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THE NEWLY DISENFRANCHISED: A CONSTITUTIONAL RIGHT WITHHELD

Herman R. Brown, Jr.*

INTRODUCTION

Traditionally, Blacks and women have been denied their constitutional rights based strictly on race and sex. This brand of disenfranchisement has in many instances made these groups feel like "second class" citizens. Although recently, these groups have been able to share in some rights previously withheld, the "playing field of equality of rights" is still not level. For example, women still earn less pay for comparable work performed by their male counterparts. Blacks continue to be shut out of the system based strictly on race.

Just as women and Blacks have been denied their rights, other groups have suffered similar indignities. In recent years a new disenfranchised group has emerged demanding their equal rights also. This groups' disenfranchisement is not based on race, gender, national origin or any other immutable characteristic that has been deemed worthy of protection by the courts. This new group has been stigmatized and discriminated against based on their sexual orientation. Although this group has made gains in recent years, they contend that they not only want to be treated as "normal" people, but they too demand equal rights. Chief among these rights, they demand the right to marry. I contend that this right should be granted. After all, the laws should be applied in an even-handed way regardless of how people may personally feel about the issue of same-sex marriage.

We must not forget, for example, that no matter how repugnant the Ku Klux Klan might be to some, they have been afforded the right to obtain permits to march down public streets and exemplify their symbols of hate. It is therefore beyond any justifiable legal reasoning as to why this hate is sanctioned by the state, but the open love shared by gay couples is stifled by the state's denial of a marriage license, which symbolizes their love.

The courts have steeped this denial of rights in what is deemed tradition. However, what is deemed traditional is not dispositive on the issue of what is legally correct. Therefore, it is time for courts to become aware of the

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changing traditions in society. These new traditions embrace equal rights for all, including those whose lifestyle is different from the status quo. This difference encompasses a new type of couple. A duo far removed from our once beloved television couple, Ozzie & Harriet. A quick glance back at the “Ozzie & Harriet Age” will undoubtedly reveal that the 1950’s are now but a distant traditional memory.

The year was 1953. The TV show that everyone admired was Ozzie and Harriet,"¹ which depicted the perfect “nuclear” (American as apple pie) family. American families aspired to imitate this family. Ozzie went off to work while Harriet stayed home to attend to the elements of the perfect homemaker. Dinner was promptly served at a designated time and the conversation reflected on the daily activities of this perfect family. “It was seemingly a golden age of innocence and inconsequence.”² Forty years later however, this world began to disappear, and the very same television programming that we had come to admire, began to deal with issues of social conflict, social change and even moral dilemmas in the spheres of sexual behavior,³ and a very different type of family order.

As we embark upon the 21st century, there is a rapid emergence of another type of family, one that is far removed from Ozzie & Harriet. It is the type of family structure for which many in our society are ill-prepared to cope with. As recent as September 1991, a television show depicted a variation of this new type of family, when it showed the viewing audience a purported marriage ceremony between two men⁴. This indicates that television, like society, has moved far beyond Ozzie & Harriet.

Just as television has changed, so too has the social order. But, has it changed so much so that Ozzie can now marry Harry?

Societal progress has redefined the concept of family and thereby created a legal dilemma. To solve these dilemmas in the past, society has often turned to its legal arm, namely, the court system, to bring about some sort of harmonious resolution to whatever threatened the status quo. Once again society is faced with a legal dilemma, a challenge to the status quo, this challenge encompasses the rights of homosexuals to marry.

3. Id. at 81.
This paper will explore the concept of family and the reality of same-sex marriages. Additionally this paper will examine the question of whether marriage statutes (on their face or as applied) can withstand constitutional scrutiny under an equal protection analysis.

THE FAMILY

Before entering into a discussion of whether same-sex marriage should be allowed, it is necessary to discuss what constitutes a family. Since the concept of family is largely founded on the existence of a marriage, the definition of family is thus inextricably interrelated to the discussion of any court granting or allowing same-sex marriages.

The definition of family has generally included: "two or more persons related by birth, marriage, or adoption, who reside in the same household". Therefore, a mandatory step toward any courts willingness to recognize same-sex marriages would be for courts to recognize a changing social landscape and redefine how they look at the concept of family.

Family is a concept central to our society. Family values are extolled by politicians, families provide emotional and financial support, and family status determines many public and private benefits. Defining the family, then, is a critical and far-reaching act.

