I. Introduction

"[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[1]

This was the view of the United States Supreme Court on marriage in 1888. What about their view today? Is marriage still the foundation of society? Is the public today deeply interested in maintaining marriage in its purity? More to the point – what is marriage today? The Court has found that a right to marry exists as part of a general right to privacy.[2] In the last half of the twentieth century, Supreme Court decisions, as well as changes in social norms undermined the position marriage once held as the only lawful venue for sexual expression. With full sexual and reproductive autonomy constitutionally protected, is it still meaningful to talk of a "right" to marry? Can a right to privacy encompass the right to enter a publicly defined and sanctioned union? Must the state recognize some intimate relationships as marriages? Or, is civil recognition of marriage a benefit conferred by the state to encourage a particular lifestyle choice?

There is obvious tension between the desire of same-sex couples to enjoy the rights and responsibilities of marriage, and the belief of a substantial majority of Americans that marriage means the union of one man and one woman. This article addresses the implications of the right to marry, especially in conjunction with the right to sexual autonomy articulated by the Supreme Court in Lawrence v. Texas in 2003.[3] This is just one "theater" in the ongoing battle between individual rights and the will of the majority as expressed through representative government.

The recently concluded 2006 elections again brought national attention to the issue of homosexual rights - specifically whether same-sex couples should be able to marry. In eight

states, ballot initiatives sought to amend state constitutions to define marriage as being a union between one man and one woman. Seven of those initiatives passed.[4] The sole exception was Arizona.[5] These results come on top of a number of similar state constitutional amendments passed in 2004. So, what is the state of same-sex marriage right now? Currently, "[twenty-six] states have constitutions limiting marriage to one man and one woman, and twenty-six have state laws enforcing that limitation."[6] The District of Columbia and seven states have recognized same-sex unions in some form.[7] Only Massachusetts allows same-sex marriage.[8]

The debate over same-sex marriage is new to the American political scene. Indeed, it is new to the world as a whole. The first country to legalize same-sex marriage was The Netherlands in 2001.[9] To date only five countries and the state of Massachusetts allow same-sex marriage.[10] Even the creation of legal civil unions didn't begin until 1989 when Denmark became the first country to formally recognize and give marriage-like benefits to same-sex couples.[11] The United States Supreme Court has not ruled on same-sex marriage.[12] Just a few decades ago there were no United States Supreme Court cases addressing same-sex conduct at all, and the very possibility that two people of the same sex could ever get legally married was so far-fetched to the average American as to be nearly inconceivable. Over the course of the last 30 years or so, however, American society has become more aware and accepting of homosexuality. As society has changed, there have been increasing calls to recognize same-sex relationships in the same fashion as heterosexual relationships. There have been a few state challenges to the opposite-sex requirements of state marriage statutes.[13] Some of these challenges resulted in civil union rights for same-sex couples,[14] others failed completely.[15] In Massachusetts in 2003, one of those challenges succeeded.[16]

Since civil unions and same-sex marriage are such recent phenomena, it is difficult to determine what the long-term effects of legal recognition of same-sex relationships will be. Such speculation about future "unknown unknowns"[17] is the primary fuel for the debate over same-sex marriage, and will be for generations to come. I will not explicitly discuss any of these possible effects in this article, as any such discussion would be not only speculative, but too unwieldy given time and space constraints. I also will not discuss in depth many of the arguments on either side of the same-sex marriage debate. Others have done this very thoroughly.[18]

In this article, I will examine the legal precedents the United States Supreme Court relied on in their decision in Lawrence. Although the Goodridge decision,[19] which legalized same-sex marriage in Massachusetts, was specifically based on the Massachusetts state constitution, the plaintiffs cited (and the court quoted) the United States Supreme Court's decision in Lawrence v. Texas.[20] It is clear that the Lawrence decision is relevant to the same-sex marriage debate. In Lawrence, the Supreme Court, in striking down a Texas anti-sodomy law, effectively found a constitutional right to sexual autonomy. In turn, Lawrence rested on several previous decisions finding fundamental constitutional rights in areas of personal, private behavior.

In this article, I will trace the development of the right of privacy and the right to marry. It is these two newfound rights which, when taken together, possibly open the door to court-ordered same-sex marriage. After tracing the development of the right to privacy and the right to marry in Supreme Court jurisprudence, I will offer my criticisms of the right to marry and discuss the consequences of carrying that right to its logical conclusion. I will also examine why this right differs from other rights arising from the constitutional right to privacy such as the right to use contraception, the right to procreate, and the right to choose an abortion. Then I will summarize the reasoning of the majority in the Lawrence case, and of Justice Scalia's vehement

dissent in which he criticized how the Court articulated its fundamental rights analysis, and the standard of review the court used. I will briefly discuss the link between the Lawrence right to sexual autonomy and same-sex marriage. The court's pattern of reasoning in Lawrence, while not directly leading to the subsequent holdings in Goodridge, certainly encouraged the Massachusetts court, and could presage more radical changes in the area of states' rights under the police power to regulate the moral conduct of their citizens. As Justice Scalia put it in Lawrence, the Court's reasoning potentially spells "the end of all morals legislation."[21] The Lawrence right to sexual autonomy, and the right to marriage, grounded in the right to privacy, will also need to be dealt with in any future Supreme Court case on same-sex marriage. Ultimately, I suggest that marriage should not be considered a fundamental right, but a privilege or benefit conferred by the state to advance a legitimate state purpose. Marriage is a policy decision to encourage stable heterosexual child-rearing relationships. I will conclude by recommending strategies for use by opponents of same-sex marriage in any future Supreme Court case.

Overview of the Argument Structure of This Article

The Unites States Supreme Court has historically found a right to marry only in conjunction with the right to privacy in personal intimate decisions. The right to marry should not be tied to privacy. It is at odds with privacy in several respects. It is public, it involves more than just the individual, and it exists specifically to allow and encourage state regulation of and intervention into the family unit. Marriage was traditionally the only legal venue for the expression of sexual intimacy. It was in this context that the court articulated a right to marry. Marriage is no longer the sole legal outlet for sexual expression. Since the fundamental rights at issue in the cases articulating the right to marry and the right to privacy have been individual

rights such as sexual expression and reproductive freedom, and since those rights have been found to be constitutionally protected, the right to marry is no longer necessary to protect them and to allow citizens to freely exercise them. It is unclear whether the present conception of the right to marry gives the state an affirmative obligation to provide marriage to its citizens. If so, this obligation in conjunction with the right to sexual autonomy opens the door for future courts to rule that the state must recognize all intimate relationships or risk interfering with the exercise of citizens' fundamental rights. The state has potentially been removed from its traditional "gate keeping" role in the regulation of the moral realm, and of marriage in particular. Thus, the concurrent existence of a right to sexual autonomy and a right to marry risks reducing civil marriage to nothing more than a state rubber stamp on the intimate desires of its citizens. I argue that the proper course of action for opponents of same-sex marriage is to urge the Supreme Court, in any future same-sex marriage case, to re-characterize marriage; not as a right, but as a group of benefits conferred by the state to recognize and encourage men and women who enter into relationships for the purpose of procreation and providing a stable home for children.

