 Opponents have acknowledged that the legal recognition of same-sex marriage is nearer now than it has ever been. In response, websites arguing against same-sex marriage have popped up at an astounding pace. One website in particular, www.onemanonewoman.com, is devoted to attracting signatures for a petition to amend the Constitution to prevent same-sex marriage. See LIBERTY ALLIANCE, PETITION OF SUPPORT FOR THE FEDERAL MARRIAGE ACT, available at http://www.onemanonewoman.com (last visited Feb. 23, 2005).
72 In the meantime, tactics similar to those of the legislatures in Hawaii and Alaska (constitutionally redefining marriage) are currently being employed by some members of Congress.
original intent of the Framers while at the same time remaining cognizant of the evolving social and moral norms. Despite such tension, some principles have surfaced. Generally, "the Court has . . . observed that the [Substantive Due Process] Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." Though same-sex marriage will lack such deep roots, it is important to reiterate that history and tradition is "not in all cases the ending point of the substantive due process inquiry." Even so, the lack of deep roots can, in part, be explained by the fact that "lesbians, bisexuals, and gays have historically been subjected to discrimination." This history of discrimination had the effect of preventing any notion of same-sex marriage from entering the "consciences of the people." However, for those that suggest fundamental rights still must be deeply rooted in history and tradition, they need not look any further than cases such as Loving v. Virginia and Roe v. Wade to support the assertion that even rights lacking deep roots have still been held to be fundamental.

The recognition of the a woman's right to have an abortion is of particular interest as it illustrates this tension between evolving social norms and the original intent of the Framers. The first criminal ban on abortion in the United States was enacted in Connecticut in 1821. Likewise, the Texas anti-abortion statute considered in Roe v. Wade had originally been enacted in 1854 and remained in effect for well over one hundred years before it was repealed by the Court in 1973. Yet, even though abortion lacked deep roots, the Court still opined "that the right of privacy, however based, [was] broad enough to cover the abortion decision." This extension of the right of privacy indicated that the

75 STRASSER, supra note 34, at 68 (citation omitted). For a documentary discussing the history of discrimination targeting lesbians and gay men, see generally JONATHAN KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. (Thomas Y. Crowell Co. 1976).
76 STRASSER, supra note 75, at 67–68.
78 Roe v. Wade, 410 U.S. 113 (1973) (recognizing a woman's right to terminate a pregnancy in limited circumstances).
79 Id. at 138.
80 Id. at 119.
81 Id. at 155.
Court’s interpretation of the Due Process Clause took account evolving societal standards and practices. Not only did abortion lack deep roots, but it was extremely controversial at the time of *Roe v. Wade*. These same features of the abortion debate are equally shared with the arguments regarding same-sex marriage. One important feature of this comparison is that both abortion and same-sex marriage involve an extension of an already-established fundamental right.82

3. Extension of the Existing Right to Marry

Proponents of same-sex marriage are not faced with the task of persuading the Court to recognize a new right; they are merely arguing for the Court to extend an existing, recognized right. Incidentally, the same-sex relationship context is not the first time that a fundamental right has been denied to homosexuals, yet guaranteed to others. In many respects, these were the circumstances involved in *Lawrence*. Prior to *Lawrence*, it seemed that the Supreme Court was in fact willing to treat homosexuals differently regarding certain fundamental privacy rights. The decision that *Lawrence* overruled, *Bowers v. Hardwick*, indicated this very notion.83 The 1985 *Bowers* majority upheld a Georgia statute criminalizing consensual sodomy. In so doing, the Court expressed its unwillingness to announce that the right to engage in homosexual sodomy was a fundamental right.84 While on its face the law targeted all forms of sodomy, both between heterosexuals and homosexuals, the Court’s opinion demonstrated that the statute in question was directed primarily at homosexuals. In fact, the basis for the majority’s refusal relied on “[p]roscriptions against that conduct [having] ancient roots,”85 and that there was “[n]o connection between family, marriage, or procreation . . . and homosexual activity.”86 This language suggests that homosexuals should not be permitted to enjoy certain rights because of historical proscription, and because such “sexual deviance” serves no “legitimate” end, such as procreation. One must remember that not all heterosexual sexual activity is geared toward procreation, yet “traditional” marriage is protected as a fundamental right. Why then is