Family has been defined many ways, one (commonly used and generally accepted) definition is a follows: "[a] group of persons consisting of parents and children; father, mother and their children." This dictionary definition however, does not limit our inquiry, but begins our inquiry into what constitutes a family in the 1990s. Although courts have traditionally defined family by relationship of blood, marriage or adoption, they have reluctantly begun to recognize the dramatic changes in the nature of the American family that have taken effect over the last two decades. Indeed the traditional family is gradually becoming the exception, rather than the rule.

The traditional family with a breadwinner-husband and a homemaker-wife who live with their biological children is certainly an anomaly in America
Studies show that only "15% of the households in the United States now match the once-standard definition of a family as a working husband, homemaker wife, and children." Although existing families have diverse characteristics, the functional aspects of this basic social unit remain the same: the provision of love and support to its members. [However], social institutions and the law have not kept up with the changes in 'family' life. As a result, many groups which function as families are not recognized as such, and are denied benefits which society bestows upon families which resemble the traditional model, if only superficially.

Ultimately the solution requires the reevaluating of the basic assumptions that legal distinctions place on marriage and family status. This type of reevaluating by the courts has fortunately begun. The New York Court of Appeals, in Braschi v. U.S. Army, for example recognized this by expanding the definition of family beyond traditional boundaries. The Court recently construed a rent-control statute's use of the word "family" to include homosexual relationships: "[A] more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence."

In Braschi, Miguel Braschi and Leslie Blanchard were gay life partners. Although the two men could not make their relationship official, they lived as a couple for over 10 years. Their emotional bond was strong: they lived together in the same apartment, maintained a faithful and exclusive commitment to one another, and exchanged bracelets to symbolize their relationship. They linked their financial lives through joint bank accounts, credit cards and safe deposit boxes. On September 1986 Leslie Blanchard died.

The landlord initiated proceedings to evict Braschi as an illegal holdover tenant. To keep the apartment, Braschi sought a preliminary injunction barring his eviction. He claimed that section 2204.6(d) of the New York Rent Control

10. Treuthart, supra note 5.
12. Treuthart, supra note 5.
13. Id.
15. Id.
16. Id. at 206, 543 N.E.2d at 50, 544 N.Y.S.2d at 785.
17. Id.
regulations protected him from eviction since he was a member of the tenant of record’s surviving family. This provision prevented a landlord from evicting, upon the death of the tenant, “either the surviving spouses of the deceased tenant or some other member of the deceased tenant’s family who has been living with the tenant.”"  

While the lower court in Braschi insisted that the term “family” included only traditionally recognized family relationships, the appeals court abandoned such formalistic rules and fashioned a flexible standard designed to protect the fundamental elements of family. The court concluded its nontraditional analysis by remarking: “[t]he intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.” The Court went on to spell out the Braschi-Blanchard relationship using a four-factor test of what constituted a family: (1) the exclusivity and longevity of the relationship; (2) the level of emotional and financial(3) the manner in which the parties conducted their everyday lives and held themselves out to society; and (4) the reliance placed upon one another for daily family services. Applying this test to “the reality of the family life” of the pair, the court concluded that they were in fact members of a family.  

The Appellate Division in New York recently followed the Braschi decision in, East 10th Street Association v. Goldstein. In that case the Court interpreted the Rent Stabilization Code to protect gay partners as “family” members, even though the statute specifically defined family to include husband, wife, son, daughter and so forth." Other courts have also broken with the conventional definition of family. In Smith v. Organization of Foster Families, the Court rejected a strict traditional definition of family, instead recognizing that “the importance of the family relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association.” Additionally, the majority in Zablocki v. Reidhal, also recognized this trend toward a change in traditional definitions, and went as far as to say, recognition

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18. Id. at 206.
19. Id. at 212-213.
20. Id.
21. Id.
22. Id.
of changes in the nature of family life entails the evolution of the laws relating to marriage. 25

Similarly the legal definition of family was broadened in the case of Moore v. City of East Cleveland. The Supreme Court granted constitutional protection beyond nuclear families to extended families. 26 The aforementioned examples of the changing definitions of family illustrate how far some courts have moved beyond the traditional definitions of family. Yet there are some detractors. For example, commentators have explicitly stated that the Braschi holding should be limited to the rent-controlled housing context. However, Braschi’s spirit is broader. 27 To narrow the Braschi holding would be to misinterpret the broad holding in the case involving the courts formulation of what constitutes a family, regardless of the sex of the parties. Further, to narrow the Braschi holding to its limited facts would not recognize that the new definition of family is already having a widespread impact, 28 and may prove to be the first of many steps toward the full recognition of the rights of nontraditional families; chief among these rights should be the rights of homosexuals to marry.

