DEAN V. THE DISTRICT OF COLUMBIA:
GOIN’ TO THE CHAPEL AND WE’RE
GONNA GET MARRIED*

HEATHER HODGES†

I. Introduction ........................................................................................................................................ 94
II. Background of Same-Sex Marriages Claims ................................................................................. 96
   A. Same-Sex Marriage Claims and Statutes ................................................................................. 100
   B. Same-Sex Marriage Claims and Constitutional Claims ....................................................... 102
   C. The Impact of Bowers v. Hardwick ....................................................................................... 104
   D. The Implications of Baehr v. Lewin ..................................................................................... 106
III. Background of Dean v. District of Columbia .............................................................................. 108
IV. The Court’s Analysis .................................................................................................................... 110
   A. D.C. Marriage Statute Excludes Same-Sex Marriages ......................................................... 110
   B. The Human Rights Act Did Not Redefine Marriage ............................................................. 114
   C. Constitutional Claims ........................................................................................................... 115
      1. Due Process Rights ............................................................................................................. 115
      2. The Equal Protection Claim ............................................................................................... 118
         a. Concurring Opinion by Judge Steadman .................................................................. 118
         b. Concurring Opinion by Judge Terry .......................................................................... 119
         c. Dissent In Part by Judge Ferren .................................................................................. 120
            (i) Criticism of the Majority Ruling ........................................................................... 120
            (ii) Overview .................................................................................................................... 121
            (iii) Applying Bowers v. Hardwick ........................................................................... 123
            (iv) Factors Applicable to Suspect and Quasi-suspect Status .................................... 124
            (v) Lesbians and Gays as Suspect or Quasi-Suspect Classes ................................... 128
V. Analysis of Same-Sex Marriage Arguments .................................................................................. 129
   A. The Effectiveness of Statutory Arguments ............................................................................. 129

* DIXIE CUPS, Goin’ to the Chapel and We’re Gonna Get Married, on CHAPEL OF LOVE (Red Bird Records 1960).
† American University, Washington College of Law, J.D. candidate 1997. I would like to thank my parents, Bob and Linda Hodges, Nettie Thomas, and Greg Kofron for their neverending support and encouragement.
INTRODUCTION

God, I, Craig, take you, Pat, to be my husband, to have and to
hold from this day forward, for better, for worse, for richer, for
poorer, in sickness and in health, to love and to cherish, until we
are parted by death. This is my solemn vow.¹

For Craig Dean and Pat Gill,² like many homosexual couples,³ this
moment is a dream that has never become a reality.⁴ Presently, no

¹ ABRAHAM J. KLAUSNER, WEDDINGS: A COMPLETE GUIDE TO ALL RELIGIOUS AND INTERFAITH MARRIAGE SERVICES 53 (1986).
² Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995). The plaintiffs in this case were Craig Robert Dean and Patrick Gerard Gill. For a more detailed discussion of this case see discussion infra Part III.
³ For purposes of this Note, any use of the word homosexual will include gay men and lesbians unless otherwise indicated. Use of the terms gay and lesbian is meant to also include bisexual, transsexual, and transgender persons.
⁴ See For Better or For Worse, NEWSWEEK, May 24, 1993, at 69. Despite legal and social proscriptions against same-sex marriage, many lesbians and gays have participated in symbolic ceremonies. “During a massive gay [lesbian, bisexual and transgender] rights march in Washington, [ D.C.], 1,500 homosexual couples participated in a ‘wedding’ replete with ministers and rice.” Id. See also Nightline: Same-Sex Marriages Proposed in Hawai4 (ABC television broadcast, Sept. 25, 1995). Some commentators have argued that participation in symbolic ceremonies in combination with domestic partnership legislation would “stop short of marriage, but could grant to same-sex couples many of the same benefits, from filing of joint tax returns, to visiting a partner in the hospital, to inheritance rights.” Id. Proponents of same-sex marriages argue, however, that while domestic partnership legislation is a step in the right direction, it simply does not go far enough. As Evan Wolfson of the Lambda Legal Defense Fund argues, “domestic partnership, even if it were to be extended in its fullest capacity, doesn’t come close to approaching all the legal and economic and important social benefits, responsibilities, rights, and obligations that come with the institution of marriage...” Id. For further insight on the advantages and disadvantages of domestic partnership legislation see generally, Hubert J. Barnhardt, III, Let The Legislature Define the Family: Why Default Statutes Should Be Used to Eliminate Potential Confu-
sion, 40 EMORY L.J. 571, 609-08 (1991) (explaining that legislatures should define family because it can provide precise definition of who does and does not qualify as family instead of relying on courts to define family on a case-by-case basis).
state legally recognizes same-sex marriages. In Baehr v. Lewin, the Hawaii Supreme Court reignited the controversy over same-sex marriages by requiring the State of Hawaii to demonstrate that prohibiting same-sex marriage is based upon compelling state interests. The state's ability to demonstrate the requisite compelling state interests presupposes that the Hawaii legislature and its citizens will not put a stop to same-sex marriages first. In the wake of the Hawaii Supreme Court's decision, the Governor of Hawaii signed a bill banning same-sex marriages. Fearing that the legalization of same-sex unions in Hawaii would force other states to

5. Peter G. Gunthrie, Marriage Between Persons of the Same Sex, 63 A.L.R.3d 1199 (1975) (noting that cases addressing the legality of same-sex marriage claims have taken the position that "since marriage has always been the union of a man and woman as husband and wife, there cannot be a valid marriage contract of persons of the same-sex."). Denmark is the only country that has legalized same-sex marriages. Karlyn Barker, D.C. Gay Couple to Press Fight for Marriage License; Kelley Assailed for Alleged Reversal on Issue, WASH. POST, Jan. 7, 1992, at D1. One proponent of same-sex marriages calls the exclusion of homosexuals from marriage "offensive ... [carrying] a strong symbolic and legal message that lesbian and gay Americans are relegated to second-class status." Philip S. Gutis, Small Steps Toward Acceptance Renew Debate on Gay Marriage, N.Y. TIMES, Nov. 5, 1989, § 4, at 24. Conversely, others have expressed reservations about pushing for the legalization of same-sex marriages and instead encourage lobbying for domestic partnership legislation. Id. See also Steven K. Homer, Against Marriage, 29 HARV. C.R.-C.L. L. REV. 505, 506 (1993) (arguing that legalization of same-sex marriages may very well create new levels of inequality for homosexuals because "the benefits associated with marriage are likely to come in a piecemeal fashion because ... marriage does not create social approval but merely stands for it").


7. Nightline, supra note 4 (explaining how the potential for legal recognition of same-sex marriages in Hawaii creates an issue for the entire country because marriages which are valid in one state are legally recognized in another).

8. Baehr v. Lewin, 852 P.2d at 48 (holding that refusal to grant same-sex marriages is sexual discrimination for which a state must show a compelling governmental interest for it to be upheld).

9. See New Hawaiian Law Bans Gay Marriages, N.Y. TIMES, June 24, 1994, at A1; see also Elaine Herscher, When Marriage Is a Tough Proposal: Women's Suit at Heart of Debate Over Same Sex Unions, S.F. CHRON. May 15, 1995, at A1 (noting that legislature also created commission to study "the inequities faced by same-sex couples—a move that could lead to a statewide domestic partner law").
honor those marriages, some state legislatures seek to enact preventive measures. A final decision in Baehr is not anticipated until 1997.

Despite the Baehr decision, other states are still unwilling to legalize same-sex marriages. The District of Columbia Court of Appeals recently addressed the issue of whether same-sex couples have the right to marry. In Dean v. District of Columbia, the court elected not to follow Hawaii's lead and instead followed a long line of decisions by other state courts refusing to acknowledge same-sex unions. In a per curiam opinion, the court in Dean held that the scope of the District's Marriage and Divorce Act does not encompass same-sex marriages nor does the Human Rights Act of the District of Columbia change the definition of marriage.

10. For an examination of the choice of law implications if Hawaii recognizes same-sex marriages, see e.g., Joseph W. Hovermill, A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages, 53 Md. L. Rev. 459, 493 (1994) (arguing that the court should not refuse to recognize same-sex marriages performed legally in another state unless the state legislature has clearly expressed public policy to the contrary); Deborah M. Henson, Will Same-Sex Marriages Be Recognized in Sister States? Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Leewin, 52 U. Louisville J. Fam. L. 551, 584 (1994) (explaining that if a state elected not to honor an out-of-state marriage on public policy grounds, the Full Faith and Credit and Due Process Clauses may override that decision); Thomas M. Keane, Aloha, Marriage?: Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages, 47 Stan. L. Rev. 499, 531 (1995) (predicting that if same-sex marriages are recognized, there may be lack of uniformity in state marriage laws because courts will avoid applying the Full Faith and Credit Clause and will instead try to determine which state's conflict laws govern); Habib A. Balian, "Til Death Do Us Part": Granting Full Faith and Credit to Marital Status, 68 S. Cal. L. Rev. 397, 406-17 (1995) (arguing the Full Faith and Credit Clause may serve as a useful tool to force recognition of same-sex marriages in other states).

11. See David W. Dunlap, Some States Trying to Stop Gay Marriages Before They Start, N.Y. Times, Mar. 15, 1995, at A18. "Utah legislators voted overwhelmingly ... to deny recognition to marriages performed elsewhere that do not conform with Utah law ... including same-sex unions. On ... March 1, 1995, a bill rendering any same-sex marriage null and void failed by one vote ... [in] the South Dakota Senate ... [On March 3, 1995] a bill was introduced in the Alaska House ... to make it explicit that 'marriage is a civil contract entered into by one man and one woman.'" See also Nightline, supra note 4 (noting that other states are launching "preemptive legal strikes," with mixed results).

12. Same-Sex Marriage Trial Postponed Until 1996, L.A. Times, July 15, 1995, at A16 (reporting that the court postponed the September trial to give the legislature time to review the recommendations of the commission).


14. See discussion infra Part I.A.-D. (discussing previous cases addressing the right to same-sex marriage).


court further held that denial of same-sex marriages does not violate due process or equal protection rights. In a lengthy dissent, however, Judge Ferren disagreed with the court's granting of summary judgment on the equal protection issue.

Part I of this Note discusses the prior history of same-sex marriage claims. Part II describes the factual and procedural background of the case, and Part III analyzes the court's opinion. Finally, Part IV evaluates Dean including the conclusions drawn by the court and discusses how the failure of courts to legally recognize same-sex unions is gender discrimination in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

I. BACKGROUND OF SAME-SEX MARRIAGE CLAIMS

Controversy over same-sex marriages is not a new phenomenon nor have the arguments supporting same-sex unions changed significantly over time. In their struggle to legalize same-sex unions, same-sex marriage advocates have encountered many barriers. First, the courts' formulation of the definition of marriage automatically precludes same-sex couples from entering the institution of marriage because they limit this privilege to heterosexual couples only. In conjunction with this definitional requirement of marriage, opponents of same-sex marriages buttress their arguments by claiming that same-sex unions cannot be recognized as a marriage because procreation is the central purpose

19. See infra Part III.C. (discussing the court's ruling on the couple's constitutional claims).
20. See infra Part III.C.2.c.
21. See The People Speak, PHOENIX GAZETTE, July 6, 1995, at A2. (reporting that a recent poll by EPIC-MRA-Mitchell Research found that 33% of the nation's voters believe that same-sex marriages should be allowed, while 63% disagreed, and 4% were undecided); see also Carl J. Panek, 58 Percent in U.S. Oppose Legalizing Same-Sex Marriages, CHI. TRIB., Mar. 26, 1996, at C12.
22. See Arthur S. Leonard, Lesbian and Gay Families and the Law: A Progress Report, 21 FORDHAM URB. L. REV. 930 (1994) (noting that decisions by appellate courts in Kentucky, Minnesota, and Washington refused to order state legislatures to award marriage licenses to same-sex couples). See also, Henry J. Reske, Gay Marriage Ban Unconstitutional?: Hawaii Supreme Court Thinks So, Unless State Can Show Compelling Interest, 79 A.B.A.J. 28 (1993). Other states have recently been targeted for marriage-license suits including Florida and Arizona. New Mexico and New Jersey may also be challenged because "those states' constitutions and case law show potential for being challenged." See generally, Brad Bonhall, State of the Union, L.A. TIMES, Mar. 6, 1994, at 1. Although no state presently recognizes same-sex unions, five California counties and several cities do, including Los Angeles, West Hollywood, and Laguna Beach. Id.
23. See Leonard, supra note 22, at 930 (noting that for same-sex marriage claims, gay litigants typically challenge the statutory meaning of marriage and they raise many constitutional claims).
24. See William J. Eskridge, A History of Same-Sex Marriage, 79 Va. L. Rev. 1419, 1427-32 (1993) (stating that courts purposely formulate a definition of marriage that excludes same-sex couples from enjoying heterosexual privileges); see also infra note 42, and accompanying text.
of marriage, which same-sex couples cannot accomplish together. In spite of these obstacles, same-sex couples hoping to overcome society's bias against legal acknowledgement of same-sex marriages advance a number of arguments supporting their claims.