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82 Clearly, when dealing with same-sex marriage the right to marry must be extended. With abortion, the Court in *Roe v. Wade* extended the right to privacy to encompass a woman’s right to an abortion. See id. at 115 (“[T]he right of privacy . . . is broad enough to cover the abortion decision.”).
83 *Bowers*, 478 U.S. at 186.
84 Id. at 192.
85 Id. at 192.
86 Id. at 191 (emphasis added).
homosexuality singled out as distinct? Essentially, the only real answer is that not all citizens are entitled to enjoy certain private rights enjoyed by the masses. There was, as one commentator put it, a "homosexuality exception" to certain privacy rights that were enjoyed by heterosexuals.87

The Lawrence decision, handed down in November 2003, has seemingly abolished any exception as to sexual privacy rights that Bowers may have created.88 Like Bowers, the Texas statute held unconstitutional in Lawrence criminalized consensual sodomy among adults; but unlike Bowers, the Texas statute explicitly targeted only sodomy between same-sex individuals.89 The fact that the Texas statute in Lawrence only targeted homosexuals tends to strengthen the argument that the Court is becoming more and more receptive to challenges made to laws that are solely restrictive of the rights of homosexuals. To be sure, Lawrence does not stand for the proposition that homosexuals have the right to marry. In fact, in Justice Kennedy's own words, "[this ruling] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."90 However, in some respects, laws forbidding marriage among same-sex couples are similar to the Texas anti-sodomy statute. The main similarity is that the only triggering element for the application of these statutes is that the couple is comprised of two individuals of the same sex.

While some similarities exist between the Texas anti-sodomy statute and statutory prohibitions of same-sex marriage, there are also obvious differences.91 The Texas statute carried with it criminal penalties for engaging in same-sex sodomy, whereas statutes prohibiting same-sex marriage do not. Nevertheless, this difference lies in mere form rather than in substance. Penalties do not always have to be criminal in nature. Indeed, same-sex marriage prohibitions have a very real penalty; they deny the tangible and intangible benefits of the marriage relationship. Surely this difference in penalties would not prevent the application of Lawrence to challenges respecting prohibitions of same-sex marriage.

87 ESKRIDGE, supra note 41, at 134.
88 Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent.").
89 TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."); repealed by Lawrence, 539 U.S. at 578.
90 Lawrence, 539 U.S. at 578.
91 The phrase "prohibitions of same-sex marriage" is a general one. It incorporates both explicit prohibitions as well as statutes that explicitly define marriage as a union between one man and one woman. The reason for such an incorporation is that these restrictive definitions have the same effect of the explicit prohibitions in preventing same-sex marriage.
4. The Uncertain Effects of Removing the "Homosexuality Exception"

If one reads Lawrence to eliminate the "homosexuality exception" to constitutionally protected privacy rights, what is there to stop the Court from applying cases such as Loving v. Virginia\(^9\) to same-sex marriage? The same arbitrary triggering elements were present in the miscegenation statutes that forbade interracial marriage. Those statutes, which were rendered unconstitutional by Loving, were triggered simply due to the fact that a husband and wife happened to have different skin colors. Loving was a reflection of the time in which the case was decided. It also reflected that the interpretation of the Constitution's guarantee of substantive due process was not static. The prohibitions of mixed-race marriages were rooted in a history and a tradition saturated with racist overtones. Yet, despite such history and tradition, Loving ensured that members of different races could marry with full assurance that they would enjoy the many benefits and obligations enjoyed by other married couples.

Even the institution of slavery was upheld at one point in the early history of this country, only to be vehemently rejected years later.\(^9\) While the comparison between the prohibition of same-sex marriage and slavery has many obvious differences, the process of validation was the same for both. As one commentator suggests, the prohibition of same-sex marriage is itself a form of "moral slavery."\(^9\) "Moral slavery condemns a structural injustice marked by two interlinked features: first, its abridgement of the basic human rights of a class of persons, and second, the rationalization of such abridgement on inadequate grounds reflecting a history of unjust treatment (involving the dehumanization of the group)."\(^9\) Like slavery at the time of its abolition, same-sex couples are currently denied the right to marry for reasons rooted in a history of unjust and unequal treatment. In fact, "several of the familiar ways in which the constitutional evils of racism and sexism were constructed (namely, the distortion of the public/private distinction, segregation, anti-miscegenation) reasonably inform understanding of the constitutional evil of homophobia."\(^9\) This construction of the "evil of homophobia" is something that the Court in Lawrence took note of in

\(^9\) See Scott v. Stanford, 60 U.S. 393 (1857) (the infamous "Dred Scott" decision), superseded by U.S. Const. amends. XIII & XIV.
\(^9\) Id.
\(^9\) Id. at 65.
discussing the history behind the *Bowers* decision. The opinion states that:

the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family . . . . The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."  