II. Development of the Right to Marry – From State's Right to Constitutional Right

Marriage law in the United states differs from marriage law in most other countries. In the U.S. it has always, at least in theory, been a question of state law.[22] This is not the case in most other nations, particularly those that have a strong national government.[23] This difference can be attributed to our federal system of government and the independent status enjoyed by each of the American colonies prior to the ratification of the Articles of Confederation and, subsequently, the United States Constitution. The laws of the American colonies were originally derived from the common law of England.[24] This common law included prohibitions on most sexual activity outside of marriage. The common law developed over the course of several

centuries under a heavy Christian influence. Whether the purpose of such prohibitions was to punish homosexual conduct, or merely to discourage non-procreative sexual activity,[25] the historical roots of regulations on sexual activity and marriage in the United States predate the founding of the Republic.

Early Supreme Court Pronouncements on Marriage

Marriage has been variously characterized by the Supreme Court over the years. In the citation heading this article the Court called marriage the "foundation of the family and society"[26] and essential to civilization and progress.[27] In 1878, it was called a contract in Reynolds v. United States.[28] In upholding a federal law aimed at curtailing Mormon polygamy in U.S. territories the court said "[m]arriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law."[29]

In 1923, the Supreme Court called it a liberty in Meyer v. Nebraska.[30] In that case, the Court invalidated a state law prohibiting the teaching of any subject in a language other than English. The law was held to be an unconstitutional depravation of a liberty protected by the fourteenth amendment. In regards to such protected liberties, the Court said

> While this court has not attempted to define with exactness the liberty thus guaranteed . . .[w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[31]

The court in Meyer was not directly addressing whether a right to marry existed in the constitution, but mentioned it in passing while discussing other rights.

Until the twentieth century, the federal courts never intervened in state laws affecting or regulating entry into marriage. Regulation of marriage was held to be the exclusive domain of

the state.[32] When the federal courts did begin to intervene, they did so using the due process and equal protection provisions of the fourteenth amendment to the U.S. Constitution.[33] In a series of cases beginning in 1942, the Supreme Court found that state actions or restrictions which burdened or violated fundamental rights related to procreation were unconstitutional. In these cases, the court did not articulate a right *to* marry, but addressed marriage only as it was necessary to discuss the fundamental right at issue in each case.[34] These procreative rights affected marriage because at the time marriage was, in many states, the sole legal venue for sexual intimacy and childbearing.[35]

In Skinner v. Oklahoma,[36] the Supreme Court invalidated an Oklahoma statute on fourteenth amendment equal protection grounds. The law provided for the forced sterilization of criminals convicted three times of "crimes involving moral turpitude."[37] While not central to the holding[38], the court mentioned that this depravation of the ability to reproduce potentially interfered with the petitioner's freedom to contract marriage and to procreate within it.[39] "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[40] A court hearing this case today, from our cultural viewpoint 64 years removed, would probably not have included marriage in the above quote. The Oklahoma statute did not address marriage. Clearly, marriage is not essential to human survival in the same way procreation is. People can and do procreate outside of marriage. If no one got married, the human race would survive. If no one had children, the race would eventually die out. From the cultural perspective of the time, however, the two weren't severable. People, for the most part, had children only within marriage. Again in this case, the court speaks of marriage only in conjunction with another right, the right to procreate.

In 1961, members of the Supreme Court discussed permissible state restrictions on behavior within marriage. In Poe v. Ullman,[41] a married couple did not want any more children, and sought the advice of a doctor on how to prevent pregnancy.[42] The majority of the Supreme Court found no justiciable question, and let stand a Connecticut law which criminalized use of, or instructions on the use of, contraceptives.[43] Justice Harlan in dissent argued that there was a constitutional question at stake,[44] and made a distinction between regulating sexual activity outside of marriage versus activity between married individuals.

> Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.[45]

In Harlan's view, the Court has acknowledged state prohibitions on adultery, homosexuality, and other extramarital sex. Harlan also implied that these prohibitions are acceptable exercises of state power, while those which regulate marital sexual conduct are not.[46] This helps bring into focus the state's role as a gate keeper to the institution of marriage. Also of note, Harlan spoke of marriage as a relationship with an existence of its own which the state "must allow."[47] Harlan's opinion is important, because it foreshadowed the Court's future jurisprudence on the issue of contraception, as well as other rights within marriage.[48] Once more in Poe, the Court was not directly addressing marriage, but the right to privacy within marriage.

In 1967, the Court did directly address a state restriction on entry into marriage in Loving v. Virginia.[49] At issue was a Virginia miscegenation law. The court called marriage "a social relation subject to the State's police power."[50] Ultimately, the case was one of racial

discrimination, and was decided on due process and equal protection grounds. The state could not use race as a criterion for denying entry into marriage.[51] The court could have left the decision on this basis without articulating fully the constitutional right to marry, but it did not. The Court went on to clarify an aspect of the right to marry, by finding that "the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."[52]

The Loving case is central to the same-sex marriage debate. It is the first articulation of a specific freedom, or right, to marry which is beyond state power to regulate. Even here, it should be noted, the Court is not speaking of a general right to marry, but of a more specific right to marry a person of another race. The Loving case is important as well because it is the only Supreme Court case overturning a state restriction aimed specifically at one's choice of marriage partner. As such, it is frequently cited as favorable precedent by supporters of same-sex marriage. They seek to make an analogy between inter-racial marriage and same-sex marriage. They ask, if the former cannot be prohibited without violating equal protection, why can the latter? It is beyond the scope of this article to discuss Loving, or equal protection, as it relates to same-sex marriage, but it should be said that it is one of the central cases in the debate. Entire article can be, and have been, written about the Loving case's implications for the same-sex marriage debate.[53]

Emanations, Penumbras, and the Right to Privacy

At this point we need to take a detour to discuss a parallel set of cases which developed during the same era and concerned the idea of a right to privacy arising from the Constitution. These cases don't deal directly with a right to marry. They deal with personal, reproductive

decisions made by individuals within a marriage, and later by any individual regardless of marital status.

In Griswold v. Connecticut,[54] the Supreme Court again reviewed Connecticut's anti-contraceptive law.[55] Drawing on Justice Harlan's dissent in Poe,[56] the Court this time found a constitutional question, and invalidated the state statute. The majority found that the state, by banning the use of contraceptives rather than their manufacture, transportation or sale, chose a method of regulation which infringed on a personal right to privacy within marriage.[57] The court did not find the liberty involved explicitly stated in the Constitution, but instead found that "[t]he foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[58] Among these are the "penumbral rights of 'privacy and repose.'"[59]

This is the famous (or infamous) penumbras and emanations case. The Court found that the right of married couples to have access to information about, and means of, contraception "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[60] This case formally established the right to privacy in the Constitution. It is articulated as privacy within the context of a marriage, but has since been expanded. This right to privacy has proven controversial over the years as the court predicted it would.[61] It has most recently been used by Democratic senators as a litmus test of sorts for Chief Justice John Roberts and Justice Samuel Alito during their confirmation hearings before the Senate judiciary committee. The reason for the Democrats' intense interest in the existence and stability of the right to privacy is because such a right is foundational to the Supreme Court's decisions on abortion.