Therefore, when the Braschi holding is viewed in light of the above argument, it is clear that it cannot be limited, but expanded to encompass the ever changing social and familial landscape.

By further outlining the Braschi holding, I would submit that the new definition of family includes; two lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence. 29 Despite the gradual emergence of new definitions of family, and the courts seemingly becoming more liberal on the issue of what constitutes a family, definitions of family are not dispositive of the inquiry of whether same-sex marriages should be allowed.

Thus, we now turn to other issues that seem to inform the courts decision of allowing same-sex marriages.

27. Esseks, supra note 9.
28. See e.g., Comment, The Legal Family-A Definitional Analysis, 13 J. Fam. L. 781 (1973-74).
THE CASE FOR SAME-SEX MARRIAGES:
AN OVERVIEW OF THE COURTS RESPONSE

The state has a compelling interest in fostering the traditional institution of marriage (whether based on self preservation, procreation or in nurturing and keeping alive the concept of marriage and family as a basic fabric of society [This institution] is as old and as fundamental as our entire civilization, which institution is deeply rooted and long established in firm and rich societal values.

The legislature has chosen to restrict the right to marry to people of the opposite sex, a classification which has a rational basis and which does not offend the equal protection right of the Fourteenth Amendment or due process.30

The above reasoning is echoed throughout the annals of judicial philosophy and reasoning and has served as a shield against allowing homosexual marriages. The literature surrounding this subject is replete with faulty reasoning and evasive techniques, and the watchword, "tradition," (rather than legal reasoning) has been the courts vehicle for denying same-sex marriages. Most state statutes do not expressly prohibit same-sex marriages.31 However, when courts have been faced with the issue they have generally found a way to deny such marriages, even though nontraditional definitions of family have emerged. Every court that has considered the question of same-sex marriage has taken the position that a lawful marriage can be entered into only by two persons of [the] opposite sex.32 To date no American state has legalized same-sex marriages.33

When same-sex couples have attempted to marry in states with statutory schemes that lack specific guidance, courts have resorted to using dictionary definitions and relying on common "custom and usage" to conclude that the union must be between members of opposite sexes.34

31. Ingram, A Constitutional Critique of Restrictions On The Right To Marry—Why Can't Fred Marry George—or Mary & Alice at the Same Time, 10 J. OF CONT. LAW. 33, 38 (1949).
32. Id.
33. Treuthart, supra note 5.
34. 2 H. Clark, The Law Of Domestic Relations In The United States 77 (1988).
Commentators on the subject have gone so far as to argue that "this prohibition has primarily ancient origins that can be found in the Bible." However, a historical overview of same-sex marriages (submitted by plaintiffs) in a recent case, Craig Robert Dean v. District of Columbia, seemingly suggests otherwise. Even if there were a rational justification for this restriction, it would appear that most of these restrictions no longer serve any legitimate state interest in modern society. Their continual existence is a result of the long standing presence in American society and law of a remarkable symbiosis between widely held sacred and secular views of marriage. It is time to review these restrictions and demand that some credible medical or moral evidence be shown before we uphold laws that shrink the area of choice in selecting a partner for marriage.

This type of forward thinking can be seen as early as 1897 when Justice Holmes wrote,

it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry the IV. It is still more revolting if the grounds which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Our current statutes and court decisions construing these statutes fall under the rubric of what Justice Holmes called, "blind imitation of the past."

Even a cursory review of some of the cases addressing this issue reveal nothing more than courts blindly holding on to tradition to justify their reasoning rather than applying applicable principles of law.

For example, in Washington State, the Court of Appeals in Singer v. Hara, strained to determine that no discrimination occurred on the basis of sex in denying two men the opportunity to marry. The court based its holding on its conclusion that the definition of marriage did not encompass the type of

36. See generally, Plaintiff's Mem. On The History of Same-Sex Marriage.
37. Ingram, supra note 31 at 39.
39. Id. at 365.
relationship plaintiffs desired to form. That marriage is "the legal union of one man and one woman" was implied from prior decisions in which the definition was deemed by the court in each case to be so obvious as not to require recitation, and from the rule of statutory construction that words of a statute must be used in their usual and ordinary sense.