At some point in history, society deemed these individuals inferior or evil, and it is against that backdrop that we maintain the current prohibition.

There are notable differences between the argument against laws targeting homosexual sodomy and same-sex marriage. One of those differences can be found in the text of Justice Kennedy's majority opinion in *Lawrence*. He noted that "[t]he 25 States with laws prohibiting the conduct referenced in *Bowers* are reduced now to 13, of which 4 enforce their laws only against homosexual conduct . . . [and] there is a pattern of nonenforcement" in those states. This same societal trend away from "criminalizing" homosexual activity, or at least activity with which certain homosexuals are associated, cannot be seen in regard to same sex-marriage. Yet only Massachusetts has acknowledged that same-sex couples cannot be denied a legal marriage. While political figures, such as Mayor Gavin Newsom of San Francisco, have acknowledged as much, no other jurisdictions have reached this conclusion. Despite this fact a trend is forming, such that several state courts may be inclined to hear challenges to the prohibition of same-sex marriage primarily due to the steadfast urging of same-sex marriage advocates.

Whether the Supreme Court chooses to extend *Lawrence* to same-sex marriage remains to be seen. However, *Lawrence* is still in its infancy, and given the many legal developments in the United States one can only assume that a case concerning same-sex marriage could reach

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98 *Id.* at 559.
the country’s highest court sooner rather than later. It is important to recognize that a Supreme Court recognition of same-sex marriage as a fundamental right does not necessarily rest on an extension of Lawrence. While Lawrence does specifically deal with same-sex individuals, it likely will not dictate the Court’s opinion. Rather, the Court will, and must, consider all areas of its substantive due process jurisprudence. It is in that analysis that cases such as Loving v. Virginia\textsuperscript{101} and Roe v. Wade\textsuperscript{102} must be considered, and both of these cases bode well for advocates of same-sex marriage.

VI. CAN A STATE JUSTIFY A BAN ON SAME-SEX MARRIAGE?

Convincing the Supreme Court that a same-sex marriage should be considered as fundamental as marriage between heterosexual persons is only the beginning. Technically speaking, even fundamental constitutional rights can be infringed upon by state laws if supported by a compelling governmental interest. “When a statutory classification 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.”\textsuperscript{103}

There is little doubt that states have “significantly interfered” with same-sex individuals’ right to marry. Following the lead of the Defense of Marriage Act,\textsuperscript{104} several states have, through their respective legislatures, defined marriage as the union between one man and one woman.\textsuperscript{105} Some states, Kentucky among them, have gone even further and enacted statutes that impose an outright ban on same-sex marriages.\textsuperscript{106} Such significant interference may still be constitutionally valid if the state is able to provide the proper justification. There are a number of possible justifications a state may offer to defend denying same-sex individuals the right to marry.\textsuperscript{107} While justifications such as “preserving the sanctity of marriage” are not likely to hold up under their own weight, other justifications are not so easily overcome.

\begin{footnotes}
\item[101] Loving v. Virginia, 388 U.S. 1 (1967).
\item[105] See, e.g., K.R.S. § 402.005 (Banks-Baldwin 1998) (“The word ‘marriage’ means only a legal union between one man and one woman . . . .”).
\item[106] § 402.020.
\item[107] See ESKRIDGE, supra note 41, at 137–43.
\end{footnotes}
A. Interest in Fostering Procreation

The first possible justification could be the state’s interest in fostering procreation. As one commentator stated, “the right to marriage is determined not solely by commitments arising from love as such, but by ‘the natural teleology of the body.’”\(^{108}\) However, this justification suffers multiple flaws, and is not a “publicly reasonable basis for law.”\(^{109}\)