The Court's finding in Griswold regarding zones of privacy was used later in one of the best known Supreme Court cases, Roe v. Wade,[62] to explain how the right to terminate a pregnancy is constitutionally protected.[63] In Roe, the Court invalidated a Texas abortion statute which prohibited abortions except to save the life of the mother.[64] Regarding the right to privacy as it relates to abortion, the court said,

> [t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[65]

The Right to Marry is Located

It wasn't until 1978 that the Court formally articulated a constitutional right to marry. In Zablocki v. Redhail,[66] the Court set aside a Wisconsin law which forbade the issuance of a marriage license, without authorization from a court, to any "Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment."[67] The statute stated that court permission would not be forthcoming unless the applicant proved compliance with support obligations and, "demonstrates that the children covered by the support order 'are not then and are not likely thereafter to become public charges.'"[68] The Court found that this restriction was, in many cases, a complete bar to marriage for those who otherwise would be able to marry.[69] Regarding the decision to marry, the Court said "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[70] This is a fundamentally different statement than the Court articulated in previous cases.

III. Potential Problems with the Right to Marry

Some thoughts on potential problems with the right to marry as it has been articulated by the Supreme Court. This section of the article isn't a formal legal analysis. I just want to point out, from a broader philosophical or policy perspective, some of the issues which arise from thinking of marriage as a fundamental right arising from the right to privacy. In Poe[71] and Griswold,[72] the Court addressed the right to privacy *within* a marriage. That is to say, the rights at issue were rights solely because of the existence of a marriage. In Zablocki, the extension of the right of privacy to encompass the decision *to marry* is characterized by the Court as an obvious, logical step. It is not such an easy step to make. Justice Stewart, in concurring with the court's ruling in Zablocki, questioned its holding regarding a right to marry.

> I do not agree with the Court that there is a "right to marry" in the constitutional sense. That right, or more accurately that privilege, is under our federal system peculiarly one to be defined and limited by state law. A State may not only "significantly interfere with decisions to enter into marital relationship," but may in many circumstances absolutely prohibit it. Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife. But, just as surely, in regulating the intimate human relationship of marriage, there is a limit beyond which a State may not constitutionally go.[73]

Justice Stewart's statement reflects the more traditional and, I would argue, the more correct view of marriage. State recognition of a given intimate relationship is not absolutely required. Under this view marriage is better seen as a privilege, and not as a fundamental right.[74] The Court tacitly acknowledges that, in fact, the real issue is not the right to marry. The right really at issue is the right to procreate, and it is an issue because of Wisconsin's laws prohibiting sex outside of marriage. "[I]f appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place."[75] It is important to keep this factual context in mind when talking of a right to marry. It is not at all certain that the court would have articulated a right to marry as it

did were the same case to be decided today. With all private sexual conduct constitutionally protected, marriage wouldn't be necessary to enable Zablocki to exercise either his right to enter intimate relationships, or his right to procreate. This is one way that the Lawrence decision could be seen as a double-edged sword from the perspective of same-sex marriage advocates. Since Griswold and Zablocki, sex has been separated from procreation and from marriage both culturally and judicially. Winning the right to have sex in any manner, and with any partner, of your choosing does not automatically lead to the right to marry a partner of your choice. This de-coupling of sex from marriage and procreation has, at the least, meant two battles to fight in order to gain the right to same-sex marriage. Lawrence was the first battle, a future Supreme Court case on same-sex marriage will be the second.

But what is it that makes marriage different from other fundamental rights? First, marriage is not an exclusively individual right. Eisenstadt v. Baird was another in the line of cases developing the right to privacy. As the follow-up to Griswold, this case found a right to the use of contraceptives by single people. In this case, the Court emphasized that the right to privacy protects *individual* rights.[76] "If the right of 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."[77]

Marriage necessarily involves more than one person. The state's power to regulate private, individual conduct has come under fire in the aforementioned cases, and I think rightly so. But, where the conduct involves or affects more than just the individual, the state has an interest, even an obligation to exercise its police powers to set the parameters of interaction between those individuals. In the context of marriage, this state obligation includes ensuring that there is not abuse, physical or otherwise, within the marriage, as well as ensuring that there is not

coercion or fraud by either party entering the marriage. The state must also ensure that each individual's rights are protected with regards to property and custody of children upon dissolution of a marriage. Regulating such interaction between individuals to ensure justice is the state's *raison d'etre*. It is the fundamental reason for forming a government in the first place. An exercise of an individual right cannot justly be allowed to infringe upon the right of another, nor can assertions of privacy in the exercise of such a right preclude the state from the exercise of its obligation to ensure such justice. The Court has recognized this in its decisions on abortion. In Roe v. Wade,[78] and later in Planned Parenthood v. Casey,[79] the court acknowledged that the state had a legitimate interest in the growing life of the unborn child.[80] The court balanced the competing interests of the mother, the state, and the unborn child (as protected by the state) and fashioned a framework for determining which interest took precedence at which point in the pregnancy.[81] The court, though not in so many words, recognized that more than one person was involved in the exercise of the protected right to choose abortion, and reaffirmed the right of the state to appropriately protect the interests of both mother and child.

Second, exercising the right to marry cannot be done without the state.[82] Individual rights of the kind discussed in the cases I've summarized can be exercised in isolation, without the state. A person can decide whether to use birth control, as was at issue in Griswold and Eisenstadt, without reference to the state. A person can decide when, and with whom to have sex, as was at issue in Lawrence. In each of these, and in the other cases I've summarized, the issue was state interference with the exercise of a right which *did not involve the state.*

On the other hand, marriage is a public institution. It seems nonsensical to speak of privacy with regards to entering a publicly recorded, judicially enforceable legal relationship. The entire institution of marriage is public. That is why it appeals to couples, both heterosexual

and homosexual. It is seen as a public affirmation of two peoples' commitment to one another, and it is that. But, the public nature of marriage goes far beyond expressions of love. When two people marry, they invoke the enforcement power of the state to monitor and police their relationship. At marriage, the state imposes obligations on the married couple, and it enforces those mutual duties, even after the marriage ends. Couples can, by simply cohabiting rather than going through the formalities of marriage, choose not to involve the state in their relationship, and an ever increasing number so choose. Marriage is a public act, authorized, performed, enforced, and dissolved by public officials. Two people can't just decide to get married and do so absent input or assistance from anyone, at least not if they want a valid recognized marriage. Marriage licenses are required, and are issued by the state. The persons who can perform the required ceremonies are listed in the state marriage statute. Many of the benefits which accrue to those who enter the institution are determined by the legislature. The certificate of marriage is required to be filed with the state. Obligations relating to support of spouse and children are judicially enforced. Marriage is not a case of the government reaching into the bedrooms of its citizens and arresting them for making personal intimate decisions.[83] In fact, it is quite the opposite. Marriage is a petition *by the individuals* to the government for recognition of their relationship and the consequent enforcement of promises and conferral of benefits.

