ARTICLE

EQUAL ACCESS AND THE RIGHT TO MARRY

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How should courts think about the right to marry? This is a question of principle, of course, but it has also become a matter of litigation strategy for advocates challenging different-sex marriage requirements across the country. We argue that the right to marry is best conceptualized as a matter of equal access to government support and recognition, and we contend that the doctrinal vehicle that most closely matches the structure of the right can be found in the fundamental interest branch of equal protection law. Two other arguments have dominated litigation and adjudication so far, but both of them suffer from weaknesses. First, a liberty theory grounded in due process argues that everyone has a fundamental right to civil marriage. But civil marriage is a government program that states likely could abolish without constitutional difficulty. In that way, it differs from other family-related liberties such as the ability to procreate or engage in sexual intimacy. Second, an equality theory suggests that classifications on the basis of sexual orientation are constitutionally suspect. But that approach is unlikely to succeed in the Supreme Court or many state tribunals. Equal access, in contrast, requires states to justify laws that selectively interfere with civil marriage, regardless of any independent due process or

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classification-based equal protection violations. We show how this approach is grounded in precedent regarding intimate relationships, as well as in analogous law concerning voting and court access. Our proposal offers courts a workable way to evaluate the constitutionality of different-sex marriage requirements and a more satisfying conceptual basis for the right to marry generally. It also suggests a useful framework for thinking about recognition of other nontraditional family structures.

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INTRODUCTION

How should courts think about the right to marry? This is a question of principle, of course, but it is also a matter of litigation strategy for advocates challenging different-sex marriage laws across the country. Now that David Boies and Theodore Olson have filed a prominent federal lawsuit, the question has taken on even greater urgency.[1]

[1] Complaint, Perry v. Schwarzenegger, No. 09-2292 (N.D. Cal. May 22, 2009).

In this Article, we argue that the interest at stake is best described as a right that we call *equal access*: once a state decides to recognize and support marriage, it presumptively must make that status available evenhandedly. Our concept of equal access is grounded doctrinally in the fundamental interest branch of equal protection law; it is distinct from the substantive due process claims and classification-based equal protection claims that have dominated recent efforts to enforce marriage rights. We show that in earlier cases concerning civil marriage, as well as in analogous cases concerning voting and court access, the Supreme Court has invalidated selective denials of access to fundamentally important government institutions even if the interests at stake were not separately protected by the Due Process Clause and even if a particular classification was not recognized as inherently suspect.[2] Yet in the same-sex marriage context, courts and commentators have failed to appreciate the extent to which fundamental interest claims under the Equal Protection Clause require separate analysis. This is a significant oversight that forfeits the unrealized potential—both strategic and conceptual—of the equal access approach.

Our proposal is particularly important because both of the primary alternative arguments supporting marriage rights for same-sex couples have weaknesses. First, a liberty theory grounded in substantive due process argues that everyone has a fundamental right to civil marriage.[3] This claim has been largely unsuccessful in same-sex marriage litigation. State courts and lower federal courts have typically agreed (often with little analysis) that there is a fundamental right to marry for different-sex couples. However, they have held that there is no corresponding right to "same-sex marriage" because that specific interest is not deeply rooted in American history and traditions, as some due process doctrine seems to require.[4] Thus, even in states where same-sex couples have won the right to marry, courts have rested their holdings on grounds other than a fundamental right to marriage protected by federal or state due process provisions.[5]

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[2] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (voting); Douglas v. California, 372 U.S. 353 (1963) (criminal appeals).

[3] *See, e.g.*, Hernandez v. Robles, 855 N.E.2d 1, 6 (N.Y. 2006) (noting the plaintiffs' due process argument).

[4] *See, e.g.*, *id.* at 9 ("The right to marry is unquestionably a fundamental right. The right to marry someone of the same sex, however, is not 'deeply rooted'; it has not even been asserted until relatively recent times." (citations omitted)).

[5] *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862, 889-904 (Iowa 2009) (applying heightened scrutiny to strike down marriage bans on the grounds that sexual orientation is a

We disagree with the line these courts draw between "marriage" and "same-sex marriage," but there is a deeper difficulty with this first line of argument: there may be no due process right to civil marriage at all, even for different-sex couples.[6] First of all, the precedents that courts cite when they seek to identify a due process right to marry ground that right in the separate liberty interest in procreation. That connection has been undermined by the widespread acceptance—as a matter of constitutional doctrine, statutory reform, and societal change—of sexual intimacy and childbearing outside marriage. But the more fundamental issue is that civil marriage is a government program that provides certain benefits and imposes certain obligations. In this respect, it differs from other family-related liberties, such as rights that protect decisions regarding child rearing, procreation, contraception use, or termination of a pregnancy. All of those rights exist independent of government involvement, and all of them enjoy protection against state interference under substantive due process doctrine. Civil marriage is also different from private or religious marriage, which likewise may well be protected by a basic liberty right.[7]

To see this, consider that states could almost certainly get out of the marriage business altogether, leaving marriage to religious groups or other private institutions. They could choose to offer civil unions or domestic partnerships, under which both same-sex and different-sex couples would enjoy all the material benefits that formerly flowed only from marriage. Or they could choose to make other family rela-

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suspect class); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008) (same). The one exception is California, which suggested that same-sex couples have a right to marry—or, at least, to have their relationships formally recognized by the state—based in part on the state's due process clause, although the court relied more heavily on a separate constitutional provision addressing privacy interests. *In re* Marriage Cases, 183 P.3d 384, 419-20 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 7.5, *as recognized in* Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009).

[6] *See* Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 40-43 (1996) (concluding that a state could abolish civil marriage without violating due process); Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2083 (2005) (same).

[7] In our terminology, "civil marriage" refers to marriages that are recognized by the government. In most states, to enter a civil marriage, a couple must apply for a state marriage license, generally by completing a form that demonstrates that they meet the marriage requirements as defined under state law, and they must solemnize their marriage in a civil proceeding or religious ceremony after which the (religious or secular) officiant files the marriage license with the state. "Civil union" or "domestic partnership" describes a separate status, also created by the government (sometimes available to both different- and same-sex couples and sometimes available only to same-sex couples), that provides some or all of the benefits and obligations of civil marriage without using the term "marriage."

tionships the primary bases for government benefits or recognition, such as relationships between parents and children.[8] While these options are probably not politically viable today, they likely do not violate any federal constitutional rights. Yet abolishing civil marriage would impose the greatest possible burden on the freedom to participate in state-sponsored marriage. That result seems incompatible with a pure liberty approach that grounds the right to civil marriage in due process.

The second argument dominating litigation today is that different-sex marriage requirements discriminate on the basis of sexual orientation in violation of the Equal Protection Clause or parallel state provisions.[9] Generally, the success of this claim has turned on whether courts have been willing to hold that classifications on the basis of sexual orientation require heightened scrutiny. Plaintiffs have won the right to marry, or at least the right to a legal status equivalent to marriage, in states that have determined that sexual orientation classifications are presumptively suspect.[10] But state courts in New York, Washington, Maryland, Indiana, and Arizona have all held that classifications on the basis of sexual orientation do not pose special concerns.[11] Lower federal courts have also rejected the contention that such distinctions should be recognized as inherently suspect.[12] There is a widespread sense that the Supreme Court is unlikely to announce a new constitutional presumption against all classifications based on sexual orientation. Partly, this may be because the Court seems to be moving away from the traditional tiers-of-scrutiny framework altogether.[13] And where ordinary review has been applied, most courts have upheld

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[8] *See generally, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (advocating that states allocate benefits on the basis of parent-child and other caretaker-dependent relationships rather than marital-nuclear-family relationships); NANCY POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008) (arguing that the state should not privilege marriage above other diverse family forms).

[9] Advocates and commentators have also argued that different-sex marriage requirements constitute sex discrimination because they limit marriage based on the sex of each member of the couple, but courts have typically rejected this argument. *See infra* text accompanying notes 159-161.

[10] *See, e.g.*, *Kerrigan*, 957 A.2d at 482; *Varnum*, 763 N.W.2d at 906-07.

[11] Standhardt v. Superior Court *ex rel.* County of Maricopa, 77 P.3d 451 (Ariz. Ct. App. 2003); Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005); Conaway v. Deane, 932 A.2d 571 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006).

[12] *See, e.g.*, Wilson v. Ake, 354 F. Supp. 2d 1298, 1307-08 (M.D. Fla. 2005).

[13] *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 518-24 (2004) (describing how tiered review seems to be breaking down and advocating a move to a single, uniform test).

marriage bans,[14] although Massachusetts found that different-sex marriage requirements failed to satisfy even rationality review.[15] Overall, the classification-based equal protection argument against same-sex marriage exclusions faces real challenges, particularly in federal court.

We argue that the right of equal access to civil marriage is best thought of neither solely as a matter of due process, nor only as a question of classification-based equal protection. Instead, our equal access approach holds that, once conferred, the right to marry in a legally recognized ceremony is fundamental: if a government decides to recognize and support civil marriage, it cannot exclude same-sex couples without providing an adequate justification. A presumption of unconstitutionality is appropriate here because of the particular harm that may arise when the material and expressive benefits of a fundamentally important government institution are extended unequally. That harm may exist even if the interest at stake is not a fundamental liberty protected by the Due Process Clause and even if a particular classification has not been recognized as inherently suspect. Independent analysis is required to determine whether a different-sex marriage requirement can stand under our equal access proposal. Pointing this out to courts is effective strategy for litigants. As important, equal access opens up a more satisfying way of conceptualizing the right to civil marriage.

We show that the right to marry is similar in structure to other guarantees, particularly the right to vote and the right of access to certain court procedures. There is no fundamental right to participate in federal presidential elections or state elections under the Federal Due Process Clause, according to conventional thinking.[16] However, once a state chooses to hold elections, barring a subset of citizens from the polls can raise an equal protection problem because of the fundamental importance of the franchise.[17] Likewise, there is no due process

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[14] *See* cases cited *supra* note 11.

[15] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003).

[16] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973) (noting that "the right to vote, *per se*, is not a constitutionally protected right"); Pope v. Williams, 193 U.S. 621, 632 (1904) ("The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments."); McPherson v. Blacker, 146 U.S. 1, 35 (1892) (noting that the state legislature has plenary power to choose electors for the electoral college and that it may decide to choose electors itself rather than hold a direct election); Cain, *supra* note 6, at 35-36 ("If a state were to abolish in total the right of its citizens to vote in state elections, no explicit provision of the United States Constitution would be violated."); Sunstein, *supra* note 6, at 2096 ("As the Constitution is now understood, states are not required to provide elections for state offices.").

[17] Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

right to appeal a criminal conviction. But if a state offers criminal appeals, it must take steps to ensure that poor people are not excluded.[18] Unequal access to certain civil legal proceedings concerning the family, such as divorce or termination of parental rights, may also be unconstitutional.[19] Neither due process nor equal protection wholly explains the results in these cases—instead, the overlapping interests at stake deserve special consideration.[20] We contend that something similar is true of civil marriage: because of its fundamental importance, selective exclusion from legal wedlock should be presumptively unconstitutional.

A few scholars have supported variants of our argument, although their proposals have differed from equal access in important respects. Most helpfully, Cass Sunstein has argued for a fundamental interest theory of the right to marry, supported in part by an analogy to voting rights.[21] However, he ultimately asks courts to enforce a conception of the right to marry that falls short of our concept of equal access. Sunstein concludes that although bans on same-sex marriage raise "serious" constitutional concerns, courts should refrain from striking them down, largely for prudential reasons.[22] By contrast, we urge courts presented with such claims to enforce the Constitution's guarantees, and we think that doing so on equal access grounds would be compatible with practical and institutional considerations.[23]

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[18] *See* Douglas v. California, 372 U.S. 353, 355 (1963) ("[T]here can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'" (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956))).

[19] *See* M.L.B. v. S.L.J., 519 U.S. 102 (1996) (holding that a state could not dismiss a mother's appeal from a termination of parental rights solely because she could not afford record-preparation fees); Boddie v. Connecticut, 401 U.S. 371 (1971) (holding that a state could not deny access to divorce proceedings solely because of inability to pay court fees and costs).

[20] *See, e.g.*, *M.L.B.*, 519 U.S. at 120 (observing that "the Court's decisions concerning access to judicial process . . . reflect both equal protection and due process concerns" and that a "precise rationale has not been composed because cases of this order cannot be resolved according to easy slogans or pigeonhole analysis" (internal quotation marks and citations omitted)).

[21] Sunstein, *supra* note 6, at 2083-85. Patricia Cain likewise argues that the right to marry is properly grounded in the fundamental interest branch of equal protection law, draws analogies to voting, and concludes, as we do, that the state could constitutionally abolish marriage. *See generally* Cain, *supra* note 6. However, she also focuses on state rationales for civil marriage, and she ultimately argues that state recognition of nonmarriage equivalents would be sufficient. *Id.* pt. V. In contrast, we argue that equal access to the expressive benefits of civil marriage is critical.

[22] *See* Sunstein, *supra* note 6, at 2114.

[23] Additionally, Sunstein's article was written before almost all of the recent same-sex marriage cases were decided, and he only explores the implications of his ap-

We develop and defend our argument in three parts. Part I describes difficulties with the due process argument for a fundamental right to civil marriage for same-sex couples and—more surprisingly—even for different-sex couples. It shows how that argument has played out in federal and state litigation and points out its flaws. Part II argues that the classification-based equal protection argument is unlikely to succeed in federal court or many state courts. Part III argues for our equal access proposal, demonstrating how it would work doctrinally and why it is preferable to the dominant alternatives, both conceptually and strategically. In conclusion, we suggest that equal access also offers a promising framework for rethinking the constitutional status of other nontraditional family arrangements.

Our proposal offers the best of both worlds. On the one hand, it reaffirms the fundamental importance of marriage and emphasizes that *everyone* presumptively has a right to marry once a state decides to offer civil marriages. This right of evenhanded access is not limited to a particular group. On the other hand, the equality component of our theory provides a better vehicle for consideration of the expressive elements of marriage and the dignitary harms that flow from the creation of "separate but equal" solutions such as extending equivalent material benefits to gay and lesbian couples under the rubric of civil unions. Moreover, equal access is both backward looking and forward looking. Unlike due process, which generally looks to tradition, equal protection is designed to remedy governmental deprivation of rights, including longstanding ones.[24] Finally, equal access stands a better chance of success in litigation than the alternatives. Courts will rightly perceive it to be less radical because it does not ask them to announce a new suspect class, nor does it require them to declare a freestanding fundamental right to marry applicable to same-

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proach for that issue in a limited way. By contrast, we carefully analyze and critique how courts have understood these claims in the context of same-sex marriage, and our proposal responds to limitations of the two principal arguments advanced up until now. We have also found helpful Pamela Karlan's discussions of the "stereoscopic" overlap of the Due Process and Equal Protection Clauses. Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002) [hereinafter Karlan, *Stereoscopic*]; Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1448 (2004) [hereinafter Karlan, *Foreword*]. However, her focus is not on marriage rights.

[24] In *Harper*, a case located in the fundamental interest wing of equal protection law, the Court noted that "[i]n determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality" and it emphasized that "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." Harper v. Va. Bd. of Elections, 383 U.S. 663, 669 (1966).

sex couples. Instead, our proposal offers a sensible, moderate judicial response to the controversy around same-sex marriage.

I. DUE PROCESS

In the past decade, same-sex couples seeking the right to marry have brought numerous challenges to different-sex marriage requirements. They have relied on two principal arguments: (1) different-sex marriage requirements violate the Due Process Clause or state analogues, and (2) those requirements classify on the basis of sexual orientation in violation of federal or state equal protection guarantees. Although advocates have had some notable successes, principally with the second argument, many courts have rejected both approaches. This Part identifies significant weaknesses in the due process strategy, while the next Part discusses limitations of the standard equal protection theory.

Section I.A briefly reviews the current state of litigation challenging different-sex marriage requirements. Section I.B argues that Supreme Court precedent establishing a "right to marry" is muddled, chiefly because the Court has blended equal protection and due process rationales. Section I.C shows that recent decisions have denied due process claims on the ground that tradition does not recognize a right to marriage for *same-sex* couples and it explains why we do not find that argument persuasive. Section I.D then concludes that the due process argument—as applied to both same-sex and different-sex couples—suffers from two more serious weaknesses: its doctrinal underpinnings have been undermined and it mischaracterizes the structure of the right to civil marriage when it focuses solely on liberty.

A. *A Brief Summary of Litigation*

Civil marriage in this country has primarily been a matter of state law. Until recently, it has been limited to the union of one man and one woman, either implicitly or explicitly. In the 1970s, same-sex couples brought a handful of cases challenging different-sex marriage requirements, but all of these early claims were unsuccessful.[25]

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[25] *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974). The same-sex couple seeking marriage rights in *Baker v. Nelson* appealed the case to the Supreme Court of the United States, which dismissed the appeal "for want of substantial federal question." 409 U.S. 810, 810 (1972). Although a summary dismissal is technically a dismissal on the merits, the Supreme Court has made clear that such a dismissal

In the 1990s, same-sex couples won preliminary victories in Hawaii and Alaska using state constitutional law.[26] Although each state responded by amending its constitution to prohibit same-sex marriage specifically,[27] the decisions sparked a nationwide debate that continues to this day. Numerous states passed legislation or constitutional amendments explicitly limiting marriage to different-sex couples.[28] Congress also enacted the Defense of Marriage Act (DOMA), which specifies that the federal benefits of marriage will only be available to different-sex couples and that states will not be required, under the Full Faith and Credit Clause, to recognize same-sex marriages from other states.[29] Courts in Arizona,[30] California,[31] Indiana,[32] Maryland,[33]

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does not "have the same precedential value . . . as does an opinion of th[e] Court after briefing and oral argument on the merits." Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 477 n.20 (1979). The Court has therefore suggested that although generally "inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so," this may not be the case "when doctrinal developments indicate otherwise." Hicks v. Miranda, 422 U.S. 332, 344 (1975) (internal quotation marks omitted). As discussed in detail in the text, both equal protection and due process doctrines, as related to the question of same-sex marriage, have evolved considerably since 1972, when *Baker* was dismissed. Accordingly, we agree with courts that have held that the dismissal in *Baker* does not bar lower federal courts from substantively considering the federal constitutional claims that case raised. *See, e.g.*, *In re* Kandu, 315 B.R. 123, 135-38 (Bankr. W.D. Wash. 2004). However, we recognize that other federal courts have held that *Baker* is binding precedent. *See, e.g.*, Wilson v. Ake, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005). In any case, *Baker* is not a binding determination on state constitutional claims, including claims brought under state analogues of federal constitutional provisions. *See, e.g.*, Hernandez v. Robles, 855 N.E.2d 1, 17 n.4 (N.Y. 2006) (deeming *Baker* instructive on the scope of the federal Due Process Clause as interpreted in *Loving v. Virginia*, 388 U.S. 1 (1967), but noting that the New York Due Process Clause may be interpreted "more expansively"). And of course, the U.S. Supreme Court may choose to consider any federal constitutional claims on the merits and overrule whatever precedential significance *Baker* holds.

[26] *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct. 1998) (holding that state different-sex-marriage requirements triggered strict scrutiny because they interfered with the right to privacy, classified on the basis of sex, and placed limitations on the exercise of a fundamental right); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that state different-sex-marriage requirements employed sex-based classifications subject to strict scrutiny under the state's equal protection clause).

[27] *See* ALASKA CONST. art. I, § 25; HAW. CONST. art. I, § 23.

[28] *See* Human Rights Campaign, Marriage and Relationship Recognition, http://www.hrc.org/issues/marriage/marriage_laws.asp (last visited Mar. 15, 2010) (cataloguing state provisions).

[29] 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

[30] Standhardt v. Superior Court *ex rel.* County of Maricopa, 77 P.3d 451 (Ariz. Ct. App. 2003).

[31] Strauss v. Horton, 207 P.3d 48 (Cal. 2009). The California decision upholds a constitutional amendment limiting marriage to different-sex couples but relies heavily on the fact that California permits same-sex couples to form domestic partnerships

New York,[34] Oregon,[35] Washington,[36] and the District of Columbia[37] have held that statutory or constitutional provisions limiting marriage to different-sex couples do not violate their respective constitutions. A handful of lower federal courts have likewise held that DOMA and state constitutional amendments do not violate the Federal Constitution.[38]

At the same time, a growing number of states, as well as the District of Columbia, currently permit same-sex couples to marry or offer legal statuses that provide all of the (state-controlled) rights and benefits of marriage. In 2003, Massachusetts became the first state to permit gay couples to marry, following a ruling by its high court.[39] Since then, Connecticut[40] and Iowa[41] have also permitted marriage for same-sex couples after their high courts overturned exclusions. Legislatures in New Hampshire,[42] Vermont,[43] and the District of Columbia[44] have allowed same-sex marriage without being required to do so by judicial decisions. The legislature in Maine tried to do so as well,[45] but its law was subsequently repealed by voter referendum.[46] Likewise, the Cali-

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that provide the legal rights and benefits of marriage. *Id.* at 74-77. An earlier California decision had held that a statutory provision that limited marriage to different-sex couples violated the state constitution. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

[32] Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005).

[33] Conaway v. Deane, 932 A.2d 571 (Md. 2007).

[34] Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

[35] Li v. State, 110 P.3d 91 (Or. 2005).

