

Civil Marriage

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THE FREEDOM TO MARRY MUST NOT BE DENIED

BY AMELIA CRAIG CRAMER

Gay and lesbian couples in long-term committed relationships, many of whom are raising children together, are denied the right to marry by Arizona's exclusionary law restricting civil marriage to different-sex couples. This legislated limitation on whom one may marry excludes families headed by same-sex couples from a profound and vitally important social and legal institution. That institution exclusively provides access to countless legal benefits and protections—and affords unique societal and personal significance to the relationship.¹

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Amelia Craig Cramer is a civil Deputy Pima County Attorney. She is the former executive director of Gay & Lesbian Advocates & Defenders and former managing attorney for the western regional office of Lambda Legal Defense and Education Fund. Ms. Cramer is a founding member of the State Bar of Arizona's Committee on Sexual Orientation and Gender Identity. She is former co-chair of the board of directors of the Arizona Human Rights Fund and former co-chair of the City of Tucson Commission on GLBT Issues. She resides in Tucson with her partner of nine years, Dr. Amy S. Cramer, and their 4-year-old daughter, Meg.



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WHAT'S AT STAKE

Civil marriage provides a panoply of 1,049 federal rights and responsibilities,² as well as hundreds of state rights and responsibilities, that are largely unavailable through any other means. These include:

1. protections after a spouse's incapacitation or death (e.g., priority in guardianship or appointment as guardian, conservator and medical decision-making surrogate for an incapacitated spouse; survivorship and intestacy rights; spousal estate and gift tax marital deductions; tax-deferred transfer of spouse's pension benefits and IRA and 401(k) plan proceeds; standing to file suit for spouse's wrongful death; right to priority in disposition of spouse's physical remains; disability benefits; Social Security benefits)
2. economic supports for family finances (e.g., tuition credit and scholarships for spouses of those in public service; tax deduction of spouse's medical expenses; joint tax returns; community property)
3. workplace and private sector safety nets (e.g., coverage under family health insurance plans, family medical leave to care for a spouse; right to make health care decisions for an incapacitated spouse; right to visit in the hospital with an ill spouse)
4. protections to care for children and one another (e.g., legitimization of children conceived through alternative insemination, alimony, maintenance, custody, and division of assets in event of dissolution of the relationship)
5. informational privileges (e.g., right to act on behalf of and receive information about one's spouse; right to confidentiality of communications between spouses; and privilege not to

be forced to testify against a spouse)

Contrary to common misconceptions, there are only a small number of equivalent protections that may be cobbled together for couples excluded from marriage (e.g., health care powers of attorney, guardianship papers, wills), and these are available and enforceable only at a significant cost that not everyone can afford.³ Moreover, the "domestic partner" benefits increasingly offered by public- and private-sector employers to provide insurance, child care and other benefits to the families of unmarried employees are not equivalent to the benefits enjoyed by married employees because, among other things, the value of these benefits is treated as taxable income to unmarried employees, while married employees receive the benefits tax-free.⁴

Legal rights and responsibilities are not the only issue. Marriage also includes a

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vast web of social support. Marriage is an important means to express personal and spiritual values. It is central to our liberty and happiness. Same-sex couples, for whom marriage is every bit as meaningful and appropriate as it is for different-sex couples, along with their children, suffer tremendous social harm due to exclusion from this central institution. They and their families are relegated to second-class status. They are shut out of the most profoundly important social and cultural institution in our society. This is an intolerable

affront to same-sex couples' rights to liberty, equality and happiness.

BIAS NOT A LEGITIMATE STATE INTEREST

It is well established as a matter of law that the right to marry the person one loves is so central to liberty and happiness as to be a fundamental civil right. "The freedom to marry has long been recognized as one of the vital personal rights" guaranteed by the U.S. Constitution.⁵ The Constitution guarantees that one may marry that single person in the whole world whom one loves.⁶ One may marry from prison⁷; one may marry despite failing the children of a previous marriage⁸; and one may marry across any ethnic or racial divide.⁹

The U.S. Supreme Court last year for the first time recognized that the Constitution entitles persons who are gay or lesbian to the same freedoms, the same personal rights and personal liberties as non-gay persons, including in the area of family and domestic relations. The Court held that the constitutional guarantee of substantive due process overrides the will of a state legislature to criminalize certain private, consensual, adult sexual activity.¹⁰ It recognized that the constitutional guarantee of due process protects against unreasonable intrusions into

personal liberty in the area of "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."¹¹ The Court expressly recognized that "persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."¹² Thus, the denial to lesbian and gay people of the freedom to marry their partners must satisfy the strict limits placed on governmental restrictions of liberty under the Constitution's due

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process clause.