Other jurisdictions have considered whether statutory or ceremonial marriage can be entered into by same-sex couples, and have uniformly held that it cannot be. One such case is the landmark decision in Baker v. Nelson, in which two males applied for a marriage license and the clerk declined to issue one solely on the ground that they were of the same sex. The Minnesota Supreme Court affirmed the trial court's order quashing a writ of mandamus, and directed that a marriage license not be issued. The court rejected the argument that the absence of express statutory prohibition against same-sex marriages showed a legislative intent to authorize such marriages. The court resorting to the same type of language that courts have often used, found that the statute used "marriage" as a term of common usage, meaning the state of union between persons of the opposite sex, and referred to dictionary definitions. Further in Anonymous v. Anonymous, the court held that a marriage ceremony between two males did not in fact or law create a marriage.

Similarly, Jones v. Hallahan, further exemplifies this phenomenon. The court held that: "while Kentucky statutes neither specifically prohibited nor authorized issuance of a marriage license to same-sex couples, the appellants were prevented from marrying by their own incapability of entering into a marriage as that term is defined.

In Pennsylvania, this trend continued in Desanto v. Barnsley. The Pennsylvania court reasoned: "As in other states, Pennsylvania's Marriage Law does not define marriage, nor do we have any case that specifically states that 'marriage.' either common law or statutory, is limited to two persons of opposite sex. Nevertheless, the inference that marriage is so limited is so strong."

42. Id. at 1191-92.
43. Id. at 1191, n.6.
44. Id.
46. Id. at 186.
Although the Pennsylvania case dealt with common law marriage as opposed to statutory marriage, the court made it clear that the result would be the same. The following quote from *In re Estate of Manfredi*, is illustrative of this point: "Marriage in Pennsylvania is a civil contract by which a man and a woman take each other for husband and wife."\(^{50}\)

In, *In the Matter of Estate of Cooper*, the court adopted a different line of reasoning. The court was asked to adopt the Braschi-Blanchard reasoning. It however, declined the invitation and held: "a surviving partner of a homosexual relationship could not elect to take under a partner's will as a surviving spouse."\(^{51}\) The *Cooper* court further stated: "There is a great distinction between being part of a family entitled to protection of rent control laws because of public policy and legislative intent, and in being a surviving spouse of a decedent."\(^{52}\)

There have been numerous arguments advanced by courts to deny same-sex marriages. Courts generally rely on the following state interests to support the prohibition against same-sex marriages:

1. encourage procreation;
2. encourage morality;
3. encourage the traditional family;
4. support laws prohibiting homosexual acts;
5. avoid social ostracism.\(^{53}\)

Of all the above choices, the courts, besides relying on tradition, seem fascinated with the idea of prohibiting same-sex marriages based on encouraging procreation. This can be seen in *Singer v. Hara*, where the court stated in relevant part:

The fact remains that marriage exists as a protected legal institution primarily because societal values associated with the propagation of the human race. Further it is apparent that no same-sex couple offers the possibility of birth of children by their union. Thus, the refusal of the state to authorize same-sex marriages results from such impossibility of

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52. *Id*.
53. *Id*, supra note 1.
reproduction rather than from an invidious discrimination on account of sex.\textsuperscript{54}

This same language was echoed in a recent District of Columbia case. In that case the plaintiffs instituted a lawsuit alleging that their application for a marriage license was denied by the District of Columbia Marriage License Bureau without lawful basis. The plaintiffs asserted, \textit{inter alia} that the denial of a marriage license by the Clerk to a couple of the same-sex violated the statute authorizing marriages and is an invidious act of discrimination on the basis of sexual orientation. The D.C. Government stated that the couple should not be allowed to marry because, "to ensure the propagation of the human race, this court must prevent plaintiffs from marrying."\textsuperscript{55}

This argument was met head-on by the petitioners in \textit{Baker}, in which petitioners stated: [T]he state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited.\textsuperscript{56} The court responded by saying that the classification is no more than theoretically imperfect. The court added, "We are reminded however, that abstract symmetry is not demanded by the Fourteenth Amendment."\textsuperscript{57}