[36] Andersen v. King County, 138 P.3d 963 (Wash. 2006).

[37] Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995).

[38] *See, e.g.*, Smelt v. County of Orange, 374 F. Supp. 2d 861 (C.D. Cal. 2005) (upholding DOMA); Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (same); *In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (same); *see also* Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006) (finding that a Nebraska constitutional amendment limiting marriage to different-sex couples did not violate the Federal Constitution).

[39] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); *see also* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (determining that the state must offer same-sex couples the right to marry rather than access to a separate status such as civil union).

[40] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

[41] Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

[42] N.H. REV. STAT. ANN. § 457:1-a (2010).

[43] VT. STAT. ANN. tit. 15, § 8 (2009). In 1999, the Vermont Supreme Court had held that the state's failure to provide the rights and benefits of marriage violated its state constitution but that the state could meet its obligation by creating a separate civil union status. Baker v. State, 744 A.2d 864, 867 (Vt. 1999).

[44] Council of D.C. B18-0482, Council Period 18 (D.C. 2009).

[45] ME. REV. STAT. ANN. tit. 19-A, §§ 650-A, 650-B, 651 (2009).

[46] *See* Dep't of the Sec'y of State, Bureau of Corps., Elections & Comm'ns, 2009 Referendum Tabulation, http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html (reporting 52.9% approval of Question 1, a "people's veto" of the Maine legislation).

fornia Supreme Court held that a state statute limiting marriage to different-sex couples was unconstitutional[47] but its decision was overturned by a subsequent referendum, Proposition 8, which amended the state constitution to specify that marriage in California was solely between a man and a woman.[48] Additionally, California, Nevada, New Jersey, Oregon, and Washington have created separate legal statuses, known as civil unions or domestic partnerships, that are available to same-sex couples and that afford all of the state-level benefits and obligations of marriage.[49] (Some of these states were responding to directives from their courts; other legislatures acted on their own initiative.)

Accordingly, there are two distinct issues currently being litigated. One is whether an absolute denial of access to civil marriage or an equivalent status is unconstitutional; the second is whether the creation of a separate status is itself unconstitutional. Up until now, the bulk of litigation has been in state courts under state constitutions. Many state constitutions, however, contain protections that parallel the Federal Constitution, and consequently most decisions rely heavily on federal precedent.

In May 2009, prominent Supreme Court litigators David Boies and Theodore Olsen (adversaries in *Bush v. Gore*[50]) filed a federal lawsuit challenging California's constitutional amendment, Proposition 8.[51] Their lawsuit ensures that constitutional issues surrounding the right to marry for same-sex couples will now receive a high-profile hearing in federal court.

B. *Confusion over the "Right to Marry"*

From time to time, the Supreme Court has said that there is a fundamental right to marry. However, both the rationale for that right and its structure have remained unclear. Justices have drawn on both due process and equal protection rationales, sometimes alternating between them, sometimes relying on both, and sometimes explicitly

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[47] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

[48] CAL. CONST. art. I, § 7.5.

[49] *See generally* Human Rights Campaign, *supra* note 28. Additionally, Colorado, Hawaii, Maine, and Wisconsin have enacted state laws that provide some, but not all, spousal rights to same-sex couples, and New York recognizes same-sex marriages formed in other jurisdictions. *Id.*

[50] 531 U.S. 98 (2000).

[51] Complaint, *supra* note 1.

invoking neither.[52] The reasons for that confusion are easy to understand, and historically, the failure to differentiate between the two rationales may have been relatively insignificant. However, the current controversy over marriage rights for same-sex couples highlights the confusion and calls for greater clarity.

Loving v. Virginia was probably the most significant early decision concerning the constitutional right to marry. Because it invalidated a selective exclusion from civil marriage, it also provides important support for our equal access approach.[53] In *Loving*, the Court famously struck down Virginia's anti-miscegenation law, relying primarily on the Equal Protection Clause. It ruled that Virginia had employed invidious racial classifications,[54] and it rejected the state's argument that the statute applied equally to blacks and whites, holding instead that its provisions were "measures designed to maintain White Supremacy."[55] That equal protection rationale was sufficient to justify the outcome.

Yet in two paragraphs at the end of its decision, the Court added that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," and it therefore indicated that the Virginia law also violated the Due Process Clause.[56] "Marriage is one of the basic civil rights of man," the Court said, and marriage is "fundamental to our very existence and survival."[57] This language could have been understood to articulate a liberty theory, under which anti-miscegenation laws were unconstitutional not (only) because they classified on the basis of race, but because they interfered with the exercise of a fundamental freedom, the right to marry.

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[52] *See* Cain, *supra* note 6, at 32-33 ("One cannot even tell under current Supreme Court jurisprudence whether marriage is a 'fundamental right' for purposes of substantive due process . . . or whether it is only a fundamental right whose allocation must adhere to notions of equal protection."); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 982-85 (1979) ("[J]udicial selection of values for special protection against the majoritarian process has wavered . . . between a liberty base and an equality base . . . . This doctrinal imprecision has bred unpredictability, disrespect, and charges of outcome-orientation.").

[53] 388 U.S. 1 (1967).

[54] *Id.* at 11.

[55] *Id.*

[56] *Id.* at 12.

[57] *Id.* (internal quotation marks omitted).

Loving is probably best understood as a hybrid case, however.[58] Even in its short discussion of the due process question, the Court interwove considerations of evenhandedness and autonomy:

> To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.[59]

That blended language might have raised doubts about whether the due process right was doing any independent work in *Loving*. Even if not, this section added something important to the analysis: a specific concern with the selective denial, on the basis of race, of access to the fundamentally important institution of civil marriage. In this respect, the Court's analysis of the due process claim could be understood as partially sitting within the developing fundamental interest branch of equal protection law.

In fact, the *Loving* Court borrowed the idea that marriage is fundamental to human survival from *Skinner v. Oklahoma*, arguably the first decision in that line of equal protection decisions.[60] There, in the course of ending Oklahoma's practice of sterilizing certain criminals, the Court acknowledged the importance of procreation, calling it "one of the basic civil rights of man."[61] It added that "[m]arriage," along with procreation, was "fundamental to the very existence and survival of the race."[62] Ultimately, the Court grounded its decision in equal protection rather than due process. That was possible because the state only sterilized people who had committed larceny, not those who had been convicted of embezzlement—even though the monetary amounts stolen might have been the same, and even though the two crimes otherwise carried equivalent punishments. Larcenists were

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[58] *See* Karlan, *Foreword*, *supra* note 23, at 1448 ("*Loving* was not simply an equal protection case. Rather, the case represents a turning point, as the Court moved from the completed project of imposing strict scrutiny on racial classifications toward a new project of applying strict scrutiny to limitations on fundamental rights. . . . Today, most courts and scholars see the Equal Protection and Due Process Clauses as discrete bases for strict scrutiny. But in *Loving*, the two clauses operated in tandem.").

[59] *Loving*, 388 U.S. at 12; *see also* Karlan, *Foreword*, *supra* note 23, at 1448-49 ("[I]n articulating its Due Process Clause-based argument, the Court relied on *Skinner v. Oklahoma*, an equal protection decision, for the proposition that marriage 'is one of the basic civil rights of man.' . . . This use of equal protection decisions to inform conceptions of liberty, and vice versa, was a hallmark of the Warren Court." (citation omitted)).

[60] 316 U.S. 535 (1942).

[61] *Id.* at 541.

[62] *Id.*

not a "protected class" for purposes of equal protection analysis, and consequently regulation of larcenists was presumptively allowed.[63] But because Oklahoma made this sort of distinction *with respect to sterilization*, the Court concluded that the state had "made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[64] Although *Skinner* did not concern equal access to a voluntary government program—in fact, it concerned conduct that today would probably merit independent due process protection—it nevertheless is critical to our approach because it framed the fundamental interest aspect of equal protection doctrine.

Zablocki v. Redhail came closest to articulating an equal access understanding of the right to marry.[65] There, the Court invalidated a state law prohibiting fathers who owed child support from wedding without a court order.[66] Although the decision was grounded squarely in equal protection, it nevertheless referred liberally to the full range of precedents articulating a "right to marry," including those that understood the right as a matter of liberty protected by due process.[67] Justice Douglas cited *Skinner* and *Loving* for the proposition that "decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."[68] Heightened scrutiny applied not because individuals who failed to pay child support (or the poor generally) constituted a protected class but because the regulation at issue significantly limited access to civil marriage.[69] So *Zablocki* is a seminal case for the equal access approach.

Finally, in *Turner v. Safley*, the Court struck down a Missouri prison regulation that prohibited inmates from marrying unless they could obtain permission of the superintendent, which would be given only under "compelling" circumstances.[70] Without specifying whether its

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[63] "[I]f we had here only a question as to a State's classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised." *Id.* at 540.

[64] *Id.* at 541.

[65] 434 U.S. 374 (1978).

[66] *Id.* at 390-91.

[67] *Id.* at 384-85 (citing *Loving* and *Skinner*). *Zablocki* also relied on *Griswold v. Connecticut*, 381 U.S. 479 (1965), which had characterized marital privacy as lying within a zone of privacy created by several constitutional guarantees, and *Boddie v. Connecticut*, 401 U.S. 371 (1971), a due process decision regarding access to divorce proceedings. *Id.*

[68] *Id.* at 384.

[69] *See* Sunstein, *supra* note 6, at 2088 ("[T]he Court's ultimate holding [in *Zablocki*] turned on the fundamental rights branch of the equal protection doctrine, not on substantive due process.").

[70] 482 U.S. 78, 95 (1987). The State apparently had conceded that the decision to marry was a fundamental right for non-inmates. *See id.*

decision was grounded in the Due Process Clause or the Equal Protection Clause,[71] the Court characterized the "right to marry" as "fundamental" and held that even in the prison context the state must show at least a reasonable relationship between a marriage regulation and legitimate penal objectives.[72] The Court noted that marriage retained considerable significance even for inmates, both because their unions would likely be consummated in the future, and because such marriages were "expressions of emotional support and public commitment," exercises of religious faith, and preconditions for receipt of numerous government benefits.[73]

Running through this line of cases, then, is a conviction that marriage is fundamentally important, often explicitly because of its connection to procreation and child rearing. Despite that common thread, however, the cases do not share a consistent doctrinal basis. *Skinner* and *Zablocki* found equal protection violations, *Loving* articulated two separate rationales but intertwined consideration of equal protection and due process, and *Turner* was unclear about the constitu-

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[71] Carlos Ball contends that the Supreme Court and the lower courts "all viewed the case solely from the perspective of due process and fundamental rights" and argues that *Turner* therefore

> is the case that most clearly supports the proposition that the state has a due process obligation to recognize at least some relationships as marital independently of equal protection considerations that go to the issue of whether the state, once it recognizes some relationships as marital, has an equality-based obligation to recognize others in the same way.

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, 1200 (2004). It is true that *Turner* does not include explicit discussion of a classification-based equal protection claim, but that does not answer the question whether the Court's references to marriage as "fundamental" ground the decision in due process or the fundamental interests branch of equal protection jurisprudence. Notably, the Court relied upon *Loving* (as discussed above, a hybrid of equal protection and due process) and *Zablocki* (equal protection), suggesting to us that, in fact, it may well have been at least implicitly relying on something like an equal access theory. The district court relied solely upon *Zablocki* for the proposition that marriage "involves fundamental human rights," Safley v. Turner, 586 F. Supp. 589, 594 (W.D. Mo. 1984), while the Eighth Circuit cited to *Loving*, *Zablocki*, *Skinner*, and *Meyer* for the same assertion, *Turner*, 777 F.2d at 1313. Thus, the formal basis for the *Turner* holding is unclear. Moreover, the particular issue in the case turned on what level of scrutiny would be applied to prison regulations affecting inmates' constitutional rights, a question the Court never resolved because it found the marriage restrictions failed to pass even a rational relationship test.

[72] *Turner*, 482 U.S. at 89 ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

[73] *Id.* at 95-96.

tional interest at stake.[74] One scholar concludes that "[n]o right to marry case has been analyzed and decided as a 'pure' substantive due process case."[75]

Rather, the rationales underlying the Court's decisions concerning the right to marry are tangled. And the confusion extends to the deeper conceptual structure of the right to marry—whether it is a liberty interest that all individuals enjoy in the same way, an equality interest against certain types of government differentiation, or some combination of these. In the rest of this Part, we identify drawbacks of the due process understanding of the right to civil marriage. But first, we critique a more common argument against the due process theory raised solely in the same-sex marriage cases.

C. *An Unpersuasive Critique*

Although we do not think due process provides the strongest grounding for same-sex couples' right to marry, we disagree with courts as to *why* it fails. Several courts have held that there is a fundamental due process right to marry but not a fundamental right to *same-sex* marriage. In other words, they have defined the right with a high level of specificity, so that it protects only unions between one man and one woman. We reject this particular limitation on the due process rationale, but we acknowledge that it has been successful in litigation. Adopting our alternative proposal therefore allows advocates to build on the widely held judicial (and societal) understanding of marriage as fundamentally important while avoiding what has proven to be a difficult due process argument.

When plaintiffs in same-sex marriage cases argue that the denial of the right to marry violates their rights under the Due Process Clause or state analogues, courts routinely agree that marriage is a "fundamental right," a conclusion they support by citing the body of Supreme Court cases discussed above, as well as state decisions.[76] But

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[74] Moreover, concurring and dissenting opinions sometimes differed from the majority concerning the most relevant constitutional provision. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 391-92 (1978) (Stewart, J., concurring in the judgment) (arguing that the law violates a freedom protected under the Due Process Clause, not a right to equal protection).

[75] Cain, *supra* note 6, at 33.

[76] *See, e.g.*, Smelt v. County of Orange, 374 F. Supp. 2d 861, 877 (C.D. Cal. 2005) ("It is undisputed there is a fundamental right to marry." (citing *Turner*, 482 U.S. at 95; *Zablocki*, 434 U.S. at 383-86; and Loving v. Virginia, 388 U.S. 1, 12 (1967); as well as Planned Parenthood v. Casey, 505 U.S. 833 (1992))); Conaway v. Deane, 932 A.2d 571, 617 (Md. 2007) ("It is undisputed that the right to marry, in its most general sense, is a

although courts are willing to recognize a due process right to marriage, they have also, almost uniformly, held that the right is not general enough to encompass marriage for same-sex couples. They reason that due process rights are fundamental only if they are "deeply rooted in this Nation's history and tradition," and they ask whether a right to same-sex marriage meets this standard.[77] Given the way the question is framed, it is not surprising that the answer is consistently "no."[78] Judges also sometimes rely on the historically unremarkable fact that all of the prior decisions concerned different-sex couples[79]

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fundamental liberty interest that goes to the core of what the U.S. Supreme Court has called the right to 'personal autonomy.'"); *id.* at 618 n.63 (citing the body of federal marriage precedents); Lewis v. Harris, 908 A.2d 196, 207 (N.J. 2006) ("The right to marriage is recognized as fundamental by both our Federal and State Constitutions." (citing *Zablocki*, 434 U.S. at 383-84; and a New Jersey case, J.B. v. M.B., 783 A.2d 707, 716 (N.J. 2001))); Hernandez v. Robles, 855 N.E.2d 1, 9 (N.Y. 2006) ("The right to marry is unquestionably a fundamental right." (citing *Zablocki*, 434 U.S. at 384; *Loving*, 388 U.S. at 12; and a New York case, Cooper v. Morin, 399 N.E.2d 1188, 1194 (N.Y. 1979))); Andersen v. King County, 138 P.3d 963, 976 (Wash. 2006) ("The fundamental right to marriage 'is part of the fundamental right of privacy implicit in the Fourteenth Amendment's Due Process Clause.'" (quoting *Zablocki*, 434 U.S. at 384)).

[77] *See, e.g.*, *Hernandez*, 855 N.E.2d at 9 ("In deciding the validity of legislation under the Due Process Clause, courts first inquire whether the legislation restricts the exercise of a fundamental right, one that is 'deeply rooted in this Nation's history and tradition.'" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))); *see also Deane*, 932 A.2d at 617 ("Our task in the present case, therefore, is to determine objectively whether the right to marry another person of the same sex is so deeply rooted in the history and tradition of this State, as well as the Nation as a whole, that 'neither liberty nor justice would exist if it were sacrificed.'" (quoting *Glucksberg*, 521 U.S. at 721)); *Lewis*, 908 A.2d at 208 ("Thus we are concerned only with the question of whether the right to same-sex marriage is deeply rooted in this State's history and its people's collective conscience."); *Andersen*, 138 P.3d at 976 (similar).

[78] *See, e.g.*, *Smelt*, 374 F. Supp. 2d at 878 ("The history and tradition of the last fifty years have not shown the definition of marriage to include a union of two people regardless of their sex."); *Deane*, 932 A.2d at 627 ("[T]he laws of our State historically, and continue to, employ sex-specific language that reflects Maryland's adherence to the traditional understanding of marriage as between a man and woman."); *Lewis*, 908 A.2d at 209 ("Although today there is a nationwide public debate raging over whether same-sex marriage should be authorized under the laws or constitutions of the various states, the framers of the 1947 New Jersey Constitution, much less the drafters of our marriage statutes, could not have imagined that the liberty right protected by Article I, Paragraph 1 embraced the right of a person to marry someone of his or her own sex."); *Hernandez*, 855 N.E.2d at 9 ("The right to marry someone of the same sex, however, is not 'deeply rooted'; it has not even been asserted until relatively recent times."); *Andersen*, 138 P.3d at 978 ("Nor is there a tradition or history of same-sex marriage in this state. Instead, prior to and after statehood, state laws reflected the common law of marriage between a man and woman.").

[79] *See, e.g.*, Standhardt v. Superior Court *ex rel.* County of Maricopa, 77 P.3d 451, 458 (Ariz. Ct. App. 2003) ("Implicit in *Loving* and predecessor opinions is the notion that marriage, often linked to procreation, is a union forged between one man and

and justified the right to marry partly on the ground that marriage was important for procreation (an argument that we take up and reject below).[80] In sum, courts identify the due process right with a high degree of specificity and then easily find that there is no longstanding right to marry someone of the same sex.

Of course, there are strong arguments that the right to marry should be understood more generally as a right of consenting adults to choose a spouse or to have the state recognize intimate relationships, absent a compelling justification for refusing to do so.[81] In *Lawrence*, the Court explained that the interest at stake in that case was properly understood as a right of consenting adults to sexual intimacy.[82] It rejected as too narrow its previous characterization in *Bowers v. Hardwick* of an asserted fundamental right for "homosexuals to engage in sodomy."[83] After *Lawrence*, to the extent that there is a due process right to marry, it may be appropriate to define marriage broadly, without limiting it by definition to a specific, historically dominant configuration.[84] As Chief Judge Kaye of New York stated in

one woman."); *Lewis*, 908 A.2d at 210 ("We add that all of the United States Supreme Court cases cited by plaintiffs, *Loving*, *Turner*, and *Zablocki*, involved heterosexual couples seeking access to the right to marriage and did not implicate directly the primary question to be answered in this case."); *Andersen*, 138 P.3d at 979 ("Federal decisions have found the fundamental right to marry at issue only where opposite-sex marriage was involved.").

[80] To the extent that courts mention the possibility of heightened scrutiny under the Equal Protection Clause or state analogues, they typically reject that claim without separate analysis for the reasons they previously discussed in reference to the due process argument. *See, e.g.*, *Hernandez*, 855 N.E.2d at 10 ("The plaintiffs argue for strict scrutiny [under the Equal Protection Clause], on the ground that the legislation affects their fundamental right to marry—a contention we rejected above [in analyzing the Due Process claims]." (citation omitted)). In *Andersen*, the Washington Supreme Court performed its analysis under its state Equal Protection Clause analogue but relied on due process standards in determining whether marriage constituted a "fundamental right." 138 P.3d at 976-79.

[81] This is typically how plaintiffs in the litigation have framed the right at issue. *See, e.g.*, *Deane*, 932 A.2d at 619 ("Appellees seek a declaration that the right to marry encompasses the right to marry a person of one's choosing without interference from the government, even if the other person is of the same sex."); *Lewis*, 908 A.2d at 206 ("Plaintiffs maintain that the liberty interest at stake is 'the right of every adult to choose whom to marry without intervention of government.'").

[82] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[83] *Id.* at 566-67. It is important to note, however, that *Lawrence* distinguished between the personal autonomy right at issue in that case and the separate issue of "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578.

[84] *See* Karlan, *Foreword*, *supra* note 23, at 1451 (arguing that the *Lawrence* Court "ratchet[ed] up the level of generality at which the liberty interest was described"); Cass R. Sustein, *Liberty After* Lawrence, 65 OHIO ST. L.J. 1059, 1071-72 (2004) (arguing

her dissent from the court's ruling against gay and lesbian couples, "fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights."[85] Moreover, limiting the right in this way involves arbitrariness, as Cass Sunstein has pointed out.[86] And certainly, like the Texas statute at stake in *Lawrence*, laws that selectively deny marriage rights to same-sex couples implicate dignity concerns.[87]

Such arguments in support of a pure due process theory, however, have been consistently unsuccessful in same-sex marriage cases. Due process claims have been raised in every state court case as well as in several federal venues—and yet only one state court of last resort has held that same-sex couples have a fundamental right to marry derived from the (state) due process provision, and even that court suggested that due process might not be independently sufficient to resolve the issue.[88] Although we disagree with the rationale employed in most of

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that certain language in *Lawrence* undercuts the tradition-based defense of prohibitions on same-sex marriage).