Third, privacy within a legally recognized relationship or status is different than privacy associated with entry into that relationship or status. It is as if the Zablocki court had said "since citizens have privacy rights guaranteed in the Bill of Rights, it makes little sense to ignore the private right of anyone to become a citizen." This should rightly be recognized as absurd. Not just anyone can become a citizen. The state has the right, some might even call it a constitutional obligation, to ensure that the prerequisites for citizenship are met. The state is the "gatekeeper"

on the road to citizenship. Marriage is another status for which the state serves as gatekeeper. If it is the right and duty of the state to regulate entry into marriage (and the Supreme Court has held repeatedly that it is[84]), then this gatekeeper function must allow the state leeway for regulation of entry into marriage. Indeed there are many restrictions on who may marry. There are, at a minimum, residency restrictions,[85] age restrictions,[86] consanguinity restrictions,[87] restrictions requiring physical presence,[88] restrictions on those infected with certain diseases,[89] and restriction on marriage for those currently married.[90] Most of these involve the above mentioned duty of the state to ensure the health and safety of its citizens, and to ensure justice in their interactions with one another. If individuals' decisions about who and when to marry are protected by a right of privacy, then the state is effectively given no say in the marriage process beyond mere obligatory ratification of a private action. The court in Zablocki acknowledged this possible outcome and tried to guard against it.

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.[91]

Indeed, to completely "privatize" the decision of an individual to exercise his or her fundamental right to marry would mean that any requirements of the state, from licensing to registration to the permitted genders of the parties involved, would be subject to challenge as impermissible restrictions on the exercise of individual rights. This would mean the effective privatization of marriage itself, as asserting adequate justification for state regulations of any kind would be next to impossible.

The Zablocki decision is crucial to the issue of marriage as a whole. And the Court's articulation in that decision of a fundamental right to marry, separate and distinct from rights

arising from marriage, does not adequately deal with the ways in which the right to marry differs from other protected rights. Whether this pronouncement by the court was deliberate, inadvertent, or just incompletely reasoned, it is a precedent which the court will need to address. In the event that a state constitutional or statutory prohibition on same-sex marriage is challenged in federal court, the existence of this, as yet unqualified, right to marry will potentially make it much easier for the Supreme Court to compel recognition of same sex marriage.[92]

IV. Sexual Autonomy – the Lawrence v. Texas Decision[93]

Another right which has been recently discerned in the right to privacy by the Supreme Court is the right of people to engage in consensual sodomy. This could also be termed the right to sexual autonomy. Just as in the case of marriage, exercising sexual autonomy in the manner at issue in Lawrence also involves more than one person and is, therefore, not strictly an individual right. In this sense, it is conceptually similar to the right to marry and, therefore, is subject to criticism on similar bases as the right to marry. Traditionally, the state has regulated all sexual relationships, just as it has all marriages. In this section of the article I will examine how the Court reasoned in finding a right to sexual autonomy in Lawrence v. Texas. Since the rights are similar, the Court is likely to follow a similar fundamental rights analysis if and when it chooses to hear a case in which the right to marriage for same-sex couples is at stake. After outlining the reasoning of the majority in Lawrence, and Justice Scalia's criticism of the decision in his dissenting opinion, I will theorize how a hypothetical same-sex marriage case would play out under "Lawrence analysis." I will then conclude with some strategy suggestions for opponents of same-sex marriage.

The Lawrence Majority Opinion

Lawrence was arrested by Texas law enforcement officers who were called to his home to investigate a weapons complaint.[94] When officers entered the home (legally), they observed Lawrence and his partner engaged in anal sex.[95] Officers arrested the two men and charged them with “deviate sexual intercourse” under Texas law.[96] The men pled *nolo contendere* at trial and were fined 200 dollars plus court costs.[97] Their convictions were upheld by the Texas Court of appeals and the U.S. Supreme Court granted *certiorari*.[98]

The Court stated that they were reviewing the case under the due process clause of the 14th amendment.[99] The majority also wanted to reevaluate the Court’s previous holding in Bowers v. Hardwick,[100] in which they upheld a Georgia anti-sodomy law. The Court’s analysis in Lawrence begins with an overview of the development of the right to privacy for individuals similar to the one I have done in this article. The court cites Griswold, Eisenstadt, and Roe for the proposition that individuals have the right to privacy in personal, intimate decisions separate and apart from their marital status.[101] The Court then reviews their decision in Bowers v. Hardwick,[102] the only previous Supreme Court decision dealing with the constitutionality of state bans on sodomy.

Bowers was decided in 1986. The law in question was a Georgia law which outlawed sodomy.[103] The facts in Bowers were remarkably similar to those in Lawrence. The police entered Bowers’ home legally and found him engaged in intimate relations with his partner.[104] Although the prosecutor declined to charge Bowers, he sued in federal court to have the statute declared invalid.[105] The Supreme Court upheld the Georgia statute, finding no constitutional right to engage in the particular sex acts at issue.[106]

The Court in Lawrence overruled Bowers.[107] They specifically criticized several aspects of the Bowers decision. First, the majority attacked the issue the Court addressed in Bowers.[108] "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward."[109] The majority in Lawrence would have stated the issue in more expansive terms. To the majority, the liberty at issue was the liberty to form personal, homosexual relationships. [110] They focused not on the act actually outlawed, but on other acts which, cumulatively, constitute a relationship. "The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[111]

Second, the Court criticized the Bowers majority's characterization of the history of anti-sodomy laws in the United States.[112] The Bowers majority stated that sodomy has always been a crime in under the common law and, as of 1961, was a crime in all 50 states.[113] The Lawrence majority again focused on homosexual relationships, rather than the act the statute prohibits. The court said "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."[114] This wasn't so much a response to Bowers, as just the desire of the court to reframe the issue as the majority in Bowers did not make the same distinction. The Court discounted the Bowers majority's characterization of sodomy laws through history simply because the laws historically applied to heterosexual as well as homosexual conduct.[115] The Court also found it significant that "[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private."[116]

To further counter the historical picture in Bowers, the Lawrence majority discussed trends in international jurisprudence toward removing legal prohibitions of sodomy.[117] The Court called these developments "authorities pointing in an opposite direction."[118] These foreign

authorities, together with the reimagining of the historical analysis given in Bowers, were apparently enough to convince the court that opposition to homosexual sodomy is not "deeply rooted in this Nation's history and traditions."[119]

While the Court found it "a tenable argument"[120] that the Texas law was invalid under the equal protection clause, the majority did not use equal protection as the basis for striking down the law – an outcome which would have been consistent with Bowers. Rather, the majority stated "we conclude the instant case requires us to address whether *Bowers* itself has continuing validity."[121] Having done so, the Lawrence majority declared Bowers overruled.[122] The remaining two paragraphs of the decision overturned the Texas sodomy statute and, therefore, all state sodomy statutes.[123]

The Lawrence Dissent

Justice Scalia's dissent in Lawrence was longer than the majority opinion. He was critical of the decision on a number of grounds.