The rationale in \textit{Baker} was echoed by Judge Hill in \textit{Adams v. Howerton}, in which the Judge justified the denial of same-sex marriages using strikingly similar justification: "[T]he main justification in this age for societal recognition and protection of the institution of marriage is procreation, perpetuation of the race."\textsuperscript{58} In that case plaintiff's also argued that some persons were allowed to marry and their union was given full recognition and constitutional protection, even though the above stated justification-procreation-was not possible. Judge Hill continued his analysis by saying:

The state has chosen to allow legal marriage as between all couples of opposite sex. The alternative would be to inquire of each couple, before issuing a marriage license, as to their plans for children and to give sterility tests to all applicants, refusing licenses to those found sterile or

\textsuperscript{54} Singer \textit{v}. Hara, 522 P.2d 1187, 1195 (Wash.1974).
\textsuperscript{57} \textit{Id}. at 314.
unwilling to raise family. Such tests and inquiries would themselves raise serious constitutional questions. ⁵⁹

Even if marriage is protected because it often involves procreation, the argument that gay and lesbian couples should therefore be denied the right to marry is without merit. ⁶⁰ As the plaintiffs in Gill stated when faced with this argument, "This of course is nothing but nonsense." ⁶¹ Given current advances in productive technology—in particular artificial insemination and surrogacy—gay men and lesbians can easily produce offspring. ⁶² Thus, allowing gay men and lesbians to marry would not be inconsistent with the policies favoring procreation. ⁶³ In sum, same-sex marriages are wholly consistent with the theoretical and policy justifications of the previously mentioned state interests. If court[s] were indeed serious about the interest promoted by the right to marry—self determination, autonomy from the state and societal and familial stability—then it should value them for heterosexuals and homosexuals alike and recognize that the fundamental right to marry should extend to gay and lesbian couples. ⁶⁴

Even though courts have hidden behind this rationale, they have side-stepped the issue of whether or not the denial of same-sex marriage meets with constitutional approval under the Equal Protection Clause of the Fourteenth Amendment. Even when courts were willing to face the Fourteenth Amendment challenges, they have been reluctant to apply the correct analysis that would be applied to other groups that would trigger Fourteenth Amendment protections.

Courts have consistently applied the rational basis test rather than the test which should be applied, namely, the strict scrutiny test.

⁵⁹. Id.
⁶¹. Id.
⁶³. Id. at 1608
⁶⁴. Id.
SAME-SEX MARRIAGES AND THE FOURTEENTH AMENDMENT:
A SUSPECT CLASSIFICATION

Even within a nation of minorities, American gay and lesbian people constitute a minority group that elicits an extraordinary high degree of fear and contempt from society at large and receive an inordinately low degree of state protection from the institutionalization of that antipathy. As a result, gays suffer discrimination in virtually every social sphere. They are denied jobs, housing, custody of their children, and the right to marry.

As recent as October 21, 1991 USA Today reported that a purported lesbian marriage cost Robin Shahar a job within the Georgia Attorney General's office.

Recent testimony before the California Legislature by a gay San Francisco policeman, Mitchell Grobeson revealed that he was forced to resign from the Los Angeles Police Department in 1988 after officials there orchestrated a campaign of harassment against him.

Cheryl Sommerville, a cook in Douglasville, Georgia was fired because she was a lesbian. And the list goes on.

In the wake of the Black civil rights and women's movements, gays have increasingly sought constitutional protection from this pervasive discrimination. Thus far, however, their efforts have met with little success. Because of this denial of equal protection of the laws, courts should recognize homosexuality as a suspect classification under the equal protection clause of the Fourteenth Amendment and therefore subject laws that discriminate (either on their face or as applied) to strict scrutiny, beyond the rational basis test currently [used]. To determine whether state statutes defining marriage as a union of man and woman violate the equal protection clause of the Fourteenth Amendment, courts must first decide which tier of scrutiny should be applied. They must determine whether the class excluded from the right is suspect or non-suspect, and whether the right at issue is fundamental or not, to decide whether to examine the legislation in question with strict, heightened, or

66. Id.
71. Id.
minimum scrutiny. If indeed the courts determine that a suspect class or fundamental right is invoked they will examine the statute and its treatment, and will generally strike it down unless it is narrowly tailored to a compelling state interest. Homosexuals should be classified as a suspect class and therefore any statute, as applied or on its face is unconstitutional if it denies them equal protection under the law.