[85] *Hernandez*, 855 N.E.2d at 23 (Kaye, C.J., dissenting).

[86] Sunstein, *supra* note 6, at 2085, 2119. Arbitrary line drawing also raises equality concerns, as several authors have noted, although our focus in this Section is on the implications of the decision for due process. *See* Karlan, *Foreword*, *supra* note 23, at 1454-55 (demonstrating "the centrality of an equal protection sensibility to the [*Lawrence*] Court's due process analysis"); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 460-61 (2010) (showing how *Lawrence* bridged liberty and equality doctrines).

[87] *See* Ball, *supra* note 71, at 1218-19 ("There is an obligation arising from *Lawrence* for the state to respect the dignity of lesbians and gay men; [and] that obligation . . . will remain unfulfilled until . . . the state gives full recognition to their committed relationships"); R.A. Lenhardt, *Beyond Analogy:* Perez v. Sharp*, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839, 898 (2008) ("[I]t seems clear that, at a minimum, limitations on marriage for same-sex couples violate important principles of dignity . . . .").

[88] *See* cases cited *supra* notes 76-79. The Supreme Court of California is the one state high court that has identified a due process–derived right to marry that applied to same-sex couples. *In re* Marriage Cases, 183 P.3d 384, 420 (Cal. 2008). The California court relied more heavily, however, on the state's separate constitutional protection of privacy, which had previously been recognized to include a right of personal autonomy applicable to marriage. *See id.* at 420 ("[T]he state constitutional right to marry, while presumably still embodied as a component of the liberty protected by the state due process clause, now also clearly falls within the reach of the constitutional protection afforded to an individual's interest in personal autonomy by California's explicit state constitutional privacy clause."). In contrast to federal and most other state decisions, previous California decisions had emphasized a liberty interest at stake in the constitutionally protected right to marry. Most notably, in *Perez v. Sharp*, which struck down the state's anti-miscegenation law more than fifteen years before the Supreme Court's decision in *Loving*, the California Supreme Court characterized the relevant issue as the freedom "to join in marriage with the person of one's choice." 198

these decisions, we think there are other, stronger reasons why even advocates for same-sex couples should think twice before placing too much weight on due process arguments.

D. *Two Weaknesses*

We think that there are real difficulties with relying on the Due Process Clause alone as the source of protection for the right to marriage. First, doctrinally, due process rationales for marriage flow from a historical, and now obsolete, understanding of marriage as the only lawful means for realizing independent liberty interests in procreation and sexual intimacy. Modern legal developments, which protect the rights of adults to engage in sexual activity outside marriage and to establish parent-child relationships regardless of marital status, significantly undercut the due process rationale for recognizing marriage as a fundamental right. Second, conceptually, liberty alone is probably the wrong framework for thinking about the right to marry. Civil marriage, after all, is a government created and government regulated status. The state could almost certainly choose to simply stop recognizing marriages entirely. This possibility suggests not only that there may not be a due process right to civil marriage for same-sex couples but also, more radically, that there may not be a due process right to civil marriage at all. In this Section, we take up these critiques in turn.

Identifying the weaknesses of a due process basis for the right to marry underlines the importance of the equal access approach that we propose. Our key point, however, is that whether or not there is a due process right to civil marriage, separate analysis is required to determine whether selective denial of marriage rights violates equal protection.

P.2d 17, 19 (Cal. 1948); *cf.* Lenhardt, *supra* note 87, at 844-45 (arguing that the *Perez* court's framing of the issue provides much stronger support for marriage rights for same-sex couples than the *Loving* Court's approach). Subsequently, however, even the California Supreme Court held that—in light of the later-enacted constitutional amendment limiting marriage to different-sex couples—the constitutional due process and privacy guarantees could be satisfied by access to a legal status equivalent to marriage. Strauss v. Horton, 207 P.3d 48 (Cal. 2009). Additionally, in one of the first "modern" challenges to different-sex marriage requirements, a lower court in Alaska relied in part on federal due process cases in concluding that a prohibition on same-sex marriage could violate the state's constitutional guarantee of a right to privacy, but the case was subsequently mooted by a constitutional amendment. Brause v. Bureau of Vital Statistics, No. 95-6562, 1998 WL 88743, at *3-5 (Alaska Super. Ct. 1998), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25.

1. Marriage and Procreation

Substantive due process cases that recognize family-related fundamental rights nearly always link marriage to procreation. Among the first in this line was *Meyer v. Nebraska*, which concerned parents' rights to make decisions regarding the education of their children.[89] In striking down a state law criminalizing instruction in languages other than English in grammar schools, the Court linked marriage to a substantive due process liberty interest in making decisions regarding child rearing.[90] Later, in *Skinner*, the Court again connected "marriage" to "procreation" and characterized them jointly as "fundamental to the very existence and survival of the race."[91] Although these earlier cases did not concern marriage directly, the central federal marriage decisions, *Loving* and *Zablocki*, also explicitly associated marriage with procreation and child rearing. *Loving*, citing *Skinner*, described marriage as "fundamental to our very existence and survival."[92] And *Zablocki* spelled out the value of marriage by emphasizing its connection to other established fundamental due process rights:

> It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . [I]t 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. The woman whom [Redhail] desired to marry had a fundamental right to seek an abortion of their expected child or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings. Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection.[93]

Turner, which concerned prison inmates, focused more explicitly on the tangible government benefits associated with marriage and its personal, spiritual, and societal significance.[94] But even in that context,

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[89] 262 U.S. 390 (1923). Earlier, in *Maynard v. Hill*, the Court mentioned in passing that marriage recognized "the most important relation in life." 125 U.S. 190, 205 (1888).

[90] *See id.* at 399 (holding that the liberty interest guaranteed by the Due Process Clause includes "the right of the individual . . . to marry, establish a home and bring up children"); *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (asserting that legislation may not "unreasonably interfere[] with the liberty of parents and guardians to direct the upbringing and education of children under their control").

[91] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[92] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[93] Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (citations omitted).

[94] Turner v. Safley, 482 U.S. 78, 95-96 (1987).

where the liberty interests in procreation and sexual intimacy could be curtailed, the Court also noted that "most inmate marriages are formed in the expectation that they ultimately will be fully consummated."[95]

This historic linkage of marriage and procreation has been significant in the same-sex marriage context. When determining the scope of the right to marry in due process analysis, many courts have relied on this language from *Meyer*, *Skinner*, *Loving*, *Zablocki*, and *Turner* to argue that the fundamental right to marriage protected under the Due Process Clause is necessarily limited to heterosexual couples because only they may procreate naturally.[96] Similarly, courts have employed this focus on the ability to produce a biological child to bolster the so-called "responsible procreation" justification, which posits that states may reasonably decide to provide the benefits associated with marriage to heterosexual couples exclusively because only those couples can have children by accident.[97]

But the connection between marriage and procreation has been undermined. When these Supreme Court cases were decided, the close association between marriage and procreation made sense because marriage was, in most states, a necessary precursor for lawful sexual intercourse and thus lawful procreation. Sexual intimacy outside of marriage, even when completely voluntary and between adults,

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[95] *Id.* at 96.

[96] *See, e.g.*, Dean v. District of Columbia, 653 A.2d 307, 363 (D.C. 1995) (Steadman, J., concurring) ("While plainly the marriage state involves far more, the Supreme Court teaches that at bottom the institution reflects considerations 'fundamental to the very existence and survival of the [human] race,' [*Skinner*, 316 U.S. at 541,] and bound up with sexual relations, procreation, childbirth and child rearing." (citing *Zablocki*, 434 U.S. at 386)); Conaway v. Deane, 932 A.2d 571, 619 (Md. 2007) (noting that prior Supreme Court cases concerning marriage, including *Loving*, *Boddie*, *Zablocki*, *Turner*, and *Skinner*, "do not represent a compelling basis to extend the fundamental right to include same-sex marriage . . . [because] [a]ll of the cases infer that the right to marry enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species"); Andersen v. King County, 138 P.3d 963, 978 (Wash. 2006) (citing *Skinner*, *Loving*, and *Zablocki* for the proposition that the fundamental right to marry does not extend to same-sex couples in part because "[n]early all United States Supreme Court decisions declaring marriage to be a fundamental right expressly link marriage to fundamental rights of procreation, childbirth, abortion, and child rearing"); *cf.* Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986) ("[N]one of the rights announced in [earlier privacy cases including *Meyer*, *Skinner*, *Loving*, *Griswold*, and *Eisenstadt*] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . [because] [n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . ."), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[97] *See infra* subsection III.E.1.

violated criminal bans on fornication.[98] Thus, at that time, the connection that the Court drew was logical; a liberty interest in procreation or child rearing was quite limited if there was not a related liberty to enter into marriage. Even *Griswold*, which recognized a due process liberty interest in choosing to use contraceptives, and thus implicitly in choosing to have nonprocreative sexual intercourse, grounded that right in a concern for *marital* privacy.[99] By 1978, when *Zablocki* was decided, the link had weakened some. Nonetheless, the Court's reasoning in *Zablocki*—"it would make little sense to recognize a right to privacy with respect to other matters of family life and not with respect to the decision" to marry since marriage is "the only relationship in which the State . . . allows sexual regulations legally to take place"—was derivative.[100] The Court did not articulate an independent basis for recognizing the right to marry as a liberty interest under the Due Process Clause, and *Zablocki* itself was an equal protection case.

In fact, the Supreme Court played a key role in weakening the substantive legal links between marriage, procreation, and private sexual decisionmaking. In 1972, the Court in *Eisenstadt v. Baird* departed from the focus on "marital" privacy that had motivated *Griswold*; it held instead that unmarried persons had an equal right to choose to use contraceptives.[101] Later, in *Lawrence*, the Court went fur-

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[98] Today, while some criminal fornication laws remain on the books, prosecutions are extremely rare and might well violate modern constitutional principles. *See, e.g.*, Martin v. Ziherl, 607 S.E.2d 367, 371 (Va. 2005) (applying the reasoning in *Lawrence* to strike down a state anti-fornication statute).

[99] 381 U.S. 479, 485-86 (1965) ("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.").

[100] *Zablocki*, 434 U.S. at 386; *see also supra* text accompanying notes 66-69. As noted above, *Turner* does suggest several other grounds for recognizing the fundamental importance of marriage. *See supra* text accompanying note 73. Notably, however, most of the factors identified by the court—government benefits and public recognition—are closer to other fundamental interests recognized under the Equal Protection Clause than to the "privacy" rationales that justify other due process family rights. *See* discussion *infra* Part III.

[101] 405 U.S. 438, 453 (1972). *Eisenstadt* was formally decided on equal protection grounds. The Court claimed that it did not need to reach the question whether the statute at issue—which permitted married persons but not unmarried persons to access contraceptives for the purpose of preventing pregnancy—impinged on the fundamental liberty interests identified in *Griswold* because it held that the distinction failed to satisfy even rational basis review. *Id.* at 447 n.7. Because rational basis review is usually extremely deferential, it makes sense to suspect that the law's invalidation had something to do with the status of the right. It is therefore possible to think of *Eisenstadt* as a case concerning the unequal allocation of a fundamental interest. *See, e.g.*, Cain, *su-*

ther and held that private consensual sexual activity by two individuals of the same sex—conduct that was by definition both nonprocreative and (at the time of *Lawrence*) nonmarital—merited due process protection.[102] Of course, many individuals may choose to have sexual relations or children only within marriage, but the government can no longer use criminal law to punish individuals who make different choices. Thus, under modern constitutional principles, a right to *enter marriage* is no longer necessary to protect the separate due process liberty interests associated with choices regarding sexual intimacy or child rearing.

In the law of parent-child relationships, a related evolution has occurred. At common law and under state law throughout much of the nineteenth century, children who were conceived outside of marriage were branded as bastards.[103] Even if the father was known, children had no claim for support or right of inheritance unless they were legitimized.[104] Even more surprising to modern sensibilities, nonmarital children sometimes had no claim to support from their mothers; nor did unwed mothers have a clear claim to custody of their children.[105] Thus, historically, marriage was essential to ensure that children received support from their parents as well as to permit parents to claim a right to care and custody of their children.

During the nineteenth century, states began to enact laws recognizing that so-called illegitimate children were part of their mothers' families.[106] Some states also imposed support obligations on nonmarital fathers. However, as late as 1971, Texas and Idaho still denied

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pra note 6, at 34 (arguing that "*Eisenstadt* belongs in the 'fundamental rights' branch of equal protection cases").

Notably, the Court implied that the liberty interest at issue was the same for married persons and single persons: "[W]hatever the rights of the individual to access to contraceptives may be, the rights *must be the same for the unmarried and married alike* . . . [because] [i]f 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." *Id.* at 453 (first emphasis added). The Court did, however, also suggest that states could permissibly criminalize sex between unmarried persons under fornication laws. *Id.* at 449-50.

[102] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[103] *See generally, e.g.*, John Witte, Jr., *Ishmael's Bane: The Sin and Crime of Illegitimacy Reconsidered*, 5 PUNISHMENT & SOC'Y 327 (2003) (reviewing the history of the treatment of illegitimacy in early modern Anglo-American common law and early American statutory schemes).

[104] *See id.* at 334.

[105] *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 197, 207 (1985).

[106] *See id.*

nonmarital children any right to support from their fathers, and Virginia only imposed obligations if the father voluntarily and formally recognized his child.[107] Even many states that imposed support obligations failed to recognize any right by a biological father to decisions related to the care or custody of a nonmarital child.[108]

More recent developments have moved the law sharply away from the marriage-focused determination of parental rights and responsibilities. In *Stanley v. Illinois*, the Supreme Court held that biological fathers had a protectable interest in their nonmarital children; subsequent decisions further developed biological fathers' rights, at least when the fathers had taken steps to develop relationships with the children.[109] The Court has also held that state distinctions between marital and nonmarital children in the distribution of benefits or availability of specific remedies violate the Equal Protection Clause.[110]

Additional statutory reforms further dismantled the legal infirmities that had traditionally accompanied illegitimate status. Now, under the Uniform Parentage Act (UPA) and commonly under other state laws, both parent-child relationships and parent-child support obligations are established largely independent of any consideration of marital relationships.[111] (This is one of the weaknesses of the so-called "responsible procreation" justification for different-sex mar-

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[107] *See* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 22-23 (1971).

[108] *See id.* at 29-30.

[109] *See* 405 U.S. 645, 658 (1972) (requiring procedural safeguards before terminating a nonmarital biological father's relationship with his children). *See generally, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (reviewing doctrine recognizing a due process–protected liberty interest in a nonmarital biological father's relationship with his children, although permitting a marital father's interest to trump a nonmarital biological father's interests in certain circumstances).

[110] *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173-76 (1972) (holding that a denial of workers' compensation benefits to unacknowledged nonmarital children in favor of the father's marital children violated the Equal Protection Clause); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 76 (1968) (striking down a law barring a mother from recovering in an action based on the wrongful death of her illegitimate child); Levy v. Louisiana, 391 U.S. 68, 72 (1968) (overturning a law barring an illegitimate child from recovering in an action based on the wrongful death of his or her mother).

[111] *See* UNIF. PARENTAGE ACT § 201 (2000) (amended 2002), *available at* http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.htm. The UPA preserves the marital presumption that a child born to a married woman is the child of her husband, *id.* § 204(a)(1), but permits the presumption to be rebutted in an action brought within two years of the birth by the presumed father, the mother, or any other person, *id.* § 607.

riage requirements; whether or not bound by marriage to the mother of a child, the father is legally responsible for providing support.[112])

Social norms around procreation have changed as well. It is increasingly common, and thus considerably less stigmatizing, for children to be born to unmarried parents. A recent study by the Centers for Disease Control found that almost forty percent of all babies delivered in the United States were born to unmarried women.[113] And of course, modern advancements in artificial reproductive technology have dramatically expanded possibilities for procreation (for both different-sex and same-sex couples) without heterosexual sexual intercourse.[114] These developments highlight that the distinct liberty interests in procreation and child rearing no longer serve as a convincing justification for *marriage* as a due process liberty interest.

2. The Structure of the Right

Thinking about civil marriage as a liberty right protected by due process does not fit the structure of the right very well, and it runs up against the fact that civil marriage could be abolished altogether without constitutional difficulty.

According to proponents of the due process approach, the "liberty" guaranteed by the Fourteenth Amendment includes a right to marry in a legal ceremony.[115] Yet in other contexts where due process guarantees freedom to make a range of personal, intimate decisions related to the family, it protects against excessive government *interfe-*

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[112] There are many other grounds on which to challenge the responsible procreation argument, most notably that excluding same-sex couples from marriage in no way affects the state's interest in encouraging heterosexual couples who may accidentally bear children to marry. *See infra* subsection III.E.1. For other critiques of the responsible procreation argument, see, for example, Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1 (2009), and Edward Stein, *The Accidental Procreation Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. (forthcoming 2010) (draft on file with authors).

[113] STEPHANIE J. VENTURA, NAT'L CTR. FOR HEALTH STATISTICS, NCHS DATA BRIEF NO. 18, CHANGING PATTERNS OF NONMARITAL CHILDBEARING IN THE UNITED STATES (2009), *available at* http://www.cdc.gov/nchs/data/databriefs/db18.pdf.

[114] *See, e.g.*, Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER, L. & JUST. 18, 25-35 (2008) (discussing the growing use of artificial insemination in the United States).

[115] *See, e.g.*, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 123-30 (1996) (arguing that due process, along with equal protection, could ground a constitutional right to marry for same-sex couples).

rence. Think of choices regarding child rearing,[116] sexual intimacy,[117] contraceptive use,[118] terminating a pregnancy,[119] or living with members of an extended family.[120] A certain level of regulation over some of these decisions is permitted when necessary to further independent state objectives. Thus, for example, the liberty interest in making child-rearing decisions does not preclude criminal or civil penalties for excessive corporal punishment; the liberty interest in choosing to use contraceptives does not preclude generally applicable regulation of prescription medicine; and the liberty interest in choosing to terminate a pregnancy does not preclude consideration of the state's interest in protecting the independent potential life of a fetus. However, the *right* at issue in each case exists entirely independent of the state and protects against unduly burdensome regulation. In other words, there is no direct state action involved in how one raises one's children, engages in sexual intimacy, uses contraceptives, terminates a pregnancy, or chooses with whom to live.

Thus, these substantive due process rights (at least arguably) are not burdened when the state refuses to aid or facilitate access to them, under current law. According to the Court, the government need not support a woman's decision to terminate her pregnancy, even though that right is constitutionally protected from excessive regulation.[121] Likewise, parents have a due process right to control the education of their children, although they do not have a corresponding right to government funding of those choices.[122] Getting married in a civil

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[116] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[117] Lawrence v. Texas, 539 U.S. 558 (2003).

[118] Eisenstadt v. Baird, 405 U.S. 438 (1972) (unmarried couples); Griswold v. Connecticut, 381 U.S. 479 (1965) (married couples).

[119] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[120] Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[121] *See* Harris v. McRae, 448 U.S. 297, 326 (1980) (upholding a federal law banning the use of federal Medicaid funds for most abortions); Maher v. Roe, 432 U.S. 464, 480-81 (1977) (upholding a state law that granted Medicaid benefits for childbirth but not for nontherapeutic abortions); *cf.* Robin L. West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009) (arguing that a cost of the liberty-derived status of abortion rights is that it absolves the state of a responsibility to provide support for pregnancy or parenting).

[122] *See* Norwood v. Harrison, 413 U.S. 455, 462 (1973) (holding that even though parents have a constitutional right to send their children to private school, they do not have a right to equal government support of private schools); Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (holding that even though a state could not forbid private schools from teaching foreign languages before the eighth grade, it could exclude German classes from its public school curriculum); *cf.* Nelson Tebbe, *Excluding Religion*, 156 U.

ceremony is different from these other family-related activities. It is not possible to wed in this sense without state involvement because the state itself creates the status.[123] As the Massachusetts high court put it, "[T]here are three partners to every civil marriage: two willing spouses and an approving State."[124] Civil marriage entails a host of state and federal benefits, as well as significant legally enforced obligations. Cass Sunstein therefore calls civil marriage a "government-run licensing system."[125] If that is so, it makes little sense to think of entering a civil marriage as an activity that could be protected by a right to be free from undue government interference. Additionally, marriage serves as a public signifier of social status,[126] and in this respect, too, it is distinct from the interests protected by these other family rights.[127]

Our conception becomes clearer if you think of the right to marry in two parts: (1) the ability of consenting adults to join together in a private ceremony, which may well be protected by a liberty right against government interference, and (2) the ability to have the government recognize that union with an official license that provides access to important legal rights and obligations, as well as expressive benefits. We contend that the second does not involve a typical liberty interest.[128]

According to the first component, private institutions, religious and otherwise, have a constitutionally protected right to conduct mar-

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PA. L. REV. 1263, 1282-83 (2008) (drawing on those cases to argue against a constitutional right to equal government support of religious exercise).

[123] Of course, marriage itself predates government licensing; throughout much of history, marriage was regulated through societal conventions (that arguably helped establish government entities), private contract, and religious law. *See generally, e.g.*, Abrams & Brooks, *supra* note 112, at 1, 6-8 (discussing how the concept of marriage relationships predates state regulation of marriage); Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1766-67 (2005) ("The state has been a relative latecomer in the regulation of marriage").