The first tactic, an argument focusing on statutory interpretation, is the least plausible argument for several reasons. The argument runs as follows: where the marriage statute does not explicitly prohibit same-sex marriages or does not use terms like "husband and wife" or "one man and one woman," then the statute, by its own words, does not prohibit same-sex marriages. This argument often proves to be an unsuccessful tactic because a court can circumvent it in several ways. First, when the statute is based on general, gender-neutral language and the legislative history is silent about same-sex marriages, a plain reading of the statute will lead the court to conclude that the legislature only contemplated the "traditional" concept of marriage, that between a husband and wife, and not unions of two women or two men. Second, where the statute is silent on the definition of marriage, courts do not look at a marriage statute in isolation. Instead, they often look at a marriage statute in the context of other statutes. For instance, a court may utilize the canon of in pari materia to examine a marriage statute along with a similar statute such as the divorce statute. The court will thereby conclude that since only a husband and wife can divorce, the

25. See infra notes 43 and 52-61 and accompanying text.

26. Even though same-sex couples cannot biologically have children together, many same-sex couples pursue other alternatives to raise children. Approximately 3 million gay men and lesbians in the United States are parents, and 8 to 10 million children are raised in lesbian and gay households. ABA Annual Meeting Provides Forum for Family Law Experts, 13 Fam. L. Rep. (BNA) 1512, 1513 (1987). "About 25 percent of gay men and 33 percent of lesbians are parents." Id. Professor Nancy Polikoff notes there are a variety of ways that lesbian couples may form a family including "adoption from the U.S. and abroad; artificial insemination through a sperm bank; intercourse with a friend; artificial insemination with an unknown donor; and artificial insemination with a gay donor." Nancy D. Polikoff, This Child Does Have Two Mothers, 78 GEO. L.J. 459, 466-67 (1990) (quoting PHYLLIS LYON & DEL MARTIN, LESBIAN/WOMAN 141 (1972)). "Lesbians also have adopted children who originally came into their homes for foster care. Lesbian couples sometimes have two children, whether biological or through adoption, with one woman the legal parent of each ... Many variations exist among lesbian-mother families, just as among heterosexual families." Id. at 465-67. Options pursued by gay men may include "adoption and foster care of children, ... donor insemination or [hetero]sexual intercourse [which enables] gay men ... [to] become biological fathers of children whom they intend to co-parent with a single woman (whether lesbian or heterosexual), with a lesbian couple, or with a gay male partner." Charlotte J. Patterson, Children of Lesbian and Gay Parents, 69 CHILD DEV. 1025, 1027 (1992).

27. Dean, 653 A.2d at 315.

28. Leonard, supra note 22, at 931 (explaining that courts will not accept a statutory argument because they "give words their 'ordinary' or 'everyday' meanings).

29. Dean, 653 A.2d at 314 (quoting District of Columbia v. Thompson, 593 A.2d 621, 630 (D.C. 1991)).
marriage statute could not possibly permit same-sex marriages.30

If the statutory interpretation argument fails, homosexual litigants usually advance constitutional arguments31 grounded in either the due process clause or equal protection clause of the Fourteenth Amendment.32 Although neither the statutory nor the Constitutional arguments have proven successful thus far, same-sex litigants may have more success with Constitutional arguments in the near future.33 By advancing Constitutional as opposed to statutory arguments, litigants do not have to contend with the definitional requirements of marriage. Under the definitional requirement, same-sex marriages do not fit the legislative definition of "marriage" because the core purpose of marriage is procreation.34

30. *Id.* at 314. See discussion infra Part III.A. and note 111.

31. See *Eskridge*, supra note 24, at 1424-26 (arguing that any state's refusal to recognize same-sex marriage violates a due process right to marry, the state's equal rights amendment and/or the Fourteenth Amendment's equal protection clause, and such discrimination should trigger heightened equal protection scrutiny). See generally William M. Hohengarten, *Same-Sex Marriage and the Right of Privacy*, 103 Yale L.J. 1496 (1994) (arguing that constitutional right of privacy requires recognition of same-sex marriages); Editors of the Harvard Law Review, *Developments in the Law: Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1605-11 (1989) [hereinafter *Sexual Orientation and the Law*] (stating that prohibition of same-sex marriages violates fundamental privacy rights and that burdening this right cannot withstand even the lowest level of scrutiny); *Comment, Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. Pa. L. Rev. 193 (1979) (stating that "homosexual couples involved in exclusive, long-term relationships are similarly situated to committed heterosexual couples" and thus, a middle level of judicial scrutiny should be applied to classification based on sexual preference); Jennifer L. Heeb, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 Seton Hall L. Rev. 347, 380-84 (1993) (arguing the best approach to attaining same-sex marriage rights is through the due process clause and not the equal protection clause of the Fourteenth Amendment "because the marriage and family rights embodied in the Due Process Clause are equally applicable to homosexuals' interest in marriage"); Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 Berkeley Women's L.J. 134, 169-70 (1987-1988) (asserting that statutes denying two members of the same-sex a legal right to marry interferes with "fundamental rights to marriage, family, and procreation," and should therefore be subject to strict scrutiny). But see *Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285, 1292-97 (1985) (warning that First Amendment protection may not be the best vehicle to gain legal recognition of same-sex marriages because First Amendment protection extends to "public homosexual expression and activities" and not to private homosexual conduct).

32. *Leonard*, supra note 22, at 932-37 (expounding the fundamental right and suspect classification arguments for same-sex marriages).

33. See infra Part I.D. and Part III.C.2.c.

34. See infra note 51. See also *Eskridge*, supra note 24 at 1427-28. The "main argument against same-sex marriages is definitional: marriage is necessarily different-sex and cannot include same-sex couples. Therefore, the authors of any statute that talks of 'marriage' could have only contemplated different-sex couples, even if the statute is not gendered, i.e., does not use the specific terms 'husband and wife.'" *Id.* Another part of this argument is that "same-sex unions are not 'marriages' because the purpose of marriage is procreation, which same-sex couples cannot accomplish." *Id.*
A. Same-Sex Marriage Claims and Marriage Statutes

Baker v. Nelson\textsuperscript{35} typifies the difficulty in overcoming the definitional argument against same-sex marriages. The court in Baker was the first court during the flurry of same-sex marriage cases during the 1970s to consider a same-sex marriage claim based upon the denial of a marriage license.\textsuperscript{36} The litigants, a gay couple, alleged that since the marriage statute did not explicitly prohibit same-sex marriages, the legislature intended to authorize same-sex unions.\textsuperscript{37} The Minnesota court essentially ruled that marriage is strictly a heterosexual privilege.\textsuperscript{38} After examining a dictionary definition of marriage,\textsuperscript{39} the court stated that the governing marriage statute defines “marriage” as “the state of the union between persons of the opposite sex. It is unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would have used the term in any different sense.”\textsuperscript{40}

In Jones v. Hallahan, two Kentucky litigants suffered the same fate when they applied for a marriage license.\textsuperscript{41} Although the Kentucky statute at issue did not specifically prohibit same-sex marriages, the litigants were once again unable to overcome the definitional meaning of marriage. The court stated that the litigants were “prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a

\textsuperscript{35} 191 N.W.2d 185 (Minn. 1971), \textit{appeal dismissed}, 409 U.S. 810 (1972). The same-sex marriage cases of the 1970s reflect the modern gay and lesbian rights movement sparked by the 1969 Stonewall Riots. “Before the birth of Gay Liberation at the Stonewall Inn, ... lesbian and gay activists, and the homophile movement had been scarcely visible to the general population. The notion that anybody could have a ‘right’ to a same-sex marriage was virtually non-existent.” Friedman, \textit{supra} note 31, at 137 (footnote omitted).

\textsuperscript{36} \textit{Baker}, 191 N.W.2d at 185. See, \textit{e.g.}, \textit{infra} notes 39-40.

\textsuperscript{37} \textit{Baker}, 191 N.W.2d at 185.

\textsuperscript{38} \textit{Id}. at 186.

\textsuperscript{39} \textit{Id}. The court examined sources such as \textit{WEBSTER'S THIRD INTERNATIONAL DICTIONARY} and \textit{BLACK'S LAW DICTIONARY} to ascertain the definition of marriage. \textit{WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY} defines marriage as the “state of being united to a person of the opposite sex as husband or wife.” \textit{Id}. at n.1 (citation omitted). \textit{BLACK'S LAW DICTIONARY} defines marriage as “the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex.” \textit{Id}. (citation omitted).

\textsuperscript{40} \textit{Baker}, 191 N.W.2d at 186.

\textsuperscript{41} 501 S.W.2d 588 (Ky. 1973) (the two female plaintiffs asserted that they were entitled to a marriage license).
marriage as that term is defined." The court stated that this definitional argument against same-sex marriages is completely "tautological and circular." The court defined marriage as the union between men and women, thus excluding same-sex couples because marriage is only the union between a man and a woman. The courts' formulations of the definition of marriage therefore make no attempt to define or understand marriage beyond exclusion of same-sex couples.

Another context in which same-sex marriage litigation may arise is in the dissolution of a same-sex union. Of course, this situation has only arisen in cases involving people who are transsexual or transgendered. For instance, in *Anonymous v. Anonymous*, the plaintiff sought dissolution of his marital status. The plaintiff married his wife, supposedly believing her to be a woman by birth, but he subsequently "discovered" that she had male sex organs. According to the court, the couple never acted like husband and wife because they never engaged in sexual intercourse and did not

42. *Id.* at 589. The court further observed that "the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage." *Id.* at 590. Additional cases holding that same-sex individuals do not have a right to marry include: *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980), aff'd on other grounds, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982) (stating that even if Colorado law recognized same-sex unions, it would be against the policy of the federal government to recognize such relationships under the federal Immigration and Nationality Act); *In re Estate of Cooper*, 187 A.D.2d 128, 132 (N.Y. App. Div. 1993) (holding that term "surviving spouse" does not include homosexual life partners and therefore, survivor is not entitled to election under decedent's will); *Gavoski v. Gavoski*, 610 N.E.2d 431, 433 (Ohio Ct. App. 1991) (holding that "woman cannot live in concubinage with another woman, as homosexuals living together in Ohio can never marry, and, thus, can never be concubines to one another"); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Sup. Ct. 1984) (holding two persons of same-sex can not enter into common law marriage); *Slayton v. State*, 633 S.W.2d 934 (Tex. Ct. App. 1982) (noting that it is impossible for persons of the same sex to marry "with or without the formalities of law"); *Jennings v. Jennings*, 315 A.2d 816, 820 n.7 (Md. Spec. Ct. App. 1974) (noting that Maryland does not recognize same-sex unions. "Only a marriage between a man and a woman is valid in this state.").

43. See Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J. L. ETHICS & PUB. POL'Y 215, 221 (1995) (noting that since courts construe marriage to mean only a union between a man and woman that "gender discrimination and sexual-orientation discrimination is built into the institution of marriage; therefore since marriage itself is permitted, so too must barring same-sex couples from it. Discrimination against gays ... is not illegitimate discrimination in marriage, indeed it is necessary to the very institution ...")); Eskridge, supra note 24, at 1427-28 (discussing that a focus on the definition of marriage is disposed of in one of two ways: "functional approach" or "definitional approach"). The "functional approach" entails defining marriage by its supposed purpose, procreation. The "definitional approach" involves defining marriage as only for different-sex couples therefore excluding same-sex unions. See also *Bacht*, 852 F.2d at 61 (characterizing the definitional approach to defining same-sex marriages as "circular and unpersuasive").

44. *Jones*, 501 S.W.2d at 589-89.


46. *Id.*
cohabitate as a husband and wife. Even though the wife later removed her male sex organs, the court held that the parties could never have been "husband and wife." In observing that the law does not include marriages of the same-sex, there was no reason for the plaintiff to seek an annulment because "the marriage ceremony itself was a nullity. No legal relationship could be created by it."

B. Same-Sex Marriage Cases and Constitutional Claims

Constitutional arguments were equally unpersuasive in courts of the 1970s. In Baker, the Minnesota Supreme Court concluded that the prohibition of same-sex marriages neither denied a fundamental right to marry nor was it invidiously

47. Id. at 500.
48. Id.
49. Id. at 501.
50. Anonymous, 325 N.Y.S.2d at 501. For other leading cases addressing the dissolution of a same-sex union, see B. v. B., 355 N.Y.S.2d 712, (N.Y. Sup. Ct. 1974) (holding that a female to male transsexual has no valid counterclaim for divorce in annulment proceeding because there can not be a marriage contract between a woman and partner lacking male sex organs) (emphasis added). But see M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976), cert. denied, 364 A.2d 1076 (holding that even though the state marriage statute requires partners to be of the opposite sex, a male who has a successful gender reassignment can be considered female for marital purposes).
51. 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972).
52. Id. at 186. Adhering to the traditional meaning of marriage, the court stated that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis." Id. By determining that procreation is the central purpose of marriage, the court concluded that the institution of marriage does not include same-sex couples because they can not create children together. Id. Same-sex couples can have children through alternative means of reproduction, such as through a sperm donor or surrogate mother. See Sexual Orientation and the Law, supra note 31 at 1608. A logical extension of the argument that procreation is the central purpose of marriage would preclude heterosexual couples incapable of having children from marrying. See Patterson, supra note 27 at 1027 (discussing alternative families).
The court in *Jones v. Hallahan* followed the Baker decision and found no Constitutional rights violated for individuals of the same-sex who are denied the right to marry. The Washington Supreme Court, in *Singer v. Hara*, was the only court during the 1970s to address litigants’ Constitutional arguments extensively. Upon examining the statutory requirements to obtain a marriage license, the court rejected the plaintiffs’ argument that the statutes do not prohibit same-sex marriages. The plaintiffs’ constitutional arguments also failed to persuade the judges. The court rebuffed the claim that limiting access to same-sex marriages

53. *Baker*, 191 N.W.2d at 187. The court responded to petitioner’s procreation argument by stating that “[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.” *Baker*, 191 N.W.2d at 187 n.4 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). The court further found the litigants’ *Loving* analogy inapplicable because “there is a clear distinction between a marital restriction based ... upon race and ... fundamental difference[s] in sex.” *Baker*, 191 N.W.2d at 187. In *Loving v. Virginia*, 388 U.S. 1 (1967), the Court struck down Virginia’s anti-miscegenation statute noting that “[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” *Loving*, 388 U.S. at 12. For an in-depth analysis comparing anti-miscegenation statutes and same-sex marriage prohibitions, see James Trosino, *American Wedding Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. Rev. 93 (1993). Trosino argues that anti-miscegenation laws were not actually racial restrictions. Rather, legislators based these laws on the notion that: there was a fundamental difference between the races, and that this difference made interracial marriage inappropriate ... what the *Baker* court is really saying, without any empirical support, is that there is some fundamental difference between a gay relationship and a heterosexual relationship, and that this difference justifies denying gay couples the right to marry. *Baker*, 191 N.W.2d at 194. Unlike the *Baker* court, the court in *Baehr v. Lewin*, 852 P.2d 44 (Haw.), *rehg* granted in part, 875 P.2d 225 (Haw. 1993) is the only court thus far to adopt the *Loving* analogy to recognize a same-sex marriage claim. As the *Baehr* court stated, “[s]ubstitution of ‘sex’ for ‘race’ and article I, section 5 for the fourteenth amendment yields the precise case before us together with the conclusion that we have reached.” *Baehr*, 852 P.2d at 49.