The constitutional guarantee of equal protection requires that same-sex couples be afforded the same rights as different-sex couples.¹³ It is unconstitutional for a state to discriminate on any basis in the absence of a legitimate and sufficiently weighty governmental interest.¹⁴ Bias or prejudice is not a legitimate state interest; thus, a state may not discriminate on the basis of sexual orientation if the only governmental interest in doing so is bias or animus toward gay men, lesbians and bisexuals.¹⁵ Similarly, a state may not discriminate on the basis of sex unless it has a legitimate and sufficiently important governmental interest for doing so.¹⁶

Denying same-sex couples the right to marry is an unconstitutional denial of substantive due process and equal protection because it discriminates both on the basis of sexual orientation and on the basis of sex for no legitimate reason—as held by supreme courts in Hawaii, Vermont and Massachusetts.¹⁷ So long as there is a government-sponsored institution of civil

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marriage, equal protection demands that all persons be entitled to participate in this institution equally. A woman must not be denied the right to marry the person she loves simply on the basis of her sex, just as a person of color must not be denied the right to marry the one he loves simply on the basis of his race.¹⁸

ARIZONA COURT OF APPEALS IN ERROR

Notwithstanding the foregoing, the Arizona Court of Appeals recently rejected a challenge to this state's statutory prohibition against same-sex marriage in *Standhardt v. Superior Court*.¹⁹ The decision in *Standhardt* is flawed for many reasons, including the following:

1. The court accepted as a “given” not subject to challenge the argument that marriage is “defined” as being between a man and a woman. But the State’s choice to discriminate in how it “defines” who may marry is not immune from judicial review. Courts may not abdicate their responsibility to safeguard constitutional rights by deferring to legislative definitions that perpetuate discriminatory restrictions. There is no due process or equal protection exemption in the Constitution for “definitions.”²⁰
2. The court failed to give proper weight to marriage as a fundamental right.²¹ It misinterpreted the U.S. Supreme

Court’s decision in *Lawrence v. Texas* as having applied a rational basis test and therefore as having rejected any fundamental right for individuals in same-sex relationships. To the

contrary, the Supreme Court based its decision in *Lawrence* on the fundamental liberty interest in privacy and personal autonomy secured by the earlier precedents on which it directly relied.²² The “due process right to demand respect for conduct protected by the substantive guarantee of liber-

ty” recognized in *Lawrence*²³ obtains only to safeguard fundamental rights. Moreover, the reference in *Lawrence* to the Texas statute not furthering a “legitimate state interest which can justify its intrusion into the personal and private life on the individual”²⁴ is not an application of the rational basis test (which is unconcerned with the degree of a law’s intrusion) and cannot be read to obliterate all that comes before it that squarely grounds the decision in a fundamental rights analysis. The Supreme Court in *Lawrence* had no need to evaluate the adequacy of state interests that might justify an intrusion on fundamental rights because the state in that case had conceded it had no “compelling” interest to support the law.²⁵ The Court merely noted that Texas had not advanced even a legitimate justification for the measure’s burdens. Thus, the Court had no need to go any further under any level of scrutiny.