The most important and obvious flaw is that cases such as *Roe v. Wade*\(^{110}\) and even *Griswold v. Connecticut*,\(^{111}\) wherein the Supreme Court invalidated an anti-contraception law, stand for the proposition that the procreation justification will not necessarily salvage a law that infringes upon the right of intimate privacy. More directly, language from the majority decision in *Lawrence v. Texas* seems completely to reject the procreation argument. The pertinent part of the opinion reads: “individual decisions by married persons, concerning the intimacies of their physical relationship, *even when not intended to produce offspring*, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.”\(^{112}\)

Secondly, the procreation rationale is both too narrow and under-inclusive. It is narrow in that “it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”\(^{113}\) Furthermore, laws based upon such a justification are inherently under-inclusive since they do not reach all individuals who are similarly situated. Specifically speaking, should impotent heterosexual, postmenopausal women, and even fertile heterosexual couples with no desire to procreate, be denied a legal marriage?\(^{114}\) If the only justification is procreation, the logical answer must certainly be yes. Put another way, “[i]f the natural teleology of the body made any sense as a basis for public law, such childlessness [*of heterosexual couples*] as much violates the natural teleology of the body as that of a homosexual couple.”\(^{115}\)

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109 Id. at 161.


113 Lawrence, 539 U.S. at 567.

114 ESKRIDGE, supra note 41, at 96.

115 RICHARDS, supra note 94, at 161.
B. Interest in Protecting Children

A second commonly asserted state justification is the suitability of a same-sex couple to raise children. The main premise of the justification is that “a child is best parented by its biological parents living in a single household.” This justification is inadequate and overly broad. It essentially assumes that, in any situation, the biological parents are inherently better equipped to raise their child than, for instance, an adopting couple. Such an argument undermines the very purpose of adoption: to get the child into the best hands possible. In addition, studies comparing children raised in same-sex households with children raised in households consisting of one biological parent conclude that a higher percentage of children in the latter households have psychiatric troubles. The only real risk associated with children in a same-sex household is the way the same-sex couple chooses to raise the child in light of “societal homophobia.” In essence, the risk is that a child could potentially be shielded from many experiences and interactions that are thought to be “essential” to his or her development, all because of the potential negative reception of the fact that his or her parents are gay. Thus, one commentator suggests that “legal same-sex marriage would help legitimize the couples’ interaction with the world, especially where children are concerned.”

C. Interest in Maintaining the Status Quo

A third justification resonates with simplicity, and it likely underlying many laws forbidding same-sex marriage. It is best described by one commentator as a “definitional objection.” Simply put, marriage has always been the union of man and woman, and any other definition is simply “oxymoronic.” While seemingly a weak argument,

\[116\] ESKRIDGE, supra note 41, at 139.
\[117\] Id. at 140 (“there are plenty of bad biological parents and good adoptive or stepparents”).
\[118\] Id. at 139–40. The studies, conducted by Susan Golombok, compared twenty-seven families headed by lesbians with twenty-seven families headed by single heterosexual mothers. “The researchers found no differences between the children in the two groups along most dimensions, including sex role behavior, gender security, and the ability to form and maintain peer relationships.” Id.
\[119\] Mark Townsend, Mental Health Issues and Same-Sex Marriage, in On The Road To Same Sex-Sex Marriage 89, 94 (Robert P. Cabaj & David W. Purcell eds., 1998).
\[120\] Id. at 95.
\[121\] ESKRIDGE, supra note 41, at 89.
\[122\] Id.
the Kentucky Court of Appeals in *Jones v. Hallahan* refused to acknowledge a constitutional claim for recognition of a same-sex marriage for this very reason. The court stated that “marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary.” Not only is such reasoning suspect and self-perpetuating, but history tells us that this type of reasoning, absent something else, will not be treated favorably by the Court. The best proof can be found in cases such as *Loving v. Virginia*, where the Court reversed the “definitional” prohibition of mixed-race marriages. “For most of American history different-race marriages were not acceptable, but that was no argument to perpetuate this discrimination once our society rejected the racist assumptions of that exclusion.” A justification should not become compelling simply by the passage of time; rather it should be anchored by rational underpinnings of its own.

Of course, likely before this transition can occur, our society must reject the discriminatory assumptions that are the basis of the exclusion of same-sex couples from marriage. A poll conducted in January 2004 suggests that the majority of Americans still oppose same-sex marriage, yet developments in cases such as *Lawrence* and *Goodridge* suggest that the legal treatment of homosexuals may be abandoning such opposition.