Before leaping to the bare conclusion that homosexuals are a suspect class, a number of factors must be analyzed. The Supreme Court has identified several factors that guide a suspect class inquiry.

The first factor the Court generally considers is whether the group at issue has suffered a history of purposeful discrimination. "Homosexuals have historically been the object of pernicious and sustained hostility." In High Tech Gays v. Defense Industrial Security Clearance Office, Judge Henderson realized this same harsh truth: "Lesbians and gays have been the object of some of the deepest prejudice and hatred in American Society." Homosexuals have been the frequent victims of violence and have been excluded from jobs, schools, housing, churches, and even families. "[Discrimination] faced by homosexuals in our society is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes, such as aliens or people of a particular national origin." Moreover, recent incidents show that homosexuals are continuously subject to discrimination and even physical injury as a result of homophobia. As recent as November 1991, hundreds of gays staged a "Take back the night rally" to protest against harassment, threats and physical violence.

The second factor that the Supreme Court considers in suspect class analysis is whether the discrimination embodies a gross unfairness that is sufficiently

inconsistent with the ideals of equal protection to term it invidious. In weighing this concept of gross unfairness, the Court has considered: (1) whether the disadvantaged class is defined by a trait that "frequently bears no relation to ability to perform or contribute to society," (2) whether the class has been saddled with unique disabilities because of prejudice or inaccurate stereotypes; and (3) whether the trait defining the class is immutable. I will explore these questions in turn:

Sexual orientation plainly has no relevance to a person's ability to perform or contribute to society. This irrelevance of sexual orientation to the quality of a person's contribution to society only suggests that classifications based on sexual orientation reflect prejudice and inaccurate stereotypes—the second indicia of a classification of gross unfairness. Moreover, under the second question, homosexuals have been denied jobs, and other benefits of life that heterosexuals do not face based on prejudice.

The last characteristic under unfairness is immutability as an indicator of gross unfairness. The Supreme Court has never held that only classes with immutable traits can be deemed suspect. The Supreme Court considers immutability relevant in the sense that members of the class must be physically unable to change or mask the trait defining their class. At a minimum, the Supreme Court is willing to treat trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity. In essence, "Immutability may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically." Racial discrimination, for example, would not suddenly become constitutional if medical science developed an easy, cheap, and painless method of changing one's pigment. The courts have stated: "Under either formulation, we have no trouble concluding that sexual orientation is immutable for the purpose of equal protection doctrine."

81. Id.
82. Id.
83. Id. at 1446.
84. See Generally Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv. L. Rev. 1285, 1303 (1984) (arguing that the ability to change a trait is not as important as whether the trait is a "determinative feature of personality").
Although the causes of homosexuality are not fully understood, research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change.\textsuperscript{86} The final factor the Supreme Court considers in suspect class analysis is whether the group burdened by official discrimination lacks the political power necessary to obtain redress from the political branches of government. In evaluating whether a class is politically underrepresented, the Court has focused on whether the class is a "discrete and insular minority."\textsuperscript{87}

Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly members of this group are particularly powerless to pursue their rights openly in the political arena. Even when gays overcome this prejudice enough to participate openly in politics, the general animus towards homosexuality may render this participation wholly ineffective.\textsuperscript{88} Elected officials sensitive to public prejudice may refuse to support legislation that even appears to condone homosexuality.\textsuperscript{89} Although some states have passed legislation barring discrimination against gays, nationally, homosexuals have been wholly unsuccessful at getting legislation passed that protects them from discrimination.

In view of the factors that the Supreme Court has considered in the past, it should be concluded as the Watkins Court concluded: "Our analysis of the relevant factors in determining whether a given group should be considered a suspect class for the purposes of equal protection doctrine ineluctably leads us to the conclusion that homosexuals constitute a suspect class."\textsuperscript{90}

Despite the overwhelming evidence surrounding discriminatory treatment of homosexuals, courts have used various avenues to keep from directly addressing the issue. Moreover they have been reluctant to look at homosexuals as a suspect class. One such case that highlights this is Adams v. Howerton, in that case a male Australian citizen and male American citizen who went through a purported ceremony of marriage in Colorado brought action against the Immigration and Naturalization Service seeking a declaration compelling granting of immediate relative status to the Australian citizen on grounds that the administrative denial was an abuse of discretion and an error of law. Chief