54. 501 S.W.2d 588 (Ky. 1973).

55. *Id.* at 590 (stating that “no constitutional issue is involved. We find no constitutional sanction or protection of the right of marriage between persons of the same sex.”).


57. *Id.* at 1189 (stating that the statute’s reference to males and females “clearly dispels any suggestion that the legislature intended to authorize same-sex marriages”).

58. *Singer*, 522 P.2d at 1190-97. The plaintiffs argued that since the Equal Rights Amendment of the Washington Constitution prohibits classification on account of sex, it is unconstitutional to construe state law as permitting a man to marry a woman but denying him the right to marry a man. *Id.* at 1190. The plaintiffs also presented an equal protection challenge based on the federal Constitution, arguing that a statutory prohibition of same-sex marriage is a classification based on sex and is therefore inherently suspect. Plaintiffs urged the court to require a “compelling state interest” rather than a mere rational interest in order to uphold the statute. *Id.* at 1195.
violates the state Equal Rights Amendment (ERA). The court implicitly accepted the state’s argument that this prohibition applied equally to all same-sex couples. Therefore, since the plaintiffs, a gay couple, failed to show that the state treated them differently from a lesbian couple, the prohibition of same-sex marriages is not an impermissible sexual classification under the ERA.

Similarly, the court disposed of the plaintiffs’ equal protection arguments under the U.S. Constitution by applying a rational basis test. Instead of adopting a strict scrutiny test, the court declared that since the state has a vested interest in fostering a favorable environment to raise children, the state has a rational basis for excluding gay and lesbian couples from the right to marry.

C. The Impact of Bowers v. Hardwick

It is important to note that the flurry of unsuccessful same-sex marriage claims during the 1970s predate the Supreme Court’s

59. Id. at 1194-95. In drawing this conclusion, the Singer court limited the scope of the ERA by making assumptions about what voters intended by passing the ERA. The court stated that:

We are not persuaded that voter approval of the ERA necessarily included an intention to permit same-sex marriages. On the contrary ... the Voters Pamphlet indicated that the basic principle of the ERA is that both sexes be treated equally under the law ... to be entitled to relief under the ERA, appellants must make a showing that they are somehow being treated differently by the government than they would be if they were females.

Id. at 1190 n.5 (citations omitted).

60. Id. at 1190 n.5.

61. Singer, 522 P.2d at 1194-95. The court failed to see the similarity between the prohibition of same-sex marriages in this context and the impermissible racial classification struck down in Loving; 388 U.S. 1 (1967). The court stated that:

[in Loving ... the parties were barred from entering into the marriage relationship because of an impermissible racial classification. There is no analogous sexual classification involved ... because appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons of the opposite sex.]

Id. at 1192.


63. Id. While the court acknowledged that classifications based on sex are subject to strict judicial scrutiny under Washington law, it avoided applying the the strict standard of review by concluding that the prohibition of same-sex marriage is not a classification based on sex. Application of strict scrutiny requires the state to show that a compelling governmental interest necessitates the prohibition of same-sex marriages. Application of the rational basis test, however, requires only that the prohibition of same-sex marriage be rationally related to a legitimate governmental objective. Id. at 1195-97.

64. See id. at 1197 (reasoning that “marriage as now defined is deeply rooted in our society ... marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman.”).
controversial decision in *Bowers v. Hardwick*.\(^6\) Although the *Bowers* Court found that the right to engage in adult consensual homosexual sodomy is not protected by the right of privacy, the *Bowers* decision raises a number of other Constitutional questions,\(^6\) including whether this decision forecloses the possibility of same-sex marriage rights.\(^6\)

The *Bowers* decision should not, however, serve as the basis for rejecting a same-sex marriage claim. First, the Supreme Court decided *Bowers* under "the Due Process Clause, not the Equal Protection Clause, and did not involve discrimination at all."\(^6\) Consequently, the *Bowers* decision should not serve as a barrier to lesbian and gay litigants asserting same-sex marriage claims under an equal protection or discrimination theory. Second, even under a due process analysis, the *Bowers* decision should not preclude the application of the privacy doctrine for same-sex marriage claims.\(^6\)

Same sex couples can join the institution of marriage even if the state proscribes the practice of sodomy.\(^7\) One’s participation in an activity that the state proscribes does not qualify as an automatic relinquishment of other rights. Therefore, "the right of gay men and lesbians to marry is unrelated to their right to engage in..."

---

65. 478 U.S. 186 (1986) (rejecting the existence of a federal constitutional right of privacy between two adult males engaging in consensual sodomy).

66. See Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of Bowers v. Hardwick*, 24 GOLDEN GATE U. L. REV. 1, 2-3 (1994) (noting that some constitutional claims raised in the aftermath of *Bowers* include "whether all oral-genital and all anal-genital sexual activities between consenting adult heterosexuals in physical privacy can be criminalized ... or if constitutional privacy is to be afforded only for heterosexual private consenting adult sexual activities").

67. The conflict between allowing same-sex marriage in a state that criminalizes homosexual sodomy between consenting adults is that partners to a legally recognized union cannot legally consummate their union. See Mary F. Gardner, Braschi v. Stahl Associates Co.: *Much Ado About Nothing*, 35 VILL. L. REV. 361, 363 (1990) (noting that since states do not violate the constitution by criminalizing consensual sodomy, recognition of same-sex marriages may conflict with some state laws that make adult consensual sodomy a crime).

68. Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994). The *Bowers* Court refused to find that homosexuals have a fundamental right to engage in consensual homosexual sodomy because "[p]roscriptions against that conduct have ancient roots." *Bowers*, 478 U.S. 186, 192 (1986). As a consequence, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* at 194. The Court also reasoned that because the same-sex litigants did not demonstrate that the right to practice sodomy bore some relation to "family, marriage or procreation," the constitutional right to privacy does not protect homosexual conduct. *Id.* at 191.

69. See Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Disjunctive Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921, 974-75 (1995) (arguing the view that *Bowers* precludes same-sex marriages ignores the limited focus, i.e., due process rights, of that Court's decision).

sodomy."\(^{71}\) Under this analysis, same-sex litigants within the District of Columbia can not only raise equal protection and discrimination arguments, but litigants can also raise same-sex marriage claims under the right of privacy, bolstered by the fact that the District of Columbia no longer proscribes homosexual sodomy between consenting adults.\(^ {72}\)

**D. The Implications of Baehr v. Lewin**

The decision in *Baehr*\(^ {73}\) signifies an unprecedented breakthrough for same-sex couples seeking a right to marry. To date, the Hawaii Supreme Court is the only court in the history of the United States that has potentially recognized a right for same-sex couples to marry legally. On remand, the Hawaii Supreme Court ordered the State of Hawaii to overcome the difficult burden of proving that the prohibition of same-sex marriages is based upon compelling state interests.\(^ {74}\)

As in the 1970s cases,\(^ {75}\) the three same-sex litigants in *Baehr* were unable to overcome some of the same barriers that their predecessors encountered. First, the Hawaii Supreme Court determined that by the plain language of the marriage statute, the Hawaii Legislature intended to restrict marital relations to "male and female" couples.\(^ {76}\) Additionally, the Hawaii Supreme Court ruled that the prohibition of same-sex marriages does not violate the fundamental Constitutional right of privacy.\(^ {77}\) Guided by caselaw addressing the fundamental right to marry protected by the federal

---

\(^{71}\) *Sexual Orientation and the Law*, supra note 31, at 1606 n.23. It is important to note that if the *Bowers* decision included the criminalization of consensual adult heterosexual sodomy, it is highly improbable that the courts would forbid heterosexuals from entering the institution of marriage because the state proscribes such conduct. Likewise, it is unreasonable to exclude same-sex couples from the institution of marriage because they may engage in the very same or similar sexual conduct as heterosexuals.


\(^{74}\) Id. at 68.

\(^{75}\) *See supra* Part I.A-B. Baker, 191 N.W.2d at 185 (holding that the prohibition of same-sex marriages is not individually discriminatory and does not deny a fundamental right); *Jones*, 501 S.W.2d at 588 (stating that same-sex marriages have no constitutional sanction or protection); *Singer*, 522 P.2d at 1187 (finding that prohibition of same-sex marriages does not violate the state Equal Rights Amendment nor the equal protection clause of the Fourteenth Amendment); *Anonymous*, 325 N.Y.S.2d at 499 (holding that no legal marriage existed where the female partner had male genitalia).

\(^{76}\) *Baehr*, 852 P.2d at 60. *See Haw. Rev. Stat. sec. 572-1(7)* (1985) (requiring that "the man and the woman to be married and the person performing the marriage ceremony all be physically present at the same place and time at the marriage ceremony") (emphasis added).

\(^{77}\) *Baehr*, 852 P.2d at 57 (holding that same-sex couples do not have fundamental right to same-sex marriage "arising out of the right of privacy or otherwise").
Constitution, the court determined that the right to marry protected by the Hawaii Constitution is similar to the implicit federal right. The court determined that the federal "fundamental right to marry ... presently contemplates unions between men and women." The court was thus unwilling to extend Hawaii's fundamental right to marry to same-sex couples.

The court was, however, more compelled to accept the equal protection claim. In comparing the equal protection clause of the Hawaii Constitution to that of the United States Constitution, the court concluded that the Hawaii Constitution allows the court to accord greater equal protection rights than the United States Constitution because it specifically prohibits discrimination based upon impermissible sexual classifications. Unlike previous courts addressing same-sex marriage claims, the Hawaii Supreme Court held for the first time that "sex is a 'suspect category' ... [and] is subject to 'strict scrutiny.'" Despite the giant step the Hawaii Supreme Court took to ensure same-sex marriage rights in Hawaii, other states continue to dispose of same-sex marriage claims based upon the Equal Protection Clause of the federal Constitution or another state constitution.

78. Id. at 55-57. The court looked to federal case law for guidance because the right to marry protected by the Hawaii Constitution was not delineated by any Hawaii court. Id. at 55.
79. Id. at 56.
80. Id. at 57 (holding that the plaintiffs' due process rights were not violated because the right to same-sex marriage is not "so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions").
81. Id. at 59-60. The court stated that:

The equal protection clauses of the United States and Hawaii Constitutions are not mirror images of one another. The fourteenth amendment to the United States Constitution ... provides ... that a state may not "deny to any person within its jurisdiction the equal protection of the laws." ... [T]he Hawaii Constitution provides ... that “[n]o person shall ... be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry.”

Id. (citations omitted).
82. See supra Part II-A-B and cases cited.
83. Baehr, 852 P.2d at 67.
84. For further analysis on Baehr and the implications of permitting same-sex marriages in Hawaii, see Jeffrey J. Swart, The Wedding Luau—Who is Invited?: Hawaii, Same-Sex Marriage, and Emerging Realities, 43 EMOY L.J. 1877, 1614-15 (1994) (arguing the decision in Baehr reflects a recognition of changing circumstances rather than judicial legislation); Megan E. Farrell, Baehr v. Levin: Questionable Reasoning; Sound Judgment, 11 J. CONTEMP. HEALTH L. & POL’Y 589, 591-92 (stating that the decision in Baehr is justified even if the court did not follow its own past reasoning for determining the level of scrutiny to be applied to sex-based classifications); see also, Scott K. Kozuma, Baehr v. Levin and Same-Sex Marriage: The Continued Struggle for Social, Political and Human Legitimacy, 20 WILLAMETTE L. REV. 891 (1994). The Baehr decision may not advance gay and lesbian rights because:
Columbia,\textsuperscript{85} demonstrates the continued reluctance to open the institution and privileges of marriage to same-sex couples.\textsuperscript{86}

\section*{II. BACKGROUND OF \textit{Dean v. District of Columbia}}

On November 13, 1990, the appellants,\textsuperscript{87} Craig Dean and Robert Gill, applied for a marriage license from the Clerk of the Superior Court as required by District of Columbia law.\textsuperscript{88} The couple subsequently received a letter from the Clerk rejecting their application for a marriage license.\textsuperscript{89} Dean and Gill thereafter filed a complaint for declaratory and injunctive relief in the District of Columbia Superior Court seeking an order requiring the Clerk to issue a marriage license.\textsuperscript{90} They argued that: (1) they qualify for a marriage license under the marriage statute because it is "gender-neutral" and (2) the Clerk interpreted and applied the marriage statute provisions in violation of the District of Columbia Human Rights Act\textsuperscript{91} because the refusal to issue a license is impermissible discrimination based upon sex or sexual orientation.\textsuperscript{92}

The District filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. Judge Bowers it is unclear whether the Hawaii court's decision will significantly advance the gay-rights movement ... [t]he \textit{Baehr} opinion expressly distinguishes between same-sex and homosexual couples, noting that the two are not necessarily synonymous. This, in effect, negates any direct implication that the decision seeks to place sexual preference within the purview of the equal protection guarantee. In fact, the court's holding is based solely on the grounds of sex, not sexual orientation, discrimination. In terms of technical legal analysis, then, \textit{Baehr} does little to aid efforts to legitimize homosexuality.

\textit{Id.} at 904-905.