[124] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003).

[125] Sunstein, *supra* note 6, at 2082.

[126] *See, e.g.*, Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 558-62 (2007) (examining marriage's privileged social status).

[127] Strong arguments may be made that some of these other fundamental rights raise significant equality concerns as well. *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 & n.3 (2007) (arguing for an equal citizenship or antisubordination approach to the right to terminate a pregnancy, and citing others who have made similar equality arguments).

[128] In this way, we disagree with the *Goodridge* court, which thought that the fact that a state could abolish civil marriage altogether cut not only against a due process analysis, but also against an equal access approach. 798 N.E.2d at 957 n.14 ("The 'right to marry' is different from rights deemed 'fundamental' for *equal protection* and due process purposes because the State could, in theory, abolish all civil marriage . . . ." (emphasis added) (citations omitted)).

riage ceremonies, and the state may not interfere without a compelling justification.[129] Those ceremonies may be conducted largely independent of whether and how the state recognizes marriages.[130] Thus, state laws that permit marriages between same-sex couples do not require private religious or secular institutions to conduct or recognize those marriages.[131] Conversely, states that do *not* provide civil marriage for same-sex couples presumptively must allow individual religious institutions and secular institutions to perform them. Such private choices are protected by due process and, in many cases, by the First Amendment. Significantly, however, such ceremonies do not give same-sex couples any of the legal benefits that flow from civil marriage, and they may have less expressive impact as well.

The second component—the ability to wed in a government recognized ceremony—is quite different from the private liberty component. It requires government action, and, as discussed in Part III, it is best protected by the fundamental interests branch of equal protection law.

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[129] *See* Sunstein, *supra* note 6, at 2095-96 (arguing that a state move to abolish private efforts to create the expressive equivalent of state-sponsored marriage "would be unconstitutional, under the Free Exercise Clause, as applied to religious institutions," and that it would also be invalid as to nonreligious unions under the Due Process Clause).

We recognize that some state laws prohibit not only certain civil marriages, such as those for gay and lesbian couples, but also criminalize some private marriages, such as those between multiple spouses or close family members. Although such laws are beyond the scope of our discussion here, which is focused on civil marriage, an implication of our analysis is that laws restricting at least some types of private marriages may well require strong state justification if the right to private marriage bears a close enough resemblance to other family-related due process rights.

[130] *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862, 905-06 (Iowa 2009) ("[O]ur constitutional principles . . . require that the state recognize both opposite-sex and same-sex civil marriage. Religious doctrine and views contrary to this principle remain unaffected, and people can continue to associate with the religion that best reflects their views."). In our conclusion that institutions could continue to make their own determination whether to celebrate marriages for same-sex couples, we are thinking of churches, synagogues, mosques, secular humanist organizations, and similar institutions. It would be another matter, of course, if institutions that typically do not celebrate marriages sought to define marriage more restrictively than the state. For instance, if private employers chose to recognize only certain marriages for the purpose of distributing benefits, antidiscrimination rules might properly come into play; such actions might also violate other constitutional or statutory provisions, such as Title VII or state or local employment discrimination laws.

We also note that religious institutions may not need to rely on due process because of the ready availability of free exercise arguments. *See generally* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, at xii (Douglas Laycock et al. eds., 2008).

[131] *See, e.g.*, N.H. REV. STAT. ANN. § 457:37 ("Each religious organization, association, or society has exclusive control over its own religious doctrine, policy, teachings, and beliefs regarding who may marry within their faith.").

One way to appreciate the disjunction between a due process conception and this second component of the right to marry is to consider a situation in which a government decided to get out of the marriage business altogether. Although state and federal courts assert that marriage is "unquestionably" a fundamental right, they also sometimes suggest that the state could choose simply to stop performing civil marriages.[132] Commentators and political actors likewise make such suggestions with regularity.[133] In fact, abolishing civil marriage is increasingly proposed as a "solution" to the same-sex marriage difficulty: the state could simply permit both same-sex and different-sex couples to form civil unions, leaving religious and secular institutions to resolve the thorny issue of who may marry.[134]

But these proposals raise a puzzle. They necessarily rely on an intuition—often unvoiced—that abolishing a right to civil marriage would not violate constitutional rights. We agree. Yet if a liberty interest in civil marriage really were guaranteed by substantive due process, a proposal to abolish it would seem to raise serious constitu-

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[132] *See In re* Marriage Cases, 183 P.3d 384, 432 (Cal. 2008). The California Supreme Court, the only court to hold that failure to permit same-sex couples to marry violates a state due process provision, offered a detailed assessment of the complexity of these issues. In the case that overturned the state's statutory different-sex marriage requirements, the court suggested that the right to marry included a *positive* right to state recognition of certain intimate relationships, such as marriage, and that the state could not simply abolish marriage. *Id.* at 426 & n.42. Later in the opinion, however, the court suggested that a potential remedy for the constitutional violation could be to substitute a separate, uniform designation that would apply to both same-sex and different-sex couples. *Id.* at 453; *see also* Melissa Murray, *Equal Rites and Equal Rights*, 96 CAL. L. REV. 1395, 1399-1401 (2008) (discussing this possibility). Notably, in *Strauss v. Horton*, the court subsequently held that a constitutional amendment that limited marriage to different-sex couples was constitutionally permissible, in large part because same-sex couples had access to the rights and obligations of marriage through a separate domestic partnership status. 207 P.3d 48, 74-77 (Cal. 2009).

[133] For academic perspectives, see, for example, MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (Anita Bernstein ed., 2006); Cain, *supra* note 6; Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006). The approach is gaining at least some political traction. *See, e.g.*, Lisa Rein, *Bill Would End Civil Marriage, Create Domestic Partnerships*, WASH. POST, Feb. 5, 2008, at B4 (discussing a bill proposed in Maryland to replace "marriage" with family "partnerships" that would be available to both different- and same-sex couples).

[134] This solution would solve the equal protection problem we believe lies in creating separate statuses, such as civil unions, solely for same-sex couples while continuing to permit different-sex couples to marry. *See infra* Section III.E. However, we take no position on whether it would be preferable to move toward civil unions for everyone or to permit both same-sex and different-sex couples to marry civilly. For a thoughtful consideration of some of the pros and cons, see Scott, *supra* note 126, at 537, 551-65.

tional concerns. After all, a complete denial of access to civil marriage would impose a maximum burden on the relevant liberty interest. It is difficult to see how the state could conceivably justify elimination of civil marriage under the standard customarily used to assess deprivations of due process—whether the denial of the right is narrowly tailored to serve a compelling government interest.

Nonetheless, there is reason to think that this intuition is sound—namely, that a state could constitutionally abolish its civil marriage system without offending the Constitution *so long as it denied access to marriage for everyone.*[135] This thought experiment suggests that the right to civil marriage is primarily grounded in the Equal Protection Clause rather than the Due Process Clause. As we show in Part III, our equal access analysis appropriately synthesizes both the sense that civil marriage is of fundamental importance *and* that it could be abolished altogether.

Others have noted these differences between marriage and other due process–protected family rights and have proposed creative theoretical justifications for including marriage among them. For example, David Meyer, looking at the public significance of marriage, argues that privacy should be understood counterintuitively to include a right to *public* recognition of family relationships,[136] and Carlos Ball argues that privacy includes positive as well as negative rights.[137] We agree with these scholars that, despite the delinking of civil marriage from decisions regarding procreation and child rearing, the institution remains fundamentally important and the Supreme Court has correctly held that it merits constitutional protection. However, as

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[135] *See* Cain, *supra* note 6, at 42-43 (concluding that civil marriage could be abolished consistent with the Constitution). It is possible to imagine an argument that eliminating civil marriage would violate substantive due process because access to government-recognized marriage has become embedded in the American understanding of intimate relationships. Yet it would be difficult for that argument to succeed, particularly in the context of a state that had generated enough public support to abolish civil marriage through the democratic process. Sunstein, *supra* note 6, at 2094-95. Sunstein therefore rejects the due process argument for civil marriage and concludes that "whatever the content of the right to marry, it does not include a right that the state maintain an official scheme for recognizing and legitimating marriage." *Id.* at 2095.

[136] David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 VILL. L. REV. 891, 892 (2006). Meyer recognizes the "basic irony" in the claim, and that it would "push constitutional privacy onto distinctly different ground," but presents it as a way of reconciling otherwise confusing precedent. *Id.*

[137] Ball, *supra* note 71, at 1203-07 (arguing that even if the Due Process Clause primarily protects negative rights, "the fundamental right to marry stands as an important exception").

explained fully in Part III, we think that the better way to resolve the tension between equal access to civil marriage and other due process rights is to recognize that the former is more properly located in the fundamental interest branch of equal protection law.

II. CLASSIFICATION-BASED EQUAL PROTECTION

Before turning to equal access, we address the dominant equal protection claim in same-sex marriage cases, namely, that laws prohibiting gay men and lesbians from marrying impermissibly classify on the basis of sexual orientation. We conclude that this argument has serious limitations, although its drawbacks have more to do with pragmatics than principles.

Basic equal protection law will be familiar to most readers. Government laws and policies must treat similarly situated individuals alike.[138] The government may, however, enact legislation that acknowledges relevant differences between individuals.[139] Most of the time, legislative judgments regarding necessary distinctions receive deference.[140] But certain classifications are presumptively disallowed on the ground that they are likely to be illegitimate, and therefore they must be justified by the state, with doubts and ambiguities resolved against the government. Under the Federal Constitution, race, national origin, religion, and alienage are among the classifications that must be justified by a compelling state interest under the strict scrutiny standard of review; classifications on the basis of sex receive a less demanding form of heightened review, intermediate scrutiny.[141] Regulations that do not employ suspect categories are presumptively constitutional and will be upheld so long as they are rationally related to a

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[138] *E.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) ("[A]ll persons similarly situated should be treated alike.").

[139] *See, e.g.*, Tigner v. Texas, 310 U.S. 141, 147 (1940) ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.").

[140] *See, e.g.*, *Cleburne*, 473 U.S. at 440 ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

[141] *Id.* Religion has been included in the list of suspect classifications, albeit in dicta. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) (characterizing as presumptively invalid classifications "drawn upon inherently suspect distinctions such as race, religion, or alienage").

legitimate state interest.[142] Most state courts employ a similar tiered structure of review.[143]

In same-sex marriage cases, plaintiffs typically argue that classifications on the basis of sexual orientation should be presumptively invalid; in other words, they argue that sexual orientation should be recognized as a suspect classification. Courts look at a variety of factors in determining whether a given classification must be justified by a compelling state interest. Factors that are sometimes (but not always) considered include whether there has been a history of discrimination against the members of the given class, whether the classification at issue is generally irrelevant to a person's ability to participate or contribute to society, whether the classification is based on an immutable characteristic, and whether it identifies a group that is a numerical minority or is otherwise relatively politically powerless.[144]

As a threshold matter, some states have challenged plaintiffs' contention that different-sex marriage requirements classify on the basis of sexual orientation at all. They argue that the statutes at issue do not explicitly refer to sexual orientation but instead simply provide that men must marry women and that women must marry men. Further, they sometimes note that a gay man or a lesbian woman is not treated differently from a straight man or woman: all people who seek to marry face the same restrictions, regardless of their sexual orientation. However, courts have uniformly found these arguments unconvincing. They have recognized the reality that gays and lesbians are treated differently from heterosexuals in one critical respect, namely, their ability to marry their chosen partners.[145]

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[142] *Cleburne*, 473 U.S. at 440.

[143] *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 423 (Conn. 2008) (adopting federal equal protection methodology for adjudication under the state equality provision).

[144] *See, e.g.*, *id.* at 461 (applying these factors to conclude that discrimination on the basis of sexual orientation merits heightened scrutiny); Varnum v. Brien, 763 N.W.2d 862, 889-96 (Iowa 2009) (same). *But see, e.g.*, Andersen v. King County, 138 P.3d 963, 975 (Wash. 2006) (holding that sexual orientation is not a suspect class because it is not immutable and "gay and lesbian persons are not powerless but, instead, exercise increasing political power").

[145] *See In re* Marriage Cases, 183 P.3d 384, 440-41 (Cal. 2008) ("By limiting marriage to opposite-sex couples, the marriage statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation."); *see also, e.g.*, Smelt v. County of Orange, 374 F. Supp. 2d 861, 875 n.20 (C.D. Cal. 2005) (noting that different-sex marriage restrictions implicitly classify on the basis of sexual orientation); *Kerrigan*, 957 A.2d at 431 n.24 (same); *Varnum*, 763 N.W.2d at 885 (same); Conaway v. Deane, 932 A.2d 571, 605 (Md. 2007) (same); Hernandez v. Robles, 855 N.E.2d 1, 11 (N.Y. 2006) (same).

On the more substantive question of whether the compelling interest test applies to laws that classify on the basis of sexual orientation, results have been considerably more mixed. High courts in California, Connecticut, and Iowa all held that discrimination on the basis of sexual orientation received heightened scrutiny ("strict" scrutiny in California and an intermediate level in Iowa and Connecticut), and they went on to find that the rationales offered in support of prohibiting marriage for same-sex couples were inadequate to survive such scrutiny.[146] Consequently, they ordered the states at issue to permit same-sex couples to marry. (California subsequently passed a voter referendum that superseded this decision by amending the state constitution.[147]) And the highest courts in New Jersey and Vermont, which apply flexible balancing tests rather than rigid tiers of scrutiny, each held that the state rationales were inadequate to justify exclusion of same-sex couples from the rights and benefits of marriage,[148] although each court allowed the state to satisfy its obligations by creating a separate legal status.[149]

Without explicitly applying any form of heightened scrutiny, the Massachusetts high court held that state rationales were inadequate to justify denying marriage to same-sex couples.[150] The Massachusetts holding was somewhat akin to recent Supreme Court decisions concerning rights for gays and lesbians that have invalidated regulations without specifying a standard of review. In *Romer v. Evans*, the Court struck down a Colorado constitutional amendment that specifically prohibited state or local protections against discrimination on the ba-

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[146] *In re Marriage Cases*, 183 P.3d at 442-44, 446-52; *Kerrigan*, 957 A.2d at 432-481; *Varnum*, 963 N.W.2d at 889-904.

[147] *See* CAL. CONST. art I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California."); *see also* Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009) (holding that the constitutional amendment is permissible but that marriages of same-sex couples prior to its enactment remain valid).

[148] Lewis v. Harris, 908 A.2d 196, 217-21 (N.J. 2006); Baker v. State, 744 A.2d 864, 884-86 (Vt. 1999).

[149] *See Lewis*, 908 A.2d at 222 ("We will not presume that a difference in name alone is of constitutional magnitude."); *Baker*, 744 A.2d at 886 ("We hold only that plaintiffs are entitled . . . to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.").

[150] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) (holding that the marriage statute did not survive rational basis review). In *Goodridge*, the court did not resolve whether the constitutional infirmity could be fixed by providing the rights and benefits of marriage through some other status, but the court ultimately held that the state could not limit "marriage" to different-sex couples while creating "civil unions" for same-sex couples. Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004).

sis of sexual orientation.[151] Similarly, the Court's recent decision in *Lawrence* did not explicitly apply strict scrutiny.[152] Because these decisions are arguably hard to square with the great deference generally shown to legislative decisionmaking under rational basis review, some commentators contend that the Court is moving towards a more searching review of laws that classify on the basis of sexual orientation without formally announcing heightened scrutiny.[153]

But in the marriage context, Massachusetts is virtually alone in striking down a different-sex marriage law under ordinary review. Many courts, including the highest courts of New York,[154] Washington,[155] and Maryland,[156] as well as an intermediate court in Indiana,[157] have held that heightened scrutiny is not applicable and that, under ordinary review, states may choose to limit marriage to different-sex couples. Federal courts that have considered the question have likewise held that heightened scrutiny is not applicable and that different-sex marriage requirements are permissible.[158] As discussed more fully in Section III.E below, these courts emphasize that rational basis review is highly deferential and, accordingly, that admittedly overbroad

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[151] 517 U.S. 620, 635 (1996).

[152] *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (concluding that "liberty protected by the Constitution" includes the liberty for adults to make choices regarding intimate conduct with another person within the home); *id.* at 586 (Scalia, J., dissenting) ("[N]owhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right.'").

[153] *See* William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause,* 37 FLA. ST. U. L. REV. (forthcoming 2010) (manuscript at 3 & n.12, 18 & n.122) (citing cases), *available at* http://ssrn.com/abstract=1461447.

[154] *See* Hernandez v. Robles, 855 N.E.2d 1, 11 (N.Y. 2006) (holding that, at least as applied to marriage, classification on the basis of sexual orientation does not require heightened scrutiny because it relates to the state's legitimate interests in serving children).

[155] *See* Andersen v. King County, 138 P.3d 963, 974 (Wash. 2006) (holding that sexual orientation classifications did not require heightened scrutiny because plaintiffs had not established sexual orientation as an immutable trait).

[156] *See* Conaway v. Deane, 932 A.2d 571, 609-14 (Md. 2007) (holding that heightened scrutiny is not applicable because lesbians and gay men are not politically powerless).

[157] *See* Morrison v. Sadler, 821 N.E.2d 15, 21-22 (Ind. Ct. App. 2005) (applying rational basis review to a marriage statute on the ground that, under the Indiana Constitution, all classifications are subject to rational basis review).

[158] *See, e.g.*, Wilson v. Ake, 354 F. Supp. 2d 1298, 1308-09 (M.D. Fla. 2005) (applying rational basis review and upholding DOMA).

and underinclusive justifications can suffice, even though they may strike many as far-fetched.

Same-sex couples also routinely argue that different-sex marriage requirements improperly discriminate on the basis of sex. Plaintiffs typically assert both that the statutes impermissibly use sex-based classifications and that they tend to rely upon and thus reinforce sex stereotypes.[159] In one of the earliest modern challenges to different-sex marriage requirements, the Supreme Court of Hawaii held that the use of sex-based classifications in marriage statutes triggered strict scrutiny under that state's equal rights amendment and remanded to the trial court for consideration of the state's justifications.[160] More recent cases, however, have consistently rejected the sex discrimination argument, generally on the ground that different-sex marriage statutes apply equally to men and to women.[161]

We think that the arguments in favor of heightened scrutiny on the basis of sexual orientation are strong in theory. But, as noted above, many courts have already held that classifications on the basis of sexual orientation do not trigger heightened scrutiny. Realistically speaking, we recognize that courts—federal courts in particular—are

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[159] *See generally* Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 469-72 (2007) (discussing plaintiffs' briefing in recent same-sex marriage cases). Theorists have long claimed that discrimination on the basis of sexual orientation should be recognized as a form of sex discrimination. *See, e.g.*, Andrew Koppleman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) (arguing that discrimination against homosexuals is sex discrimination because it perpetuates gender hierarchy); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (claiming that animus against homosexual behavior preserves and reinforces the social meaning attached to gender). More recently, commentators have considered such sex discrimination claims specifically with respect to denial of marriage rights to same-sex couples. *See, e.g.*, Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97 (2005) (exploring the "gender talk" that underlies arguments for retaining traditional marriage restrictions and the absence of a sex discrimination perspective in the debate over same-sex marriage); Widiss, *supra*, at 479-87. *But see* Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001) (arguing that the sex discrimination argument misstates the primary harm of discrimination against gay men and lesbians).

[160] Baehr v. Lewin, 852 P.2d 44, 64-67 (Haw. 1993). A subsequent constitutional amendment rendered the ongoing appeal moot. *See* HAW. CONST. art. I, § 23 (permitting the legislature to limit marriage to different-sex couples); Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *8 (Haw. Dec. 9, 1999) (holding that the amendment rendered the ongoing appeal moot).

[161] *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 435-39 (Cal. 2008); Conaway v. Deane, 932 A.2d 571, 585-602 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1, 10 (N.Y. 2006); Baker v. State, 744 A.2d 864, 880 n.13 (Vt. 1999); Andersen v. King County, 138 P.3d 963, 988 (Wash. 2006) (all rejecting the sex discrimination argument).

reluctant to announce new suspect classes.[162] The Supreme Court arguably avoided that sort of announcement in *Lawrence* precisely because it feared the consequences for a range of laws, including, but not limited to, laws concerning marriage.[163] We also see considerable merit in the claim that different-sex marriage requirements trigger heightened scrutiny under sex discrimination principles, particularly since many of the rationales offered by states reflect sex-based stereotypes, as one of us has argued previously.[164] Again, though, few courts have been persuaded. And, although strong arguments can be made that different-sex marriage requirements fail to satisfy even rational basis review, it seems unlikely that many courts will follow Massachusetts's lead and strike down different-sex marriage requirements under that deferential standard. We believe that equal access offers a strong alternative for challenging the exclusion of same-sex couples from civil marriage.

III. EQUAL ACCESS

In this Part we show how equal access provides stronger support for a right to marry than the alternatives. Even though a right to civil marriage may not be guaranteed as a matter of due process, and even assuming that classifying on the basis of sexual orientation is not inherently suspect, the government presumptively may not exclude gay men and lesbians once it decides to offer marriage licenses to the public. In Section III.A, we show how the Supreme Court arguably

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[162] *See* Araiza, *supra* note 153 (manuscript at 3) ("[T]he Court has apparently sworn off creating new suspect classes, preferring instead to resolve new equal [protection] problems by varying the actual scrutiny accorded under the rational basis test but thereby essentially freezing the current doctrinal status of all non-suspect classes." (citation omitted)).

