

Same Sex Marriage and the Constitution

Although the United States Supreme Court recently dismissed the appeal of two males who were denied a marriage license,¹ same sex² couples continue to seek legal approval of their relationships.³ The numerous benefits conferred by the state on married couples provide substantial motivation for such litigation.⁴ Although not frivolous,

¹*Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972). See Note, *The Minnesota Supreme Court 1970-71*, 56 MINN. L. REV. 928, 959 (1972); 22 DRAKE L. REV. 206 (1972); Note, *The Legality of Homosexual Marriage*, 82 YALE L. J. 573 (1973).

²The term "same sex" will be used to avoid the connotation of "homosexual" as one who has sexual desires toward a member of one's own sex. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1085 (3d ed. 1966). "Same sex" is used herein to refer to two persons of the same sex regardless of their sexual proclivities.

³Litigation is pending in at least three states: *Jones v. Hallihan* (Kentucky), W-152-70 (Ct. App. Ky. 1972); letter from Michael Withey (Washington) to Leo Sullivan, Dec. 14, 1972, on file at the UCD Law Review office; letter from Richard Cross (Texas) to Leo Sullivan, Feb. 15, 1973, on file at the UCD Law Review office. See letter from William G. Sharp, Los Angeles County Clerk, to Carlo M. DeFarrari, Tuolumne County Clerk, Dec. 1, 1972, noting incidents of same sex couples attempting to record marriages under CAL. CIV. CODE § 4213 (West Supp. 1972) in Los Angeles County. Unlike other states, California recognizes unlicensed marriages performed by a clergyman of unmarried persons "who have been living together as man and wife." A "certificate of marriage" is filed subsequently with the county clerk. CAL. CIV. CODE § 4213 (West Supp. 1972).

⁴*E.g.*, right to file joint income tax return, INT. REV. CODE OF 1954, § 1; gift tax exemptions and deductions, INT. REV. CODE OF 1954, §§ 2513, 2515 and 2523; estate tax marital deduction, INT. REV. CODE OF 1954, § 2056; right to inherit from spouse, CAL. PRO. CODE § 201 *et seq.* (West Supp. 1972); privilege not to testify against spouse, CAL. EVID. CODE § 970 (West 1966); standing to recover for injuries to minor child, CAL. CODE OF CIV. PRO. § 376 (West Supp. 1972). Homosexual couples are also motivated by morality or religion. Cole, *Marriage Is An Evil That Most Men Welcome*, Advocate, Mar. 29, 1972, at 1, col. 1. See D. MARTIN AND P. LYON, LESBIAN/WOMAN 103 (1972):

For some, marriage means a religious sacrament and commitment. For others it may also take on a legal significance in terms of community property, the filing of joint income tax returns and inheritance rights. Recognition of a Lesbian union might also serve to validate the couple who wished to take on the legal responsibility of adopting homeless, unwanted children. It would also simplify insurance problems, making the couple eligible for family policies, for family rates on airlines travel and for that matter, for 'couple' entry to entertainment functions, too.

the constitutional arguments in support of same sex marriage, based both on the Equal Protection Clause⁵ and on the proposed Equal Rights Amendment,⁶ will not likely be upheld.⁷ This article explores those arguments after an introductory discussion of the claim that state statutes tacitly permit same sex marriage.

I. STATUTORY INTERPRETATION

No state expressly prohibits same sex marriage. All states, however, place certain other restrictions on couples seeking marriage, such as restrictions of age⁸ and blood relationship.⁹ On its face, it appears that same sex marriage is permitted by the presumption that if a statute expressly excludes specified persons from its application no other exceptions are intended.¹⁰

State legislatures, however, did not likely intend to permit same sex marriage. Express prohibition of such marriages is unnecessary because traditional definitions of marriage include only heterosexual couples.¹¹ The Minnesota Supreme Court in *Baker v. Nelson*,¹² the leading case on same sex marriage, gave significant weight to this definition. The two male appellants in *Baker*, having been denied a marriage license, argued that the absence of an express statutory prohibition against same sex marriage indicated a legislative intent to authorize such marriages. The Minnesota Court summarily rejected the contention, finding that the statute employs the term "marriage" as one of common usage — the state of union between persons of the opposite sex — and thus expresses a legislative intent to authorize only such opposite sex marriages.¹³ The court concluded that "it is

⁵U.S. CONST. AMEND. XIV, § 1.

⁶H.R.J. Res. 208, 92nd Cong., 2d Sess., 118 CONG. REC. § 4212 (daily ed. Mar. 22, 1972).

⁷But see Note, *The Legality of Homosexual Marriage*, 82 YALE L. J. 573 (1973).

⁸E.g., CAL. CIV. CODE § 4101 (West Supp. 1972): "Any unmarried person of the age of 18 years or upwards, and not otherwise disqualified, is capable of consenting to and consummating marriage."

⁹E.g., CAL. CIV. CODE § 4400 (West 1970): "Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous, and void from the beginning"

¹⁰*Expressio unius est exclusio alterius*. 50 AM. JUR., STATUTES, § 244; 45 CAL. JUR. 2D, STATUTES, § 133.

¹¹WEBSTER'S NEW COLLEGIATE DICTIONARY 515 (2d ed. 1960) defines marriage as:

State of being married; also, the mutual relation of husband and wife; wedlock; abstractly the social institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining family

¹²291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

¹³*Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d at 185 (1971).

unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would have used the term in any different sense.”¹⁴

The *Baker* court is supported by *Anonymous v. Anonymous*,¹⁵ the only other reported American case on same sex marriage. The male plaintiff sought a declaration regarding his marital status with the defendant. After the parties had taken part in a marriage ceremony the plaintiff discovered the defendant was a male. The New York Superior Court decided that:

Marriage is and always has been a contract between a man and a woman. “‘Marriage’ may be defined as the status or relation of a man and a woman who have been legally united as husband and wife. It may be more particularly defined as the voluntary union for life of one man and one woman as husband and wife”¹⁶

The court declared the marriage ceremony itself a nullity, rather than annulling or voiding the marriage because of fraud, incapacity, or other statutory reason.