\textsuperscript{85} 653 A.2d 307 (D.C. 1995) (per curiam).

\textsuperscript{86} A favorable decision in \textit{Dean} was pivotal to some proponents of same-sex marriages because the District of Columbia does not impose a residency requirement in order to marry. Therefore, a same-sex couple could marry in the District of Columbia and hope that their home state would honor that marriage. Leonard, supra note 22, at 940.

\textsuperscript{87} The appellants, a same-sex couple, applied for a marriage license and the District of Columbia denied their request. \textit{Dean}, 653 A.2d at 309.

\textsuperscript{88} D.C. CODE ANN. \textsection 30-110 (1993) (authorizing the Clerk of the Court to grant applications for marriage licenses). \textit{See infra} Part III.A. (discussing the \textit{Dean} court's interpretation of the District of Columbia marriage statute).

\textsuperscript{89} The letter denying the marriage application stated: "[t]he sections of the District of Columbia Code governing marriages do not authorize marriage between persons of the same sex. Therefore, the application for a marriage license in this case is denied." \textit{Dean}, 653 A.2d at 309.

\textsuperscript{90} \textit{Id.}

\textsuperscript{91} Human Rights Act, D.C. CODE ANN. \textsection 1-2501 to 2557 (1992).

\textsuperscript{92} \textit{Dean}, 653 A.2d at 309. \textit{See also}, Human Rights Act, D.C. CODE ANN. \textsection 1-2501 (1992) (stating that the intent behind this enactment was to eliminate, among other things, discrimination based upon sex and sexual orientation). For a further discussion of the Human Rights Act see \textit{infra} Part III.B.
thereafter granted summary judgment for the District because what the couple sought to enter was not, by statutory definition, a marriage. Dean and Gill moved for reconsideration. They asserted that the trial court's interpretation of the marriage statute and the Human Rights Act violated their Constitutional rights to due process and equal protection of the laws under the Fourteenth Amendment and violated the Establishment Clause of the First Amendment. Judge Bowers granted the motion for reconsideration, but rejected all of Dean and Gill's Constitutional claims. The couple presented both statutory and Constitutional claims on appeal.

After an exhaustive analysis, the District of Columbia Court of Appeals, in a per curiam opinion, affirmed the trial court's granting of summary judgment. Specifically, the court found that: (1) the prohibition of same-sex marriages in the District of Columbia neither violated homosexuals' due process or equal protection rights; (2) the Human Rights Act did not change the definition of

---

93. *Dean*, 653 A.2d 309-10. In granting the motion for summary judgment, Judge Bowers stated:

> Plaintiffs were denied a marriage license because of the nature of marriage itself, requiring ... the parties ... be a male and a female. What the plaintiffs ... sought a license to enter into, by definition, simply was not a 'marriage.' Any change in that definition must come from the legislature—not this Court.

94. *Id.* at 310. In order to ascertain the meaning of marriage, Judge Bowers examined: (1) the legislative history of the Marriage and Divorce Act, D.C. Law 1-107, 1977 D.C. Stat. 114; (2) the references to gender in the various provisions of the District of Columbia Code; (3) references to marriage in the Bible; (3) decisions by appellate courts in other jurisdictions; (4) the dictionary definition of marriage; (5) the common law of the District of Columbia; and (6) the rejection by the City Council to include same-sex marriages in the Human Rights Act. *Id.* at 309-10.

95. Indicative of the court's bias, the trial judge accused appellants of "an eleventh hour attempt to recast themselves as victims of unconstitutional action." *Id.* at 321.

96. *Dean*, 653 A.2d at 310. The trial court concluded that homosexuals qualify neither as a "suspect" class nor as a "quasi-suspect class." The court thereafter held that the prohibition of same-sex couples from marriage is rationally related to three state interests: (1) fostering procreation, which is essential to the survival of the human race; (2) prohibiting sodomy, an activity deemed by society to be "so morally reprehensible" that it is criminalized in the District of Columbia as well as other jurisdictions; and (3) avoiding unwarranted "social tinkering" with one of the most sacred institutions known to mankind, namely, marriage ...." *Id.* at 332-33. Interestingly, after the trial court issued its opinion, the District's statute criminalizing sodomy was amended "to eliminate consensual sexual acts between persons who are above the existing age of consent." *Id.* at 334 n.30.

97. *Dean*, 653 A.2d at 310.

98. *Id.* at 308.

99. *Id.* at 333.

100. *Id.* at 361-64.
marriage;\textsuperscript{101} and (3) the marriage statute did not include same-sex marriages.\textsuperscript{102} Judge Ferren dissented, however, believing that there were material issues of fact that preclude granting summary judgment on the equal protection issue.\textsuperscript{103}

III. THE COURT'S ANALYSIS

A. The D.C. Marriage Statute Excludes Same-Sex Marriages

In ruling on the statutory interpretation arguments, the court extensively examined the meaning of marriage through the legislative history of the marriage statute, statutes enacted along with the marriage statute, and legislation amending the marriage statute. The heart of Dean and Gill's statutory challenge\textsuperscript{104} centered on the gender-neutral language of the marriage statute. The Dean court noted that since its enactment in 1901,\textsuperscript{105} the marriage statute has not undergone significant changes that would affect the couple's claims.\textsuperscript{106} The court's task, then, was to ascertain what Congress meant by marriage in 1901.\textsuperscript{107} Dean and Gill encouraged the court to examine the plain language of the statute because its gender-neutral language presumably indicated that the marriage statute "has always authorized same-sex marriages."\textsuperscript{108} The court disagreed with their analysis because one provision of the marriage statute retains

\textsuperscript{101} Id. at 320.
\textsuperscript{102} Dean, 653 A.2d at 314.
\textsuperscript{103} Id. at 358 (Ferren, J., concurring in part and dissenting in part). Judge Ferren would remand the case for trial on the equal protection issue. See infra Part III.C.2.c for further analysis of Judge Ferren's dissent.
\textsuperscript{104} Their appeal first focused on the Marriage and Divorce Act, D.C. CODE ANN. §§ 30-101 to 30-121 (1993).
\textsuperscript{105} Dean, 653 A.2d at 310 n.2.
\textsuperscript{106} Id. at 312. The only significant changes to the Marriage and Divorce Act occurred in 1977. Id. at 311. Apparently, a proposed bill by Councilmember Arrington Dixon, which did not become a law, would have implicitly authorized same-sex marriages. "Bill No. 1-89 would have changed § 30-101 to read: 'A marriage between two persons which is licensed, solemnized and registered as provided in this Act is valid in the District of Columbia.' Id. In another section, the legislature made a specific reference to same-sex marriages:

The court shall enter its decree declaring the invalidity of a marriage entered into under the following circumstances ... a party lacks the physical capacity to consummate the marriage by sexual intercourse, and at the time the marriage was solemnized the other party did not know of the incapacity; provided that this clause shall not apply persons of the same sex.

\textsuperscript{107} Id. at 311-12 (quoting proposed change to D.C. CODE ANN. § 30-112 (1975) (emphasis in original)). The court concluded that if the bill had been adopted, same-sex marriages would have been permissible in the District of Columbia. Id. at 312. Consequently, the actual changes to the 1977 Act are irrelevant to the case at hand. Id.
\textsuperscript{108} Id.
gender-specific language; thus, the consanguinity provision reflects "taboos—indeed moral judgments about improper marriage relationships—that transcend genetic concerns. The use of gender-based terminology ... reflects a legislative understanding that marriage, as understood by Congress ... is inherently a male-female relationship."

In support of this conclusion, the court also studied statutes relating to and affecting marriage rights. As the court reasoned, if same-sex couples can marry, then logically they can divorce. The court discovered, however, that the legislature filled the divorce

---

109. *Id.* at 313. See D.C. CODE ANN. § 30-101 (1993). As the couple argued, the statute does not explicitly state that parties of the same-sex can not marry nor that a valid marriage requires a man and woman. The code provides that the following marriages shall be void:

1. The marriage of a man with his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, stepmother, wife's mother, daughter, wife's daughter, son's wife, sister, son's daughter, daughter's daughter, son's son's wife, daughter's son's wife, wife's daughter's brother, daughter's sister, sister's daughter;
2. The marriage of a woman with her grandfather, grandmother's husband, husband's grandfather, father's brother, mother's brother, father, stepfather, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, daughter's husband, daughter's daughter's husband, husband's son's son, husband's daughter's son, brother's son, sister's son;
3. The marriage of any persons either of whom has been previously married and whose previous marriage has not been terminated by death or a decree of divorce.

*Id.* As the court pointed out, however, the consanguinity provision refers to marriages between a "man' with a 'wife' and a "woman' with a 'husband.' Therefore, the marriage statute is not completely gender-neutral. *Dean, 653 A.2d* at 313 (footnote omitted). The couple contended, however, that the underlying policies of this section are to prevent biological inbreeding, a policy that does not implicate same-sex couples because they cannot procreate together. *Id.* The couple argued that this one exception to the gender-neutrality in the marriage statute lends further support to their argument. Since the only exceptions are for public health policies, the "omission of gender references in all other provisions of the marriage statute necessarily implies that same-sex marriages are permitted." *Id.*

110. *Id.* at 313. As the court reasoned, the consanguinity provision is not limited to prohibitions against biological inbreeding. While genetic diversity may be a legitimate concern, this analysis does not explain other prohibitions. For instance, "the prohibitions against a man's marrying his son's wife or a woman's marrying her stepfather." *Id.* (quoting D.C. CODE ANN. § 30-101 (1993)).

111. *Id.* As the court concludes:

[If appellants were to prevail in their statutory interpretation, the law would permit same-sex couples to enter into some kinds of marriage relationships that the statute forbids for opposite-sex couples, even though such relationships would not be genetically dangerous for any kind of marriage. Indeed, if men could marry men § 30-101 would not preclude a bi-sexual man who may have had a biological son from marrying that son, or from marrying his own father or brother.

*Id.* at 313-14. The absurdity of this argument should be obvious. Two men cannot procreate, so there is no such "genetic danger."

112. *Id.* at 314.
statute with references to “husband and wife,”\textsuperscript{113} and therefore, the present marriage statute is not gender-neutral.\textsuperscript{114} Additionally, like previous courts addressing same-sex marriage claims,\textsuperscript{115} the court relied on the traditional meaning of marriage\textsuperscript{116} which, consequently, led the court to conclude that marriage requires two people of the opposite sex.\textsuperscript{117}

\textsuperscript{113} Id. The divorce statute contains numerous references to “husband and wife.” See, e.g., D.C. CODE ANN. § 16-904(d)(1) (1989) (granting annulment where such marriage was contracted while either of the parties “had a former wife or husband living...”) (emphasis added); D.C. CODE ANN. § 16-911(1)(I) (Supp. 1995) (requiring the “husband or wife to pay alimony to the other spouse ...”); D.C. CODE ANN. § 16-912 (1989) (granting court authority to “retain to the wife her right of dower in the husband’s estate; and the court may, in similar circumstances, retain to the husband his right of dower in the wife’s estate.”) (emphasis added); D.C. CODE ANN. § 16-913 (1969) (“[w]hen a divorce is granted on the application of the husband or wife, the court may require him or her to pay alimony to the other spouse...”) (emphasis added); D.C. CODE ANN. § 16-916(a) (1989) (“[w]henever a husband or wife shall fail or refuse to maintain his or her needy spouse...”) (emphasis added). However, nowhere in the code is “husband” defined as male and “wife” defined as female.

\textsuperscript{114} Dean, 653 A.2d at 315. The court also placed particular significance on the fact that Congress enacted the divorce and marriage statutes at the same time. Thus, “when [the] legislature enacts two statutes at [the] same time and the statutes have similar subject matter and purpose, principles of in pari materia dictate that the statutes should be read with reference to each other.” Id. (quoting District of Columbia v. Thompson, 593 A.2d 621, 630 (D.C. 1991)). With respect to statutes, in pari materia refers to those “relating to the same person or thing or having a common purpose.” BLACK’S LAW DICTIONARY 791 (6th ed. 1990).

\textsuperscript{115} For other cases discussing same-sex marriage, see supra note 43 and accompanying text.

\textsuperscript{116} The court emphasized the importance of construing the language of the statute “by [its] common meaning and ordinary sense.” Dean, 653 A.2d at 315 (quoting Barbour v. District of Columbia Dep’t of Employment Servs., 499 A.2d 122, 125 (D.C. 1985)). After examining many dictionaries, including BLACK’S LAW DICTIONARY 972 (6th ed. 1990), BLACK’S LAW DICTIONARY 762 (2d ed. 1910), WEBSTER’S MODERN DICTIONARY 281 (1902), and WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1384 (1986), the definitions convinced the court that “marriage”—both at the turn of the century when the marriage statute was enacted and in modern times when the statute was amended—means the union of two members of the opposite sex.” Id. (citations omitted).

Although the court recognized that the meanings of words change over time, it limited its inquiry to what the legislature intended marriage to mean when it enacted the statute. Id. Additionally, the court cited previous same-sex marriage cases as precedent for its analysis. See supra Parts IA-B. discussing relevant cases. See e.g., M.T. v. J.T., 355 A.2d 204, 207 (N.J. Super. Ct. App. Div. 1976) (stating that “a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female.”); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (affirming decision that denial of a marriage license to a same-sex couple is required by state law and allowed by State and Federal Constitutions); Jones v. Halahan, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973) (finding that by definition a lesbian couple is incapable of entering into a marriage); Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971) (holding that an interpretation of a marriage statute as applying only to opposite-sex couples was not a violation of the Constitution).

Interestingly, the court did not rely on the recent decision by the Hawaii Supreme Court. The court noted “[a]lthough the Supreme Court of Hawaii, in Bader v. Lewis... recently reversed a trial court decision barring same-sex marriages and remanded for further proceedings, the court’s opinion was premised on state constitutional grounds, not on statutory interpretation applying an evolving definition of marriage. Dean, 653 A.2d at 316 n.15 (citation omitted) (emphasis added).