[163] Karlan, for example, has made the following argument:

> By contrast to the incremental possibilities of fundamental rights/due process–based strict scrutiny, suspect classification/equal protection–based strict scrutiny seems far more binary: either a group is entitled to heightened scrutiny across the board or it isn't. The Court may have feared that if it struck down Texas's statute on the ground that it violated the Equal Protection Clause to treat gay people differently from straight people, this would require it to invalidate all laws that treat gay and straight couples differently, the most obvious of which are laws restricting the right to marry.

Karlan, *Foreword*, *supra* note 23, at 1460. Now that federal courts find themselves confronted with the marriage question, analogous fears about other laws may drive them away from classification-based analyses.

[164] *See* Widiss et al., *supra* note 159, at 487-98 (arguing that common justifications proffered for different-sex marriage requirements, such as a necessity for different sex role models for children or "responsible procreation," impermissibly rely on sex stereotypes).

has already established that selectively denying access to civil marriage presumptively violates equal protection. We also compare civil marriage to other government programs that likewise implicate fundamental interests for equal protection purposes—notably voting and court access. Section III.B argues that equal access best captures the liberty and equality interests at play, while Section III.C shows how our approach blends considerations of traditionalism and progressivism. Section III.D sets some limits to our proposal, and, finally, Section III.E applies our framework and concludes that government interests in different-sex marriage laws cannot overcome the presumption of unconstitutionality that the equal access approach imposes.

A. *Marriage as a Fundamental Interest*

Our argument is that the government presumptively must allow equal access to any program of civil marriage that it chooses to create. Equal access does not require the government to create an institution of officially recognized marriage, and it does not prevent officials from dismantling the existing system. What it does demand is that lawmakers who decide to offer civil marriage must administer that program evenhandedly, or else bear the burden of justifying exclusions. Because access to civil marriage plays an important role in American society and because exclusion from that institution, especially when based on membership in a recognized social or status group, has implications for equal citizenship, states must justify selective denial of marriage rights.

Longstanding doctrine holds that courts will look carefully at laws or policies that interfere substantially and unequally with interests that are deemed to be particularly important or "fundamental." A presumption of unconstitutionality applies in such situations, where a liberty concern meets an equality concern, even if neither the interference nor the inequality standing alone would be enough to create such a presumption. Although this doctrine, the fundamental interest branch of equal protection law, is relatively undertheorized and poorly understood, the Court has applied it in a variety of contexts.

Most often, fundamental interest analysis is used to assess the constitutionality of limitations on participation in certain government programs, where the programs themselves exist as a matter of government discretion and could be eliminated altogether without constitutional impediment. Take for instance the right to vote, which we discuss more fully below. There is no federal due process right to vote in presidential or state elections, according to conventional understanding, but any voting apparatus that the government does establish

presumptively must be made equally available.[165] Similarly, there is no fundamental due process right to a criminal appeal, but once the government establishes that institution, it must ensure (relatively) equal access to appellate review.[166] In other words, even if a person's interest in engaging in certain conduct does not enjoy protection under the liberty provision of the Due Process Clause, and even if the government classification does not draw heightened scrutiny under standard equal protection analysis, nonetheless courts properly apply a presumption of unconstitutionality if the conduct is fundamentally important and if the government interferes with it unequally. Civil marriage, like voting and criminal appeals, is a discretionary government program that nevertheless carries enormous social and legal importance and that likewise sits at a nexus of equality and liberty concerns. Though real differences separate these interests, they are all properly protected by the fundamental interests doctrine.

The fundamental interests branch of equal protection law is typically traced to *Skinner v. Oklahoma*.[167] As we explained in Part I, the *Skinner* Court invalidated a law that provided for the sterilization of certain repeat offenders. Under the sterilization law, qualifying offenses included felonies such as larceny but did not include embezzlement. So someone who repeatedly stole money from a stranger could be subject to sterilization, whereas someone who repeatedly embezzled the same amount from an employer could not.[168] The Court recognized that normally a state could classify crimes as it wished, without special federal constitutional oversight. Here, however, the proposed punishment involved "a basic liberty," since "[m]arriage and procreation are fundamental to the very existence and survival of the race."[169] Because the state law interfered with a fundamental interest unequally, strict scrutiny was required.[170]

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[165] *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (striking down a state poll tax under the Federal Equal Protection Clause).

[166] *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 606-07 (1974) (explaining that even though a state need not provide appellate review for criminal defendants at all, once it does, it must provide adequate access to the appellate system for indigent defendants).

[167] 316 U.S. 535 (1942).

[168] That was true even though a single conviction for larceny or embezzlement would trigger the same level of fines or imprisonment. *Id.* at 542.

[169] *Id.* at 541.

[170] Today, after *Griswold* and *Casey*, there likely is a fundamental due process right to procreate that would be sufficient to justify the result in a case like *Skinner*. In 1942, however, the Court had turned sharply away from the doctrine of substantive due process, particularly in the economic realm. Justice Stone, concurring in *Skinner*, thought the case ought to be analyzed under due process, but only because the state

Zablocki applied this branch of equal protection law to civil marriage, and it therefore provides a key precedent for our equal access approach. Recall that in *Zablocki*, the Court invalidated a law that prohibited fathers who had court-ordered child support obligations from marrying unless they obtained a judicial determination that they were meeting those obligations and that their children would not become "public charges."[171] Citing earlier pronouncements regarding the centrality of marriage, including *Skinner*, *Loving*, *Meyer*, and *Griswold*, the Court reaffirmed that marriage constituted "the most important relation in life."[172] But rather than deciding the case as a due process matter, the majority opinion left no doubt that it was grounding its decision in the Equal Protection Clause.[173] As in *Skinner*, the Court specified that heightened scrutiny applied because the law provided unequal access to marriage, a matter of fundamental importance, rather than because of the nature of the classification (of those who failed to pay child support): "Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination' of the state interests advanced in support of the classification is required."[174]

Although we have argued that the link between marriage and procreation has weakened,[175] we concur that civil marriage is fundamentally important and therefore that courts must carefully scrutinize laws or policies that selectively deny access to that institution. That is not simply because of the social importance of equal access to marriage or the significance of that access for the equal dignity and status of individuals, but also because the Court has recognized a right of constitutional importance.[176]

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law did not provide for a hearing to determine whether the prisoner's criminal tendencies could be inherited. Justice Stone, a principal supporter of the New Deal, would not have suggested a return to the era of substantive due process. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[171] Zablocki v. Redhail, 434 U.S. 374 (1978).

[172] *Id.* at 384-86 (quoting Maynard v. Hill, 125 U.S. 190, 205 (1888)).

[173] *Id.* at 382-83. Justice Stewart concurred in the judgment but specifically disagreed with the Court's reliance on the Equal Protection Clause, arguing that the decision should instead have relied on due process. *See id.* at 391 (Stewart, J., concurring).

[174] *Id.* at 383 (majority opinion).

[175] *See supra* subsection I.D.1.

[176] *Cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1972) ("[I]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal signi-

How is it possible, some might wonder, for the right to marry for same-sex couples to qualify as a fundamental interest under equal protection if it does not count as a fundamental right under substantive due process? The Court has fueled confusion on this point by blending its analyses under the two clauses.[177] Occasionally, the Court has even suggested—in passing and without analysis—that the standard for determining whether conduct is fundamental under the two constitutional doctrines is the same.[178] And, as noted above, in same-sex marriage litigation, courts have typically rejected plaintiffs' fundamental interest equal protection claims simply by referring back to their due process analysis.[179] We contend that this is a significant mistake. In other contexts, including the right to vote and the right to a criminal appeal, the Court has made clear that unequal allocation of a critical government program may trigger heightened scrutiny even if the underlying right is not protected by due process. It is perfectly possible, in short, for an interest to be fundamental for equal access purposes but not for due process purposes. And thus, equal protection claims regarding access to civil marriage demand consideration on their own merits—they do not rise and fall with the due process analysis.

This is not to say that all regulation of marriage requires heightened scrutiny. Rather, *Zablocki* acknowledged that some regulation of marriage is permissible. Although "[s]tatutory classification[s]" that interfere "directly and substantially with the right to marry" trigger

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ficance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.").

The Court has never specified precisely what standard should be used to make this assessment. However, the Court's prior statements in *Zablocki* are sufficient to support a holding that civil marriage is "fundamental." Additionally, civil marriage is a key aspect of how individuals construct a personal and familial identity, although it is no longer a prerequisite for lawful sexual intimacy or childbearing, as we have noted. Moreover, it is rarely differentiated from religious and private marriages, which probably are protected liberty interests under the Due Process Clause. Thus, unlike most other government programs, civil marriage is intimately intertwined with liberty interests that are protected by the Constitution, a point we return to in Sections III.B and III.C.

[177] *See supra* Section I.B; *see also* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (locating the relevant right in various provisions of the Constitution). The confusion is further compounded by cases, such as *Eisenstadt v. Baird*, 405 U.S. 438 (1972), in which the Court struck down statutes on equal protection grounds for unequally interfering with liberty interests protected under the Due Process Clause. *See supra* note 101.

[178] *See* Vacco v. Quill, 521 U.S. 793, 799 (1997) (suggesting that the *Glucksberg* test should govern whether a right or interest is fundamental in both contexts).

[179] *See supra* note 80.

heightened scrutiny,[180] "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."[181] Fundamental interest analysis does not show any special concern over regulations that do not significantly impede access. Of course, separating out restrictions that do and do not place a significant obstacle in the path of those seeking civil marriage may require difficult line drawing in some instances.

Zablocki's effort to set limits on the presumption of unconstitutionality reflects a common challenge, namely, how to carefully scrutinize denial of access to certain fundamentally important government programs while at the same time permitting a level of regulation that is necessary to shape and operate such programs. This differs from classification-based equal protection analysis, which simply posits that certain classifications will almost always be inappropriate. And it differs from standard due process analysis, which typically protects rights that may be realized without any government involvement at all.[182] Although both fundamental interest equal protection doctrine and due process doctrine share a concern with laws that impose a significant burden on protected conduct, only the former confronts that concern in the context where the conduct itself is made possible by a government program that owes its existence and shape to official law and policy.

For our purposes, the voting cases provide a particularly helpful analogue. The Constitution is not commonly thought to guarantee a right to vote in presidential or state elections.[183] Nevertheless, the Court has reasoned that because the right to vote is fundamentally important, state rules that interfere directly and equally with participation in elections are presumptively invalid as a violation of equal protection principles. As the Court explained in *Harper v. Virginia Board of Elections*, the right to vote is "a fundamental matter in a free and democratic society," and therefore "any alleged infringement . . . must

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[180] Zablocki v. Redhail, 434 U.S. 374, 387-88 (1978) ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.").

[181] *Id.* at 386.

[182] *See supra* text accompanying notes 115-122.

[183] *See supra* note 16; *see also* Bush v. Gore, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1875) ("[T]he Constitution of the United States does not confer the right of suffrage upon any one.").

be carefully and meticulously scrutinized."[184] Thus, although poll taxes had been longstanding in many jurisdictions, the Court concluded that wealth had no relationship to voter qualifications and that poll taxes were impermissible. Admittedly, *Harper* also suggested that heightened scrutiny might be merited because the poll tax classified on the basis of income,[185] but even after the Court quashed the idea that wealth classifications raise any special constitutional concerns,[186] it has continued to apply a presumption against regulations that provide unequal access to voting.[187] Applying heightened scrutiny, the Court has struck down a wide range of voting requirements, such as property-related regulations for special elections[188] and durational residency requirements,[189] restrictions that in many other contexts would not merit heightened scrutiny.

At the same time, the government must have some discretion to regulate the voting process. Recognizing this, the Court has developed a balancing test that attempts to distinguish between "severe restrictions" on the right to vote, which must be "narrowly drawn to advance a state interest of compelling importance," and "reasonable,

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[184] 383 U.S. 663, 667 (1966) (internal quotation marks omitted); *see also* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 629 (1969) (characterizing the right to vote as a matter of equal participation in state elections and noting that states have latitude to decide whether to hold elections at all, at least for "certain public officials"); Cain, *supra* note 6, at 35 (recognizing that although the right to vote in state elections is not constitutionally protected, there is a right to participate on an equal basis with other qualified voters once the state has opted to hold elections).

[185] *See Harper*, 383 U.S. at 668 ("Lines drawn on the basis of wealth or property . . . are traditionally disfavored.").

[186] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28-29 (1973) (declining to recognize wealth as a suspect class and noting that "this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny").

[187] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 337 (1972) ("[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest." (internal quotation marks omitted)); *cf. Bush*, 531 U.S. at 104-05 ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. . . . Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." (citing *Harper*, 383 U.S. at 665)).

[188] *See Kramer*, 395 U.S. at 633 (invalidating a New York school board voting restriction); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (striking down a provision limiting the ability to vote on a bond issue for utilities to property owners).

[189] *See Dunn*, 405 U.S. at 358 (overturning a minimum-residency-duration restriction on voting).

nondiscriminatory restrictions," which are generally permissible.[190] Additionally, even restrictions on the right to vote that are rational and would otherwise be constitutional may be impermissible if the state cannot show that they "protect the integrity and reliability of the electoral process itself."[191] Like the standard established by *Zablocki*, this approach may call for some difficult line drawing (and at times it may even risk arbitrariness).[192] Nonetheless, the doctrine makes sense when one considers the competing interests at stake in this context. On the one hand, some regulations are necessary to set up and run the government program. On the other hand, substantial limitations must receive careful evaluation because of the fundamental importance of the interest at issue.

Cases concerning access to courts for indigent defendants are also analogous, and the Court has likewise drawn on a blend of due process and equal protection principles to resolve them. Even though there is no federal constitutional right to an appeal in state criminal courts, constitutional difficulties can arise once appeals are provided "if indigents are singled out by the State and denied meaningful access to the appellate system."[193] Thus, for example, the state must provide a free trial transcript to an indigent defendant for a direct appeal,[194] and it must provide appellate counsel on a direct appeal as of right.[195] That is true even though states obviously are not required to relieve every burden that results from poverty.

This doctrine was originally developed in the criminal context. The Court has generally refused to extend the reasoning to civil court access—with one notable, and for our purposes very significant, set of exceptions: certain legal processes concerning establishment and disestablishment of the family. Drawing on the criminal law cases, the

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[190] Burdick v. Takushi, 504 U.S. 428, 434 (1992) (internal quotation marks and citations omitted); *see also* Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (describing the distinction between constitutionally suspect restrictions and "reasonable, nondiscriminatory restrictions").

[191] Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1616 (2008) (plurality opinion); *cf. id.* at 1624, 1626-27 (Scalia, J., concurring) (reserving strict scrutiny for regulations that severely burden the right to vote, and possibly for those intended to disadvantage a class, and applying a less demanding balancing test to others).

[192] *See generally* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 329-30 (2007) (describing the Court's task in regulating electoral processes).

[193] Ross v. Moffitt, 417 U.S. 600, 611 (1974).

[194] Griffin v. Illinois, 351 U.S. 12, 19 (1956).

[195] Douglas v. California, 372 U.S. 353, 357-58 (1963). Counsel is not constitutionally required on discretionary appeals. *Ross*, 417 U.S. at 614-16.

Court has protected indigent persons by holding that the state must waive filing fees for divorce cases,[196] provide blood tests for paternity suits,[197] provide transcripts for appeals from a termination of parental rights,[198] and additionally, in some parental-termination matters, provide counsel.[199] In all of these decisions, the Court has relied extensively on the body of law, discussed in Section I.B, that describes the fundamental importance of marriage and family relations.[200] Thus, the Court must "examine[] closely and contextually the importance of the governmental interest advanced" when evaluating "state controls" of these relationships.[201] In other words, when the government, through its regulation of marriage, divorce, and parental status, serves as a gatekeeper to family formation and dissolution, the Court has made clear that access to legal process must be provided on a relatively evenhanded basis. This is true even though poverty is not recognized as a suspect class. That said, it may be significant that wealth-based classifications have long been recognized as troubling, a point we discuss in greater detail below.[202]

In discussing both the criminal appeal context and family-related civil cases in which assistance to the indigent may be required, the Court has acknowledged that neither the Due Process Clause nor the Equal Protection Clause "by itself provides an entirely satisfactory basis for the result reached."[203] Rather, cases of this kind "'cannot be resolved by resort to easy slogans or pigeonhole analysis'" since the liberty and equality principles are intertwined.[204] Nonetheless, most "res[t] on an equal protection framework," since "due process does not independently require . . . a right to appeal."[205] Liberty and equality are similarly intertwined in considerations of restrictions to marriage—although due process may not guarantee a right to civil marriage, equal protection principles mandate that the state allow evenhanded access to marriage once it has chosen to establish it.

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[196] Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971).

[197] Little v. Streater, 452 U.S. 1 (1981).

[198] M.L.B. v. S.L.J., 519 U.S. 102 (1996).

[199] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

[200] *See, e.g.*, *M.L.B.*, 519 U.S. at 116 (citing *Turner*, *Zablocki*, *Loving*, *Skinner*, *Pierce*, and *Meyer*).

[201] *Id.* at 116.

[202] *See infra* text accompanying notes 248-252.

[203] Ross v. Moffitt, 417 U.S. 600, 608-09 (1974).

[204] *M.L.B.*, 519 U.S. at 120 (quoting Bearden v. Georgia, 461 U.S. 660, 666 (1983)).

[205] *Id.* at 120 (alteration in original) (internal quotation marks omitted).

B. *Liberty and Equality*

So far, we have argued that each of the dominant arguments for the right to marry for same-sex couples has significant limitations.[206] In the last Section, we showed how a right of equal access to civil marriage could be protected instead under the fundamental interest branch of equal protection law, even if there were no freestanding due process or classification-based equal protection violation. Here, and in the next Section, we go further and argue that our proposal is not only doctrinally available, but that it is conceptually preferable to the alternatives. We think this is true in at least two respects. First, it blends liberty and equality considerations in ways that match our considered convictions about why governments that provide a marriage licensing system must include same-sex couples. Second, it productively combines traditionalism and progressivism: on the one hand, it recognizes the central role that state-recognized marriage has traditionally played in our society and, on the other hand, it pushes the government to operate civil marriage evenhandedly in order to comply with the egalitarian aspirations of equal protection.

1. Liberty

Equal access to civil marriage has a dual structure. It has a liberty aspect insofar as aspiring spouses are claiming the freedom to participate in a government institution that carries immense personal, legal, and societal significance. It also has an equality aspect, which we address in the next subsection.

As we explained in Part I, there are good reasons to think that the denial of access to civil marriage may not constitute an independent due process violation. That might at first suggest that denials of access to civil marriage do not raise liberty concerns. After all, such exclusions do not interfere with personal autonomy, in the sense of the ability of private individuals to act without government involvement, because the conduct that couples are seeking to engage in is made possible by the government in the first place. In this respect, a right to marry civilly is different from the right to private and religious marriage and also from most other family-related due process rights. Additionally, we have described civil marriage as a government benefit program, and noted that different-sex marriage requirements deny same-sex couples those benefits. Most denials of government subsi-

[206] *See supra* Parts I-II.

dies do not raise liberty problems. For example, we normally would not think that a student who is excluded from a modest state merit scholarship could complain of a government burden.[207]

Nonetheless, our contention that there may not be a due process right to civil marriage should not be understood to mean that the right of access to civil marriage in general, and for same-sex couples in particular, does not implicate liberty concerns. Civil marriage is a fundamentally important government program that has extraordinary personal and social significance in contemporary America. This is all the more true because civil marriage is so rarely differentiated from private and religious marriages, which implicate more classic liberty interests. Thus, when the government denies access to civil marriage, it not only interferes with the ability of individuals to engage in conduct, but also with their ability to construct a personal and familial identity.[208] In this sense, marriage is different from other important government programs, such as education or health care, that are less intimately intertwined with an individual's identity. Equal access therefore involves a liberty interest not only in access to or participation in certain critical programs that the government chooses to offer, but it also protects the freedom to define self and family in socially recognized ways.

One strength of recognizing the liberty aspect of marriage access is that it is universal in a way that the equality interests are not. Once a state has chosen to implement civil marriage, liberty is curtailed for anyone, gay or straight, when the state refuses to permit that person to marry the person of her choice in a legal ceremony.[209] The liberty interest, as opposed to the equality interest, does not depend on differential treatment. It is shared generally by all citizens, not just by persons who wish to marry someone of the same sex or who are otherwise selectively excluded from access to marriage.[210]

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[207] Locke v. Davey, 540 U.S. 712, 720-21 (2004) (reasoning inter alia that the burden was not great when a student was denied a college tuition scholarship); *cf.* Tebbe, *supra* note 122, at 1267 (arguing that excluding religious exercise from such ordinary government subsidies raises free exercise concerns less often than is generally believed, because free exercise ought to be understood primarily as a liberty right, and denials of subsidies usually do not raise liberty concerns).

[208] *Cf.* Meyer, *supra* note 136, at 898 (arguing that denial of formal government recognition may constitute disruptive government intervention in private family relationships because it can in fact impair the dynamics of excluded relationships).