### D. Interest in Preventing “Social Disorder”

One final commonly offered state justification is that the recognition of same-sex marriage could lead to a “massive disruption of the current social order” and could lead to other “social ills.” In fact, Justice Scalia relied on this very justification in writing his dissent in *Lawrence v. Texas*. Scalia expressed concern that the majority opinion in *Lawrence* would open the door to invalidating “[s]tate laws against bigamy[,] . . . adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.” Scalia reasoned that all of these acts are “traditional

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125 ESKRIDGE, supra note 41, at 91.
126 William M. Welch, *Kerry May Face GOP Attacks on Gay Marriage*, USA TODAY, Feb. 6, 2004, at 2A (“A USA TODAY/CNN/Gallup Poll . . . found that 53% of Americans oppose a law allowing gay couples to marry.”).
129 Lawrence, 539 U.S. at 590 (Scalia, J. dissenting).
ELIMINATING THE EXCEPTION?

and that it would be impossible to make a distinction between homosexuality and those offenses. What is most disturbing about Scalia’s dissent is not really the fact that he makes such “apocalyptic predictions”, rather, it is that he views homosexuality as a moral offense on the same level as bestiality and obscenity.

The “social disorder” justification is primarily flawed due to the fact that homosexuality is treated as an offense. Such a concept is eerily reminiscent of the United States eugenics movement that targeted “‘degenerate’ offenders” like homosexuals for sterilization. Homosexuality is not an illness, and yet Scalia and others that oppose Lawrence and same-sex marriage seek to treat it as such. The extension of marriage to include same-sex relationships is not going to inject a disease into society. If anything, it will raise awareness and stress equality, much like desegregation and the civil rights movement emphasized the plight of African Americans.

The opposing argument that is offered most often is that the Court cannot recognize same-sex marriage without recognizing practices like polygamy. This “slippery slope” argument fails to recognize the difference in the state justifications that have been offered for banning same-sex marriage and those that can be offered for banning polygamy and incest. Specifically, there are compelling interests that can be offered to sustain a prohibition of polygamy that cannot be offered with regard to same-sex marriages. Many of the laws applicable to a married couple are designed for only two individuals. The state has an administrative interest in preserving such a body of law. For instance, imagine a male with multiple wives who becomes incapacitated due to a violent car accident. Which of the spouses is to have the decision-making responsibility? The state has a compelling interest in such instances to have quick decisions that are not marred by disagreements and infighting among the concerned wives. Furthermore, “there would . . . be rivalry

130 Id.
131 Id.
132 Gomes, supra note 128, at 19.
133 Peter Kwan, Querying a Queer Spain Under Franco, 5 Mich. J. Race & L. 989, 994 n.16 (2000). For a discussion of other “treatments” that were used to “cure” homosexuality, see Katz, supra note 75, at 197–205.
134 See Kwan, supra note 133, at 993 n.16 (“It was not until 1973 that the American Psychiatric Association finally removed homosexuality as a mental illness from its Diagnostic and Statistical Manual of Psychiatric Disorders.”).
135 See generally Eskridge, supra note 41, at 144–52 (describing the “slippery slope” argument for recognizing same-sex marriages).
136 Id. at 144.
137 See id. at 149.
between . . . [spouses] . . . [for] spousal benefits." Consider the difficulties in administering divorce proceedings and monitoring support payments. Arguably, the most drastic effect of allowing polygamous marriages is that the entire inheritance scheme of the states would have to be amended to take multiple spouses into account.

Assuming that the Supreme Court were to recognize same-sex marriage as a protected fundamental right, it would be inconsistent with substantive due process jurisprudence to permit bans on same-sex marriage due to the absence of compelling governmental justifications. Justifications based on the lack of procreation and childrearing capabilities of same-sex individuals, the two most commonly asserted justifications, are both archaic and juvenile. Furthermore, actual case law, *Roe v. Wade*, supports the notion that procreation is not a compelling justification. In the end, the real fight is in convincing the Court to extend the existing fundamental right of marriage to same-sex couples. From there, a court may be unlikely to deny this right based on one of these common justifications.