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\item \textsuperscript{86} An Argument for the Application of Equal Protection: Heightened Scrutiny to Classifications Based on Homosexuality, 57 S. Cal. L. Rev. 797, 817-821 (1984).
\item \textsuperscript{87} Watkins v. U.S. Army, 837 F.2d 1428, 1447 (1988).
\item \textsuperscript{88} Roland v. Mad River Local School Dist., 470 U.S. 1014. (1985).
\item \textsuperscript{89} The Washington Blade, Oct. 18, 1991 at 19, col. 1.
\item \textsuperscript{90} Watkins v. U.S. Army, 837 F.2d at 1448 (1988).
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Judge Irving Hill held, "denial of immediate relative status to the Austrian citizen did not constitute a denial of constitutional rights under equal protection." The court side stepped the equal protection challenge by saying that Congress has virtually plenary power in immigration matters and is not bound by otherwise applicable equal protection requirements. The court further stated, "I believe the Baker case is controlling, but if for some reason it is not, I reach the same conclusion under a de novo look at the constitutional issues. As developed earlier, the main justification in this age for societal recognition and protection of institution of marriage is procreation, perpetuation of the race." The court forcefully drove its point further by adding: "In traditional equal protection terminology, it seems beyond dispute 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. This has always been one of society’s paramount goals."

Baker is also illuminating on this point. This case involved a mandamus proceeding for a marriage license between two people of the same sex. The district court ruled that the Clerk of Court was not required to issue marriage license to applicants who were of the same sex. The Supreme Court held that the statute governing marriage does not authorize marriage between persons of the same sex, and such marriages are accordingly prohibited and that such statute does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution. In Baker, the petitioners relied on Loving v. Virginia, which struck down Virginia’s antimiscegenation statutes prohibiting interracial marriages. The Court went on to justify its holding by saying that,

Loving does indicate that not all state restrictions upon the right to marry are beyond the reach of the Fourteenth Amendment. But in a commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based upon race and one based upon the fundamental difference in sex.

92. Id. at 1124.
93. Id.
94. Id.
96. Id. at 315.
However, what the court failed to recognize is that this is the same type of disingenuous argument used in *Loving*, where the clerk claimed he was not discriminating against the applicants but, instead, his denial was based on a rational recognition of the applicants lack of qualifications i.e., one was white and the other Black. Just as defendants' ambiguous claim of the "commonly understood, reasonable meaning," of marriage did not include same-sex couples, the defendants in *Loving* then claimed that the meaning of marriage did not include racially distinct couples. These arguments are the same ones deemed to be unconstitutional and strike offensive at the very nature of human sensibility. "Now, as then, the real issue is justice versus oppression."

Another disingenuous argument can be found in *Singer v. Hara*. The Court held:

[...]

"It is apparent that the state's refusal to grant a license allowing the appellant's to marry one another is not based upon appellants' status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though not all couples who produce children are married. Those are exceptional situations: The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further it is apparent that no-same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same-sex marriage result from such impossibility of reproduction rather than from an invidious discrimination on account of sex."

Many courts have resorted to the above styled arguments, however, there has been some movement in recent years. The Court came close to declaring sex to be a suspect classification when the plurality in *Frontiero v. Richardson* stated that "classifications based upon sex, like classifications based upon race, alienage, or national origin are inherently suspect, and must therefore be subjected to strict judicial scrutiny."
However, with the exception of Watkins v. U.S. Army, homosexuals have not been regarded as an inherently suspect class. In that case Judge Norris held: "[the Court] is compelled] to conclude that homosexuals constitute a suspect class."

In the wake of Bowers v. Hardwick many commentators have interpreted its language as saying that this prohibits homosexuals from marriage. In that case Chief Justice White held that Georgia's sodomy statute did not violate the fundamental rights of homosexuals. Despite the holding in Bowers, it must be noted that the right of homosexuals to marry is unrelated to their right to engage in sodomy. Just as mormons did not forfeit the right to free exercise of religion simply because the state proscribed polygamy, (a practice that their religion once espoused), so too homosexuals do not forfeit their fundamental right to marry because the state can proscribe sodomy.