\textsuperscript{117} Dean, 653 A.2d at 316 (relying on other same-sex marriage cases as “analytical support” for conclusion that marriage is between a man and a woman).
Appellants argued in the alternative that the D.C. Council sought to reinterpret the statutory definition of marriage through Anti-Sex Discriminatory Language legislation and the Gender Rule of Construction.\textsuperscript{118}

Examining the legislative history of the 1976 Anti-Sex Discriminatory Language legislation clarified for the court the intent of the Council in enacting this piece of legislation.\textsuperscript{119} Essentially, the Council intended this legislation to create equality between but not among the sexes.\textsuperscript{120} Accordingly, the court reasoned that "[t]here was not a hint that the legislation was intended to give one class of males, e.g., gay men, an equality with another class of males, e.g., heterosexual men."\textsuperscript{121}

Furthermore, adoption of the Gender Rule of Construction\textsuperscript{122} does not require an interpretation that the statute authorizes same-

\textsuperscript{118} Id. at 316-17. The first piece of legislation the court examined was the Anti-Discriminatory Language Act of 1976. \textit{Id.} at 316. The legislature enacted this statute to "achieve equality under the law for men and women by eliminating sex-based distinctions in the District of Columbia Code, so that the rights and responsibilities of persons under D.C. law will not be different solely on the basis of their sex." \textit{Id.} at 316 (citations omitted). Ironically, the legislature considered this piece of legislation at the same time that Councilmember Dixon's bill 1-89 was pending. Bill 1-89 would have implicitly authorized same-sex marriages. \textit{Id.} at 312. \textit{See also supra} note 104, for a discussion of Bill 1-89. Since these two bills were pending at the same time, the Council explained the relationship between the two pieces of legislation by stating that the only purpose of Bill 1-36 was to "make the law equal in effect for males and females ..." \textit{Dean,} 653 A.2d at 316.

\textsuperscript{119} \textit{Dean,} 653 A.2d at 317.

\textsuperscript{120} \textit{Id.} (concluding from the Committee on the Judiciary and Criminal Law's report that the statutory change was meant to make the two statutes consistent with each other).

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} The Gender Rule of Construction states that "[u]nless the Council of the District of Columbia specifically provides that this section shall be inapplicable to a particular act or section, all the words thereof importing one gender include and apply to the other gender as well." D.C. CODE ANN. § 49-203 (1990). The couple's argument specifically focused on the 1901 Rule of Gender Construction. Because the 1982 enactment deleted the words "except where such construction would be absurd or unreasonable" and the new enactment did not provide a "disclaimer" with respect to same-sex marriages, Dean and Gill argued that the Council authorized same-sex unions. \textit{Dean,} 653 A.2d at 317.
sex marriages. As the court reasoned, if the legislature had intended such a change, the legislature “surely would have mentioned such a significant intention in the legislative history of the statute implementing the new Gender Rule of Construction.” The court concluded that they could not construe the sanctioning of same-sex marriages by the legislature from the language in the Gender Rule of Construction.

B. The Human Rights Act Did Not Redefine Marriage

Dean and Gill also alleged that the Clerk of the Court’s refusal to issue them a marriage license discriminated against them in violation of the Human Rights Act of the District of Columbia. In turn, they argued that because the Marriage License Bureau is a place of public accommodation, and failure to provide this service impedes same-sex couples from participating in this aspect of life, i.e., an aspect
reserved exclusively for heterosexuals. The District did concede, for the sake of argument, that the Marriage License Bureau is a "place of public accommodation." The court concluded, however, that the legislature did not enact the Human Rights Act to eliminate every form of discrimination. Furthermore, the court opined, if the "Council intended to effect such a major definitional change, counter common understanding, we would expect some mention of it in the Human Rights Act or at least in its legislative history."

C. Constitutional Claims

I. Due Process Rights

The court agreed that denying lesbians and gays a right to marry did not violate fundamental due process rights. The court split, however, over the equal protection claim. Both Judge Terry and Judge Steadman agreed that the equal protection claim was simply not an issue, while Judge Ferren vigorously asserted that the equal protection challenge warranted remanding the case for trial.

D.C. CODE ANN. § 1-2519(a)(1) (1992 & Supp. 1996). A place of public accommodation is defined as "all places included in the meaning of such terms as hotels ... restaurants or eating houses ... wholesale or retail stores ... banks, savings and loans associations ... clinics, hospitals ... amusement and recreation parks ... agencies or bureaus ... public halls and public elevators ... buildings and structures ..." Id. at § 1-2502(24).

128. Dean, 653 A.2d at 318. The code states that "[e]very individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service ..." D.C. CODE ANN. § 1-2511 (1992).

129. Id. at 319.

130. Id. The court relied heavily on its decision in National Org. for Women v. Mutual of Omaha Ins. Co., 531 A.2d 274 (D.C. 1987) [hereinafter NOW] to conclude that the Human Rights Act did not seek to eliminate every discriminatory practice. In NOW, the court held that the Human Rights Act did not prohibit discriminatory actuarial pricing practices by insurance companies. Id. at 279. As the court stated, "[i]f the Council had intended to effect such a dramatic change in insurance rate-setting practices, it is reasonable to assume that there would have been at least some specific reference to it in the language of the act or its legislative history." Dean, 653 A.2d at 319 (quoting NOW, 531 A.2d at 276).

131. 531 A.2d at 320 (quoting NOW, 531 A.2d at 276). Interestingly, the court also relied on the circular reasoning in Singer v. Haro, 522 P.2d at 1192. See also discussion supra notes 54-57. Thus the Human Rights Act, like the Washington ERA, can not protect against discrimination against same-sex couples seeking marriage rights because "marriage" requires persons of the opposite sex. Dean, 653 A.2d at 320. Additionally, since the Council discussed the Marriage and Divorce Act and the Human Rights Act at the same time, the court reasoned that Council-members would have expressly stated that the Human Rights Act would permit same-sex marriages even though the Marriage and Divorce Act did not, if that was their intention. Id.

132. Id. at 361-62 (Ferren, J., concurring in part and dissenting in part).
The couple did not press only their statutory interpretation arguments.\(^{135}\) Dean and Gill alternatively argued that the limitation of marriage to heterosexual couples would not survive constitutional scrutiny.\(^{136}\) The Court of Appeals first determined that the couple properly raised the constitutional arguments on appeal.\(^{137}\) Predictably, however, the Court of Appeals rejected both of their due process and equal protection claims.\(^{138}\) Dean and Gill first alleged that the interpretation of the marriage statute as well as the interpretation of marriage as an institution limited to different-sex couples “unconstitutionally burdens gays’ and lesbians’ ‘fundamental right’ to marry as they choose—a right protected by the due process clause of the Fifth Amendment.”\(^{139}\) In order to evaluate the due process claims, the court traced the development of “fundamental rights” protected by the Due Process Clause. Over the years, the Supreme Court has developed a continuum of fundamental right formulations under the due process clause.\(^{140}\) The court in Dean noted, however, that locating the exact point on this continuum is irrelevant because Dean and Gill’s due process claims fail “even under [the] most inclusive definition of

\(^{135}\) Id. at 320. In appellants’ motion for summary judgment, they argued that the “marriage statute ‘should be read, if it can be, so as to avoid difficult and sensitive constitutional questions.’” Id. at 320 (quoting Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 16 (D.C. 1987) (en banc)).

\(^{136}\) Id. (arguing that the District’s interpretation of the Marriage Statute violates the Equal Protection Clause and the Due Process Clause of the Constitution).

\(^{137}\) Dean, 653 A.2d at 321.

\(^{138}\) Id. at 331, 361.

\(^{139}\) Id. at 331.

\(^{140}\) Id. at 331 nn. 26-27. The Dean court noted that the Supreme Court initially characterized fundamental rights as “those privileges and immunities that belong to someone as a citizen of the United States—and thus cannot be denied by the states—because they are ‘implicit in the concept of ordered liberty.’” Id. at 331 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). This characterization led to the development of a test that fundamental rights are those that are “so incorporated, and thus binding on the states, as those having their ‘sources in the belief that neither liberty nor justice would exist if they were sacrificed.’” Id. (footnote omitted) (quoting Palko, 302 U.S. at 326). In Duncan v. Louisiana, 391 U.S. 145, 149 (1968), the Palko Court noted that “trial by jury in criminal cases is fundamental to the American scheme of justice...” Dean, 653 A.2d at 331 (citation omitted). “This new test meant that the Court would be willing to enforce values which the justices saw as having a special importance in the development of individual liberty in American society, whether or not the value was one that was theoretically necessary in any system of democratic government.” Id. at 331 n.27 (quoting JOHN E. NOWAK, CONSTITUTIONAL LAW 455 (1983)). In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Court overturned a housing ordinance that prevented certain members of a family from living together. The Court stated that the Due Process Clause “protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s History and tradition.” Dean, 653 A.2d at 331 (quoting Moore, 431 U.S. at 503). Finally, the Court in Bowers v. Hardwick, refused to recognize a fundamental right to engage in consensual adult homosexual sodomy. The Court thereby concluded that neither of the due process formulations from Palko and Moore would “extend a fundamental right to homosexuals to engage in acts of sodomy.” Dean, 653 A.2d at 332 (quoting Bowers, 474 U.S. 186, 191-92 (1986)).
Additionally, the court traced the evolution of the right to marry. Although the Supreme Court has recognized the right to marry as an inherent personal right, this right has been inextricably intertwined with procreation. Consequently, naming procreation, i.e., the biological capacity of a married couple to create offspring, as the primary purpose of marriage is used as a tool for excluding same-sex couples from entering into marriage. Although the Dean court graciously acknowledged that same-sex couples can have children through means such as "adoption, surrogacy, and artificial insemination," and that not every heterosexual can or chooses to have children, it could not "overlook the fact that the Supreme Court in recognizing a fundamental right to marry... has only contemplated marriages between persons of opposite sexes—persons who had the possibility of having children with each other." Moreover, the court stated, "we cannot say that...

141. Dean, 653 A.2d at 332.
142. Id. at 332-33 (citing Zablocki v. Redhail, 434 U.S. 374 (1978) (holding that a state law preventing parents with outstanding child support obligations from marrying to be a violation of equal protection). See also Loving v. Virginia, 388 U.S. 1 (1967) (finding a state law preventing marriage between people of different races to be a violation of the Equal Protection Clause and the Due Process Clause); Skinner v. Oklahoma, 316 U.S. 535 (1942) (declaring a state law allowing for the sterilization of "habitual criminals" a violation of the Equal Protection Clause).
143. Dean, 653 A.2d at 332 (citing Loving, 388 U.S. at 12). Over time, the Supreme Court has slowly crafted the institution of marriage. First, the state has long been a steward over the institution of marriage. Maynard v. Hill, 125 U.S. 190 (1888). In Maynard, the Court defined marriage as "the most important relation" and as "the foundation of the family and of society, without which there would be neither civilization or progress." Id. at 205-11. The Supreme Court discussed the importance of marriage in Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 525, 541 (1942) whereby the Court struck down a state statute permitting the state to sterilize habitual offenders against their will by stating that marriage is "one of the basic civil rights of man... "Marriage and procreation are fundamental to the very existence and survival of the race." The Court in Loving v. Virginia, 388 U.S. 1, 12 (1967), struck down a Virginia anti-miscegenation statute banning interracial marriages. The Court noted 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 [sic]." Id. in Zablocki v. Redhail, 434 U.S. 374, 390-91 (1978), the Court struck down a statute that prohibited an individual owing child support from obtaining a marriage license. Id. at 384. The Court stressed the relationship between the right of privacy and the right to marry, stating that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." Id. The Court further elaborated that:

[I]t 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... 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 enter the relationship that is the foundation of the family in our society...

144. Dean, 653 A.2d at 332.
145. Id. at 333.
146. Id. See also supra note 26.
147. Dean, 653 A.2d at 333.
same-sex marriage 'is deeply rooted in this Nation's history and tradition.'

2. The Equal Protection Claim

a. Concurring Opinion by Judge Steadman

Judge Steadman argued that the exclusion of same-sex couples from marriage did not trigger an equal protection claim. Judge Steadman viewed the marriage statute as a "statute of inclusion of opposite-sex couples ... [t]o the extent it is exclusive, it is exclusive evenly of all same-sex couples ...." Judge Steadman's primary criticism of Judge Ferren's equal protection analysis centered on Judge Ferren's assumption that the "marriage statute [is] the equivalent of a statute expressly addressed to an assertedly suspect class." Judge Steadman therefore drew a distinction between the marriage statute and legislation that purposively and invidiously discriminated against lesbians and gay men. Additionally, Judge Steadman further reasoned that even assuming as Judge Ferren does, that homosexuals constitute a quasi-suspect class, the government exhibited the requisite "important" interests to prohibit same-sex marriages because marriage is inextricably linked to procreation. Moreover, Judge Steadman noted that extending marital rights to individuals who presumably engage in conduct that

148. Id. (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)). The court noted that it could reach this decision without reference to the decision in Bowers. Id. at 393. See supra note 134.

149. Dean, 653 A.2d at 369-64 (Steadman, J., concurring). Judge Steadman opined:

It seems to me apparent that much the same considerations that elevate opposite-sex marriage to the status of a fundamental right constitute the requisite substantial relationship to an important governmental interest of a statute designed to recognize and promote that fundamental right. Surely, if only opposite-sex marriage is a fundamental right, the state may give separate recognition solely to that institution through a marriage act as here.

150. Id. at 362.

151. Id.

152. Id. at 362-63 (citing Evans v. Romer, 882 P.2d 1335, 1350 (Colo. 1994) (en banc) (holding that the state failed to establish that Amendment 2, which prohibited municipalities and state from passing legislation to protect homosexual rights, served "any compelling governmental interest in a narrowly tailored way." Therefore, Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment).