Corbett v. Corbett (otherwise Ashley),¹⁷ a leading English case which voided the marriage of two males, also supports the *Baker* reasoning:

[S]ex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognized as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element. It has, of course, many other characteristics . . . but the characteristics which distinguish it from all other relationships can only be met by two persons of the opposite sex.¹⁸

Evidence of the heterosexual definition of marriage is found in the statutes as well as in history. The *Baker* court recognized that the term is “one of contemporary significance as well [as historical], for the present statute is replete with words of heterosexual import such as ‘husband and wife’ and ‘bride and groom.’ ”¹⁹

¹⁴ *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, 186 (1971).

¹⁵ 67 Misc. 2d 982, 325 N.Y.S. 2d 499 (1971).

¹⁶ *Anonymous v. Anonymous*, 67 Misc. 2d 982, 325 N.Y.S. 2d 499, 500 (1971) (citations omitted), quoting 59 AM. JUR. 2D, MARRIAGE, § 1.

¹⁷ 2 All. E.R. 33 (P.D. & Adm.) (1970).

¹⁸ *Id.* at 48.

¹⁹ *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, 186 (1971). See, e.g., CAL. CIV. CODE § 4212 (West 1970), which designates the parties to the marriage “female” and “husband”; CAL. CIV. CODE § 4213 (West Supp. 1972), which designates the parties “man” and “wife”; CAL. CIV. CODE §§ 4401, 4425, 4426 (West 1970), which designates the parties “husband” and “wife.” Until amended in 1971 CAL. CIV. CODE § 4201 used the words “male” and “female” in prescribing age requirements for obtaining a marriage license. The amendment reflected the new age of majority (eighteen) for all persons regardless of sex. CAL. CIV. CODE § 4201 (West Supp. 1972), amended by Stats. 1971, c. 1748, p. 354, § 27, formerly Stats. 1969, c. 1608, p. 3316, § 8.

This interpretation of legislative intent is sound. In light of the traditional definition of marriage, it cannot be inferred that any legislature intended to permit same sex unions. The drafters of the Uniform Marriage and Divorce Act recognized this reasoning. Although same sex marriage is not expressly prohibited by the act, an official comment states that "in accordance with established usage, marriage is required to be between a man and woman."²⁰

II. THE EQUAL PROTECTION CLAUSE

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."²¹ Under this amendment, is state prohibition of same sex marriage unconstitutional?²²

The Equal Protection Clause does not deny to the states the right to classify persons for permissible legislative purposes.²³ It does require, however, that the classification not be arbitrary — that all persons similarly situated with respect to the statute's purpose shall be treated alike.²⁴ Marriage statutes classify persons by sex. Males may marry females but not males, and females may marry males but not females. The crucial issue is to determine the purpose of restricting marriage to heterosexual couples, and to decide whether same sex couples are reasonably excluded in relation to that purpose.

A. THE RATIONAL RELATIONSHIP TEST

When "suspect criteria" or "fundamental rights" are not involved the Supreme Court ostensibly has required only that the classification "bear some rational relationship to legitimate state purposes."²⁵ The Court has been willing to consider any conceivable legislative purpose and has allowed considerable leeway in drawing the boun-

²⁰UNIFORM MARRIAGE AND DIVORCE ACT, § 201.

²¹U.S. CONST. AMEND. XIV, § 1.

²²The possible invalidity of state marriage statutes because of the vagueness of the terms "male" and "female" implied to the statutes is beyond the scope of this paper. "The requirement that a law be definite and its meaning ascertainable by those whose rights and duties are governed thereby applies not only to penal statutes, but to laws governing fundamental rights and liberties." *Perez v. Sharp*, 32 Cal. 2d 711, 728, 198 P.2d 17, 27 (1948). Some scientists consider genitals an inaccurate indication of gender. *E.g.*, Levine, *Sexual Differentiation: The Development of Maleness and Femaleness*, 114 CAL. MED. 12 (1971). See Brief for Appellants at 68, *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971).
²³*Reed v. Reed*, 404 U.S. 71, 76 (1972); *San Antonio Independent School Dist. v. Rodriguez*, ___ U.S. ___, 93 S. Ct. 1278, 1308 (1973).

²⁴*Reed v. Reed*, 404 U.S. at 76; *San Antonio Independent School Dist. v. Rodriguez*, ___ U.S. at ___, 93 S. Ct. at 1325 (dissenting opinion), quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

²⁵*San Antonio Independent School Dist. v. Rodriguez*, ___ U.S. ___, 93 S. Ct. at 1300; *F.S. Royster Guano Co. v. Virginia*, 253 U.S. at 415.

daries of the class.²⁶ The application of this test, which places the burden of proof on the person attacking the statute, has traditionally resulted in the statute being upheld.²⁷

Recently, however, the Supreme Court has taken a modified approach. Without announcing a strict scrutiny test or shift in the burden of proof, the Court has overturned some classifications not "substantially" related to legislative ends.²⁸ The Court appears to be less willing to supply justifying rationales beyond the obvious, and will tolerate less underinclusion or overinclusion in the classification. In *Reed v. Reed*,²⁹ for example, the Supreme Court considered administrative convenience to be the only rational purpose of an Idaho statute which gave preference to males over females as executors of estates. The Court, in overturning the statute, held that the classification did not "rest upon some ground of difference having a fair and substantial relation to the object of the legislation."³⁰

Justice Marshall finds that *Reed* and similar decisions reflect a spectrum of standards in reviewing classifications, and that a rigid approach of "mere rationality" can no longer be defined.³¹ The Court continues to speak of this approach as a singular one, however, requiring rational means related to a permissible objective.³² It is

²⁶*Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1078 (1969) (hereinafter cited as *Developments*):

When the purpose of a challenged classification is in doubt, [some courts] have attributed to the classification the purpose thought to be most probable. However, other courts have attributed to the legislature any reasonably conceivable purpose which would support the constitutionality of the classification.