[209] While, of course, some people choose not to marry in a civil ceremony, they can still be said to have an interest in *access* to that government institution.

[210] *Cf.* Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES MAG., Jan. 15, 2006, at 32, 37 (arguing for a liberty approach to civil rights, partly on grounds of universality).

Although this interest in government action resembles a positive right, there is a critical difference: the government can choose not to offer a given program at all.[211] That makes it distinct from social and economic rights, such as rights to education or housing that are protected in some constitutions and that do require the government to provide certain services.

In sum, equal access captures our sense that liberty considerations are at play when courts consider exclusions from civil marriage, even though couples are not claiming a simple interest in freedom from government interference, and even though couples probably do not have a constitutional right to have the government set up a civil marriage program in the first place. Rather, once a government elects to establish a system of civil marriage, individuals then have important liberty interests in access to it.

2. Equality

Equal access also has an equality aspect, which provides that the government presumptively must administer fundamentally important programs such as marriage in evenhanded ways. Although many general restrictions on civil marriage do not raise any equality concerns—think for instance of a waiting period requirement, which applies in the same way to virtually everyone seeking a civil marriage—regulations that are not evenhanded must be justified by the government. This concern is relational, not absolute, in that it investigates how the government is treating people relative to one another.

The primary injury that the same-sex marriage litigation seeks to redress is that gay men and lesbians are denied the freedom to marry the partner of their choice *on the basis of their sexual orientation.* In short, they are targets of discrimination. It is indisputable that our country has long tolerated both public and private discrimination against gay men and lesbians—and that some (though certainly not all) opposition to expanding marriage rights rests on lingering animus.[212] In other contexts, the Supreme Court has been clear that even if discrimination on the basis of sexual orientation is not classified as inherently suspect, careful consideration is required when assessing

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[211] *See* Sunstein, *supra* note 6, at 2089-95 (distinguishing the right to participate in a civil marriage from a positive right).

[212] *See generally, e.g.*, GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY (2004) (recounting discrimination against gays and lesbians in the last century).

regulation that denies rights or selectively limits conduct on those grounds.[213] The same is true here. In short, equality is also at stake in these cases.

3. Synergy?

Our equal access proposal simply acknowledges the twin considerations of liberty and equality that are at play in many marriage exclusions. Although our analysis does not require going further, it might be possible also to identify a synergy between the two values. A special harm could be said to result when states deny access to a fundamentally important government institution like civil marriage in a way that is not evenhanded, and particularly when access is denied to an identifiable social or status group. As Pamela Karlan has phrased it when discussing such interplay in other contexts, looking "stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself."[214]

This point is slightly different from the observation that a decision that rests formally on one ground nonetheless advances both interests. In *Lawrence*, the Court said that its substantive due process holding promoted the equal citizenship of gay men and lesbians.[215] By contrast, the synergy argument would contend not simply that an equality-based expansion of marriage rights to gay and lesbian couples would have the incidental effect of promoting liberty or autonomy, but in-

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[213] *Cf.* Romer v. Evans, 517 U.S. 620 (1996).

[214] Karlan, *Stereoscopic*, *supra* note 23, at 474; *see also* Karlan, *Foreword*, *supra* note 23, at 1463 (describing the Court's "stereoscopic" approach to protecting rights of gay and lesbian people, "in which understandings of equality inform[] definitions of liberty," and under which the *Lawrence* Court could strike down a selective ban on intimate conduct because "it had already implicitly recognized that gay people are entitled to equal respect for their choices about how to live their lives").

[215] *Cf.* Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1103 (2004) ("*Lawrence* . . . weaves together substantive due process and equal protection doctrine into a holistic analysis of the cultural weight of the individual rights involved. Liberty and equality are the two chords of the opinion."); Karlan, *Foreword*, *supra* note 23, at 1449 ("*Lawrence* is a case about liberty that has important implications for the jurisprudence of equality."); Tebbe & Tsai, *supra* note 86, at 459-60 (showing how *Lawrence* bridged liberty and equality doctrines). *Lawrence* is not the only case to simultaneously advance both interests. Kenneth Karst has persuasively demonstrated that many of the Court's substantive due process decisions have concerned selective denial of freedoms to discrete groups and that "concerns about group subordination have profoundly influenced the doctrinal growth of substantive due process." Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 102 (2007).

stead that the intersection of the two concerns captures a harm that might not be actionable on either ground independently.

As described in Parts I and II, most courts considering challenges to different-sex marriage rules have considered the due process claims wholly apart from the (classification-based) equal protection claims. This hermetic approach may fail to appreciate the dual character of the injury done by denying marriage rights to same-sex couples, even if synergistic effects are put to one side. Indeed, as the Massachusetts high court observed in granting marriage rights to same-sex couples, "In matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts [of equal protection and due process] frequently overlap."[216] In the fundamental interest branch of equal protection law, the Court has been refreshingly forthright in acknowledging that liberty and equality are both at play.[217]

C. *Traditionalism and Progressivism*

One of the fights surrounding access to civil marriage for same-sex couples concerns whether the right is rooted in tradition. That matters because of judicial pronouncements describing "fundamental rights" under due process analysis as those interests that are "'deeply rooted in this Nation's history and tradition,'"[218] or those that are "'so rooted in the traditions and conscience of our people' that they are considered 'implicit in the concept of ordered liberty,'"[219] or those that are grounded in the "'traditions and collective conscience of our people.'"[220] All of these formulations look backward to tradition in order to determine whether an interest counts as fundamental under the Due Process Clause. The question then becomes whether the right to marry in a civil ceremony ought to be defined at a high level of generality, according to which the longstanding interest would be understood as freedom to marry the partner of one's choice, or whether it should be taken at a lower level, so that only official unions between one man and one woman would be protected. As discussed

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[216] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 953 (Mass. 2003).

[217] *See supra* text accompanying note 203-204.

[218] Conaway v. Deane, 932 A.2d 571, 616 (Md. 2007) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[219] *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

[220] *See id.* at 617 (articulating the Maryland high court's preferred standard and quoting Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring)).

above, courts have almost uniformly taken the latter tack and rejected same-sex couples' due process claims.[221]

A virtue of our equal access approach is that it offers judges a way to sidestep the arbitrariness that characterizes this debate about the level of generality used to identify traditions. It may be hard to make a principled argument for thinking of marriage in one way rather than the other.[222] But, for the purposes of equal access analysis, all

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[221] *See supra* text accompanying notes 76-80. The Supreme Court, like lower courts, has struggled to determine the level of generality that should be used to assess substantive due process claims. One of the most prominent examples is *Michael H. v. Gerald D.*, a case considering the constitutionality of a state law providing that a child born to a married woman living with her husband was, in most cases, conclusively presumed to be the issue of the couple. 491 U.S. 110 (1989). The law was challenged by a biological father whose claim for visitation rights with his daughter had been denied on the ground that he was not her legal father—and could not pursue a claim to become her legal father—because the child's mother had been married to another man at the time when she was born. *Id.* at 113-15. In a notable, almost notorious, footnote, Justice Scalia argued that judges should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 127 n.6. Justice Scalia reasoned that the most specific available tradition in this case limited the rights of "adulterous natural" fathers in such situations. *Id.* He argued that if judges were permitted latitude to define the tradition in question more broadly—for example, in this case, protecting the interests of parents—they would be able to impose their own views on society, because traditions viewed at a more general level provide little guidance or constraint. *Id.*

Yet the footnote only drew the vote of one other Justice. Justices O'Connor and Kennedy specifically declined to join the footnote, even though they endorsed the rest of Justice Scalia's plurality opinion. *Id.* at 132 (O'Connor, J., concurring, joined by Kennedy, J.). They declined to join the footnote on the ground that several of the Court's decisions may not have defined the relevant right in the most specific way possible, and they cited as examples the marriage cases *Loving v. Virginia*, 388 U.S. 1 (1967), and *Turner v. Safely*, 482 U.S. 78 (1987), among other precedents. *Id.* Justice Brennan, writing on behalf of four Justices, dissented and argued that a rigid conception of tradition would wrongly limit the ability of due process to check state law crafted by a majority. Rather, the liberty protected by due process "must include the freedom not to conform" to the majority's conception of the good life or the family, and Justice Scalia's approach "squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty." *Id.* at 141 (Brennan, J., dissenting).

Moreover, Justice Scalia's footnote relied heavily upon the Court's analysis in *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986), which the Court subsequently overruled in *Lawrence v. Texas*, 539 U.S. 558, 567 (2003), in large part on the ground that it classified the right at issue too narrowly.

For criticism of Justice Scalia's footnote, see, for example, LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 97-117 (1991); J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1614-29 (1990); Edward Gary Spitko, Note, *A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1339.

[222] *See* Sunstein, *supra* note 6, at 2085 (arguing that defining marriage narrowly suffers from the defect that it "seems to draw arbitrary lines"); *id.* (suggesting that defining the right to marry narrowly may be arbitrary "in principle"). On the difference

that needs to be shown initially is an interest in state-sponsored marriage that is of fundamental importance. The Supreme Court has never made clear precisely what standard should be used to determine which interests are protected as fundamental for equal protection purposes. Even if that assessment is made with reference to tradition, however, it is easy to establish a backward-looking claim that marriage meets this standard, at least with respect to unions between one woman and one man. In fact, the Court has already held as much in *Zablocki*. Equal access then departs from backward-looking analysis and asks separately whether excluding gay and lesbian couples from civil marriage can be justified. At that second stage, we believe the analysis should no longer look to tradition, but instead should invoke the forward-looking aspects of equal protection doctrine. This approach sidelines the fact that, historically, same-sex couples have not been permitted to marry.

Other fundamental interest decisions have joined backward-looking and forward-looking tendencies in similar ways.[223] In the election context, the Court held that the right to vote included protection against poll taxes without regard to whether charging voters was a common practice at that point in history.[224] It was voting as such that was deemed to be rooted in American political traditions, not voting free of financial burden. In fact, the Court candidly acknowledged that protecting indigent voters was a step forward, justified because "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."[225] Likewise, criminal defendants were given free access to appellate courts not because court fees had

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between defining fundamental rights in due process doctrine and fundamental interests in equal protection, *see supra* text accompanying notes 177-179.

[223] We believe that voting and court access offer the strongest analogies to civil marriage access, and accordingly, our analysis focuses on these fundamental interest cases. The "right to travel" doctrine is also sometimes located within the fundamental interest branch of equal protection law. *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) ("Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by a stricter standard . . . ."). In that context as well, the Court protected the right of welfare recipients to move from state to state, not because that specific interest was grounded in tradition, but because the more generalized right to travel was. *See id.* at 642. More recently, the Court has suggested that the right to travel is better located in the Privileges and Immunities Clause. Saenz v. Roe, 526 U.S. 489, 502-03 (1999).

[224] Harper v. Va. Bd. of Elections, 383 U.S. 663, 669 (1966) ("[T]he Equal Protection Clause is not shackled to the political theory of a particular era."); *see also id.* at 668-69 (observing that "[l]evy 'by the poll[]' . . . is an old familiar form of taxation" but insisting nevertheless that "[i]n determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality" (citations omitted)).

[225] *Id.* at 669.

traditionally been waived for indigent defendants—they had not been—but rather because the Court ruled that government could no longer deny meaningful appellate review to indigent criminal defendants.[226] Even when government regulations have been *upheld* in these areas, it has not been because the regulations themselves were historically rooted, but instead because they either did not significantly interfere with fundamental interests or because they did so in justifiable ways.[227]

Another way of thinking about the interaction is to allow the time-honored institution of civil marriage to be identified in a very specific way—say, as limited to one woman and one man—but then to say that the equal protection component of our approach requires courts to interrogate the way that lines have traditionally been drawn around that institution. After all, the Equal Protection Clause is designed to police exactly the sort of arbitrariness that is involved when civil marriage is defined with great specificity.[228] To the degree that *Lawrence* requires this sort of interrogation of historical exclusions, it can be thought of as likewise fusing equal protection and due process impulses.[229] A similar combination arguably was implicit in *Loving* as well, which decried the limiting of access to marriage—a "fundamental freedom"—on so "unsupportable a basis as . . . racial classification."[230] In this second way of thinking about our proposal, equal access is capable of challenging even an attempt to define marriage with a great deal of specificity. Regardless of whether the fundamental interest in civil marriage is initially defined with greater or lesser

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[226] Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." (citation omitted)).

[227] *See, e.g.*, Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1623 (2008) (holding that any burden that the state's identification requirement placed on voters was justified by governmental interests, such as avoiding voter fraud).

[228] *See* Sunstein, *supra* note 6, at 2111-12 ("[T]he Equal Protection Clause is a self-conscious repudiation of traditions that embody illicit line-drawing, making distinctions that are arbitrary or invidious. The Equal Protection Clause stands for a commitment to public reason-giving that puts traditions to the test. . . . [T]he Due Process Clause has had a quite different function. The purpose of that clause has generally been to protect time-honored practices from governmental intrusion.").

[229] *See id.* (arguing that the *Lawrence* Court defined the due process right according to emerging values, thereby generalizing tradition, and that by doing so the Court folded in "a kind of equal protection component" capable of questioning the way lines had been drawn around traditional institutions).

[230] Loving v. Virginia, 388 U.S. 1, 12 (1967); *see also supra* text accompanying notes 53-59.

specificity, the equality value requires exclusions from that institution to be justified. Either way, in other words, our conclusion here is that equal access combines the backward-looking orientation of due process with the forward-looking impulse of equal protection.

In sum, our approach not only combines liberty and equality principles, as shown in the last Section, but it also combines considerations of traditionalism and progressivism. It is oriented toward tradition in its recognition of marriage's importance to individuals and to society, but it is also progressive in its insistence that marriage presumptively should be extended to same-sex couples on equal terms. In this way, the force of marriage's historical importance dovetails with strong constitutional pressure toward evenhandedness in the administration of that institution. This twofold analysis avoids difficult debates over whether advocates or opponents have identified tradition on the right level of generality. Most will agree that the institution of civil marriage is fundamentally important to American public and private life. The question is whether a state is constitutionally obligated to administer that institution in evenhanded ways.

This analysis helps identify a related, but distinct, benefit of the equal access approach. Much opposition to extending marriage rights to same-sex couples stems from individuals' sincere religious beliefs. But it is a hallmark of our constitutional jurisprudence that the state may not advance or inhibit any particular religious view. Equal access helps sharpen the distinction between private marriages, which are protected as a fundamental right under the Due Process Clause, and civil marriage, protected as a fundamental interest under the Equal Protection Clause. Although we contend that the state presumptively must provide access to civil marriage on an evenhanded basis, religious denominations and other private groups remain free to make their own determinations regarding whether they will recognize such unions.[231] Individuals who oppose permitting same-sex couples to

[231] *See supra* text accompanying notes 129-131130. The Supreme Court of Iowa makes this distinction explicit in its decision requiring the state to begin offering same-sex couples the right to marry civilly on the grounds that the differential treatment of gays and lesbians lacked adequate justification. *See* Varnum v. Brien, 763 N.W.2d 862, 904-06 (Iowa 2009) ("In the final analysis, we give respect to the views of all Iowans on the issue of same-sex marriage—religious or otherwise—by giving respect to our constitutional principles [of equal protection for all]. These principles require that the state recognize both opposite-sex and same-sex civil marriage. Religious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views."). Perhaps not coincidentally, the Iowa decision is the only unanimous state high court decision on the issue in recent

marry may feel less threatened by the expansion of civil marriage if the constitutional basis for that change evokes the broader and familiar commitment to ensuring equal access to government institutions and more clearly protects their own individual—and their own individual religion's—right to make a different determination with respect to private marriages.

D. *Limits*

Of course there are limits to the right we are proposing. In particular, a successful equal access claim must involve a substantial burden on access to a fundamentally important government institution, such as civil marriage. Moreover, courts will require plaintiffs to show that the government has administered its program unequally, and they may be particularly willing to find an equal access violation where the marriage regulation at issue excludes an identifiable social or family group. Finally, even if a substantial burden exists, the law will still be upheld if the government can show that it is narrowly tailored to a sufficiently important interest.

1. Substantial Burden

First, to qualify for protection under the equal access theory, the challenged government limitation must place a substantial or significant burden on the right to enter civil marriage. Regulations that do not interfere significantly with marriage are not presumptively unconstitutional on equal access grounds.[232] This proposed limitation draws on language in *Zablocki* that distinguishes between regulations that interfere "directly and substantially with the right to marry," and "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship."[233] A similar threshold re-

years; other recent decisions, both those finding a constitutional violation and those denying the claim, have been issued by sharply divided courts.

[232] A hypothetical law that discriminated on the basis of sexual orientation without imposing a substantial obstacle to civil marriage might well be unconstitutional on other grounds, but not under our equal access theory. In other words, this Article leaves to one side laws that discriminate against gay and lesbian couples without burdening the right to marry.

[233] Zablocki v. Redhail, 434 U.S. 374, 386-87 (1978); *see also* Cain, *supra* note 6, at 35 n.44 ("[A]s the fundamental rights prong of equal protection analysis has been developed, the unequal allocation will be strictly scrutinized only if there is a 'direct and substantial' burden on the right." (citing Montgomery v. Carr, 101 F.3d 1117, 1120-21 (6th Cir. 1996) (holding that anti-nepotism rules do not place a direct and substantial burden on marriage))).

quirement is used in the voting rights context.[234] This limit references the liberty component of our equal access approach. Though applying it may at times require difficult line drawing,[235] we think it appropriately protects fundamental interests while leaving room for regulations that are not unduly onerous. That said, courts must apply such tests with care to ensure that they rigorously assess significant burdens.[236]

Both before and after *Zablocki*, courts have made such distinctions when assessing the extent to which regulations burden marriage or family relationships. For example, in *Califano v. Jobst*, the Supreme Court upheld a provision of the Social Security Act that revoked certain disability benefits from recipients when they married people who did not themselves qualify for those benefits.[237] According to the Court, that restriction was permissible on the assumption that marriage often means an increase in economic status. Although the funding condition did, in a sense, interfere with the right to marry, it did not do so in a way that required heightened scrutiny.[238] The majority in *Zablocki* subsequently distinguished *Jobst* on the ground that the law in *Zablocki* (prohibiting individuals who owed child support from marrying) involved greater "directness and substantiality of the interference with the freedom to marry."[239] Likewise, courts have turned away

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[234] *See supra* text accompanying note 190 (explaining that "reasonable, nondiscriminatory restrictions" on the right to vote may be permissible under *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).

[235] This has been the subject of considerable discussion in the voting rights context. See, for example, the exchange in *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610 (2008), between the plurality, *id.* at 1616 n.8, and Justice Scalia's concurrence, *id.* at 1624-25 (Scalia, J. concurring).

[236] Although *Crawford* ostensibly requires a relatively robust inquiry into whether regulations are related to voter qualifications, the support for the voter identification requirements it upheld was arguably quite weak, and powerful arguments can be made that the identification qualifications actually imposed a rather significant burden. *See id.* at 1627-43 (Souter, J., dissenting); *id.* at 1643-45 (Breyer, J., dissenting). Thus, it is important to note a danger implicit in our approach: it requires courts to make judgment calls regarding whether a burden on marriage is substantial and whether it is even handed, as we discuss next. Our hope is that judges would apply such standards responsibly. As we note in the next Section, courts have uniformly held that the government interests put forward to justify denying denial of marriage rights to same-sex couples are insufficient to pass any kind of heightened scrutiny.

[237] 434 U.S. 47, 58 (1977).

[238] *Id.* at 53-54 (applying rational basis review).

[239] Zablocki v. Redhail, 434 U.S. 374, 387 n.12 (1978) (adding that the social security condition in *Jobst*, unlike the regulation in *Zablocki*, "placed no direct legal obstacle in the path of persons desiring to get married").

challenges to the "marriage penalty" imposed by income tax codes.[240] We also believe that reasonable waiting periods and the procedural formalities associated with marriage licenses would be routinely considered permissible. Minimum-age requirements, too, could be seen relatively insubstantial in the sense that they do not bar individuals from marriage under such regulations—they only require individuals to wait until both aspiring spouses are old enough to marry under state law.[241]

2. Inequality

Second, equal access only applies a presumption of invalidity where plaintiffs can show that the government has administered its program unequally. A decision by a state to eliminate civil marriage entirely would not state an equal access claim because it would treat everyone uniformly. (As we discussed earlier, however, such a reform is probably not viable politically.) Many standard marriage requirements would likewise be permissible simply because they apply in the "same way" to everyone, as a matter of current social practices and arrangements.[242] And the state may prohibit everyone from marrying objects or concepts, so long as it can show a rational basis for the regulation.[243]

Laws that treat individuals unequally, by contrast, would require stronger justifications. The challenge here is that virtually any law can

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[240] *See, e.g.*, Mapes v. United States, 576 F.2d 896 (Ct. Cl. 1978) (upholding the marriage penalty in tax codes).

[241] *See, e.g.*, Moe v. Dinkins, 533 F. Supp. 623 (S.D.N.Y. 1981) (holding that minimum-age restrictions delay, but do not deny, exercise of the right to marry). Even if courts deemed age requirements significant enough burdens to trigger a presumption of unconstitutionality, it is possible that the state's legitimate interest in ensuring sufficient mental capacity to commit to the responsibilities of marriage would be sufficient to justify these requirements, particularly since they accord with numerous other areas of law in which minors are treated differently from adults. *See infra* subsection III.D.3 (discussing our third limit).