VII. RECENT DEVELOPMENTS REGARDING SAME-SEX MARRIAGE

Since the decision was handed down in *Lawrence v. Texas*, there have been a number of developments that warrant discussion. While the specifics of these developments are outside the scope of this note, they are relevant to the legal arguments that have been made. The first major development is the Massachusetts Supreme Judicial Court's holding in *Goodridge v. Department of Public Health* that it was in violation of the Massachusetts Constitution to deny a same-sex couple a marriage license. Subsequent to its decision in *Goodridge*, the court refused a potential compromise that would extend to same-sex couples the right to civil unions. In an opinion addressed to the Massachusetts Senate holding that anything less than full marriage rights was unconstitutional, four justices stated that "the proposed [civil union] law by its express terms forbids same-sex couples [sic] entry into civil marriage, [which] continues to relegate same-sex couples to a different status . . . . The history of our nation has demonstrated that separate is seldom, if ever,

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138 Id.
140 *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) ("Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.").
141 Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2003).
equal." Currently, Massachusetts is the only state that allows same-sex couples to marry legally. However, the significance of this decision is that it also places the future of same-sex marriage in the hands of the state legislature. Like Hawaii and Vermont before it, Massachusetts could potentially amend its constitution to define marriage as only between heterosexual couples, thus putting an end to the state constitutional arguments in favor of the recognition of same-sex marriage. There will undoubtedly be fierce debate over this topic, but the ultimate outcome is clouded with uncertainty.

The second major development involved instances where marriage licenses were issued to same-sex couples in contravention of laws and policies banning same-sex marriage. San Francisco Mayor Gavin Newsom provided the best example of this activism. On February 10, 2004, Newsom addressed a letter to the San Francisco County Clerk requesting the clerk to issue marriage licenses to same-sex couples. The events that followed garnered national attention. Thousands of same-sex couples lined up in front of the courthouse seeking licenses. The California Supreme Court has since halted this practice until arguments can be heard on cases pending before it, but not before Mayor Newsom’s actions brought this issue before the national and international public. Though these instances mark a significant step for same-sex couples, statutory rights must be extended in order for there to be a lasting effect.

The significance of these developments is twofold. First, they mark an increased awareness and tolerance of same-sex couples by society. There have arguably been more advances in civil rights for same-sex couples in 2003 than in any year prior. Second, these developments have all occurred at the state and local level, which could potentially lead to issues regarding the junior DOMAs and the Full Faith and Credit Clause. If jurisdictions such as Massachusetts recognize same-sex marriages, can other jurisdictions refuse to recognize these marriages and remain in compliance with the demands of the Full Faith and Credit Clause? This is an issue that may in fact be played out in upcoming legal battles. However, there may be a simpler and more uniform solution available. While granting marriage licenses is a responsibility relegated to the states, infringement upon a fundamental right, such as marriage, is something that must be resolved by the Supreme Court.

142 Id. at 569.
143 Letter from Gavin Newsom to Nancy Alfaro, supra note 100.
144 See supra notes 32–39 and accompanying text.
VIII. CONCLUSION

Same-sex couples have never enjoyed the right to a legal marriage. Yet, the Supreme Court has held on a consistent basis that marriage is indeed a fundamental right protected under the Constitution. While the prohibition of same-sex marriage has in some respects been ingrained into the minds of the public, upon close examination there is little or no satisfactory rationale for maintaining such a prohibition. What was once considered a "homosexuality exception" to certain privacy rights is arguably no more under Lawrence v. Texas. It is true that the historical and traditional treatment of same-sex couples in this country does not support the recognition of the right for same-sex individuals to marry; however, it is inequitable to foreclose this issue on historical grounds, given that the prohibition rests on a history of unequal treatment. To rely exclusively on history would mean that cases such as Roe v. Wade, Loving v. Virginia, and even Lawrence v. Texas were incorrectly decided.

The ultimate significance that Lawrence will play in the fight to extend the right to marriage to same-sex couples is indeterminable. It is mere speculation to say that, under Lawrence, the Court has no alternative but to acknowledge same-sex marriage as a fundamental right. It has been almost two years since Lawrence was decided, and the proposition remains to be tested by the Supreme Court. However, with the developments across the United States and the ever increasing attention that same-sex couples are gathering domestically and abroad, it will be interesting to see just how long it will be until the Supreme Court is forced to render a decision on the matter. If and when that time does come, same-sex couples have a very persuasive argument to make. As a matter of precedent, the Court may have no other choice than to recognize same-sex marriage. As a matter of equality, it seems that the Court should have no other choice.

145 See supra notes 21–31 and accompanying text.