First, he criticized the unequal application of the doctrine of *stare decisis*. He contrasted the majority's willingness to overturn Bowers with their reluctance to do the same in other cases involving highly controversial subject matter, particularly Roe v. Wade.[124]

Second, Scalia criticized the majority's statement of the fundamental liberty of which Lawrence was deprived without due process of law.[125] He was specifically critical of their repeated references to "liberty protected by the Constitution."[126] He noted that "[t]he Fourteenth Amendment *expressly allows* States to deprive their citizens of 'liberty,' *so long as 'due process of law' is provided.*"[127] Scalia thought the Court should have overruled Bowers by examining the fundamental liberty at stake in Bowers, namely "a right to engage in homosexual sodomy,"[128]

and not the fundamental liberty at stake in Lawrence. Scalia also criticized the majority for failing to articulate the fundamental liberty at stake at all.[129]

Third, Scalia disputed the majority's rational basis analysis. He would have found that rational basis was "satisfied by the enforcement of traditional notions of sexual morality."[130] Scalia also warned of the dangerous precedent set by the Court when they asserted that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[131] To Scalia, this is precisely the rational basis justifying many laws. The majority's adoption of this limitation on the definition of rational basis "effectively decrees the end of all morals legislation"[132] because "If . . . the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws [against fornication, bigamy, adultery, adult incest, bestiality, and obscenity] can survive rational-basis review."[133]

Fourth, Scalia criticized the arguments, made by Justice O'Connor in concurrence, that the Texas anti-sodomy law was unconstitutional as a denial of equal protection.[134] Scalia saw O'Connor's concurrence as setting a dangerous precedent in terms of how she defined the class of people affected by the law.[135] Scalia feared that this could lead to the invalidation of any law which a group of people have a tendency to break.[136]

It is beyond the scope of this article to examine Scalia's dissent in depth, or its potential usefulness to those opposed to same-sex marriage in any future case. His dissent does serve as an excellent general critique of the Lawrence decision, and possibly as a template for future courts to cite to justify refusal to follow its precedent. It also illuminates the reasoning which, if followed in a future same-sex marriage case, could lead to the overturning of state marriage statutes.

V. Same-sex Marriage Under "Lawrence Analysis"

Lawrence is the most recent Supreme Court case in the area of privacy in personal intimate conduct. It, therefore, represents the current method of fundamental rights analysis favored by the Court. The rights vindicated in the Lawrence decision were found to arise from the right to privacy.[137] The right to privacy in turn, as I have explained above, has been held to arise from the penumbra of other rights contained in the Bill of Rights in conjunction with the due process clause of the 14th amendment.[138] In the Zablocki decision, the Court found a right to marry rooted in the same constitutional source.[139] Clearly, the Supreme Court sees a kinship between these two rights. As they arise from the same right to privacy, the Court should analyze them in similar fashion if judicial decisions are to be consistent. With that in mind, how would the Supreme Court reason in a hypothetical same-sex marriage case?

Framing the issue

After restating the facts of the case, and the questions the court would address, the Court in Lawrence began their opinion by framing the issue at stake. In Lawrence the issue was not the right to homosexual sodomy, but the right to pursue relationships free from state interference.[140] What is the fundamental right at stake in our hypothetical?

The Court in Lawrence concluded that the state law at issue sought to regulate a relationship which was within the right of privacy of the participants to enter into.[141] In our hypothetical, could the Court reasonably find that marriage is a similar relationship? The main difference is the distinction between public and private actions. Marriage is a public institution, and entering marriage is a public action. The conduct at issue in Lawrence was private.[142] So, how could the Court reason around this? By defining the issue very broadly.

The Court criticizes the Bowers majority for oversimplifying the issue involved as only the right to engage in homosexual sodomy. They liken this to telling married couples that marriage is just about the right to have sexual intercourse.[143] The Court, in our hypothetical case, would likely frame the issue broadly as well. The issue would not be "the right to marry a partner of the same sex," but something more akin to "the right to public acknowledgement of a legal intimate relationship." Or even "The right to public enforcement of mutual commitment in intimate relationships." At this point the Court could examine the mechanisms extant in society for recognition of relationships and enforcement of mutual commitment. Since the only institution by which society recognizes intimate personal relationships is marriage, the die is cast for a decision requiring equal access to the institution, or decrying the depravation of access to it without due process of law.

Historical Analysis

The historical analysis would follow a similar pattern. Marriage laws historically have not differentiated between same-sex marriage and heterosexual marriage.[144] In Lawrence, the Court pointed out that it has been only in the last 30 years or so that states laws began to specifically target homosexual sodomy.[145] Similarly, it has only been in the last few decades that state marriage laws have been amended to define marriage as being between one man and one woman. If our hypothetical same-sex marriage case were subjected to the Lawrence Court's analysis of history, it is entirely possible that the Court would find that opposite gender marriage was not "deeply rooted in this Nation's history and traditions" as is necessary under a commonly quoted definition of fundamental rights.[146]

As a side matter, this is an opportune point to reiterate one of Justice Scalia's major criticisms of the Lawrence decision, which I feel compelled to articulate beyond what I could fit

in footnotes. The reasoning of the Court on this point is, quite simply, perverse and illogical. The Court reasons that, historically, the law did not single out homosexual sodomy for condemnation, and therefore legal proscriptions aimed at homosexual sodomy do not have deep roots.[147] Would the Court rather that the law had prohibited homosexual relations exclusively rather that treating all sodomy equally? The Court admits that sodomy has been universally prohibited in the United States regardless of the sex of the participants.[148] If all sodomy has historically been universally condemned regardless of who participates, then homosexual sodomy, as a subset of all sodomy, has been so condemned as well.[149] Prohibiting an action for all people by definition prohibits it for any individual or group of people. This attack on the reasoning in Bowers would receive a failing grade in any introductory logic course. The Court uses this fallacious argument to trivialize the reasoning of the majority in Bowers, and to understate the extent of the historical antipathy, both social and legal, towards sodomy. It may be true as Justice Kennedy states, that "history and tradition are . . . not in all cases the ending point of the substantive due process inquiry,"[150] but the Court should at least be truthfully in its characterizations of history and traditions.

In our hypothetical, the outcome of the Court's historical analysis of whether same-sex marriage was "deeply rooted in this Nation's history and traditions,"[151] and thus whether it was a fundamental right, would determine the standard of review to be used. The Court in Lawrence applied some form of rational basis review.[152] It is unclear what standard of review the Court would apply following their historical analysis.

Analyzing the State Action

Let's assume that the fundamental right the Court deems to be at issue is simply the right to marry as articulated in Zablocki.[153] Regardless of the standard of review chosen, rational

basis, or strict scrutiny, the next question is "does the state action substantially interfere with exercise of that right?" This is the question on which the case will likely turn. The arguments here on both sides are many, and are well documented. I will not go into great detail here, but will give a single point-counterpoint example to illustrate the "flavor" of the debate.

Proponents of same-sex marriage can point to the court's decision in Loving v. Virginia.[154] This is the sole Supreme Court case dealing with restrictions on an individual's choice of marriage partner. In Loving, the Court ruled that restrictions on the ability of white individuals to choose to marry someone of another race violated equal protection partly because the same prohibition didn't apply to members of other races.[155] Had the right to marry been articulated before Loving, the case could just have easily been decided on due process grounds. The argument would be that the racial restriction denied the exercise of the right to marry without a compelling state justification for doing so. Proponents of same-sex marriage would then point out that gender restrictions on one's choice of marriage partner similarly restrict exercise of the right to marry. Proponents would then argue that the state has no compelling interest in such restrictions.