Compare *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920) with *Two Guys from Harrison-Allenton, Inc. v. McGinley*, 336 U.S. 582 (1961).

²⁷*Developments*, *supra* note 26, at 1087.

²⁸E.g., *Reed v. Reed*, 404 U.S. 71 (1972). See Gunther, *The Supreme Court, 1971 Term, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

²⁹404 U.S. 71 (1972).

³⁰*Id.* at 76.

³¹*San Antonio Independent School Dist. v. Rodriguez*, ___U.S. ___, 93 S. Ct. at 1330 (dissenting opinion):

The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review — strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

³²The majority in *Rodriguez* described the test in two different ways: the classification must "bear some rational relationship to legitimate state purposes" and

helpful at this point to discuss how restricting marriage to heterosexual couples might be a means to a permissible end.³³

1. ENCOURAGE PROCREATION

The state has a basic interest in encouraging reproduction because "procreation [is] fundamental to the very existence and survival of the race."³⁴

Growth control is not incompatible with encouraging minimum reproduction. Some states discourage excessive population growth by easing restrictions on abortion³⁵ and the dissemination of contraceptives.³⁶ However, attempts to reduce the rate of growth do not diminish the duty of the state to insure minimum reproduction.

Nor do recent court decisions respecting the woman's right not to give birth discredit this legislative interest. The right to abortion has recently been upheld by the Supreme Court,³⁷ and the use of contraceptives has received judicial acceptance.³⁸ Recognition of the woman's right not to have children, however, would logically buttress the state's duty to encourage sufficient reproduction to continue the species.

The reasonableness of excluding same sex couples must be considered in relation to the purpose of procreation. The argument that the classification is fatally underinclusive warrants consideration.³⁹ No state imposes upon heterosexual married couples a condition that they have a proven capacity or declared willingness to procreate. Childless same sex couples are "similarly situated" to childless heterosexual couples with respect to the purpose of procreation. It may be argued, therefore, that it is irrational to allow the benefits of marriage to heterosexual couples who do not have or are not able to have children.

This objection is outweighed by the impracticality of defining the classification more broadly. To require every classification to be drawn with mathematical precision would stymie the process of legis-

must "rationally [further] a legitimate state purpose or interest." The apparent intent is that these tests are one and the same. *San Antonio Independent School Dist. v. Rodriguez*, ___ U.S. ___, 93 S. Ct. at 1300, 1308.

³³For a discussion of the same sex marriage issue under the Equal Protection analysis suggested by Justice Marshall, see Note, *The Legality of Homosexual Marriage*, 82 YALE L. J. 573 (1973).

³⁴*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

³⁵*E.g.*, CAL. HEALTH & SAFETY CODE § 25950 *et seq.* (West Supp. 1972).

³⁶*E.g.*, CAL. WELF. & INST. CODE § 10053.2 (West 1972).

³⁷*Roe v. Wade*, ___ U.S. ___, 93 S. Ct. 705 (1973).

³⁸*Griswold v. Connecticut*, 381 U.S. 479 (1965).

³⁹*Developments*, *supra* note 26, at 1084.

lation.⁴⁰ The *Baker* court held that the classification

... is no more than theoretically imperfect. We are reminded, however, that 'abstract symmetry' is not demanded by the Fourteenth Amendment.⁴¹

In *San Antonio Independent School District v. Rodriguez*⁴² the Supreme Court found that "some inequality" in implementing the state's purpose — local control of education — is not itself a sufficient basis for striking down the entire educational system. The institution of heterosexual marriage, like an educational system, "may not be condemned simply because it imperfectly effectuates the state's goals."⁴³

2. ENCOURAGE MORALITY

The state has the right to encourage moral behavior among its citizens.⁴⁴ State legislatures have determined that heterosexual intercourse within marriage is moral behavior.⁴⁵ Conversely, sodomy statutes evidence a conviction that homosexual behavior is not.⁴⁶

To define the encouragement of heterosexual intercourse as a singular objective of the state, divorced from procreation or the family, is helpful for analytical discussion. The practical value of the concept is that it matches with greater symmetry the prohibition of same sex marriage. Only a heterosexual couple is able to have heterosexual intercourse. Although the classification is overinclusive to this purpose also, a smaller minority are unable or unwilling to have inter-

⁴⁰ *Developments*, *supra* note 26, at 1083 (emphasis added):

Indeed, a permissive approach which does not require every classification to be drawn with mathematical nicety seems a practical necessity if the process of legislation is not to be hopelessly stymied. Few statutes could be drawn with the abstract precision that untempered logic might demand. Only when the lack of correspondence between classification and purpose is gross or when the classification is *otherwise objectionable* should courts intervene on equal protection grounds.

A classification is "otherwise objectionable" if it abridges a fundamental right or is based on a suspect classification. *Id.* at 1083. See text at note 56, *infra*.

⁴¹ *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, 187 (footnote omitted).

⁴² ___ U.S. ___, 93 S. Ct. 1278 (1973).

⁴³ *Id.* at 1306.

⁴⁴ H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963). See Sartorius, *The Enforcement of Morality*, 81 YALE L. J. 891 (1972).

⁴⁵ See, e.g., CAL. PEN. CODE § 269a (West 1970): "Every person who lives in a state of cohabitation and adultery is guilty of a misdemeanor . . ."

⁴⁶ See, e.g., CAL. PEN. CODE § 286 (West 1970): "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable . . ." and CAL. PEN. CODE § 288a (West 1970): "Any persons participating in an act of copulating the mouth of one person with the sexual organ of another is punishable. . . ." These statutes have withstood recent attempts at amendment, *infra* note 48, but have been criticized in judicial opinions, *infra* note 67.

course than to bear children.⁴⁷

Decriminalization of homosexual behavior does not lessen the importance of heterosexual intercourse as a state objective. Increasingly, courts and state legislatures are giving recognition to the right to privacy in consensual sexual relationships. Some states have recently repealed or significantly amended their sodomy statutes,⁴⁸ and courts have attacked similar statutes.⁴⁹ Toleration of homosexual behavior, however, is not tantamount to legislative recognition of its moral character.⁵⁰ No legislature or court intimated that homosexual behavior should be encouraged. The removal of criminal sanctions does not require the award of benefits by the state.