[242] Karlan suggests that laws prohibiting bestiality, for instance, are less problematic because "that behavior is not tied as an empirical matter in contemporary America to membership in a recognized social group" and that "[b]y contrast, gay people in the United States do form a social group whose membership extends beyond their engaging in specific sexual acts." Karlan, *Foreword*, *supra* note 23, at 1458. In other words, "statutes that target same-sex behavior are directed at a class whose primary characteristic is not its engagement in discrete acts but its existence as a subordinate social group." *Id.* Karlan is speaking about the criminalization of sexual conduct here, but a similar distinction might be drawn between laws that disallow civil marriage between humans and animals, on the one hand, and same-sex marriage bans, on the other.

[243] *Cf.* Sunstein, *supra* note 6, at 2083 (noting that states may prohibit people from entering into civil marriages with "their dog, their house, their refrigerator, July 21, or a rose petal").

be reframed as treating some individual citizen "unequally." For example, a waiting period nominally treats those who are in a hurry to wed differently from those who are not, and yet it would not present an equal access problem. Usually, distinguishing between marriage regulations that involve inequality and those that are evenhanded will be a matter of common sense. Yet in applying this limit in difficult cases, courts may choose to consider whether a challenged regulation singles out an identifiable social or status group as one factor in their analysis. In other words, inequality may become particularly problematic where the law excludes a recognized group.[244] Nothing in our analysis depends on consideration of the nature of the group affected, but including it may strengthen the appeal of the approach to certain courts and in certain cases, potentially including challenges to different-sex marriage requirements.

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[244] Of course, this raises the question of what constitutes a group, exclusion of which would be sufficient to raise special evenhandedness concerns under our equal access approach. We do not think that a traditional suspect class is required; if it were, then the fundamental interest analysis would add nothing to the standard equal protection claim. At the same time, it is important to recognize that an exclusion that affects an actually existing social group defined primarily by activities other than getting married itself may require a stronger government rationale than a prohibition that only applies to people who wish to marry, say, their cars.

We suggest there are at least three ways to define a group for these purposes, any of which would help gay and lesbian couples seeking access to civil marriage. First, a group might be identified by evidence of historical or contemporary animus or discrimination against them. In this sense, equal access analysis would respond to the classic concern that legislative or popular majorities may offer inadequate protection to disadvantaged or disfavored minorities. We know from other cases concerning gay rights, such as *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), that the Court has acknowledged that differential treatment of gay men and lesbians may be reason for special concern, even though the Court has stopped short of declaring sexual orientation to be constitutionally suspect for all purposes. Second, a group might be identified for our purposes by reference to a longstanding or widespread social movement. Without a doubt, grassroots campaigns have furthered the fight for gay rights, and their impact has been felt in legislatures as well as in courts and in the wider culture. The same cannot be said for people who wish to marry, for example, their cars. Finally, social status may play an important role in identifying the sort of group that must presumptively be given equal access to fundamentally important government programs. Status groups can be organized around common lifestyles or cultural attributes, but regardless of how they are organized, their members share a particular level of social respect or esteem. *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2322-23 (1997) (defining a status group).

Much more could be said here. Our point is simply that however the term "group" is defined, gay men and lesbians qualify. Courts could properly consider this as an important factor in assessing whether the government can provide adequate justification for selectively denying same-sex couples access to civil marriage.

Interesting in this respect is that many of the classic cases invoking the fundamental interest branch of equal protection law concerned the poor. Examples include *Harper*, the poll tax case,[245] various court-access cases,[246] and *Zablocki* itself, which addressed the marriage rights of noncustodial parents who had fallen behind on child support payments or could not prove that their children would not become public charges.[247] In those cases, the Court expressed unease because the challenged statutes selectively denied poor persons equal access to the important government institutions of voting, courts, and marriage.[248] In early cases, the Court struggled with whether to recognize wealth as a suspect classification for *all* purposes.[249] But even after the Court's decision in *San Antonio Independent School District v. Rodriguez*, which declined to recognize wealth as a suspect class,[250] the Court has continued to show special concern with denial of fundamental interests to the poor. For example, in *M.L.B. v. S.L.J.*, the Court analogized to its earlier voting and court access cases and concluded that termination of parental rights was another category "in which the State may not 'bolt the door to equal justice'" and thus that counsel for indigents was required.[251] It distinguished cases concerning other civil matters, such as bankruptcy, on the ground that they did not involve fundamental interests.[252]

The dual nature of equal access claims is important here.[253] The troubling aspect of denial of marriage rights to gays and lesbians, like

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[245] Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

[246] *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102 (1996) (holding that an indigent litigant had a right to a transcript for appeal from termination of parental rights); Douglas v. California, 372 U.S. 353 (1963) (holding that individuals had a right to counsel on direct criminal appeal). *See generally supra* text accompanying notes 193-201.

[247] Zablocki v. Redhail, 434 U.S. 374, 375 (1978).

[248] *See* Karlan, *Foreword*, *supra* note 23, at 1457 (noting that "the fact that the law explicitly targets behavior and not persons does not mean that it is not also class legislation" and analogizing to late nineteenth-century voter-eligibility statutes that excluded blacks from elections).

[249] *See, e.g.*, *Harper*, 363 U.S. at 668 ("Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." (citation omitted)).

[250] 411 U.S. 1, 28 (1973) (concluding that the Texas school-funding system, which provided less support to children living in districts with lower property values, did not "operate to the peculiar disadvantage of any suspect class").

[251] 519 U.S. at 124 (quoting Griffin v. Illinois, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring)).

[252] *Id.* at 114-15.

[253] As noted above, the majority in *M.L.B.* explicitly acknowledges that in this line of cases, "[d]ue process and equal protection principles converge." *Id.* at 120 (quoting Bearden v. Georgia, 461 U.S. 660, 665 (1983)). Indeed, the dissent takes issue with

denial of voting or court access to poor persons, is that an important liberty interest is denied (even if it does not amount to a freestanding due process violation) on a basis that raises significant equal protection concerns (even if it does not qualify as a suspect class for *all* purposes).[254] Thus, a principled distinction may be made between our position and a more general claim that any reference to sexual orientation would be subject to heightened scrutiny, just as the Court's holdings in the poll tax and court access cases have not led to heightened scrutiny of all laws that disadvantage the poor. Likewise, because of the state action involved in civil marriage, our position is distinguishable from the claim that the state has an affirmative obligation to support other fundamental liberty interests, such as the right to terminate a pregnancy, that may be exercised without government involvement.[255] In both these ways (and whatever the normative merits of these distinctions), the line we propose to draw fits with the analysis in other fundamental interest cases.[256]

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this, contending that if "neither [the Due Process nor the Equal Protection] Clause affords petitioner the right to a free, civil-appeal transcript, [one must] assume that no amalgam of the two does." *Id.* at 130 (Thomas, J., dissenting).

[254] The Court was arguably motivated by similar concerns when it held that public education could not be denied to undocumented immigrants, even though education is not a fundamental right and the state generally has considerable discretion in how it regulates immigration. *See* Plyler v. Doe, 457 U.S. 202, 223 (1982) ("[M]ore is involved in these cases than the abstract question whether [the statute] discriminates against a suspect class, or whether education is a fundamental right. . . . By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions . . . .").

[255] *Cf. M.L.B.*, 519 U.S. at 125 (distinguishing the Court's holding that a state must provide funding to indigent people appealing a decision that terminates parental rights from cases in which the Court held that the government need not provide funds for the exercise of fundamental rights "in economic circumstances that existed apart from state action"). Excluding religious exercise from government support therefore also raises different questions. *Cf.* Tebbe, *supra* note 122 (arguing against a free exercise right to equal government support of religious exercise).

[256] Moreover, the key is not whether the legislation at issue discriminates facially but whether, under a common-sense understanding of its application, it selectively denies a recognized group access to fundamentally important institutions. Poll taxes and court-access fees, for example, did not explicitly exclude individuals on the basis of their wealth. Nonetheless, the Court quite comfortably concluded that their deleterious effects were borne by the poor. This distinction matters. Supporters of different-sex marriage requirements sometimes argue that they impose limitations that apply evenhandedly to everyone, in that both straight and gay persons may marry persons of the opposite sex. As discussed above, that argument is effectively foreclosed by *Loving*, in which the Court rejected Virginia's argument that its anti-miscegenation law prohibited everyone from marrying outside their own race, not just African Americans. Loving v. Virginia, 388 U.S. 1, 8 (1967) ("[W]e reject the notion that mere 'equal application' of a statute containing racial classifications is enough to remove the classifications

Thus, courts applying our equal access approach should recognize that laws excluding gay and lesbian couples from civil marriage do selectively deny access on the basis of group status.

3. Interest Balancing

Even a law that substantially interferes with the choice to marry for a particular group only sets up a presumption of invalidity that can be rebutted by a sufficiently strong government justification. Here it may be useful to consider some of the wider applications of equal access, outside the context of same-sex couples. For instance, even if laws that prohibit polygamy trigger heightened scrutiny, they could arguably be justified by a showing that polygamy very often harms women in ways that would be difficult to detect and address without a complete ban on the practice.[257] In other words, even assuming that polygamists have suffered substantial interference with a fundamental interest in access to civil marriage, nevertheless bans on plural marriage may be justifiable in some situations as prophylactic measures designed to address well-founded fears of harm to women that might otherwise go undetected. Incest prohibitions, similarly, could conceivably be justified by concern over the risk of genetic disorders in the children of such couples.[258] Determining the constitutionality of such prohibitions is beyond the scope of this Article, but considering such bans helps to make our point here, which is simply that access to civil marriage could be limited by regulations that are closely tailored to sufficiently impor-

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from the Fourteenth Amendment's protection of all invidious racial discriminations . . . ."). Unsurprisingly, when faced with standard classification-based equal protection claims, both federal and state courts have consistently recognized the reality that different-sex marriage requirements do differentiate on the basis of sexual orientation in that gays and lesbians, as opposed to heterosexuals, may not marry the partner of their choice. *See supra* note 145 and accompanying text. This is true even though courts have split on the secondary question of whether such distinctions are inherently suspect. *See supra* notes 146-148 and notes 154-158 and accompanying text.

[257] However, it is important to note that some polygamous relationships eschew hierarchy and are truly consensual. Accordingly, serious inquiry might be merited regarding the constitutionality of upholding an absolute ban. *See generally* Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004).

[258] Note, however, that some incest laws prohibit marriages or sexual relations between individuals, such as step-siblings or persons related through adoption, that do not pose such genetic risks. *See, e.g.*, TENN. CODE ANN. § 39-15-302 (1997). Permitting such relationships may implicate other concerns regarding whether the relationship is truly consensual, but again, further consideration would be merited. *Cf.* Israel v. Allen, 577 P.2d 762 (Colo. 1978) (finding unconstitutional an incest law prohibiting marriage between adoptive siblings because it was not rationally related to a legitimate state interest).

tant government interests. We now turn to showing why laws that exclude gay and lesbian couples from civil marriage cannot survive our form of interest balancing or any form of heightened review.

E. *Application of the Equal Access Approach*

We have shown why the right to marry should be characterized as a fundamental interest under the Equal Protection Clause, and we have suggested that exclusion from civil marriage constitutes a substantial burden on that interest. Under our proposal, different-sex marriage requirements would trigger a presumption of unconstitutionality. In this Section, we show why we believe that the justifications typically offered in defense of such laws are inadequate to overcome this presumption. We also think it would be unconstitutional for states to establish a separate civil union or domestic partner status for same-sex couples while reserving the moniker marriage for different-sex couples. We address each issue in turn.

1. Complete Denial of Marriage Rights

In states where neither marriage nor an equivalent status such as civil union is available to same-sex couples, the analysis is relatively straightforward. First, members of gay and lesbian couples experience a substantial burden because they cannot marry their chosen partners. Moreover, as discussed above, they constitute an identifiable social group. Even if the laws at issue do not explicitly classify on the basis of sexual orientation, they deny same-sex couples access to civil marriage. This raises a presumption of unconstitutionality.

Analysis then turns to the adequacy of the justifications put forward for different-sex marriage laws. It is significant that no state court that has applied any sort of heightened scrutiny—either strict or intermediate—has found any of the proffered justifications sufficient. In other words, a presumption of illegality is unlikely to be rebutted.

In recent state-level litigation, two rationales have been found sufficient under rational basis review. Both relate marriage to children. First, the so-called "responsible procreation" argument posits that states have an interest in promoting stable families for children, and that, consequently, states may choose to limit the benefits of marriage to different-sex couples because only different-sex couples can have children accidentally. Under this thinking, same-sex couples, who typically have children through laborious and necessarily preplanned processes like artificial insemination or adoption, do not need the

same incentives to form stable family structures. This rationale was found adequate to justify different-sex marriage requirements in Arizona, Indiana, Maryland, New York, and Washington.[259] Variations on this argument include the simple claim that marriage is uniquely and crucially the legal site for procreation, and, since same-sex couples cannot have procreative sexual intercourse, they by definition cannot marry,[260] or that the state may encourage heterosexual unions as "optimal" for procreation.[261]

The other justification for different-sex marriage requirements that has succeeded in recent cases—again, under rational basis review—concerns child rearing. In particular, it holds that heterosexual marriage provides the "optimal" environment for raising children. As New York's highest court put it, "the Legislature could rationally proceed on the common-sense premise that children will do best with a mother and father in the home."[262] Washington's high court also relied upon this justification.[263] The argument sometimes is explicitly framed in terms of encouraging child rearing by biological parents.[264]

Notably, even in states that have upheld different-sex marriage requirements, many courts have gone out of their way to distance themselves from the government's rationales by emphasizing that rational basis review is exceptionally deferential.[265] This level of deference is

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[259] Standhardt v. Superior Court *ex rel.* County of Maricopa, 77 P.3d 451, 462-63 (Ariz. Ct. App. 2003); Morrison v. Sadler, 821 N.E.2d 15, 24-26 (Ind. Ct. App. 2005); Conaway v. Deane, 932 A.2d 571, 633-34 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1, 7-8 (N.Y. 2006); Andersen v. King County, 138 P.3d 963, 983 (Wash. 2006).

[260] *See* Stein, *supra* note 112 (manuscript at 102-14) (discussing early cases that relied upon this argument).

[261] Smelt v. County of Orange, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005) ("The Court finds it is a legitimate interest to encourage the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating . . . .").

[262] *Hernandez*, 855 N.E.2d at 8.

[263] *See Andersen*, 138 P.3d at 983 ("[G]iven the rational relationship standard and that the legislature was provided with testimony that children thrive in opposite-sex marriage environments, the legislature acted within its power to limit the status of marriage."); *see also id.* at 1005 (Johnson, J., concurring) ("The legislature was offered evidence that children tend to thrive best in families consisting of mothers, fathers, and their biological children.").

[264] *See, e.g.*, *Smelt*, 374 F. Supp. 2d at 880 ("DOMA is rationally related to the legitimate government interest . . . of encouraging the creation of stable relationships that facilitate rearing children by both biological parents.").

[265] *See, e.g.*, Conaway v. Deane, 932 A.2d 571, 629 (Md. 2007) ("Under [the rational basis review] standard, 'the State[] [is afforded] a wide scope of discretion . . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'" (second and third alterations in original) (quoting McGowan v. Maryland, 366 U.S. 420, 425-26 (1961))).

particularly significant because, as courts frequently admit, the responsible-procreation and the optimal-child-rearing arguments are dramatically over and underinclusive. Different-sex couples may marry even if they never intend to have children and, indeed, even if they are incapable of having biological children together, due to age or other physical conditions.[266] And same-sex couples routinely raise children together, whether through artificial insemination, adoption, or prior heterosexual relationships.

Furthermore, the proffered justifications are weak. The responsible procreation argument rests on a tenuous distinction between same-sex and different-sex couples, namely, that the former cannot have children accidentally and the latter can. While this is generally true (although some gay, lesbian, and bisexual individuals do have children accidentally through heterosexual intercourse), it is tangential to the state's ostensible interest in protecting children. Certainly, valid interests are served by encouraging *all* couples that have children to support each other and their children, and formal recognition through a process like marriage may facilitate these objectives. But the argument that the possibility of accidental conception leads to irresponsible parenting relies on unproven assumptions about behavior. Furthermore, excluding same-sex couples from the benefits and obligations of marriage does not further the state's interest in promoting stable heterosexual families. Rather, since same-sex couples routinely raise children together, denial of marriage to those who wish to marry undermines the state's larger interests in promoting such stability. As New York's former chief judge pointed out in dissent from a holding that the state's different-sex marriage requirement passed rational basis review, "[t]here are enough marriage licenses to go around for everyone."[267]

The optimal-child-rearing argument is also unpersuasive. While the New York court held that it is common sense that "children will do best with a mother and father in the home,"[268] social science studies fail to confirm that there are any significant differences between

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[266] Even the dissenters in *Lawrence* acknowledge that "encouragement of procreation" could not "possibly" be a justification for denying same-sex couples the right to marry "since the sterile and the elderly are allowed to marry." Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

[267] *Hernandez*, 855 N.E.2d at 30 (Kaye, C.J., dissenting); *see also In re* Marriage Cases, 183 P.3d 384, 452 (Cal. 2008) ("While retention of the limitation of marriage to opposite-sex couples is not needed to preserve the rights and benefits of opposite-sex couples, the exclusion of same-sex couples from the designation of marriage works a real and appreciable harm upon same-sex couples and their children.").

[268] *Hernandez*, 855 N.E.2d at 8.

children raised by different-sex parents and children raised by same-sex parents.[269] Moreover, in many of the states where the issue has been litigated (as well as in many other states), state law or policy permits same-sex couples to adopt children.[270] Those states have already implicitly or explicitly endorsed this living environment or, at the very least, determined that children are not harmed by being raised by same-sex couples. Additionally, as one of us has contended elsewhere, the argument that mothers and fathers, by virtue of their sex, necessarily provide distinct role models for children, relies on essentialized understandings of gender that modern sex discrimination doctrine deems impermissible in other contexts.[271]

These child-centered justifications rely heavily on the historical linkage of marriage, child rearing, and procreation. Indeed, in adopting the arguments, many courts cite back to marriage decisions from the middle of the twentieth century or even earlier.[272] As discussed in

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[269] *See, e.g.*, COMM. ON LESBIAN, GAY, & BISEXUAL CONCERNS ET AL., AM. PSYCHOLOGICAL ASS'N, LESBIAN AND GAY PARENTING 15 (2005) ("[E]vidence to date suggests that home environments provided by lesbian and gay parents are as likely as those provided by heterosexual parents to support and enable children's psychological growth."); Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOLOGIST 607, 613 (2006) ("Empirical studies comparing children raised by sexual minority parents with those raised by otherwise comparable heterosexual parents have not found reliable disparities in mental health or social adjustment."); Ruth Ullmann Paige, *Proceedings of the American Psychological Association for the Legislative Year 2004*, 60 AM. PSYCHOLOGIST 436, 496 (2005) ("[R]esearch has shown that adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish."); Ellen C. Perrin, Comm. on Psychological Aspects of Child & Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 343 (2002) ("No data have pointed to any risk to children as a result of growing up in a family with 1 or more gay parents.").

[270] California, Connecticut, the District of Columbia, Illinois, Indiana, Maine, Massachusetts, New Jersey, New York, Oregon, and Vermont permit a same-sex couple to jointly petition for an adoption. *See* Human Rights Campaign, Parenting Laws: Joint Adoption and Second Parent Adoption (July 6, 2009), http://www.hrc.org/documents/parenting_laws_maps.pdf. Additionally, Colorado and Pennsylvania permit a same-sex partner to petition to adopt the child of her partner. *Id.* In numerous other states, some jurisdictions have held that joint or second-parent adoption is available to same-sex couples, and in many jurisdictions, the law is simply unclear. *Id.* Only a handful of states explicitly prohibit same-sex couples from adopting. *Id.*

[271] *See* Widiss et al., *supra* note 159, at 489-92 ("The differences ascribed to the female and male role models reflect deep-seated stereotypes regarding male and female characteristics that are properly condemned as sex discrimination.").

[272] *See, e.g.*, Andersen v. King County, 138 P.3d 963, 982 (Wash. 2006) (supporting the responsible procreation argument by claiming that "as *Skinner*, *Loving*, and *Zablocki* indicate, marriage is traditionally linked to procreation and survival of the human

Part I, connections between marriage and procreation have eroded considerably.[273] In other contexts, courts have held that distinctions between nonmarital and marital procreation violate constitutional rights held by either parents or children.[274] Accordingly, it is not clear why a preference for marital families should suffice here. In fact, states have enacted a range of statutory provisions that break down preexisting distinctions between marital and nonmarital children.[275] Considering that the procreation and child-rearing arguments are hard to justify in the modern world even under rational basis review, they are almost certainly inadequate to satisfy any form of heightened scrutiny.