Opponents of same-sex marriage would counter that Loving could have only been decided on equal protection grounds. Race is a suspect classification for the purposes of equal protection analysis,[156] and the miscegenation statute was, therefore, subject to strict scrutiny on those grounds. In terms of equal protection, there is no suspect classification in heterosexual marriage laws. There is no sex-based classification, no alienage classification, and no other classification which would subject the marriage law to heightened scrutiny. The restriction, namely the requirement to marry a person of the opposite sex, does not discriminate. It applies equally to all - any man can marry any woman, and vice versa.[157] Such a restriction is in the

nature of the other restrictions on marriage partners which are generally thought to be acceptable; age restrictions, consanguinity restrictions, and so forth all apply equally to everyone. Therefore, equal protection analysis is not appropriate, the statute should be looked at under due process analysis, and Loving isn't relevant as it did not depend on due process.

Following the arguments, the Court will have to determine whether the state law meets the burden of proof. If the Court decided rational basis review was appropriate, then the state only needs to justify the opposite-sex requirement as advancing a legitimate government purpose. If the Court decided to use heightened scrutiny, the state will have to have a compelling reason for restricting marriage to opposite-sex couples.

VI. Suggestions for Opponents of Same-sex Marriage

In summary, when a same-sex marriage case reaches the Supreme Court, what should be the focus of the argument for those defending traditional marriage? Since it is not clear what the standard of review will be, the state should focus on articulating compelling government interests justifying opposite-sex marriage requirements in order to pass strict scrutiny. In my view, the strongest is the state's interest in encouraging procreation and the optimal environment for child-rearing. Population growth is essential to the continuing economic viability of the state, and the very survival of the nation. Biology dictates that heterosexual couples will have more children than homosexual couples. The survival of the nation is a compelling government interest. Awarding benefits and recognition to encourage heterosexual couples to enter an institution that almost universally leads to the birth of children and, subsequently, ensuring that those children are taken care of is the best way to advance that compelling government interest.

As discussed briefly above, the Loving analogy must be countered.[158] Opponents of same-sex marriage should try to argue the case as one of fundamental rights. If they do this, they

can neutralize any attack based on Loving's equal protection arguments. If the case does hinge on fundamental rights, the Lawrence case can be used against same-sex marriage. At least, an argument can be made that "Lawrence analysis" should not be used. After all, the Court in Lawrence explicitly said that they were not addressing whether or not the state was required to recognize homosexual relationships.[159]

Last, and most important, same-sex marriage opponents should attack the right to marry. It is not firmly entrenched in Supreme Court precedent, and it has not been well defined by subsequent decisions. I have outlined a few criticisms of the right to marry in this article. Opponents of same-sex marriage should build on these. Particularly the distinction between the right to engage in private behavior, and the right to have the state ratify and endorse that behavior. The Lawrence decision can't be used alone to legalize same-sex marriage,[160] but in conjunction with the fundamental right to marry found in Zablocki, the possibility exists. To prevent this, either the right to sexual autonomy, or the right to marry must be called into question. I think that the easier case to make is the case against the right to marry.

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[1] Maynard v. Hill, 125 U.S. 190, 211 (1888).
[2] Zablocki v. Redhail, 434 U.S. 374 (1978). Where the right to privacy comes from is another question. I will address emanations and penumbras later in this article.
[3] Lawrence v. Texas, 539 U.S. 558 (2003).
[4] N.Y Times, *Religious Voting Data Show Some Shift, Observers Say.* Nov. 9, 2006. (Available at http://www.nytimes.com/2006/11/09/us/politics/09relig.html). Some of these initiatives, Arizona's included, also sought to ban 'civil union' marriage-like recognition of same-sex relationships.
[5] *Id.*
[6] G. M. Filisko, *The Rites Wrangle*, A.B.A. J., Nov. 2006, at 44, 47 (originally said nineteen states have constitutional provisions, I've updated this quote to reflect the outcome of the most recent ballot initiatives. There is overlap, some states have both constitutional and statutory definitions of marriage.); *See also* Charles E. Mauney, Jr., *Landmark Decision or Limited Precedent: Does* Lawrence v. Texas *Require Recognition of a Fundamental Right to Same-Sex Marriage*, 35 CUMB. L. REV. 147, n.27 (2004-05) for a comprehensive list of state statutory and constitutional definitions of marriage.
[7] Filisko, *supra* note 6 at 47. (In October 2006, the New Jersey Supreme Court ruled that the legislature must either open marriage to same-sex couples, or enact civil union legislation granting such couples all the rights of marriage. This will make either 8 states with civil unions or 2 with same-sex marriage). *See* Lewis v. Harris, 908 A.2d 196 (N.J.,2006).
[8] Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003).

[9] Daniel Ottosson, *Wrap up Survey on the Laws Worldwide Affecting Gay, Lesbian and Transgendered People*, 2006, at 5. (available at http://www.ilga.org/statehomophobia/Legal%20Wrap%20Up%20Survey%20July%202006.pdf).
[10] *Id.*
[11] *Id.* at 6.
[12] This is partly due to marriage long being considered a state law matter. *See infra* note 22.
[13] See Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (three same-sex couples challenged Hawaii's definition of marriage); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at 6 (Alaska Super. Ct. Feb. 27, 1998) (male same-sex couple sought to compel the state to issue a marriage license to them).
[14] Baker v. Vermont, 744 A.2d 864, 881 (Vt. 1999) (three same-sex couples sought marriage licenses; the court held that the benefits of marriage must be extended to same-sex couples. The Vermont legislature subsequently passed a bill authorizing civil unions).
[15] *See* Baker v. Nelson, 191 N.W.2d 185, 186-87 (Minn. 1972), dismissed for lack of substantial federal question, 409 U.S. 810 (1973) (male same-sex couple challenged state's refusal to issue them a marriage license); Jones v. Hallahan, 501 S.W.2d 588, 589-90 (Ky. 1973) (female same-sex couple challenged state's refusal to issue them a marriage license).
[16] Goodridge, 798 N.E.2d 941.
[17] "U.S. Secretary of Defense Donald Rumsfeld . . . at the Defense Department Briefing on February 12, 2002: 'Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns — the ones we don't know we don't know.'" (Available at http://en.wikipedia.org/wiki/Unknown_unknown).
[18] For arguments against legalization of same-sex marriage, see Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y. 1 (2006); for counter-arguments, see John G. Culhane, *Uprooting the Arguments Against Same-sex Marriage*, 20 CARDOZO L. REV. 1119 (1998-99); for a summary of arguments on both sides of the issue as it relates to civil rights, see David Orgon Coolidge, *Playing the Loving Card: Same-sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201 (1997-98). Footnote 7 in particular gives a nice overview of the state of the debate in law journal circles as of 1997 and lists many articles on both sides of the debate. *Id.* at 202 n.7.
[19] Goodridge, 798 N.E.2d 941.
[20] Lawrence v. Texas, 539 U.S. 558.
[21] *Id.* at 599 (Scalia, J., dissenting).
[22] Sosna v. Iowa, 419 U.S. 393, 404 (1975). "The durational residency requirement . . . is a part of Iowa's comprehensive statutory regulation of domestic relations, an area that has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact. In Barber v. Barber, 21 How. 582, 584, 16 L.Ed. 226 (1859), the Court said: 'We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce . . . .' In Penoyer v. Neff, 95 U.S. 714, 734--735, 24 L.Ed. 565 (1878), the Court said: 'The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved,' and the same view was reaffirmed in Simms v. Simms, 175 U.S. 162, 167, 20 S.Ct. 58, 60, 44 L.Ed. 115 (1899)."
[23] *See, e.g.* United Kingdom Statute 1949 c 76.
[24] *See* Goodridge, 798 N.E.2d at 952 regarding Massachusetts law ("definition of marriage, as both the department and the Superior Court judge point out, derives from the common law. See *Commonwealth v. Knowlton,* 2 Mass. 530, 535 (1807) (Massachusetts common law derives from English common law except as otherwise altered by Massachusetts statutes and Constitution).").
[25] Lawrence, 539 U.S. at 570.
[26] Maynard v. Hill, 125 U.S. at 211.
[27] *Id.*
[28] Reynolds v. United States, 98 U.S. 145 (1878).
[29] *Id.* at 165.
[30] Meyer v. Nebraska, 262 U.S. 390 (1923).
[31] *Id.* at 399. (emphasis added).
[32] *See supra* note 22. The Reynolds case cited *supra* note 28 dealt with territorial laws, not state laws. *See also* Maynard v. Hill, 125 U.S. at 205. "Marriage, as creating the most important relation in life, as having more to do