3. ENCOURAGE THE TRADITIONAL FAMILY

The family has traditionally been founded on the heterosexual couple. It affords to each partner benefits that the state is unable to provide, such as companionship, emotional and psychological support, and basic health care.⁵¹ It directly benefits the state through stability of the family group and the rearing of children.

In relation to this singular objective the rationality of denying marriage to same sex couples becomes less clear. Except for child-bearing and heterosexual intercourse, the same sex couple can benefit each other and the state as can the heterosexual couple. Even child rearing is no longer considered by the courts⁵² or the states⁵³ to be the primary province of the female.

⁴⁷See *supra* note 39 and accompanying text. The *Baker* court suggests that to require such an ability or willingness would be both unrealistic and offensive to the constitutional right to privacy. *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, 187 (1971).

⁴⁸*E.g.*, Minnesota, Illinois, and New York have enacted statutes nearly identical with MODEL PENAL CODE § 213.2, which makes deviate sexual intercourse punishable only when committed by force or its equivalent. MINN. CRIM. CODE § 609.30; ILL. REV. STAT. ch. 38, § 11; N.Y. PEN. CODE § 135.00. In California, Assemblyman Willie Brown introduced a bill to amend §§ 286 and 288a of the CAL. PEN. CODE, *supra* note 46, but passage was denied. A.B. 437, 1971 Regular Session. For recent judicial criticism of the statutes, see *infra*, note 67.

⁴⁹*E.g.*, *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated sub nom. Wade v. Buchanan*, 401 U.S. 989 (1971).

⁵⁰Reform is the result of many factors in addition to recognition of the right to privacy, including the realization that sodomy laws are generally unenforceable and result in a misutilization of police resources. Fisher, *The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior be Excluded?*, 30 MD. L. REV. 91, 95 (1970); NATIONAL INSTITUTE OF MENTAL HEALTH, FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY, at 6 (1972).

⁵¹See E. GRIFFITH, MARRIAGE AND THE UNCONSCIOUS 12 (1957); E. JONES, MARRIAGE AND SOCIETY 204 (1952); A. MEARS, MARRIAGE AND PERSONALITY 7 (1958).

⁵²*Stanley v. Illinois*, 405 U.S. 645 (1972).

⁵³*E.g.*, CAL. CIV. CODE § 4600 (West Supp. 1972).

The Supreme Court, however, has consistently validated sex discrimination if it is designed to benefit the family. The Court as recently as 1961 upheld a state statute which exempted women from jury service.⁵⁴ The Court concluded that the "woman is still regarded as the center of home and family life."⁵⁵

Thus no court is likely to compel state recognition of same sex marriage through the "rational relationship" test of the Equal Protection Clause. The state purposes of encouraging procreation and morality are permissible, and the prohibition of same sex marriage in relation to those purposes is reasonable. Even encouragement of the family, analytically more difficult to defend, remains a reasonable purpose under current precedent.

B. THE STRICT SCRUTINY TEST

The Supreme Court has applied a much stricter test where the classification in question is based on "suspect criteria" or burdens the exercise of a "fundamental right."⁵⁶ Where these are involved, the classification must be shown to be necessary to promote some compelling state interest.⁵⁷ A "very heavy burden of justification" is demanded of a state defending such a statute.⁵⁸ With few exceptions, the application of this test results in a finding that the statute is unconstitutional.

1. FUNDAMENTAL RIGHTS

Certain rights have been found to be so fundamental that they are guaranteed against state abridgement by the Due Process Clause of the Fourteenth Amendment⁵⁹ when a compelling interest is absent.⁶⁰

a. Privacy

Recent Supreme Court decisions have defined a constitutional right to privacy. In *Griswold v. Connecticut*⁶¹ the Court found the use of contraceptives to be protected by this right. In *Roe v. Wade*⁶² the Court recognized that the right to privacy relegated the decision whether to undergo an abortion to the province of the individual. The appellants in *Baker* reasoned that the right to choose a marriage

⁵⁴ *Hoyt v. Florida*, 368 U.S. 57 (1961).

⁵⁵ *Id.* at 62.

⁵⁶ *E.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967). See *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 16, 485 P.2d 529, 539, 95 Cal. Rptr. 329, 339 (1972); *Developments*, *supra* note 26, at 1087 *et seq.*

⁵⁷ *Loving v. Virginia*, 388 U.S. at 11.

⁵⁸ *Id.* at 9.

⁵⁹ U.S. CONST. AMEND. XIV, § 1.

⁶⁰ *Roe v. Wade*, —U.S.—, 93 S. Ct. 705 (1973).

⁶¹ 381 U.S. 479 (1965).

⁶² —U.S.—, 93 S. Ct. 705 (1973).

partner is protected by the right to privacy.⁶³ The Minnesota court, however, distinguished *Griswold* on the ground that the basic premise of that decision was that "the state, having authorized marriage, was without power to intrude upon the right to privacy inherent in the marital relationship."⁶⁴

Even as explained by Justice Rehnquist as the right "of a person to be free from unwanted state regulation of consensual transactions,"⁶⁵ the right to privacy would not protect the choice of a same sex marriage partner. The right does protect the choice of an individual not to have children,⁶⁶ and arguably would prevent the state from prohibiting sexual relations between a same sex couple.⁶⁷ Marriage is not a prerequisite to either of these activities, however, and in fact is a statutorily public act.⁶⁸ The right to privacy transcends any arbitrary restrictions the state may place on marriage.⁶⁹

b. Marriage

Although the right to marry has never been the basis of an Equal Protection or Due Process decision, it has been termed by the Supreme Court as one of the "basic civil rights of man."⁷⁰ Similar language found in a number of Supreme Court decisions⁷¹ provides

⁶³Brief for Appellants at 19, *Baker v. Nelson*, 409 U.S. 810 (1972).