153. Id. at 363-64 (footnotes omitted). By emphasizing the importance of procreation in relation to marriage, Judge Steadman effectively disregards the other attributes of marriage that, according to Judge Ferren, create an equal protection claim for same-sex couples. As Judge Steadman stated, "I do not think that the existence of other aspects of marriage with which the state cannot impermissibly interfere negates the importance of the basic considerations expressed." Id. at 363 n.4. But see supra Part III.C.2.c.ii. Judge Ferren identified numerous attributes of marriage besides procreation, including governmental benefits, physical consummation, and emotional support, which all support an equal protection claim. Id. at 335-36.
the state banned seemed absurd.\textsuperscript{154}

\textit{b. Concurring Opinion by Judge Terry}

According to Judge Terry, the nature of marriage itself precludes an equal protection claim.\textsuperscript{155} He made an assertion, debatable at best, that "homosexuality is an immutable trait,"\textsuperscript{156} and thus concluded that "the equal protection claim was moot."\textsuperscript{157} As he posited, it would be "inherently inconsistent" to conclude that marriage is limited to different sex couples and then conclude that there may be "a denial of equal protection."\textsuperscript{158} In other words, since the court found that marriage requires two persons of the opposite sex, "no court can say that a refusal to allow a same-sex couple to 'marry' could ever be a denial of equal protection."\textsuperscript{159} Moreover, Judge Terry suggested that the remedy for the appellants lies within the legislature and not the courts.\textsuperscript{160} Judge Terry concluded by stating that the appellants were "free to refer to their relationship by whatever name they wish. But it is not a marriage, and calling it a marriage will not make it one."\textsuperscript{161}

\textit{c. Dissent by Judge Ferren}

\textit{(i) Criticism of the Equal Protection Ruling}

Essentially, Judge Terry dismissed the equal protection claim because marriage traditionally excludes same-sex couples.\textsuperscript{162} Judge Ferren criticized this reasoning because Judge Terry failed to account for the other qualities of marriage that the state denies to homosexuals such as emotional support, religious significance, and governmental benefits that in fact produce an equal protection claim

\begin{itemize}
  \item \textsuperscript{154} See Dean, 653 A.2d at 364 n.5 (citing Bowers v. Hardwick, 478 U.S. 186, 196 (1986)).
  \item \textsuperscript{155} Id. at 361 (Terry, J., concurring).
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} Id. at 361 (Terry, J., concurring).
  \item \textsuperscript{158} Id. at 362 (Terry, J., concurring).
  \item \textsuperscript{159} Dean, 653 A.2d at 361 (Terry, J., concurring).
  \item \textsuperscript{160} Id. Hence Judge Terry suggested that the appellants should pursue some type of domestic partnership legislation that would accord the couple the same benefits of marriage. \textit{Id. But see infra} notes 159 and 191 (discussing failure to keep domestic partnership legislation alive in the District of Columbia).
  \item \textsuperscript{161} Id. at 362 (Terry, J., concurring).
  \item \textsuperscript{162} Id. at 361.
\end{itemize}
Judge Ferren attacked Judge Steadman's analysis for several other reasons as well. First, Judge Ferren found it logically unsound to conclude that the marriage statute was not discriminatory if the legislature never "dreamed that anyone might consider it discriminatory legislation against homosexuals." Simply put, the fact that the legislature never imagined the discriminatory ramifications of the statute does not prevent the statute from having a discriminatory effect on gays and lesbians. Second, Judge Ferren disagreed with the authority that Judge Steadman relied on to reject the equal protection argument. In Judge Ferren's opinion, those cases bore no relation to Dean and Gill's situation. As Judge Ferren argued, those governmental actions did not seek "to exclude the affected classes altogether from the benefits sought." Lesbians and gays are not only forbidden to marry, but the state denies them all of the benefits that heterosexuals gain from marriage. Third, Judge Steadman reasoned that the relationship between procreation and marriage qualifies as an "important" state interest to prohibit same-sex marriages. Judge Ferren asserted that this "relationship" does not serve as a compelling or even a substantial state interest. Moreover, whether legal recognition of this relationship qualifies as a compelling state interest is certainly a matter to be decided in trial and not summary judgment.

---

163. See Dean, 653 A.2d at 359. See infra note 166. In his critique, Judge Ferren compares Judge Terry's reasoning to the same flawed reasoning adopted by the trial court in Loving in which the "divine order forbids interracial marriage to the point of making it conceptually unthinkable." Id. at 359.
164. Id. at 359.
165. Id. at 360.
166. Dean, 653 A.2d at 359-60.
167. Id.
168. Id. at 360 (referring specifically to Davis, which did not allow racial minorities who passed the test to be appointed as police officers and Feeny which allowed veterans who were female to be preferred).
169. Id. See also infra note 242. Moreover, homosexuals in the District of Columbia are also unable to attain such benefits from other alternatives such as domestic partnership legislation. Although the District acted to pass such legislation, the program has been unfunded for the past four years. Lisa Nevans, Panels to Produce D.C. Budget; Walsh Expected to Produce Bill, WASH. TIMES, Sept. 11, 1995, at A6.
170. Dean, 653 A.2d at 360-61.
171. See infra Part III.C.2.cv.
172. Dean, 653 A.2d at 361.
(ii) Critical Overview of the Decision

Judge Ferren\(^{173}\) embarked on an exhaustive analysis of the couple's equal protection claim because the failure to assert a viable due process claim does not automatically dispose the equal protection claim.\(^{174}\) Even if marriage is a fundamental right reserved for heterosexuals, there are other privileges from marriage that must not be ignored which are just as desired by same-sex couples as they are by straight couples, e.g., governmental benefits, parental and adoptive rights, emotional support, physical intimacy, religious and

\(^{173}\) This case, however, presented a unique problem on appeal because the parties' cross-motions focused on a question of law based upon undisputed "adjudicative" facts. Judge Ferren discussed in detail the difference between adjudicative facts and legislative facts. Adjudicative facts are simply those facts that "explain who did what, when, where, how, and with what motive and intent." \textit{Id.} at 322. (quoting State v. Erickson, 574 P.2d 1, 4 (Alaska 1978)). The adjudicative facts on the record are:

- appellants are both men; they are residents of the District; they are not disqualified by any of the enumerated prohibitions under the marriage statute; they applied for a marriage license from the District's Marriage License Bureau, presenting valid blood tests and the name of an authorized person willing to perform the marriage ceremony; the Clerk of the Superior Court denied them a marriage license solely on the ground that the District of Columbia Code does not authorize marriage between persons of the same-sex; they would have been issued a marriage license if they were a heterosexual couple; and the denial of a marriage license potentially denies them an extraordinary number of tangible benefits, based upon marital status, enumerated in the District of Columbia Code.

\textit{Id.} at 322 (footnote omitted). Since the undisputed facts on the record for appeal were insufficient to resolve the complex constitutional issues, Judge Ferren delved into legislative fact-finding. The court discussed the importance of using legislative facts:

\begin{quote}
[I]n legislative facts come into play when the court is faced with the task of deciding a statute, statutory interpretation or the extension or restriction of a common law rule upon grounds of policy. These policy decisions ... often hinge on social, political, economic, or scientific facts, most of which no longer fall within the classification of irrefutable. Cases involving such decisions cannot be decided adequately without some view by the court of the policy considerations and background upon which the validity of a particular statute or rule is grounded.
\end{quote}

\textit{Id.} at 324. Since the appellants' constitutional claims presented no material issue of adjudicative facts the court's task was to examine legislative facts that will include the "origins of homosexuality and the extent to which it is immutable." \textit{Id.} at 330. Consequently, Judge Ferren relied on the materials presented by the parties as well as his own sources. In order to resolve the constitutional issues, specifically the equal protection claim, Judge Ferren stated that he would "rely not only on case law but also on scientific and social sources proffered by the parties—and found on my own part." \textit{Id.}

\(^{174}\) \textit{See} \textit{Dean}, 653 A.2d at 334. \textit{But see supra} Part III.G.2.i-ii (discussing the concurring opinions by Judge Terry and Judge Steadman). Judge Ferren noted that the appellants could have raised the argument that same-sex marriage is a fundamental right for equal protection purposes. Since they did not, he did not address that argument in his dissent. \textit{Id.} at n.31 (citing Cass R. Sunstein, \textit{Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection}, 55 U. CHI. L. REV. 1161, 1168-69 (1988)). Additionally, Judge Ferren also made it clear that "even though a state does not withhold a right deemed 'fundamental' for constitutional purposes, a legislative classification that withholds other significant rights and benefits from a protected class of persons, while making those benefits available to others, can just as surely violate the equal protection clause." \textit{Id.} at 335 (citing Pyler v. Doe, 457 U.S. 202, 216-218 (1982)).
spiritual significance.\textsuperscript{175} Since the District denies lesbians and gays these heterosexual privileges when it prohibits same-sex marriages, Judge Ferren concluded that Dean and Gill had a viable equal protection claim and the court erred in granting summary judgment without benefit of a trial.\textsuperscript{176} Therefore, the central aim of Judge Ferren’s dissent was to discover whether homosexuals comprise a specially protected class under the factors historically delineated by the Supreme Court.\textsuperscript{177} Second, Judge Ferren also sought to discover whether the prohibition of same-sex marriages would survive a rational basis test under equal protection analysis or even whether a stricter or more rigorous form of review applies.\textsuperscript{178}

\textit{(iii) Applying \textit{Bowers v. Hardwick}}

First, Judge Ferren noted that four federal courts have held that gays and lesbians do not comprise suspect or quasi-suspect classes based on the homophobic rhetoric of the 1986 ruling in \textit{Bowers v. Hardwick}.\textsuperscript{179} These courts, however, misapplied the \textit{Bowers} decision because \textit{Bowers} was a due process case in which the “Supreme Court

\textsuperscript{175} The Supreme Court in \textit{Turner v. Safley}, 482 U.S. 78 (1987), held that withholding a right to marry violated prisoner’s due process rights because of the “four important attributes of marriage.” \textit{Id.} at 78., that consist of emotional support, religious and spiritual significance, physical consummation, and government benefits such as tax benefits, property rights, and social security benefits. \textit{Id.} at 95-96.

\textsuperscript{176} \textit{Dean}, 653 A.2d at 336. The most difficult issue to resolve, however, is whether homosexuals qualify as a “suspect” or “quasi-suspect” class. Even though Judge Ferren attempted to resolve this question through legislative fact-finding, he ultimately feels that the matter should be resolved at trial where the court can examine record and non-record sources and expert testimony. \textit{Id.} at 356.

\textsuperscript{177} \textit{Id.} Essentially what Judge Ferren was really trying to ascertain was which party should bear the burden at trial. If the court determined that homosexuals were not members of a “suspect” or “quasi-suspect” class, then the appellants would have the burden of demonstrating that disallowing same-sex couples to marry does not satisfy a rational basis test. Conversely, if homosexuals qualified as a “suspect” or quasi-suspect class, then the burden is on the government to show that such prohibitions fulfill compelling or even substantial governmental interest. \textit{Id.}

\textsuperscript{178} See infra Part III.C.2.v.

\textsuperscript{179} \textit{Dean}, 653 A.2d at 340. See \textit{High Tech Gays v. Defense Indus. Clearance Office}, 895 F.2d 569, 570-73 (9th Cir. 1990) (holding that homosexuals do not qualify as suspect or quasi-suspect class because homosexuality is not “an immutable characteristic; it is behavioral and, hence, is fundamentally different from traits such as race, gender, or alienage”); \textit{Ben-Shalom v. Marsh}, 881 F.2d 454, 464-66 (7th Cir. 1989) (upholding Army’s refusal to reenlist admitted lesbian noting that “[i]f homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class for equal protection purposes”); \textit{Woodward v. United States}, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (holding that homosexuals as a class are not afforded heightened scrutiny because homosexuality is primarily behavioral in nature and after \textit{Bowers} discrimination against homosexuality is not “constitutionally infirm”); \textit{Padula v. Webster}, 822 F.2d 97, 102-04 (D.C. Cir. 1987) (holding “it would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.”).
expressly noted it was not addressing equal protection issues.\textsuperscript{180} As a consequence, the decision in \textit{Bowers} does not foreclose an equal protection claim.\textsuperscript{181} As Judge Ferren points out, the \textit{Bowers} decision left a number of unanswered questions.\textsuperscript{182} Ultimately, the due process ban on consensual homosexual sodomy left open several equal protection questions. \textsuperscript{183} For example, the question remains whether the state can deny homosexuals the right to marry solely because of their sexual conduct.\textsuperscript{184} If this is true, then it is illogical to allow heterosexuals to marry when they have a right to engage in exactly the same proscribed conduct "at least when formalized in marriage."\textsuperscript{185} An underlying premise to this question is that heterosexuals may not have a constitutional right to engage in sodomy, but the state honors those marriages anyway.\textsuperscript{186}