3. The Court of Appeals in *Standhardt* failed to address the fact that Arizona’s marriage law discriminates on the basis of sex. “Rudimentary principles of statutory construction render manifest the fact that, by its plain language, [A.R.S. §§ 25-101(C) and 25-125(A)] restrict the marital relation to a male and a female.”²⁶ It is the regulation of access to the marital status and its concomitant rights and benefits on the basis of the applicants’ sex that is at issue.²⁷
4. The court mistakenly concluded that the different-sex restriction upon marriage is rationally related to the promotion of procreation, which the State has asserted as the basis for the restriction. In fact, the different-sex restriction upon marriage does not promote procreation.²⁸ The sterile and the elderly are allowed to marry, though they do not procreate; many married heterosexual couples choose



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not to procreate; and many heterosexual couples procreate outside the context of marriage. Moreover, many same-sex couples have children.²⁹ In any event, the State's assertion that civil marriage was established as an institution to promote procreation is a *post hoc* rationalization in response to litigation, not an historic fact. Arizona Revised Statutes § 25-101(B) expressly permits marriage of persons who are "unable to reproduce." The marriage laws, both historically and presently, are not about promoting procreation but about property rights before, during and after marriage.³⁰

5. Finally, the court reasoned that preservation of "the traditional institution of marriage" is a legitimate justification for refusing to give legal recognition to same-sex unions. However, as Justice Scalia pointed out in *Lawrence*, this is "just a kinder way of describing the State's moral disapproval of same-sex couples."³¹ And mere moral disapproval of homosexual conduct is "no legitimate state interest" for purposes of proscribing such conduct.³²

THE PAST DOES NOT DETERMINE THE FUTURE

Historic practice, without some grounding in a legitimate government purpose, in itself cannot justify the deprivation of due process or equal protection. That in the past homosexuality was condemned by many based upon "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family," and that marriage had therefore historically been defined as applying only to different-sex couples, does "not answer the question" whether discrimination against gay and lesbian families may be permitted to continue.³³

As Massachusetts' highest court held, "Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors."³⁴ Neither view answers the legal question whether the different-sex restriction on marriage is constitutional.

The Constitution protects minority rights in part because at times in history the majority may not support those rights. Equal protection "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me."³⁵ Were this not the case, we would live in an era when states could still justify anti-miscegenation laws and gender inequities in marriage merely to avoid disrupting the majority's deeply held expectations and beliefs. The wish to do so is not a legitimate government interest, much less a rational, exceedingly persuasive or compelling one. Thus, it cannot survive any level of judicial scrutiny.

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LESSONS FOUND IN ANTI-MISCEGENATION CASES

As with recent challenges to exclusion of same-sex couples from civil marriage,

numerous challenges to the exclusion of interracial couples from marriage were defended in the name of long-accepted definitions and deeply held beliefs. Finally, anti-miscegenation statutes were declared unconstitutional in the latter half of the 20th century. In case after case, legislation prohibiting racial intermarriage had been justified as unbending tradition rooted in natural law.³⁶ The reigning doctrine had been that laws limiting marriage to partners of the same race reflected a divinely ordained definition impervious to constitutional challenge.

That doctrine was not rejected by any court in the United States until 1948, when the California Supreme Court held that the state's anti-miscegenation law violated the federal constitutional rights to due process and equal protection.³⁷ That decision, highly controversial at the time, is now recognized as obviously correct. The recent decisions recognizing the constitutional right to marriage equality for same-sex couples in Hawaii, Vermont and Massachusetts will, in time, be regarded as equally obviously correct. By contrast, the decision of the Arizona Court of Appeals in *Standhardt* will be recognized as clearly wrong, just as the decisions of Arizona's Supreme Court in

anti-miscegenation cases, once regarded as clearly correct, are now recognized as entirely erroneous.

In its decision in *In re Walker's Estate*,³⁸ the Arizona Supreme Court described a marriage between a Pima Indian woman and a white man as a "pretend marriage" and declared the marriage to be "illegal and void, and impos[ing] no obligation on either party thereto," so that the couple's daughter had no inheritance rights. The only rationale the Court offered was that the Arizona territorial law provided by definition that "all mar-

riages of white persons with negroes, mulattoes, Indians or Mongolians, are declared illegal and void.”³⁹

Similarly, in *Kirby v. Kirby*,⁴⁰ the Arizona Supreme Court rejected a constitutional challenge to the State of Arizona’s law prohibiting and making void a marriage between individuals of the Caucasian and of the African races. The Court’s only reasoning on the constitutional issue was that such race-based restrictions upon marriage exist “in many jurisdictions” and that there had only been one case previously challenging the constitutionality of such provision—a federal case arising out of Georgia—in which the constitutionality of a similar anti-miscegenation law had been upheld.⁴¹