Perhaps because of these collective weaknesses, California, Connecticut, and New Jersey all chose to forego reliance on either the responsible-procreation or optimal-child-rearing arguments in defending their states' different-sex-marriage requirements.[276] The primary remaining argument—relied on in all three states—is that tradition is sufficient justification for preserving different-sex-marriage requirements. This argument is inadequate for reasons discussed in the next Section. Other interests put forward by states have not been found sufficient, even by state courts that ultimately permitted different-sex marriage requirements to stand under the child-related rationales discussed above. These include that limiting marriage to different-sex

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race"); *see also* Conaway v. Deane, 932 A.2d 571, 630 (Md. 2007) (supporting the responsible procreation argument by citing *Loving*, *Skinner*, and *Maynard v. Hill*, 125 U.S. 190 (1888)).

[273] *See supra* subsection I.D.1.

[274] *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972) (requiring procedural safeguards before terminating a nonmarital biological father's relationship with his children); Eisenstadt v. Baird, 405 U.S. 438 (1972) (ruling that unmarried persons have an equal right to use contraceptives); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968) (striking down a law barring a mother from recovering in an action based on the wrongful death of her illegitimate child); Levy v. Louisiana, 391 U.S. 68 (1968) (overturning a law barring an illegitimate child from recovering in an action based on the wrongful death of her mother).

[275] *See supra* note 111 and accompanying text.

[276] *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 430 (Cal. 2008) (noting that the argument from procreation was made in an amicus brief rather than in the state's brief); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 477-78 (Conn. 2008) (noting that the defendants disavowed any claim that the legislation establishing "a separate legal framework for committed same sex couples was motivated by the belief that the preservation of marriage as a heterosexual institution is in the best interests of children, or that prohibiting same-sex couples from marrying promotes responsible heterosexual procreation"); Lewis v. Harris, 908 A.2d 196, 205-06 (N.J. 2006) ("The State concedes that state law and policy do not support the argument that limiting marriage to heterosexual couples is necessary for either procreative purposes or providing the optimal environment for raising children.").

couples preserves limited state resources, that denial of marriage rights to same-sex couples promotes uniformity among states, and that, under separation-of-powers principles, any changes should be made by the legislature rather than the courts.[277] Probably as a result of the rapidly growing societal acceptance of gays and lesbians, as well as the Supreme Court's decisions in *Lawrence* and *Romer*, states have not relied upon pure morality rationales, although these often appear in amicus briefing.[278] Thus, it seems quite likely that if courts adopted our equal access analysis, states would find it difficult to articulate any arguments that would be adequate to overcome the presumption of unconstitutionality.

2. Creation of a Separate Status

Recent polls demonstrate a growing sense that many members of the public think it is unfair or foolish to deny same-sex couples the rights and responsibilities of a legal status like marriage but that they are also uncomfortable with "changing" the "traditional" definition of marriage.[279] In response to this reality, several states have created civil unions or domestic partnerships that are available to same-sex couples. In some states, courts have held that the state could satisfy

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[277] *See, e.g.*, *In re* Marriage Cases, 183 P.3d at 446-52 (discussing the state's claims that statutes were justified by tradition, comity, separation-of-powers, and procreation-based arguments); Varnum v. Brien, 763 N.W.2d 862, 873 (Iowa 2009) (observing that county-claimed statutes were justified by child-rearing concerns, conservation of state resources, and a state interest in promoting a traditional notion of marriage).

[278] *See, e.g.*, Brief Amicus Curiae of the American Center for Law and Justice in Support of Respondent Proposition 22 Legal Defense and Education Fund at 14-15, *In re Marriage Cases*, 183 P.3d 384 (No. S147999) (arguing the "impossibility of distinguishing on principled grounds same-sex marriage and polygamy").

[279] For example, a CBS News/N.Y. Times nationwide poll conducted in June 2009 asked, "Which comes closest to your view? Gay couples should be allowed to legally marry, OR, gay couples should be allowed to form civil unions but not legally marry, OR, there should be no legal recognition of a gay couple's relationship?" CBS News/N.Y. Times Poll, Supreme Court Nominee Sonia Sotomayor (June 12-16, 2009), *available at* http://www.cbsnews.com/htdocs/pdf/poll_sotomayor_061709.pdf. The poll found that, of all respondents, 33% supported marriage, 30% supported civil unions but not marriage, and 32% supported no recognition. *Id.* A Fox News/Opinion Dynamics Poll conducted in May 2009 reported very similar results. *See* Fox News/Opinion Dynamics Poll (May 12-13, 2009), *available at* http://www.foxnews.com/projects/pdf/051809_issues_web.pdf (finding that 33% supported legal marriage, 33% supported alternate legal partnership, and 29% supported no recognition). A Quinnipiac University poll conducted in April 2009 found that 38% would support and 55% would oppose a state law permitting same-sex couples to marry but also that 57% would support and 38% would oppose a law permitting civil unions. Quinnipiac University Poll (Apr. 30, 2009), *available at* http://www.quinnipiac.edu/x1295.xml?ReleaseID=1292.

constitutional requirements by providing access to such "equivalent" statuses. High courts in New Jersey, Vermont, and California have decided that denying same-sex couples the rights and benefits of marriage is unconstitutional but that the state may rectify this problem by creating a separate status for same-sex couples that provides all the same legal protections as marriage.[280] In other states, legislatures have created such statuses without being required to do so by a court.[281]

Same-sex couples have therefore begun to challenge the relegation of their relationships to these (ostensibly) "separate but equal" legal statuses. Massachusetts and Connecticut have both held explicitly that such separate statuses are insufficient and that same-sex couples must be permitted to marry.[282] In this Section, we show why it would be unlikely that limiting same-sex couples to a separate status would pass constitutional scrutiny under our equal access approach. Indeed, we think that the equal protection approach that we advocate is far better

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[280] *See* Strauss v. Horton, 207 P.3d 48, 75-76 (Cal. 2009) (reading the state constitution to require equal rights for same-sex couples, but not including equal access to the "designation of 'marriage'"); *Lewis*, 908 A.2d at 221 (holding that creation of civil unions would comport with equal protections granted by the state constitution); Baker v. State, 744 A.2d 864, 887 (Vt. 1999) (holding that the state constitution requires common benefits and protections but that these need not come from a marriage license). As discussed above, in 2008, the California Supreme Court had overturned a state statute that prohibited same-sex marriage, and same-sex marriages were permitted in the state for a period of several months. The court subsequently upheld a constitutional amendment overruling its prior decision. In reaching this determination, it appeared to rely heavily on the fact that the state had already created—and was maintaining—a separate domestic partnership status providing the legal benefits of marriage to same-sex couples. *See Strauss*, 207 P.3d at 61 ("[Proposition 8] carves out a narrow and limited exception to the[] state constitutional rights, reserving the official *designation* of the term 'marriage' for the union of opposite-sex couples as a matter of state constitutional law, but leaving undisturbed all of the other extremely significant substantive aspects of a same-sex couple's state constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection of the laws.") Also, although the Vermont Supreme Court had held that separate civil union status could be constitutionally permissible, the legislature subsequently chose to permit same-sex couples to marry. *See* VT. STAT. ANN. tit. 15, § 8 (2009) (defining marriage as "the legally recognized union of two people" and thereby including same-sex couples).

[281] *See, e.g.*, H.R. 436, 2010 Leg. (N.H. 2010) (enacted 2010).

[282] *See* Kerrigan, v. Comm'r of Pub. Health, 957 A.2d 407, 480 (Conn. 2008) (holding that same-sex couples cannot be denied the right to marry despite the availability of civil unions); Opinions of the Justices to the Senate, 802 N.E.2d 565, 571 (Mass. 2004) (holding that the creation of a separate status would be impermissible under the state constitution). In the Iowa litigation, the state had not created a separate status so the issue was not directly before the court, but the state supreme court still noted that "[a] new distinction based on sexual orientation would be equally suspect and difficult to square with the fundamental principles of equal protection embodied in [Iowa's] constitution." *Varnum*, 763 N.W.2d at 906.

suited to analysis of the stigma and dignitary harms associated with a separate status than an independent due process analysis is likely to be.

First, is the burden on the right to marry substantial? In some sense, the answer turns on an understanding of the nature of the right. To the extent that the right simply involves the tangible government benefits associated with marriage, there is no denial. However, as courts and commentators routinely recognize, marriage also carries great symbolic and intangible significance.[283] Indeed, it is precisely because of the central importance of the institution of marriage and the sense that the word itself carries particular meaning that opponents of wider marriage rights argue so strenuously that it should be reserved for different-sex couples. As one Connecticut legislator admitted forthrightly, creating civil union status permitted the legislators to expand rights for same-sex couples while at the same time assuring their constituencies that "we didn't . . . do it in a way that you [would find] offensive either to your core beliefs, to your religious beliefs, or to your view of what marriage is."[284] Creating a separate status for same-sex couples that lacks this history and tradition necessarily denies access to these aspects of marriage, even as it permits enjoyment of its legal benefits. As the California Supreme Court points out, many will understand a separate status to mean a lesser status:

> [B]ecause of the long and celebrated history of the term 'marriage' and the widespread understanding that this word describes a family relationship unreservedly sanctioned by the community, the statutory provisions that continue to limit access to this designation exclusively to opposite-sex couples . . . likely will be viewed as an official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples.[285]

Moreover, even in states that claim to have extended all the legal rights and responsibilities of marriage to same-sex couples, experience is beginning to show that the statuses remain tangibly distinct. New

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[283] *See, e.g.*, *In re Marriage Cases*, 183 P.3d at 452 (recognizing the social and historical importance of marriage); Scott, *supra* note 126, at 562-66 (discussing symbolic and social meanings of marriage); Sunstein, *supra* note 6, at 2098 ("[T]he underlying logic of the right to marry has everything to do with the fundamental importance of the expressive interests at stake."); *id.* at 2118 ("The most plausible account [of why the right to marry should qualify as a fundamental interest for equal protection purposes] points to the expressive benefits of marriage.").

[284] *Kerrigan*, 957 A.2d at 477 n.80 (quoting 48 H.R. Proc., Pt. 7, 2005 Sess. (Conn. 2005) (remarks of Rep. Robert M. Ward)) (alterations in original) (internal quotation marks omitted).

[285] *In re Marriage Cases*, 183 P.3d at 452.

Jersey and Vermont, two of the states that have created civil unions, each recently appointed commissions to study how well they were working. Both issued reports finding that, despite the legislative intent to create equivalent statuses, significant differences remain.[286] Both reports noted concrete, tangible harms largely resulting from third parties' confusion about the significance of civil unions and lack of understanding that they were intended to be equivalent to marriages. For example, the commissions found that employers were less likely to provide health benefits to members of civil unions and that health care workers improperly denied members of civil unions access to medical information regarding their partners and improperly refused to permit them to make medical decisions for their partners.[287] The New Jersey report also included testimony from residents of Massachusetts, which permits same-sex marriage, showing that both issues were much less prevalent in Massachusetts, where third parties instantly understood the meaning of "marriage," even when applied to a couple whose members were of the same sex.[288]

Both reports also emphasized significant intangible harms associated with the separate statuses.[289] Witnesses baldly stated that "sepa-

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[286] *See* N.J. CIVIL UNION REVIEW COMM'N, THE LEGAL, MEDICAL, ECONOMIC & SOCIAL CONSEQUENCES OF NEW JERSEY'S CIVIL UNION LAW 1 (2008) [hereinafter NEW JERSEY REPORT], *available at* http://www.nj.gov/oag/dcr/downloads/CURC-Final-Report-.pdf (finding that civil unions "encourage[] unequal treatment"); OFFICE OF LEGISLATIVE COUNSEL, REPORT OF THE VERMONT COMMISSION ON FAMILY RECOGNITION AND PROTECTION 26 (2008) [hereinafter VERMONT REPORT], *available at* http://www.leg.state.vt.us/WorkGroups/FamilyCommission/VCFRP_Report.pdf (finding that many members of civil unions "encountered . . . instances where they find the promise of equality to be unfulfilled").

[287] *See* NEW JERSEY REPORT, *supra* note 286, at 11-15; VERMONT REPORT, *supra* note 286, at 10.

[288] *See* NEW JERSEY REPORT, *supra* note 286, at 20-24. Notably, even marriages of same-sex couples within Massachusetts substantively differ from marriages of different-sex couples since the former are not recognized as marriages under federal law. *See* 1 U.S.C. § 7 (2006 & Supp. I 2009) (defining marriage for federal purposes as "a legal union between one man and one woman"). The New Jersey report found that, nonetheless, third parties were more likely to recognize the relationships as "marriages" and even to accord them benefits, such as health benefits, that the Employee Retirement Income Security Act (ERISA) arguably did not require because failure to do so would more obviously constitute discrimination. *See* NEW JERSEY REPORT, *supra* note 286, at 21 ("It is not that ERISA-covered employers in Massachusetts don't understand that federal law allows them to refrain from providing benefits to same-sex married couples. It's that employers also understand that without the term 'civil union' or 'domestic partner' to hide behind . . . [e]mployers would have to acknowledge that they are discriminating against their employees because they are lesbian or gay.").

[289] *See* NEW JERSEY REPORT, *supra* note 286, at 15-20 (setting forth testimony regarding the negative psychological impact that the separate status represented by civil

rate is not equal" and compared their experience to past racial segregation.[290] They described psychological harm and feeling less pected than married siblings or family members.[291] Children of same-sex couples testified that they felt the civil union status singled out their parents as different and less valuable in a way that marriage would not.[292] Again, this testimony contrasted with evidence from Massachusetts, which showed that marriage by same-sex couples was much more widely recognized as truly equivalent.[293] While one would expect that time would gradually mitigate some of these concerns, the Vermont report was issued after the state already had permitted civil unions for eight years. And, notably, a year after the report was issued, and after numerous public hearings and debates on the issue, the Vermont legislature chose to permit same-sex couples to marry.[294] In our view, for these reasons, denial of a right to "marry," even with access to a purportedly equivalent status, would be a sufficient burden to clear the threshold test.

Does the law treat groups unevenly? For the same reasons discussed above, creating a separate status constitutes discrimination on

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unions can have); VERMONT REPORT, *supra* note 286, at 6, 9 (presenting testimony from members of civil unions and their families about the mentally deleterious effects that separate status has on them).

[290] *E.g.*, VERMONT REPORT, *supra* note 286, at 7. For example, a psychologist who worked with children of same-sex couples testified at a public hearing:

> In my experience with children, the fact that their parents cannot marry and have to have an alternative to marriage sends a very bad message. It is no different than water fountains for "negroes" and "whites" 45 years ago. The message is, "your family isn't good enough and therefore your parents are unable to marry.

Id. at 6-7.

[291] *See, e.g.*, NEW JERSEY REPORT, *supra* note 286, at 19 (noting testimony from a gay teenager regarding a feeling of inferiority compared to his straight siblings because unlike them, he could not envision his future with marriage in it); VERMONT REPORT, *supra* note 286, at 9 (telling the story of a father who would not attend one son's civil union ceremony despite going to another son's same-sex marriage ceremony in Massachusetts).

[292] *See* NEW JERSEY REPORT, *supra* note 286, at 17-19 (emphasizing the challenges faced by children of same-sex couples in a civil union, particularly those arising from peers questioning their families' validity); *see also* VERMONT REPORT, *supra* note 286, at 10-11 (concluding that children do well in gay- and lesbian-headed families but that recognizing their parents' relationship as marriage would provide additional benefits).

[293] *See* NEW JERSEY REPORT, *supra* note 286, at 20-24 (evaluating the effects of allowing same-sex couples to marry in Massachusetts, and concluding that they are overwhelmingly positive and that simply changing the term from "civil union" to "marriage" can remedy the documented ills associated with civil unions).

[294] *See* VT. STAT. ANN. tit. 15, § 8 (2009) (defining marriage to include same-sex couples).

the basis of sexual orientation. Members of same-sex couples who seek to marry their chosen partners are denied that right on the basis of their sexual orientation. This is true so long as marriage is explicitly reserved for different-sex couples, even if, as is the case in some states, heterosexual couples are permitted to choose whether to be married or to enter into a civil union or domestic partnership.[295]

By contrast, if the state chose to stop performing civil marriages entirely and substituted civil union status or domestic partner status for *all* couples, there would no longer be an evenhandedness difficulty. Thus, we believe that a decision to do so would not run afoul of the equal access approach we propose.

However, assuming that the state maintained separate statuses and denied same-sex couples the right to civil marriage, the result would ultimately turn on the third question: is there sufficient justification for the difference in treatment to overcome a presumption of unconstitutionality? The primary rationale put forward by states defending the creation of such separate statuses is that they are appropriate or necessary to preserve the "traditional" definition of marriage. As courts have noted, this justification is hard to distinguish from the exclusion itself—it is, of course, this very definition that is at issue.[296] Moreover, as is widely recognized in other equal protection contexts, tradition is an inadequate justification for ongoing discrimination. Indeed, the Equal Protection Clause was enacted with the specific intention of dismantling discriminatory traditions that were in place at the time.

Equal protection analysis, as opposed to due process analysis, historically has been the vehicle used to assess the stigma and dignitary harms associated with the creation of "separate but equal" institutions. Of course, famously, the *Brown* Court relied on the Equal Protection Clause to hold that separate educational facilities were "inherently unequal."[297] Notably, the Court accepted lower courts' findings that the black and white schools were equalized, or were being equalized,

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[295] In some instances, because of federal tax, benefits, or inheritance rules, a heterosexual couple might choose to register under one of these alternative statuses rather than marry since they would not be considered "married" for federal purposes. This could permit an individual to continue receiving, for example, social security survivor benefits that would otherwise be forfeited upon remarriage. *See, e.g.*, NEW JERSEY REPORT, *supra* note 286, at 3, 42-44 (recommending that same-sex couples be permitted to marry but that the state continue to permit couples to register as domestic partners to reap some of these benefits).

[296] *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 478 (Conn. 2008) ("[T]he justification of 'tradition' does not explain the classification; it merely repeats it.").

[297] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

"with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."[298] Accordingly, the Court's holding turned explicitly on the intangible and psychological harms associated with segregation. The Court concluded that the creating a separate system was itself a harm that was cognizable under the Equal Protection Clause because it instilled in children a "feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[299]

In other contexts, as well, the Court has pointed to the intangible benefits of long-standing institutions in holding that newly created separate alternatives were inadequate. Thus, for example, in *Sweatt v. Painter*, the Court was clear that a newly created African American law school could not manufacture the connections and status that the University of Texas Law School enjoyed.[300] Likewise, in *United States v. Virginia*, the Court was clear that a newly created military institute for young women could not manufacture the connections and status that the Virginia Military Institute (VMI) enjoyed.[301] Admittedly, these new institutions differed in several tangible ways from their counterparts, and the distinctions were of considerably greater magnitude than the tangible differences between marriage and civil union.[302] But the Court held that even "more important" than these tangible distinctions was the lack of tradition and standing in the community from which these institutions would suffer.[303]

The same is true of marriage. The term marriage carries a societal significance that cannot be manufactured. The experience in Massa-

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[298] *Id.* at 492; *see also id.* at 492 n.9 (specifying the findings of each lower court regarding the state of equalization between the schools in their respective states).

[299] *Id.* at 494.

[300] 339 U.S. 629, 634 (1950).

[301] 518 U.S. 515 (1996).

[302] *See id.* at 551-52 (cataloguing differences in faculty, athletic facilities, and endowment); *Sweatt*, 339 U.S. at 633-34 (cataloguing differences in, among other things, faculty, library volumes, class size).

[303] *Sweatt*, 339 U.S. at 634 ("What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige."); *Virginia*, 518 U.S. at 553 (asserting that Virginia had created "a 'pale shadow' of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence"). In the VMI case, the Court characterized the newly created military institute as "reminiscent of the remedy Texas proposed" in *Sweatt*, and quoted extensively from the earlier case with its emphasis on the intangible significance of tradition and prestige. *Id.* at 553-54.

chusetts shows that this meaning can endure even with inclusion of same-sex couples. As the number of states permitting same-sex marriage continues to multiply, this will be all the more evident. Creating a separate civil union or domestic partnership status is a laudable step forward in expanding rights to same-sex couples. However, we feel it fails to meet the government's obligations. Having decided to create civil marriages, states must provide access to them on an evenhanded basis.

CONCLUSION

Equal access provides a sensible way for courts to protect a right to marry for same-sex couples. Not only does it match the structure of the right, but it also avoids the pitfalls of the primary alternatives, which ask courts either to declare a fundamental due process right to marry that includes the right to marry a person of the same sex, or to announce a new suspect classification. Now that the legal challenge to different-sex marriage laws has entered federal court in earnest, finding a theory that makes sense both conceptually and pragmatically has become urgent.

Beyond the current controversy, our equal access proposal has important implications for future constitutional issues. For example, equal access provides a sensible framework for assessing state bans on adoption by same-sex couples. Given the fundamental importance of child rearing, the state should be required to provide a compelling justification for selectively denying certain couples the right to adopt children. Likewise, the equal access approach could be used to assess traditional bans on polygamy and incest. While some varieties of these restrictions on civil marriage likely can be justified by important state interests, including concerns over the welfare of women and offspring, others inhibit access to civil marriage without sufficient justification.

Finally, as we have suggested, equal access provides one avenue for building into federal constitutional law a principle that often exists in state and foreign constitutions—namely, the right to dignity. Arguably already essential to much familiar federal constitutional jurisprudence, dignity could play an important role in our national conversation about the constitutionality of laws that restrict certain groups' access to fundamentally important government programs, such as voting and civil marriage. Our equal access theory provides one framework for that kind of conversation.