\textbf{(iv) Factors Relevant to Suspect and Quasi-Suspect Status}

The Supreme Court has slowly expanded the types of classes subject to legislative action that require a greater level of scrutiny for

\begin{itemize}
\item \textsuperscript{180} \textit{Dean}, 653 A.2d at 342. Accordingly, Judge Ferren stated that "this court owes them no deference, and we would abandon our judicial responsibility if we accepted what, in my view, is critically flawed reasoning." \textit{Id.}
\item \textsuperscript{181} \textit{Id.} at 343.
\item \textsuperscript{182} \textit{Id.} at 342-43. The Supreme Court would not rule on whether the criminalization of adult homosexual sodomy would apply to heterosexuals as well. \textit{Id.} at 342 (citing \textit{Bowers}, 478 U.S. at 188 n.2). Furthermore, even if the state can prohibit sodomy for homosexuals and heterosexuals alike, it seems illogical that heterosexuals are entitled to marry where homosexuals are not. \textit{Id.} Additionally, if the state can not proscribe heterosexual sodomy because of fundamental privacy rights then it is not exactly obvious why the state can prohibit homosexual marriage when heterosexuals use marriage to "legitimize their own consensual sodomy." \textit{Id.} Even if the state can not prohibit consensual homosexual sodomy by married couples, that does not preclude the state from prohibiting consensual sodomy for consenting unmarried heterosexual couples like it criminalizes fornication. \textit{Id.} (footnote omitted). Assuming for the sake of argument that homosexuals are a constitutionally protected class, the question then remains whether homosexuals can use the equal protection clause to claim a marriage right when they "admittedly engage in ... consensual sodomy, which the state can lawfully proscribe for a large measure of the heterosexual population, namely all unmarried opposite-sex couples." \textit{Id.} Even though the \textit{Bowers} decision did not draw a distinction between married and unmarried couples, it is feasible that it "left room for constitutionally protecting consensual sodomy in marriage while permitting criminal penalties for consensual sodomy outside of marriage." \textit{Id.} If this were true, the appellants' argument would be buttressed because heterosexual couples could "validate their conduct" by entering marriage while homosexual couples can not. \textit{Id.}
\item \textsuperscript{183} \textit{Id.}
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} \textit{Dean}, 653 A.2d at 343 (discussing criminal sodomy statutes that have traditionally drawn no distinctions between heterosexuals and homosexuals alike and concluding that such conduct provides no basis in itself to deny marriage to homosexual couples without denying the same to heterosexual couples) (citation omitted).
\item \textsuperscript{186} \textit{Id.} at 344.
\end{itemize}
equal protection analysis.\textsuperscript{187} Although the Supreme Court has never specifically addressed the issue of whether lesbians and gays comprise a "suspect" or "quasi-suspect" class,\textsuperscript{188} Judge Ferren opined that these groups should qualify despite courts that have held otherwise.\textsuperscript{189} After examining several factors, Judge Ferren concluded\textsuperscript{190} that homosexuals in all probability comprise either a suspect or a quasi-suspect class.\textsuperscript{191}

First, Judge Ferren determined that gays and lesbians have historically suffered from purposeful discrimination.\textsuperscript{192} Indeed, Justice Brennan has characterized such discrimination as "pernicious"\textsuperscript{193} and reflecting a "deep-seated prejudice rather than...
rationality." Additionally, such pervasive discrimination has led to "the basis of refusals to hire, the ruin of careers, undesirable military charges, denials of occupational licenses, denials of the right to adopt and to the custody of children and visitation rights, denials of national security clearances and denials of the right to enter the country." Second, lesbians and gays are also the victims of inaccurate stereotyping. Heterosexual opponents of same-sex marriages have labeled gays and lesbians as child molesters, untrustworthy, promiscuous, and unwilling to settle down and raise a family. As Judge Ferren contends, this stereotyping not only results in an "unfair assault on feelings but, more significantly, ... inaccurate stereotyping typically withholds recognition of one's capacity to be a productive member of society."

The question of whether homosexuality is immutable is the most difficult issue to resolve. Determining whether homosexuality is homosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely to reflect deep-seated prejudice rather than rationality'.

Rowland, 470 U.S. at 1014 (citations omitted).

194. Dean, 653 A.2d at 344.
195. Id. (citing Elvia R. Arriola, Sexual Identity and the Constitution: Homosexual Person as a Discrete and Insular Minority, 10 WOMEN'S RTS. L. REP. 143, 157 (1988)).
196. Id.
197. Id. at n.48. See David Russman, Alternative Families in Whose Best Interest?, 27 SUFFOLK U. L. REV. 51 (1993) (discussing problems gays and lesbians have encountered due to stereotypes in trying to adopt children, including the misconception that they will molest the children).
198. Id. at 344-45 (citing Editors of the Harvard Law Review, Developments in the Law: Sexual Orientation and the Law, 102 HARV. L. REV. 1508, 1567 (1989)). See also Patterson, supra note 26, at 1034 noting that:

Results of research to date suggest that children of lesbian and gay parents have a normal relationships with peers and that their relationships with adults of both sexes are satisfactory. In fact, the findings suggest that children in custody of divorced lesbian mothers have more frequent contact with their fathers than do children in custody of divorced heterosexual mothers. There is no evidence to suggest that children of lesbian or gay parents are at a greater risk of sexual abuse than other children. The picture of lesbian mothers' children that emerges from results of existing research is thus one of general engagement in social life with peers, with fathers, and with mothers' adult friends-both female and male, both homosexual and heterosexual.

Id. (emphasis added).

200. Dean, 653 A.2d at 345. But see supra notes 26 and 182.
201. Id. (citing Frontiero v. Richardson, 411 U.S. 677 (1973)).
immutable is necessary because every Supreme Court decision granting suspect or quasi-suspect class status has always been based on an immutable trait.\(^2\) Additionally, if homosexuality has a "genetic origin like race or gender, court[s] would be sympathetic to arguments that any statute forbidding same-sex marriage should be subject to 'strict' or at least 'intermediate scrutiny'" whereas if sexual orientation "were entirely a learned, and thus psychological phenomenon—and were subject to change ... then the statute would be reviewable under the rational basis test."\(^3\)

At this point in time, however, there is simply no definitive answer on whether homosexuality is immutable.\(^4\) Nonetheless, Judge Ferren decided that homosexuality is immutable\(^5\) like "race or gender for equal protection analysis."\(^6\) Accordingly, Judge Ferren rebuffed many theories suggesting that homosexuality may be a chosen or preferred sexual orientation.\(^7\) Thus, he was unwilling to accept the majority's implicit belief that "traumatic, possibly emotionally destructive self-help, rather than constitutional protection is the price that homosexuals must pay ... to avoid pernicious discrimination. Indeed, increasing use of gene therapy and drugs to manipulate health and human behavior suggests the quite scary spectre of enforcing a public policy for curing [sic]

\(^2\) Id. at 346. (footnotes omitted). As a consequence, Judge Ferren noted that it would be difficult to recognize homosexuals as suspect or quasi-suspect if their sexual orientation is not immutable. Id.

\(^3\) Id.

\(^4\) See id. at 348. Judge Ferren examined research on both sides of this issue. Generally, as far as Judge Ferren could ascertain, there is no conclusive scientific evidence pinpointing the origins of homosexuality. Theories range from homosexuality being genetically determined, culturally determined, environmentally determined, hormones interacting with social and environmental factors. Id. at 347 at n.49. Additionally, other theories purport that homosexuality can be changed through religious conversion, shock therapy and other treatments. Id: See also Janet E. Halley, Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability, 46 STAN. L. REV. 503 (1994) (warning queer rights advocates from relying too heavily on recent scientific evidence claiming that homosexuality is immutable).

\(^5\) Dean, 653 A.2d at 352. After examining recorded and non-recorded sources, Judge Ferren concluded that "homosexuality is not a whim; it falls within the a range from biological (genetic and/or hormonal) to psychological predisposition that is very difficult, if not impossible, to reverse." Id. Although Judge Ferren firmly believed that homosexuality is virtually unchangeable unless drastic measures are taken, he still questioned whether there was some deterrent value to forbidding same-sex marriages. Thus, as some courts have postulated, homosexuality should not be endorsed because a homosexual role model may influence a child's developing sexual identity. Id. at 353 (citing Opinion of Justices, 590 A.2d 21, 25 (1997)). Judge Ferren found, however, that there were a substantial number of courts as well as scientific evidence that have proved otherwise. "Research ... in cases concerning efforts to adopt children indicates there is 'little ground' for concern that 'children might become homosexual if raised in a lesbian or gay household.'" Id. (citing Joseph Harry, Gay Male and Lesbian Relationships, in CONT. FAM. & ALTERNATIVE LIFESTYLES 216, 229 (Eleanor D. Macklin ed., 1983)).

\(^6\) Id. at 352.

\(^7\) Id. at 346-48 n.49.
homosexuals....”

Finally, Judge Ferren concluded that homosexuals represent a politically powerless group. Despite the increasing political power of the lesbian, gay, bisexual, and transgendered rights movements over the years, homosexuals still remain a politically powerless minority. Not only has Congress effectively killed domestic partnership legislation in the District of Columbia by not funding the program, but lesbians and gays have had little success in procuring legislative protection from discrimination nationally.

v. Lesbians and Gays as Suspect or Quasi-Suspect Classes

Under Judge Ferren’s analysis, if a trial court determines that gays and lesbians do not comprise suspect or quasi-suspect classes, then Dean and Gill, all same-sex couples, cannot overcome the rational basis test. Moreover, if the central purpose of marriage is procreation, the state’s limitation of marriage to heterosexuals is rationally related to that goal. Conversely, if a court concludes

208. Id. at 352 (emphasis added).
209. Id. at 349.
210. Dean, 653 A.2d at 349. See Kevin Aloysius Zambrowicz, To Honor You All the Days of Your Life: A Constitutional Right to Same-Sex Marriage, 49 CATH. L. REV. 967, 988-39 (1994) noting that: although gays have experienced a long history of discrimination and have the abilities to contribute to society, courts are reluctant to characterize gays as politically impotent or as possessing an immutable characteristic. Any hope of granting same-sex couples the fundamental right to marry will not lie with designating homosexuality as a suspect classification. Courts are reluctant to enter into the political whirlwind that surrounds homosexuality. Homosexuality is not poised on the brink of acceptance as a suspect classification.

211. Domestic partnership legislation has been repeatedly blocked in the District of Columbia. The House voted to remove funding for the District’s Domestic Partners law by a vote of 251 for and 176 against. See Congressional Roll Call, VIRGINIAN PILOT, July 17, 1994, at A8.

212. See Evans v. Romer, 882 P.2d 1335, 1350 (Colo. 1994) (en banc) (holding that state failed to demonstrate that Amendment 2 served any compelling governmental interest in a narrowly tailored way. Thus, Amendment 2 interfered with the fundamental right of lesbians and gays to participate in the political process. Other states that have put anti-gay initiatives on the ballots include: Arizona, Missouri, Oregon, Washington, Nevada, Idaho and Michigan. States that enacted legislation to protect gay rights includes: Massachusetts, Connecticut, New Jersey, California, Hawaii, Minnesota, Wisconsin, Vermont and the District of Columbia. Bettina Bosall, Anti-Gay Rights Measures Ignite Aggressive Battles in 7 States, L.A. TIMES, Jun. 9, 1994, at A5. See also supra note 173.

213. Under a rational basis test, the marriage statute must be upheld if there is any “reasonably conceivable state of facts that could provide a rational basis for the classification.” Dean, 653 A.2d at 336 (citations omitted).
214. Id. at 336. But see supra notes 165-66.
that gays and lesbians do qualify as suspect or quasi-suspect classes, then the state cannot prove that such discrimination meets a compelling or even a substantial governmental interest.\textsuperscript{216} Even if a court decides sexual orientation is immutable, the only feasible reasons to continue discriminating against lesbians and gays would be because of a "deterrence theory"\textsuperscript{217} or adverse public sentiment.\textsuperscript{218} Nevertheless, either of these scenarios entitled Dean and Gill to a trial on this matter.

IV. CRITIQUE OF SAME-SEX MARRIAGE ARGUMENTS

It is problematic to conclude that the legislature considered same-sex marriages when it first drafted the marriage statute in 1901.\textsuperscript{219} Consequently, the\textit{Dean} court may have correctly concluded that the marriage statute, as codified in 1901, does not include same-sex marriage rights.\textsuperscript{220} Despite the fact that the District of Columbia's marriage statute enacted in 1901 does not embody same-sex marriage rights, however, the court should have considered marriage as an evolving institution.\textsuperscript{221} Therefore, the court in\textit{Dean} should have examined the marriage statute in the context of 1990's ideals instead of those in 1901. Additionally, the court incorrectly limited the scope of the Human Rights Act because lawmakers adopted the Act to eradicate discrimination based upon sex and sexual orientation.\textsuperscript{222}

Finally, the court incorrectly dismissed the couple's due process and equal protection claims.\textsuperscript{223} The judges erred in rejecting the

\textsuperscript{216} Id.

\textsuperscript{217} See supra notes 182, 185. As Judge Ferren concludes, if there is any truth to the deterrence theory that legitimizing homosexual behavior could influence a child's sexual identity, the state interest may be substantial enough to forbid same-sex marriages, "even though not substantial enough to allow discrimination, for example, in housing or employment."\textit{Dean}, 653 A.2d at 355.

\textsuperscript{218} Dean, 653 A. 2d at 355 n.61. The government would have to demonstrate that there would be a "predictable increase in antisocial homosexual behavior ... mere feeling of distaste or revulsion at what someone else is or does, simply does not offend majority values without causing concrete harm, cannot justify inherently discriminatory legislation against members of a constitutionally protected class." Id. (footnote omitted).

\textsuperscript{219} See supra notes 24, 39. The court points to one particular section of the marriage statute where the is a noticeable lack of gender neutrality, the consanguinity provision. D.C. CODE ANN. § 30-101 (1995). The provision refers to marriages of a "man" with a "wife" and of a "woman" with a "husband." \textit{Dean}, 653 A.2d at 312.

\textsuperscript{220} See supra notes 16-18, 92.

\textsuperscript{221} See supra notes 26, 51 for a discussion on the numerous means by which lesbians and gays have children biologically or otherwise. See also MARTHA FINEMAN, THE NEUTERED MOTHER: THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (discussing the drastically changing definitions of family in both societal treatment and law).

\textsuperscript{222} See infra Parts III.B., IV.B.