In *State v. Pass*,⁴² the Arizona Supreme Court affirmed both *Walker* and *Kirby*, declaring, without analysis, “We are well satisfied that the law, in so far as it forbids a white person to marry an Indian or his descendants, is constitutional. Indeed, all the courts, we believe hold that.”⁴³

It is obvious today that *Walker*, *Kirby* and *Pass* all were wrongly decided by the Arizona Supreme Court. They were effectively overruled in 1967 by the U.S. Supreme Court’s decision in *Loving*, and thus are no longer the law in Arizona. *Standhardt* was equally wrongly decided, based upon the same faulty definitional and historical reasoning, and it is sure to be overruled someday, as well.

OTHER JURISDICTIONS

It is inevitable that the United States and Arizona will recognize the freedom to marry for same-sex couples, as well they should. Other Western countries already recognize marriages as a fundamental freedom to which their citizens in same-sex couples are entitled. Canada allows same-sex couples the freedom to

marry.⁴⁴ The Netherlands also allows same-sex couples the freedom to marry.⁴⁵ In addition, registered partnerships are recognized for same-sex couples in Denmark, Norway, Greenland, Sweden, Iceland and Finland.⁴⁶ France, Germany, Hungary and Portugal all recognize a form of marital relationship known as “civil solidarity pacts” for same-sex couples.⁴⁷ And other countries provide some family recognition and protections at the national level for same-sex couples, including Australia, Brazil and Israel.⁴⁸

One notable exception to the present lack of legal recognition for same-sex couples in the United States exists in Vermont. There, “civil unions” are authorized by statute and provide all the same legal rights and responsibilities as civil marriage, but under a different name.⁴⁹ In addition, California provides same-sex couples with virtually all of the state rights and responsibilities of marriage under the name “domestic partnership.”⁵⁰ Hawaii provides same-sex couples with virtually all of the state rights and responsibilities of marriage under the name “reciprocal beneficiaries.”⁵¹ By May 2004, it is likely that Massachusetts will become the first state to issue marriage

in that state, as well.⁵³

ARIZONA PUBLIC OPINION

A recent poll in Arizona reveals that a majority in this state (53 percent) support allowing gays and lesbians to form civil unions that would give same-sex couples many of the same rights and benefits as a married man and woman.⁵⁴⁰ Moreover, a majority of Arizonans support recognizing marriages between same-sex couples performed in other states.⁵⁵ If a gay or lesbian couple is legally married in another state and later moves to Arizona, the majority of Arizonans (52 percent) think the marriage should be legally recognized here.⁵⁶

CONCLUSION

Ultimately, there is no real question *whether* same-sex marriages should be sanctioned by law. Rather, the only question is *when* the courts in this country and in this state will recognize that the freedom to marry is a fundamental right that cannot be abridged on the basis of sexual orientation or sex and thus must not be denied to same-sex couples. ▴

Ms. Cramer gratefully acknowledges the editorial assistance of Jon W. Davidson, Senior Counsel for Lambda Legal Defense and Education Fund; William M. Hardin of Osborn Maledon, P.A.; Michael Tucker of Polese, Pietzch, Williams & Nolan, P.A.; Donald Karl of Quarles & Brady Streich Lang LLP; Judy Stinson, Director, Legal Method & Writing, Arizona State University College of Law; Ron Bogard, Esq.; and law clerk Yvonne Morris, as well as legal briefs filed by Lambda Legal, which served as an invaluable resource in the preparation of this article.

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licenses and certificates to same-sex couples.⁵² A case is pending in New Jersey that might result in civil marriages of same-sex couples being legally approved