⁶⁴*Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, 186 (1971).

⁶⁵*Roe v. Wade*, —U.S.—, 93 S. Ct. at 736 (dissenting opinion).

⁶⁶*Roe v. Wade*, —U.S.—, 93 S. Ct. 705 (1973).

⁶⁷In a recent case in the Los Angeles Superior Court (Sep. 11, 1972), on the authority of *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the California law proscribing oral copulation between consenting adults was declared an unconstitutional violation of privacy:

The issue directly presented is whether or not a state can constitutionally make unlawful the consensual act of oral copulation between adults. This court has concluded it cannot Conceding the state has an extremely broad power to enact legislation, there has nevertheless been no showing of any rational relationship between Sec. 288a of the Penal Code and any valid public purpose nor any necessity for the achievement of any compelling interest.

Advocate, Oct. 11, 1972, at 3, col. 3. *But see* *Roe v. Wade*, —U.S.—, 93 S. Ct. at 727: "In fact, it is not clear to us that the claim . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions."

⁶⁸*E.g.*, in California the parties must be issued a license and the marriage must be solemnized, which includes a declaration in the presence of the person solemnizing the marriage that they take each other as husband and wife. CAL. CIV. CODE § § 4100, 4206 (West 1970). For the one exception, *see* note 3, *supra*. In addition, a certificate of registry must be filed with the county clerk. CAL. CIV. CODE § 4202 (West 1970).

⁶⁹*Eisenstadt v. Baird*, 405 U.S. at 453: "If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

⁷⁰*Loving v. Virginia*, 388 U.S. at 12.

⁷¹*E.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922); *Skinner v. Oklahoma*, 316

sufficient authority for the courts to define marriage as a fundamental right. The concept of same sex marriage fits neatly within the language describing this right — “the liberty to marry a person of one’s choosing”⁷² — but there is no indication that the Court meant the word in a sense other than its established usage.⁷³ Implicit in these decisions is the understanding that while heterosexual marriage may be a fundamental right, same sex marriage is not.⁷⁴

Under the strict criteria laid down in *Rodriguez* it is especially difficult to establish same sex marriage as a fundamental right. The Court in that case decided that disparities in public school financing due to the wealth of districts do not violate the Equal Protection Clause. The right to education, the Court held, is not “explicitly or implicitly guaranteed by the Constitution,” and is therefore not a right afforded protection by the Fourteenth Amendment.⁷⁵ The Court’s approach to fundamental rights would presumably “encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself.”⁷⁶ Same sex marriage would not be included.

In his dissent in *Rodriguez* Justice Marshall would give protection also to those interests which have sufficient nexus to recognized constitutional rights.⁷⁷ In his view, for example, even though the right to procreation is “not fully guaranteed to the citizen by our Constitution” it is nonetheless “afforded special judicial consideration in the face of discrimination because [it is] interrelated with” the established constitutional right of privacy.⁷⁸ The right to marry, however, does not have sufficient nexus to a recognized constitutional right.⁷⁹

U.S. 535, 541 (1942). See *Roe v. Wade*, ___ U.S. ___, 93 S. Ct. at 735, 757 (concurring opinions).

⁷²*Roe v. Wade*, ___ U.S. ___, 93 S. Ct. at 758 (concurring opinion).

⁷³See *supra*, note 11.

⁷⁴The Supreme Court usually links marriage with procreation when considering the importance of those rights. In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court states that “marriage and procreation are fundamental to the very existence of the race.” *Id.* at 541 (*emphasis added*). See *Meyer v. Nebraska*, 262 U.S. at 399; *Roe v. Wade*, ___ U.S. ___, 93 S. Ct. at 735, 737 (concurring opinions).

⁷⁵*San Antonio Independent School Dist. v. Rodriguez*, ___ U.S. ___, 93 S. Ct. at 1297.

⁷⁶*Id.* at ___, 93 S. Ct. at 1330 (dissenting opinion).

⁷⁷*Id.* at ___, 93 S. Ct. at 1332 (dissenting opinion).

⁷⁸*Id.* at ___, 93 S. Ct. at 1332 (dissenting opinion). See *Roe v. Wade*, ___ U.S. ___, 93 S. Ct. 705 (1973).

⁷⁹The right to choose a marriage partner is not grounded in the right to privacy. See *supra* note 64 and accompanying text.

Justice Douglas suggested that marriage is part of the right of association, guaranteed by the First Amendment:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an associa-

The most liberal view is that of Justice Goldberg, concurring in *Griswold*, that fundamental rights are inherent within the Ninth Amendment.⁸⁰ Judges "must look to the traditions and collective conscience of our people," he wrote, to determine if the right "cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."⁸¹ Even this approach, however, will not include same sex marriage. Although same sex marriage has been recognized in some cultures,⁸² it has never been recognized in American legal or social history. On the other hand, "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."⁸³

2. SUSPECT CLASSIFICATIONS

The Supreme Court has applied the "suspect classification" test to only a few classifications. Race⁸⁴ and national lineage⁸⁵ are the primary examples. The Court, however, has not barred additions to suspect status.⁸⁶

tion that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. at 486. Those "prior decisions," however, for the most part dealt with existing (not proposed) associations organized for political (not economic, social, or religious) purposes. The Court has never specifically declared marriage to be an association protected by the First Amendment.

Nor is marriage protected by the right of free exercise of religion. In *Reynolds v. United States*, 98 U.S. 145 (1878), the Supreme Court ruled that the states may prohibit polygamy, even though some Mormons considered the practice of polygamy a religious duty. "Laws are made for the government of actions," wrote Chief Justice Waite, "and while they cannot interfere with mere beliefs and opinions, they may with practices." *Id.* at 166.

⁸⁰*Griswold v. Connecticut*, 381 U.S. at 493 (concurring opinion).