with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." *Id.*
[33] U.S. CONST. amend. XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* at § 1.
[34] *See generally* Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184 (2003-04). Ball discusses the same cases dealing with the development of the right to marry that I discuss here, though he organizes them differently.
[35] *See, e.g., infra* note 75 and text accompanying note.
[36] Skinner v. Oklahoma, 316 U.S. 535 (1942).
[37] *Id.* at 536.
[38] The court held the law invalid because it applied unequally to individuals who had committed essentially the same crime. *Id.* at 541. The court discussed marriage and procreation only to emphasize the severity and permanence of the depravation. *Id.*
[39] *Id.* at 541.
[40] *Id.*
[41] Poe v. Ullman, 367 U.S. 497 (1961).
[42] *Id.* at 498-99.
[43] *Id.* at 509.
[44] *Id.* at 522-23 (Harlan, J., dissenting). Harlan also mentions the concept of other right not explicit in the Bill of Rights. "'Liberty' is a conception that sometimes gains content from the emanations of other specific guarantees." *Id.* at 517. This idea of emanations will come up later in the Griswold case, *infra* note 54.
[45] *Id.* at 553 (Harlan, J., dissenting).
[46] *Id.*
[47] *Id.* This is opposite the position taken by the Massachusetts court. In Goodridge they explicitly say that "the government creates civil marriage" Goodridge, 798 N.E.2d at 954. *See also* Ball, *supra* note 34. From Harlan's language, Ball argues generally that the state may have an affirmative obligation to recognize at least some intimate relationships as marital.
[48] Ball, *supra* note 34 at 1194.
[49] Loving v. Virginia, 388 U.S. 1 (1967).
[50] *Id.* at 7.
[51] *Id.* at 12. "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."
[52] *Id.* at 12. *See also* Ball, *supra* note 34 at 1200-03. Ball discusses in further detail the Loving decision and another case Turner v. Safley. this case overturned state restrictions on prisoners marrying while incarcerated. Ball argues that these decisions reinforce one another and together firmly enshrine an affirmative right to marry in the constitution. Be that as it may, I have omitted the latter case, as it adds little to the discussion of the origin of the right to marry.
[53] *See generally* Coolidge, s*upra* note 18. For a criticism of the "Loving analogy," see Monte Neil Stewart and William C. Duncan, *Marriage and the Betrayal of* Perez *and* Loving, 2005 BYU L. REV. 555 (2005).
[54] Griswold v. Connecticut, 381 U.S. 479 (1965).
[55] In fact the conduct of the same doctor was at issue in both Poe and Griswold.
[56] Poe, 367 U.S. 497.
[57] Griswold, 381 U.S. at 485.
[58] *Id.* at 484.
[59] *Id.* at 485. The court acknowledges the controversial nature of these rights. "We have had many controversies over these penumbral rights of 'privacy and repose.' See, e.g., Breard v. City of Alexandria, 341 U.S. 622, 626, 644, 71 S.Ct. 920, 923, 933, 95 L.Ed. 1233; Public Utilities Comm. v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068; Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492; Lanza v. State of New York, 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384; Frank v. State of Maryland, 359 U.S. 360, 79 S.Ct. 804, 3 L.Ed.2d 877; Skinner v. State of

Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one." *Id.*
[60] *Id.*
[61] *See supra* note 59.
[62] Roe v. Wade, 410 U.S. 113 (1973).
[63] "[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* at 152-53 (internal citations omitted).
[64] *Id.* at 113.
[65] *Id.* at 153.
[66] Zablocki, 434 U.S. 374.
[67] *Id.* at 375.
[68] *Id.*
[69] *Id.* at 387.
[70] *Id.* at 386.
[71] Poe, 367 U.S. 497.
[72] Griswold, 381 U.S. 479.
[73] Zablocki, 434 U.S. at 392. (Stewart, J., concurring).
[74] Ball, *supra* note 34, would argue otherwise. In his view, Harlan's dissent in Poe, in conjunction with Zablocki, and the Turner v. Safley case create an affirmative obligation on the part of the state to recognize some relationships as marriages.
[75] Zablocki, 434 U.S. at 386. The court notes, "Wisconsin punishes fornication as a criminal offense: "Whoever has sexual intercourse with a person not his spouse may be fined not more than $200 or imprisoned not more than 6 months or both." Wis. Stat. § 944.15 (1973)." *Id.* at n.11.
[76] Eisenstadt v. Baird, 405 U.S. 438 (1972).
[77] *Id.* at 453. Note the language: "right of the *individual*", "matters . . . affecting *a person*." *Id.* The court was focused here on individual rights, as it has always been.
[78] Roe v. Wade, 410 U.S. 113.
[79] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).
[80] "The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted." *Id.* at 869.
[81] "The State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and . . . it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during the pregnancy, each becomes 'compelling.'" Roe, 410 U.S. at 162-63. Casey modified the trimester framework of Roe, replacing it with one based on fetal viability. *See* Casey, 505 U.S. 833.
[82] *See also*, Mauney, *supra* note 6 for a discussion of the public versus private distinction in the right to privacy.
[83] "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Griswold, 381 U.S. at 485-86.
[84] *See supra* note 22.
[85] At a minimum for people below the age of consent. "No waiver shall be granted to persons below the age of consent if both parties are nonresidents." N.H. REV. STAT. ANN. § 457:6 (2006).
[86] "No male below the age of 14 years and no female below the age of 13 years shall be capable of contracting a valid marriage, and all marriages contracted by such persons shall be null and void." N.H. REV. STAT. ANN. § 457:4 (2006).
[87] "(1) The following marriages are incestuous and void from the beginning, whether the relationship is legitimate or illegitimate:. . .