1. This article addresses civil marriage—not religious marriage, which is a separate institution. So long as any religion creates an institution of religious marriage, the First Amendment to the Constitution provides that the government must not interfere with that religion's blessing of such marriages, or refusal to bless such marriages. U.S. Const., amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."); U.S. Const., amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."). In other words, religious groups can refuse any couple's request to bless their marriage and can decline to recognize a civil marriage. This is currently the case with regard to different-sex couples who marry legally, but whose marriages are not religiously recognized, such as the Catholic Church's refusal to recognize second marriages of Catholics who divorce, or Orthodox Judaism's refusal to perform religious marriages between Jews and non-Jews. Ending discrimination against same-sex couples in the context of civil marriage will not change those refusal rights of religious groups. Conversely, whether discrimination by the State in civil marriage is ended, religious groups remain free to perform same-sex religious weddings if they so choose.
2. See Gen. Accounting Office, Office of Gen. Counsel, GAO/OGC-97-16, Defense of Marriage Act 1-2 (1997) (listing 1049 laws in the United States Code in which marital status is a factor), available at .
3. For example, simple wills can cost anywhere from \$125 to \$500 or more. And it costs \$50 to register a domestic partnership in the City of Tucson—nearly the same amount as a marriage license costs. However, only two rights come with such registration: (1) hospital visitation within city limits; and (2) cost of use of city facilities, such as parks, at the family rate. No other jurisdiction in Arizona has a domestic partner registry.
4. Similarly, the pension and 401(k) plan benefits relied on to support surviving spouses of married employees are drastically reduced for surviving spouses in gay and lesbian couples, who, unlike their legally married counterparts, must pay a heavy tax on the entire retirement fund when their partner dies.
5. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking Virginia anti-miscegenation law and acknowledging that "marriage is one of the 'basic civil rights of man'"), quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). See also *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (describing marriage "as creating the most important relation in life"); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (the Supreme Court "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"); and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing right to marry, establish home and raise children is central part of liberty protected by due process).
6. The only exception is where there is a compelling interest, such as a restriction on age to prevent marriage of children and a restriction on consanguinity to avoid incest. No such compelling interest exists to preclude marriage for same-sex couples.
7. *Turner v. Safley*, 482 U.S. 78, 97 (1987) (striking Missouri prison regulation prohibiting inmates from marrying without prison approval as violating prisoners' fundamental right to marry).
8. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (holding Wisconsin law prohibiting person with court-ordered child support obligation from marrying without court permission "interfere[d] directly and substantially with the right to marry").
9. *Loving*, 388 U.S. at 12.
10. Some have argued that the Court is unfairly usurping legislative authority. But the Constitution provides the guiding principles by which our nation is governed and is the supreme law of the land. As such, the Constitution must override the democratic will of the majority when necessary to prevent injury to the fundamental rights and freedoms of a minority. U.S. Const., art. VI (the "Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby").
11. *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003).
12. *Id.* See U.S. Const., amend. XIV ("No State shall ... deprive any person of ... liberty ... without due process of law").
13. U.S. Const., amend. XIV ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws"); Ariz. Const., art. II, § 13 ("No law shall be enacted granting to any citizen [or] class of citizens ... privileges or immunities which, upon the same terms, shall not equally belong to all citizens").
14. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-41 (1985).
15. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (Colorado's Amendment 2 fails constitutional review because it is "inexplicable by anything but animus towards the class it affects [gay men, lesbians, and bisexuals]; it lacks a rational relationship to legitimate state interests").
16. *United States v. Virginia*, 518 U.S. 515, 531 (1996).
17. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (restriction of marriage to different-sex couples constitutes sex-based discrimination and is unconstitutional because it cannot survive the level of scrutiny accorded to sex-based discrimination), reconsideration granted in part, 875 P.2d 225 (Haw. 1993). See also Opinions of the Justices of the Massachusetts Supreme Judicial Court to the Senate, slip op., SJC-09163 (Feb. 3, 2004); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003) (barring an individual from the protections, benefits and obligations of civil marriage solely because that person would marry a person of the same sex has no rational basis, much less any compelling justification, and therefore is unconstitutional); *Baker v. Vermont*, 744 A.2d 864 (Vt. 2000) (restriction of marriage rights to different-sex couples constitutes sexual orientation discrimination and is unconstitutional because it is not rationally based).
18. See *Baehr*, 852 P.2d at 51-68 (Hawaii's law prohibiting marriage between persons of the same sex is presumptively unconstitutional sex-based discrimination in the same way that anti-miscegenation laws prohibiting marriage between persons of different races are unconstitutional race-based discrimination). See also *Loving*, 388 U.S. at 1 (Virginia's anti-miscegenation law prohibiting marriage between persons of different races is unconstitutional because, although it allows all whites to marry and also allows all people of color to marry, it does not allow them to marry one another); *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (California's anti-miscegenation law prohibiting marriage between persons of different races is unconstitutional on the basis that it violates the federal rights to due process and equal protection).
19. 410 Ariz. Adv. Rep. 25, 27 ¶¶ 19-20, 77 P.3d 451, 457 (Div. 1, Oct. 8, 2003).
20. The "definitional defense" to discrimination already has been soundly rejected in the context of marriage equality. Anti-miscegenation laws banning marriage between whites and non-whites, once prevalent throughout this nation, were defended by reference to definitions of marriage that embodied historic assumptions about marriage and race. The landmark cases unmasking the illegitimacy and legal inadequacy of such a justification demonstrate that civil marriage cannot be withheld by invoking historical definitions or unexamined traditions. See *Loving*, 388 U.S. at 9 ("historical sources ... are not sufficient"); see also *Perez*, 198 P.2d at 17; *Baker*, 744 A.2d at 864; and *Goodridge*, 798 N.E.2d at 948. The Supreme Court in *Lawrence* has reaffirmed "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; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 123 S. Ct. at 2483, quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).
21. See *Loving*, 388 U.S. at 12; *Skinner*, 316 U.S. at 541; *Maynard*, 125 U.S. at 205; *LaFleur*,