⁸¹*Id.* at 493.

⁸²*E.g.*, the Mohave Indians. Devereaux, *Institutionalized Homosexuality of the Mohave Indians*, 9 HUMAN BIOL. 494 (1937). See E. OGG, *HOMOSEXUALITY IN OUR SOCIETY* 2 (1972) (Public Affairs Pamphlet No. 484):

The majority of the societies that have been studied have condoned or even encouraged homosexual behavior, at least for some segments of their populations. Examples are ancient Greece, Japan before the Meiji era, the Tanalans of Madagascar, the Siwamis of Africa, the Aranda of Australia, and the Keraki of New Guinea.

⁸³*Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, 186 (1971).

⁸⁴*Loving v. Virginia*, 388 U.S. 1 (1967).

⁸⁵*Korematsu v. United States*, 323 U.S. 214 (1944).

⁸⁶*See, e.g.*, the discussion of wealth as the basis of a suspect classification in *San Antonio Independent School Dist. v. Rodriguez*, — U.S. —, 93 S. Ct. 1278 (1973).

a. Homosexuality

Homosexuals have never been designated a "suspect classification." They do, however, share certain characteristics with racial minorities that indicate such a classification might be appropriate.⁸⁷ Homosexuals, like racial minorities, are

... saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.⁸⁸

Unlike race, homosexuality may not be an immutable trait, "a status into which the class members are locked by the accident of birth."⁸⁹ It is unlikely, in view of the Supreme Court's reluctance to extend the "suspect classification" test beyond race and lineage,⁹⁰ that any court will conclude that the Fourteenth Amendment requires homosexuals be afforded the protection given black persons.

Even if such a classification were termed "suspect," it would not apply to the issue of marriage. The marriage statutes are not drawn to exclude only "homosexuals," but to exclude all same sex couples. In race cases the Supreme Court has overturned similarly broad classifications only when it was apparent that their purpose was invidious discrimination against one segment of the classification.⁹¹ In *Louisiana v. United States*,⁹² for instance, the Court upheld a decision overturning a statute requiring all prospective voters to pass an "interpretation test." The Court found the statute was designed to prevent only black persons from voting, and applied the "strict scrutiny" test.⁹³

However, there is no evidence that the marriage statutes were designed to discourage only homosexuals from marriage. On the contrary, it appears the motivation was purely affirmative, to encourage heterosexual intercourse and procreation within the traditional

⁸⁷See Note, *The Legality of Homosexual Marriage*, 82 YALE L. J. 573, 575 *et seq.* (1973).

⁸⁸*San Antonio Independent School Dist. v. Rodriguez*, — U.S. —, 93 S. Ct. at 1294.

⁸⁹*Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340 (1972). The causes of homosexuality are uncertain, but the most prevalent view is that the condition results from disturbed family relationships. Hooker, *Homosexuality*, NATIONAL INSTITUTE OF MENTAL HEALTH, FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY, at 12 (1972) (Task Force Working Paper). Ten to twenty percent of homosexuals are thought to be "curable." Frank, *Treatment of Homosexuals*, NATIONAL INSTITUTE OF MENTAL HEALTH, FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY, at 67 (1972) (Task Force Working Paper).

⁹⁰See *Developments*, *supra* note 26, at 1124.

⁹¹*Takahashi v. Fish & Game Comm'n.*, 334 U.S. 410 (1948); *Louisiana v. United States*, 380 U.S. 145 (1965).

⁹²380 U.S. 145 (1965).

⁹³*Id.* at 151.

family. Nor is there any indication that homosexuals alone would seek marriage if it were available to same sex couples. A criminal defendant, for instance, might marry the state's witness to preclude adverse testimony,⁹⁴ while an elderly person might seek marriage to avoid unfavorable tax consequences of property disposition.⁹⁵

b. Sex

The Supreme Court has never applied the "suspect classification" designation to sex. In *Reed* the Court, without discrediting such an approach, found the less strict "rational relationship" test sufficient to overturn the statute.⁹⁶ The California Supreme Court, however, applied the "suspect classification" title to sex in *Sail'er Inn, Inc. v. Kirby*,⁹⁷ overturning a state statute which prohibited women from serving as bartenders. The court equated prejudice against women with that against racial minorities, which results in "a whole class [being] relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members."⁹⁸

Where sex is a suspect classification, should it invoke strict scrutiny of a statute restricting marriage to heterosexual couples? The statutes classify the sexes equally, reflecting no sexual discrimination. Males may not marry males just as females may not marry females. But to suggest that application of the Equal Protection Clause ends with patent equality reflects the "narrow view" that has been rejected by the Supreme Court.⁹⁹ In *Loving v. Virginia*¹⁰⁰ the Court applied the strict scrutiny test to a miscegenation statute analytically identical to the marriage statutes under consideration. In declaring the statute unconstitutional the Court found denial of Equal Protection even though white persons were not able to marry black persons just as black persons were not able to marry white persons. The Court concluded that

the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.¹⁰¹

The inescapable conclusion is that where sex, like race, is a suspect classification, mere equal application of a statute will not immunize it from strict scrutiny to determine if it results in invidious discrimination.

⁹⁴*E.g.*, CAL. EVID. CODE § 970 (West 1966).

⁹⁵INT. REV. CODE OF 1954, § 2056.

⁹⁶404 U.S. 71 (1971).

⁹⁷5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1972).

⁹⁸*Id.* at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.

⁹⁹*Loving v. Virginia*, 388 U.S. at 8; *McLaughlin v. Florida*, 379 U.S. 184, 188 (1964).

¹⁰⁰388 U.S. 1 (1966).

¹⁰¹*Id.* at 9.