(f) marriages between any persons related to each other within and not including the fifth degree of consanguinity computed according to the rules of the civil law, except as provided in Subsection (2).” UTAH CODE ANN. § 30-1-1 (2006).
[88] “No magistrate or minister of religion shall solemnize any marriage by proxy.” N.H. REV. STAT. ANN. § 457:8 (2006).
[89] Goodridge, 798 N.E.2d at 951-52. Massachusetts laws “prohibit marriage if one of the parties has communicable syphilis” (quoting MASS. GEN. LAWS ch. 207, § 28A (2003).) (this section was repealed in 2004).
[90] “The following marriages are prohibited and declared void: (1) when there is a husband or wife living, from whom the person marrying has not been divorced.” UTAH CODE ANN. § 30-1-2.
[91] Zablocki, 434 U.S. at 386-87.
[92] *See generally* Ball, *supra* note 34.
[93] Lawrence, 539 U.S. 558.
[94] *Id.* at 562.
[95] *Id.* at 563. Incidentally, the man who called the police was a friend of the two men charged, and was himself arrested and convicted for filing a false police report. He served 15 days in jail. *See* http://www.sodomylaws.org/usa/texas/txnews40.htm. This would seem to indicate that the whole situation was a setup designed to generate a test case to be used for overturning anti-sodomy laws.
[96] Lawrence, 539 U.S. at 563.
[97] *Id.*
[98] *Id.* at 563-64.
[99] “We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.” *Id.* at 564.
[100] Bowers v. Hardwick, 478 U.S. 186 (1986).
[101] Lawrence, 539 U.S. at 565.
[102] Bowers, 478 U.S. 186.
[103] Sodomy was criminalized in the Georgia statute at issue in Bowers regardless of the sex of the participants involved. By contrast, the Texas law in Lawrence only criminalized homosexual sodomy. Lawrence, 539 U.S. at 566.
[104] Bowers, 478 U.S. at 187-88; Lawrence, 539 U.S. at 566.
[105] Bowers, 478 U.S. at 188.
[106] *Id.* at 191.
[107] Lawrence, 539 U.S. at 578.
[108] *Id.* at 566-67.
[109] *Id.*
[110] *Id.* at 567.
[111] *Id.*
[112] *Id.* at 567-73.
[113] Bowers, 478 U.S. at 193.
[114] Lawrence, 539 U.S. at 568.
[115] *Id.*
[116] *Id.* at 569. Whether or not laws are enforced has nothing to do with due process analysis.
[117] At least European jurisprudence. Lawrence, 539 U.S. at 572-73.
[118] *Id.* at 572. The court does not indicate what precedential value acts of the British Parliament or decisions of the European Court of Human Rights have in United States federal courts or how the 20th century history of sodomy in Europe is relevant to the history in the U.S. They do use these authorities to evaluate the legitimacy of the right, however “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.” *Id.* at 577. The subject of using foreign precedent is, however, a topic for another paper, it is sufficient to note that such a practice is controversial. *See also Id.* at 598. (Scalia, J., dissenting).
[119] *See* Bowers, 478 U.S. at 192; Moore v. East Cleveland, 431 U.S. 494, 503 (1977).
[120] Lawrence, 539 U.S. at 574.

[121] *Id.* at 574-75. Justice O'Connor in concurrence would have used equal protection to invalidate the law. *Id.* at 579-85 (O'Connor, J., concurring). This desire to overrule Bowers, rather than issue a limited decision consistent with precedent is strongly criticized by Justice Scalia in dissent. *Id.* at 586-91 (Scalia, J., dissenting).
[122] *Id.* at 578.
[123] *Id.* Since equal protection was not the issue, even sodomy statutes which apply to both heterosexual and homosexual conduct would unduly restrict the exercise of a fundamental right.
[124] *Id.* at 586-92.
[125] U.S. CONST. amend. XIV.
[126] Lawrence, 539 U.S. at 592. "there is no right to 'liberty' under the Due Process Clause, though today's opinion repeatedly makes that claim. *Ante,* at 2478 ("The liberty protected by the Constitution allows homosexual persons the right to make this choice"); *ante,* at 2481 (" 'These matters are central to the liberty protected by the Fourteenth Amendment' "); *ante,* at 2484 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government")." *Id.*
[127] *Id.* at 592 (emphasis in original).
[128] *Id.* at 594.
[129] *Id.* at 594. "Not once does it describe homosexual sodomy as a "fundamental right" or a "fundamental liberty interest," nor does it subject the Texas statute to strict scrutiny. Instead, having failed to establish that the right to homosexual sodomy is "'deeply rooted in this Nation's history and tradition,'" the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test, and overrules *Bowers*' holding to the contrary" *Id.*
[130] *Id.* at 601.
[131] *Id.* at 599 (quoting Bowers, 478 U.S. at 216 (Stevens, J., dissenting)).
[132] *Id.* at 599.
[133] *Id.* (emphasis in original).
[134] *Id.* at 599-602.
[135] "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class." *Id.* at 583 (O'Connor, J., concurring).
[136] "The same could be said of any law. A law against public nudity targets 'the conduct that is closely correlated with being a nudist,' and hence 'is targeted at more than conduct'; it is 'directed toward nudists as a class.'" *Id.* at 601 (Scalia, J., dissenting).
[137] Lawrence, 539 U.S. at 564.
[138] *See supra* pp. 12-13.
[139] *See supra* p. 14.
[140] *See supra* note 110.
[141] *See supra* note 111.
[142] *See* Mauney, *supra* note 6 for a discussion of public versus private actions.
[143] Lawrence, 539 U.S. at 558. The Lawrence majority falls victim to the same temptation, though. They talk in expansive terms about the dignity of homosexuals as free persons, *Id.* at 558, and the right to form relationships to pursue higher purposes. *Id.* at 574. But the court seems to think that such relationships are impossible, or at least not meaningful without physical intimacy; particularly without sodomy. Just as they accuse the Bowers majority of doing, the Lawrence majority defines homosexual relationships by the sexual practices of the participants, as if being in a same-sex relationship were just about the right to have anal sex.
[144] At least not adequately, as evidenced by the 26 recent state constitutional amendments defining marriage.
[145] "American laws targeting same-sex couples did not develop until the last third of the 20th century." Lawrence, 539 U.S. at 570.
[146] *See* Bowers, 478 U.S. at 192; Moore v. East Cleveland, 431 U.S. 494, 503 (1977).
[147] "At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter." Lawrence, 539 U.S. at 568; "In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated." *Id.* at 571.
[148] Lawrence, 539 U.S. at 568-71.
[149] *See* Lawrence, 539 U.S. at 595-96 (Scalia, J., dissenting).
[150] County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring).

[151] Moore v. East Cleveland, 431 U.S. 494, 503 (1977).
[152] *See supra* note 129.
[153] Zablocki v. Redhail, 434 U.S. 374.
[154] Loving, 388 U.S. 1. *See also supra* pp. 10-11 and note 53 for details on this argument.
[155] Loving, 388 U.S. at n.11.
[156] *See, e.g.,* Wygant v. Jackson Board of Education, 476 U.S. 267, 274 (1986); Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984).
[157] This was not the case in Loving. The miscegenation law in question in that case only applied to whites. Other races could intermarry. For example a Black could marry an Asian. Loving, 388 U.S. at n.11.
[158] *See supra* note 53.
[159] The court states that this case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Lawrence, 539 U.S. at 578.
[160] *See generally* Ball, *supra* note 34.