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endnotes

- 414 U.S. at 639-40; *Meyer*, 262 U.S. at 399; *Baehr*, 852 P.2d at 53-54; *Baker*, 744 A.2d at 898 (Johnson, J., concurring in part and dissenting in part); and *Goodridge*, 798 N.E.2d at 954-58.
22. They include *Casey v. Population Services Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and *Roe v. Wade*, 410 U.S. 113 (1973). See, e.g., *Lawrence*, 123 S. Ct. at 2477 (stating that *Roe* "confirmed once more" that the "liberty" protected by the Due Process Clause "has a substantive dimension of fundamental significance in defining the rights of the person," describing the privacy right at issue in *Eisenstadt* as a "fundamental human right" and explaining that the "liberty" interest in *Roe* is entitled to "real and substantial protection"); *id.* at 2481 (the right invoked is at "the heart of liberty").
23. 123 S. Ct. at 2482.
24. *Id.* at 2484.
25. Brief of Petitioner, *Lawrence v. Texas*, No. 02-102, 2003 WL 15232, *4.
26. *Baehr*, 852 P.2d at 55.
27. *Id.* at 54; *Baker*, 744 A.2d at 904-05 (Johnson, J., concurring in part and dissenting in part); *Goodridge*, 798 N.E.2d at 970-71 (Greaney, J., concurring).