Application of the strict scrutiny test, however, will probably not result in the demise of the marriage statutes. Such inquiry will reveal that the statutes are not the vehicle for invidious discrimination against one sex exclusively. There is no evidence that state legislators intended that restricting marriage to heterosexual couples would have a greater effect on marriages between one sex or the other. And in fact there is no evidence that marriages of one sex would predominate over the other. In each case in which the Supreme Court applied the strict scrutiny test to a racial classification a discriminatory purpose was reasonably apparent.¹⁰²

Not only is invidious discrimination absent, but the classification is based on physical differences that are not analogous to racial classifications. Different skin color does not alter a couple's capacity for heterosexual intercourse and procreation. Two persons of the same sex, however, cannot engage in sexual intercourse or procreate, strictly because of their physical make-up. The classification of heterosexual couples is necessary to those purposes of marriage.

In addition, the Supreme Court has consistently left the door open to "compelling reasons" for classifying individuals by race, rejecting a color blind interpretation of the Fourteenth Amendment.¹⁰³ Analogously, a sex blind interpretation should also be rejected.¹⁰⁴ The state's interest in procreation and morality within the family structure may be compelling, although no analogy is available from the race cases. Only once has the Supreme Court found a racial classification justified by a compelling state interest. During World War II emergency legislation ordered that all Japanese-Americans be excluded from large sections of the west coast. In *Korematsu v. United States*¹⁰⁵ the Court declared that because the measure explicitly affected only a single ethnic group it was "immediately suspect." Nevertheless, after subjecting the measure to "rigid scrutiny," the Court upheld the exclusion as necessary for the protection of the country in time of war.¹⁰⁶

Whether procreation, morality, and the family will compel the Court to reach a similar conclusion is uncertain. The absence of precedent makes any prediction tenuous. It is reasonable to conclude, however, that because of the lack of discrimination against one sex, the inherent physical differences of the sexes, and the importance of traditional marriage to society, that heterosexual marriage statutes will be upheld.

¹⁰² E.g., *Loving v. Virginia*, 388 U.S. 1 (1944). See *Developments, supra* note 26, at 1091 *et seq.*

¹⁰³ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁰⁴ See *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1972).

¹⁰⁵ 323 U.S. 214 (1944).

¹⁰⁶ *Id.* at 223.

III. THE EQUAL RIGHTS AMENDMENT

The Equal Rights Amendment states that "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."¹⁰⁷ This proposed amendment is presently before the states for ratification.

Opponents to the amendment argue that it is too rigid and does not allow the states to legislate on the basis of reasonable differences between the sexes.¹⁰⁸ Two prominent law professors testified before the Senate Judiciary Committee that the absolute wording of the amendment would in fact compel recognition of same sex marriage.¹⁰⁹

The initial question under this amendment is again the issue of equal application of the marriage statutes.¹¹⁰ Under the Equal Protection Clause denial of marriage to male and female couples equally would not likely be sufficient to remove the statutes from the application of the clause.¹¹¹ The Supreme Court has traditionally inquired beyond objective equality in applying the Equal Protection Clause to overturn racial classifications based on "invidious discrimination."¹¹² Although the Fourteenth Amendment will not necessarily be precedent for application of the Equal Rights Amendment,¹¹³ the logic of a consistent conclusion is inescapable.¹¹⁴

The proponents of the Equal Rights Amendment argue that heterosexual marriage will be included in a broad "physical differences"

¹⁰⁷ H.R.J. Res. 208, 92nd Cong., 2d Sess., 118 CONG. REC. § 4212 (daily ed., Mar. 22, 1972).

¹⁰⁸ H.R. Rep. No. 92-359, 92d Cong., 1st Sess. 3 (1971); S. Rep. No. 92-689, 92d Cong., 2d Sess. 13 (1972); Remarks of Senator Ervin, 118 CONG. REC. § 4373 (daily ed., Mar. 21, 1972); Freund, *The Equal Rights Amendment is Not the Way*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 234, 238 (1971); Brown, Emerson, Falk, and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L. J. 871, 893 (1971) (hereinafter Brown, Emerson, Falk and Freedman).

¹⁰⁹ Professors Paul Freund of the Harvard Law School and James White of Michigan Law School. S. Rep. No. 92-689, 92d Cong., 2d Sess. 47 (1972). See also Hauser, *The Equal Rights Amendment*, 1 HUM. RIGHTS 54, 62 (1971).

¹¹⁰ See *supra* note 99 and accompanying text.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 225, 231 (1971); Freund, *The Equal Rights Amendment is Not the Way*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 234, 238 (1971); Brown, Emerson, Falk and Freedman, *supra* note 108, at 892. See *infra*, note 120.

¹¹⁴ This was apparently the conclusion of Professors Freund and White. See *supra* note 109. Senator Birch Bayh expressed a contrary opinion during the Senate debate on the amendment, reasoning that a prohibition against same sex marriage would be permissible if licenses were denied equally to both male and female pairs. 118 CONG. REC. § 4389 (daily ed., Mar. 21, 1972). Senator Bayh's conclusion is criticized in Note, *The Legality of Homosexual Marriage*, 82 YALE L. J. 573, 584 (1973).

exception to the amendment.¹¹⁵ They suggest this exception will permit regulation of such sex related activities as donation of sperm, wet nurses, and maternity leaves.¹¹⁶ The principle of the Equal Rights Amendment, they insist, "does not preclude legislation which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex."¹¹⁷

Would this exception allow the prohibition of same sex marriage? If the singular purpose of marriage is the family alone — separated, for the purpose of analysis, from procreation and heterosexual intercourse — it would not. A primary objective of the amendment is to discard the legal stereotype of the female as center of home and family, and the male as the breadwinner.¹¹⁸ Legislatures would not be allowed to delegate management of community property, support requirements or child custody, for example, on the broad basis of sex where individual characteristics should be considered.¹¹⁹ Since family roles would no longer be defined on the basis of sex, there is no apparent reason why two males or two females could not fill the roles.

Nor would the physical differences exception likely compel recognition of same sex marriage if the singular purpose of marriage is procreation. The amendment is designed to disallow *any* differentiation on the basis of sex, regardless of necessity or compelling reasons.¹²⁰ It would prohibit restricting marriage to heterosexual

¹¹⁵ Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. L. REV. 281, 313 (1971). See S. Rep. No. 92-689, 92d Cong., 2d Sess. 12 (1972); H.R. Rep. No. 92-359, 92d Cong., 1st Sess. 7 (1971); Murray and Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 239 (1965); Brown, Emerson, Falk and Freedman, *supra* note 108, at 893.