According to the D.C. Court of Appeals, "sexual orientation appears to possess most or all of the characteristics that have persuaded the Supreme Court of the United States to employ strict or heightened constitutional scrutiny to legislative classifications under the Equal Protection Clause." The majority in Gay Rights Coalition v. Georgetown University held that gay men and lesbians are entitled to all of the rights accorded other human beings in the District and are entitled to the same protections against discrimination as racial minorities. This is an implicit recognition that gay men and lesbians, a sexual orientation minority, are in fact a "discrete and insular minority" similar to racial minorities and therefore, entitled to strict scrutiny as a matter of equal protection of the laws.

Commentators are virtually unanimous in arguing that the "prohibition on same-sex marriage cannot withstand any level of scrutiny," much less the "rigorous scrutiny" required by constitutional precedent "because states cannot articulate legitimate interests that are rationally related to the restrictions they impose."

100. Watkins v. U.S. Army, 837 F.2d 1428, 1448 (9th Cir. nullified on June 8, 1988).
101. Id. at 1448
105. Id. at 45-46.
Even as early as 1971 the Court in Reed v. Reed recognized that classifications based on sex, classifications based upon race, alienage, and national origin are inherently suspect. In Reed, the Court considered the constitutionality of a Idaho statute providing that, when two people are otherwise equally qualified to appointment as administrator of an estate, the male applicant must be preferred to the female. The Court noted that the Idaho statute provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the equal protection clause. The Court went on to say that "to give a mandatory preference to members of either sex over members of the other... is to make the very kind of arbitrary legislative choice forbidden by the Constitution." This departure from traditional rational-basis analysis with respect to sex-based classifications is clearly justified. The Court continued its analysis by saying:

And what differentiates sex from such non-suspect status as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

This analysis indeed applies to homosexuals.

In 1970, Justice Thurgood Marshall eloquently stated the test to be applied in informing a suspect class inquiry, He stated:

In my view, equal protection analysis... is not appreciably advanced by a prior definition of a right, fundamental or otherwise. Rather concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.

108. Id. at 75.
If courts would apply this test and not let their decisions be informed by what they believe to be traditional or moral-then Justice Marshall's test would lead them to place sex into the fulcrum of a suspect classification.

CONCLUSION

I would urge courts to rethink their positions on denial of equal protection to homosexuals in reference to marriage. Further, I would strenuously urge them to adopt the Watkins rationale. Moreover, there is no public policy or legal reason as to why same-marriages should not be allowed. From a review of court opinions on this subject; it is obvious that the courts have no legal reasons to deny any citizen equal protection of the laws. Maybe the courts reluctance is well-grounded in morals, values, and tradition, but these words do not and should not be allowed to continue to usurp constitutional guarantees afforded us all.

The following quote is illuminating on this point:

Homosexual marriage shakes the existing moral order to its core. Yet society may have to abide with a touch of moral uncertainty out of respect for our constitutional commitment to equality and our moral commitment to justice and care. The morality of marriage is that of caring and shared commitment. The mutual promise, induced by love, to act responsibly towards one another. To be fully respected as members of the community, homosexual couples must be treated as capable of taking on that. Perhaps there will come a time when we see that what turns any relationship—between man and woman, man and man, or between woman and woman—into a moral one is the existence of love and devotion to one another, and that the mode of expressing love is fundamentally a private rather than a state concern. We shield that love from the states judgment because the relationship at stake takes precedent over the possible offense the thought of certain expressions of love may cause to distant third parties.111

111. Lewis, From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage, 97 YALE L.J. 1783 (1988).
Just as Ozzie and Harriet were allowed to share in their perfect world; there will come a time when Ozzie and Harry will also be allowed to share in their perfect marital world. However, this will not come about without a persistent fight in the courts. As recent as January 4, 1992 the Washington Post reported that a District of Columbia Judge Shelia F. Bowers rejected a lawsuit by Craig R. Dean and Patrick G. Gill in which they sought the right to marry.\textsuperscript{112} Notwithstanding the above case, and others that will no doubt follow, there will indeed come a time when Ozzie and Harry will walk down the church isle and share in the matrimonial bliss that will be sanctioned by the state!! The United States Constitution demands nothing less. Equal protection under the law is a basic tenet of the Constitution, and courts can make no exceptions because same-sex marriages are seen as morally reprehensible.

I am constantly reminded that it wasn't long ago that courts thought it was morally correct for them to deny Blacks the right to vote. The denial of that right is no less pernicious than the denial of same-sex marriages.

\textsuperscript{112} The Washington Post, Jan. 4, 1992 at D2, col. 1.