Sex discrimination is subject to heightened scrutiny. See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality favors classifications based on sex among those considered to be suspect for purposes of the compelling state interest test). Some cases after *Frontiero* applied a level of scrutiny above rational basis but below strict scrutiny. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Califano v. Goldfarb*, 430 U.S. 199, 210 n. 8 (1977); and *Califano v. Webster*, 430 U.S. 313, 316-17 (1977). More recently, however, the Supreme Court has headed back toward strict scrutiny. See *United States v. Virginia*, 518 U.S. at 531 ("exceedingly persuasive justification" required to defend gender-based government action).
28. "Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. ... [There is] no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. ... While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." *Goodridge*, 798 N.E.2d at 961.
29. The 2000 Census reported 594,391 same-sex couples living together across the United States—most likely a serious underestimate because it includes only couples willing to self-report. Data reveal that 31 percent of lesbians and 23 percent of gay men have children under the age of 18 living at home with them. *Facts & Figures About Marriage, Family, and Same-Sex Couples*, Lambda Legal, available at www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/131.pdf.
30. It may be noted that the State in *Standhardt* did not assert that child-rearing would be better performed by different-sex couples. This is, undoubtedly, because that argument has been resoundingly rejected by courts that have considered it as an evidentiary matter, considering expert testimony and professional studies. See, e.g., *Evans v. Romer*, 882 P.2d 1335, 1340 (Colo. 1994), *aff'd sub nom. Romer v. Evans*, 517 U.S. 620 (1996). "Same-sex couples can provide their children with the requisite nurturing, stable, safe, consistent, and supportive environment in which to mature, just as opposite-sex couples do." *Goodridge*, 798 N.E.2d at 979 (Sosman, J., dissenting).
31. *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).
32. *Id.* at 2484.
33. *Id.* at 2480. See also *Loving*, 388 U.S. at 11-12.
34. *Goodridge*, 798 N.E.2d at 948.
35. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). See also *Perez*, 198 P.2d at 27 ("Certainly the fact alone that the discrimination has been sanctioned by the state for many years does not supply ... justification.").
36. See, e.g., *Scott v. State*, 39 Ga. 321 (1869) (justifying laws against interracial relations because "the God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it"); *State v. Gibson*, 36 Ind. 389 (1871) (laws requiring separation of the races derive not from "prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts"), *quoting Philadelphia & W. Chester R.R. Co. v. Miles*, 2 AM. L. REV. 358 (Pa. Super. Ct. 1867); *State v. Hairston*, 63 N.C. 451 (1869) (upholding anti-miscegenation law on the grounds that "the policy of prohibiting the intermarriage of the two races is so well established, and the wishes of both races so well known.").
37. *Perez*, 198 P.2d at 17.
38. 46 P. 67 (Ariz. 1896).
39. *Id.* at 75.
40. 206 P. 405 (Ariz. 1922).
41. *Id.* at 406.
42. 121 P.2d 882 (Ariz. 1942).
43. *Id.* at 883.
44. See *Halpern v. Toronto*, CarswellOnt 2159, 172 O.A.C. 276 (2003); *EGALE Canada, Inc. v. Canada*, CarswellBC 1659, 15 B.C.L.R.4th 226 (2003).
45. See Wet wan 21 December 2000, Stb. 2001, nr.9 (Neth.).
46. See *Inching Down the Aisle: Differing Paths Towards the Legalization of Same-Sex Marriage in the U.S. & Europe*, 116 HARV. L. REV. 2004, 2004-05, 2008 (May 2003).
47. *Id.*
48. See *International Recognition of Same-Sex Partnerships*, Lambda Legal (Mar. 30, 2001), available at www.lambdalegal.org/cgi-bin/IOWA/documents/record?record=432.
49. See 15 Ver. Stat. Ann. §§ 1201, et seq. Of course, this "separate but equal" institution for same-sex couples is inherently unequal. See Opinions of the Justices of the Mass. S.J.C., SJC-09163; *Brown v. Bd. of Education of Topeka*, 347 U.S. 483 (1954), overruling *Plessy v. Ferguson* and the "separate but equal" doctrine.
50. See AB 205, the California Registered Domestic Partner Rights and Responsibilities Act of 2003, which becomes effective Jan. 1, 2005.
51. See *Love Makes a Family: Legal Rights of Same-Gender Couples in Hawai'i That Are Available Under the "Reciprocal Beneficiary" Status*, available at <http://members.tripod.com/~MPHAWAII/Rblaws/couples1.htm>.
52. See *Goodridge*, 798 N.E.2d at 969-70. "We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution. ... We remand this case to the Superior Court for entry of judgment consistent with this opinion ... stayed for 180 days."
53. See *Lewis et al. v. Harris et al.*, Docket No. L-00-4233-02, in the Superior Court of New Jersey Law Division, Hudson County, where summary judgment was granted for the defendants, and in which a notice of appeal has been filed. In addition, New Jersey has just adopted a "Domestic Partnership Act," which provides some but not all rights of marriage to same-sex couples.
54. *Grand Canyon State Poll* conducted between Oct. 3 and Oct. 20, 2003, by the Social Research Laboratory at the Northern Arizona University, P.O. Box 15301, Flagstaff, AZ 86011, available upon request, contact information available at www.nau.edu/srl.
55. *Id.*
56. *Id.* Notwithstanding A.R.S. §§ 25-112 and 25-101(C), which purport to preclude Arizona from recognizing marriages of same-sex couples certified by other states, the full faith and credit clause of the Constitution mandates recognition by Arizona of valid marriages entered into in other states by same-sex couples. U.S. Const., art. IV ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."). The constitutional right to travel also appears to be implicated.