¹¹⁶ S. Rep. No. 92-689, 92d Cong., 2d Sess. 12 (1972); H.R. Rep. No. 92-359, 92d Cong., 1st Sess. 7 (1971). See also Bayh, *The Need for the Equal Rights Amendment*, 48 NOTRE DAME LAWYER 80, 81 (1971); Brown, Emerson, Falk and Freedman, *supra* note 108, at 893.

¹¹⁷ Brown, Emerson, Falk and Freedman, *supra* note 108, at 893.

¹¹⁸ Dorsen and Ross, *The Necessity of a Constitutional Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 216 (1971); Brown, Emerson, Falk and Freedman, *supra* note 108, at 889. The amendment is designed to invalidate such reasoning as employed in *Hoyt v. Florida*, 368 U.S. 57 (1961). See *supra* note 54 and accompanying text.

¹¹⁹ Brown, Emerson, Falk and Freedman, *supra* note 108, at 889.

¹²⁰ "[D]ifferentiation on account of sex is totally precluded, regardless of whether a legislature or administrative agency may consider such a classification to be 'reasonable,' to be beneficial rather than 'invidious,' or to be justified by 'compelling reasons.'" Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 225, 231 (1971). Professor Emerson's rigid construction — "sex shall not be a factor in determining the legal rights of women and men" — was cited in H.R. Rep. No. 92-359, 92d Cong., 1st Sess. 6 (1971) which in turn was favorably cited in S. Rep. No. 92-689, 92d Cong., 2d Sess. 11 (1972). Professor Freund agrees that "the proposal evidently contemplates no flexibility in construction but rather a rigid rule of equality." Hearings

couples when a classification not based on sex would be more appropriate.¹²¹ The Equal Rights Amendment would probably require that the classification be narrowed to allow marriage only between those persons who exhibit a willingness and ability to procreate, or who have in fact conceived.

When the principles of family and procreation are merged with heterosexual intercourse, the physical characteristics exception would likely apply. Only a paired male and female can have heterosexual intercourse. Because of the unique physical characteristics of each, the classification would not violate the principle that the attributes of individuals be the basis of the classification.¹²² However, interpreting the amendment in this manner would grossly violate the words of the amendment itself. There can be no more literal example of denying rights "on account of sex" than denying marriage to same sex couples because of the genitals of the applicants.

Will the courts nevertheless define a "physical differences" exception to the Equal Rights Amendment which will embrace same sex marriage? They likely will for two reasons.

First, no matter how much equality the amendment demands, males and females are physically different. Equality does not mean sameness.¹²³ As Justice Frankfurter once observed, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."¹²⁴ Only heterosexual couples can have heterosexual intercourse and procreate, and the amendment should not prohibit legislation based on that existing distinction.

Secondly, it was not the intent of Congress to compel recognition of same sex marriage. This possibility was raised during both the congressional hearings¹²⁵ and debates¹²⁶ on the amendment, and its proponents denied that the amendment would have such an effect.¹²⁷ Wording to make this interpretation explicit was not considered feasible. One recommended addition to the amendment, to allow laws "which reasonably [promote] the health and safety of the peo-

on H.J. Res. 35, 209 Before Subcomm. No. 4 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 72 (1971) (quoted by Senator Ervin).

¹²¹ Brown, Emerson, Falk and Freedman, *supra* note 108, at 897.

¹²² *Id.* at 893.

¹²³ H.R. Rep. No. 92-359, 92d Cong., 1st Sess. 7 (1971); S. Rep. No. 92-689, 92d Cong., 2d Sess. 12 (1972).

¹²⁴ *Tigner v. Texas*, 310 U.S. 141, 147 (1940), *quoted by* Justice Marshall in *San Antonio Independent School Dist. v. Rodriguez*, — U.S. —, 93 S. Ct. at 1335 (dissenting opinion).

¹²⁵ S. Rep. No. 92-689, 92d Cong., 2d Sess. 47 (1972).

¹²⁶ 118 CONG. REC. § 4561 (daily ed., Mar. 22, 1972).

¹²⁷ Remarks of Senator Birch Bayh, the amendment's chief sponsor in the Senate. 118 CONG. REC. § 4389 (daily ed. Mar. 21, 1972). *See* note 114, *supra*.

ple,"¹²⁸ would perhaps include marriage restrictions, but might also allow restrictions, such as maximum hour laws for women, considered discriminatory.¹²⁹ An addition explicitly excepting "physical differences"¹³⁰ could easily have the same effect, negating the very principle of the Equal Rights Amendment. An addition specifically excepting marriage statutes from the application of the amendment would be too restrictive, and entirely inappropriate for a constitutional amendment.¹³¹

Thus, even though the wording of the amendment lends merit to the argument that it would compel recognition of same sex marriage, courts are not likely to so interpret the amendment because of the actual physical differences of the sexes and because of the intent of Congress.

IV. CONCLUSION

It is unlikely that same sex couples seeking marriage will find support in the Constitution. If an institution so basic to society is to be radically altered, it will have to be accomplished by the states. In view of the fierce opposition to the Equal Rights Amendment because of this issue and similar issues,¹³² and the reluctance of state legislatures to modify traditional sodomy laws,¹³³ such a departure from the status quo is unlikely in the foreseeable future.

Leo Sullivan

¹²⁸ H.R. Rep. No. 92-359, 92d Cong., 1st Sess. 1 (1971).

¹²⁹ *Id.* at 5.

¹³⁰ S. Rep. No. 92-359, 92nd Cong., 1st Sess. 5 (1972).

¹³¹ Dorsen and Ross, *The Necessity of a Constitutional Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 216, 223 (1971).

¹³² See *supra* note 109.

¹³³ See *supra* note 48.