\textsuperscript{223} Dean, 653 A.2d at 393.
due process claims because they assumed that the institution of marriage is a fundamental right only because of its link to procreation.\textsuperscript{224} Also, the court erred in granting the District motion for summary judgement on the equal protection claim precisely because the prohibition of same-sex marriages is impermissible sexual discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{225}

### A. Effectiveness of Statutory Arguments

The decision in \textit{Dean} does not, in many respects, represent a significant departure from other leading cases dismissing same-sex marriage claims.\textsuperscript{226} Although Dean and Gill attempted to avoid complex constitutional issues\textsuperscript{227} by propounding statutory interpretation arguments focusing on the gender-neutral language of the marriage statute,\textsuperscript{228} the \textit{Dean} court correctly ruled that the Marriage Statute as codified in 1901, did not embody a same-sex marriage right.\textsuperscript{229}

First, the legislative history of the marriage statute and the language of the divorce statute provides clear evidence that the legislature only contemplated different-sex marriages when it enacted the statutes.\textsuperscript{230} The divorce statute the legislature enacted along with the marriage statute is replete with references to “husband and wife,”\textsuperscript{231} but the debate over the amendments to the marriage statute clearly indicates that the Council at the time rejected a same-sex marriage right.\textsuperscript{232} Second, the consanguinity provision of the marriage statute reflects more than just a concern for “biological inbreeding.”\textsuperscript{233} As the court noted, if the only concern in enacting this provision was “biological inbreeding,” then the statute would not have forbidden some couples from marrying because they could not possibly pose a risk of producing children with birth defects.\textsuperscript{234} The court concludes that the “consanguinity

\begin{itemize}
\item \textsuperscript{224} Id. at 332-33.
\item \textsuperscript{225} Id. at 335-36.
\item \textsuperscript{226} See infra notes 42, 49 and Part I.A.D.
\item \textsuperscript{227} \textit{Dean}, 653 A.2d at 320-21.
\item \textsuperscript{228} Id. at 310.
\item \textsuperscript{229} See supra note 219.
\item \textsuperscript{230} \textit{Dean}, 653 A.2d at 312-14.
\item \textsuperscript{231} Here, I will assume that “husband” refers only to men and “wife” refers only to women. Of course, some same-sex couples embrace both terms, others reject both to define themselves.
\item \textsuperscript{232} See supra Part III.A. and notes 113-17.
\item \textsuperscript{233} \textit{Dean}, 653 A.2d at 313.
\item \textsuperscript{234} Id. at 313.
\end{itemize}
provision therefore reflects taboos—indeed moral judgments about improper marriage relationships that transcend genetic concerns.\textsuperscript{235}

Even though the court ruled that the marriage statute as codified in 1901, excluded lesbians and gays from marital privileges, the court failed to consider the possibility that the institution of marriage has evolved over time to such an extent that it should embody same-sex marriages.\textsuperscript{236} Consider, for instance, the changing form of American families. The nature of the American family has not remained in the static form of a "nuclear family."\textsuperscript{237} Indeed, the emergence and widespread acceptance of alternative family forms signifies the necessity to adapt the meaning of family to societal changes.\textsuperscript{238} Considering the fact that the institution of "family" has evolved to include much more than "nuclear" families, it is not readily apparent why the institution of marriage cannot adapt to reflect societal changes as well.

The court placed particular emphasis on the "traditional" meaning of marriage\textsuperscript{239} and even acknowledged that "meanings of words are continually evolving,"\textsuperscript{240} but limited its examination of marriage to an examination of what the legislature intended in 1901.\textsuperscript{241} Logically, the court exercised judicial restraint by leaving a new interpretation of marriage in the hands of the legislature.\textsuperscript{242}

\begin{footnotes}
\item[235] Id.
\item[236] See supra note 26.
\item[237] The traditional nuclear family with a father, mother and children that has been "a cherished and idealized American norm for decades ... isn't so normal anymore. Nationally, 50\% of all children under 18 lived in a traditional nuclear family in the summer of 1991 ... [t]he other half lived with a stepparent and stepsiblings, in a single-parent household, with other relatives or non-relatives ..." Alan Gottlieb, Nuclear Family No Longer the Norm, DENVER POST, Aug. 30, 1994, at A2. The number of children living in nuclear families in 1991 was 51\%; in 1988, it was 51\%; in 1980, it was 57\%; in 1970, it was 66\%. Traditional Families Wane, Study Finds Half of Kids Live with Biological Parents, Siblings, THE DALLAS MORNING NEWS, Aug. 30, 1994, at SA.
\item[238] See supra note 221.
\item[239] See Dean, 653 A.2d at 315.
\item[240] Id.
\item[241] Id.
\item[242] See id. at 361. As Judge Terry suggests:

[the solution for the appellants] lies exclusively with the legislature. The Council of the District of Columbia can enact some sort of domestic partners law, bestowing on same-sex couples the same rights already enjoyed by married couples, whenever it wants to. But no court can order a legislature to enact a particular statute so as to achieve a result that the court might consider as desirable, or to appropriate money for a purpose that the court might deem unworthy of being unfunded.

Id. (citing Zahn v. Board of Pub. Works, 274 U.S. 325 (1927) and Hart v. United States, 118 U.S. 62 (1886)).
\end{footnotes}
Unfortunately, by leaving a new interpretation of marriage to the legislature, same-sex couples may never attain the same rights and benefits that their heterosexual counterparts reap from marriage.\(^{243}\)

**B. The Human Rights Act**

The court’s analysis of the Human Rights Act claim is difficult to evaluate. On one hand, the legislative history provides no indication that the legislature intended to dramatically change the meaning of marriage as codified in the marriage statute.\(^{244}\) Conversely, the legislature enacted the Human Rights Act to eliminate pervasive forms of discrimination against individuals based on sex or sexual orientation.\(^{245}\) The Act appears to prohibit discrimination against same-sex couples seeking a marriage license. The court’s interpretation of the act, however, undermines its supposedly expansive scope. That is, the court stated, the Council “undoubtedly intended the Human Rights Act to be a powerful, flexible, and far-reaching prohibition against discrimination of many kinds, including sex and sexual orientation,”\(^{246}\) yet the court refused to prohibit discrimination against same-sex couples who attempt to obtain a marriage license.\(^{247}\) The court relied heavily on the same “circular and unpersuasive”\(^{248}\) reasoning of Singer v. Hara.\(^{249}\) The court concluded the Human Rights Act cannot protect same-sex couples from discrimination because what they seek to enter by is not a “marriage” by statutory definition.\(^{250}\)

Even if the marriage is not by definition an institution that is open to same-sex couples, the *Dean* court was wrong to dismiss the same sex couple’s claim under the Human Rights Act. The clear language of the statute mandates that public and private entities

---

243. *See supra* notes 160, 188 (discussing the failure to fund the domestic partnership legislation in the District of Columbia).

244. The court noted that the legislature should have made some express mention of same-sex marriages in the act’s legislative history. *Dean*, 653 A.2d at 920.

245. *See D.C. CODE ANN. § 1-2501* (1996) (proclaiming, “It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia ... to ... discrimination by reason of ... sexual orientation ...”)

246. *Dean*, 653 A.2d at 319.

247. *Id.* at 320 (summarizing the arguments against granting same-sex couples a marriage license).


249. 522 P.2d 1187, 1190-92 (Wash. Ct. App. 1974) (holding that Washington ERA does not require the state to permit same-sex marriages because “marriage” does not entail same-sex relationships). *See also supra* notes 55-60.

250. *Dean*, 653 A.2d at 310 (stating that by definition, same-sex relationships cannot be marriages because the definition of marriage requires opposite-sex partners).
shall not prohibit any person from participating in "all aspects of life." According to the court, however, policymakers have historically, and therefore justifiably, limited legal recognition of marriage to heterosexual couples. Thus, without a clear indication that the legislature intended otherwise, there is simply no justification to redefine marriage. Ultimately, the failure of the Dean court to recognize a same-sex marriage claim under the Human Rights Act illustrates the difficulty of recognizing same-sex marriages under existing laws.

C. Constitutional Claims

1. Due Process

The Dean court summarily rejected Dean and Gill's due process claim for two reasons: 1) they believe the institution of marriage is inextricably linked to procreation, and 2) same-sex marriage is not a clear indication that the legislature intended otherwise, there is simply no justification to redefine marriage. Ultimately, the failure of the Dean court to recognize a same-sex marriage claim under the Human Rights Act illustrates the difficulty of recognizing same-sex marriages under existing laws.

251. D.C. CODE ANN. § 1-2511 (1996). The code defines "aspects of life" to "includ[es] but not [be] limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service ..." Id.

252. Dean, 653 A.2d at 318 (reciting the couple's argument that denial of a marriage license denies them the right to engage in an important aspect of life). See Adam Chase, Tax Planning for Same-Sex Couples, 72 DENV. U. L. REV. 359, 359 (1995) (asserting that legal marriage may create the "most important relation in life").

253. As demonstrated by the Dean court, focusing on the legislative history and the plain language of the statute may not be the most appropriate mechanism to ensure the protection of gay and lesbian rights under existing laws. Instead, invoking "dynamic statutory interpretation" may be a more useful tool when examining legislation that affects homosexuals. Dynamic statutory interpretation accounts for the lack of clarity in the language and legislative history of a statute and "assumes that an interpretation must be constructed to fit the historical and cultural moment..." Whereas the central question of traditional theories is how framers intended the statute to be applied, a dynamic theory asks what the statute should mean in relationship to contemporary society. See, e.g., Heidi A. Sorenson, A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination, 81 GEO. L.J. 2105, 2108-09 (citations omitted). Essentially, dynamic statutory interpretation is more progressive because it focuses on the statute in the context of the present whereas traditional statutory interpretation tools construe the meaning of the statute in the context of the past. Id. at 2106 n.9. The approach taken by the Dean court as well as the other courts addressing same-sex marriage claims focuses on the statute in the context of the past. See generally supra Parts I.A., III.A. Perhaps in the future, courts addressing same-sex marriage claims should invoke dynamic statutory interpretation so that the marriage statutes and statutes proscribing discrimination based on sexual orientation can best be understood in the context of societal changes rather than the traditions of the past.

254. By emphasizing the "traditional" meaning of marriage as reflected in the marriage statute, the court invoked the canon that a "general, later enactment" such as the Human Rights Act does not take precedence over an earlier more specific enactment such as the Marriage Act. See Sorenson, supra note 253, at 2106 n.9 (citations omitted).
"deeply rooted in the Nation's history and tradition." The Dean court mistakenly assumes that marriage is a constitutionally protected entity solely because of its link to procreation. In fact, the Supreme Court has proclaimed that the institution of marriage embodies much more. Moreover, marriage is also a constitutionally protected right because it fosters "familial and

255. Dean, 653 A.2d at 333 (citing Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)). The Dean court dismissed the due process claim without discussing the Bowers decision because same-sex marriage is not "deeply rooted in the Nation's history and tradition." Dean, 653 A.2d at 333. But see Eskridge, supra note 24, at 1419 (tracing tradition and evolution of same-sex marriages in Western and other cultures). The decision in Bowers could also serve as a barrier to attaining same-sex marriage rights under the due process clause. Bowers v. Hardwick, 478 U.S. 186 (1986). The Bowers decision, however, does not necessarily foreclose a due process claim. Sexual Orientation and the Law, supra note 31, at 1607-08 n.23, notes that:

The Supreme Court's recent decision in Bowers does not foreclose application of the privacy doctrine to same-sex marriage. Although Bowers held that the right of privacy does not protect the right of homosexuals to engage in sodomy, the right of gay men and lesbians to marry is unrelated to their right to engage in sodomy. Just as Mormons did not forfeit the right to free exercise of religion simply because the state proscribed polygamy ... so too homosexuals do not forfeit their fundamental right to marry because the state can proscribe sodomy .... Nor would extending the right of privacy to protect the right of gay men and lesbians to marry necessarily entail extending the right of privacy to protect the right of individuals to marry relatives. Incestuous relationships, unlike homosexual relationships, create a high risk of birth defects in their offspring. The state, therefore, has a compelling interest in regulating them. Id. Nonetheless, the argument that sodomy laws proscribing consensual homosexual conduct should negate a same-sex marriage claim is not valid in the District of Columbia due to the repeal of the sodomy laws in 1993. Dean, 653 A.2d at 334 n.30.

256. The court's holding in Turner v. Safley, 482 U.S. 78 (1987), allowing inmates to marry, expanded the meaning of marriage beyond procreation to encompass other important attributes including expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication..." Finally, marital status often is a pre-condition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). Id. at 93; see also supra note 153. The Turner decision follows other Supreme Court decisions indicating that marriage is independent of procreation including Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that married persons have the right to use contraceptives because the right of privacy) Id. at 498; Roe v. Wade, 410 U.S. 113 (1972) (upholding a woman's decision on whether or not to have an abortion is protected as a right of privacy) Id. at 153. Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the right to use contraceptives to unmarried persons) Id. at 454. One state court has held that an inability to procreate is not a legitimate reason to prohibit a couple from marrying. Marks v. Marks, 77 N.Y.S.2d 269 (Kings County Super. Ct. 1948). The court noted, however, that the person must be "capable of having the sexual intercourse which may result in the conception and birth of children" Id. at 270-71 (citations omitted).
societal stability."257 In light of the State's interest in promoting such stability, it is illogical for the State to forbid same-sex couples involved in loving, committed, stable relationships and eager to raise children, from marrying.258

Even assuming that marriage is a fundamental right solely because of its link to procreation, arguments forbidding same-sex couples from marrying are meritless. The Dean court held that the Supreme Court limited the fundamental right to marry to "persons of opposite sexes—persons who had the possibility of having children with each other."259 Logically, if marriage is limited to persons who had the possibility of conceiving children together, then the State would prohibit heterosexual couples that are biologically incapable of procreating, from marrying.260 To impose such a limit on heterosexual couples who cannot or do not want to have children would be heartless. Neither social mores nor the courts have ever imposed such limitation on heterosexual couples.261 Indeed, it confounds all reason that this procreation argument provides the basis which forbids lesbians and gays from marrying when they have already established alternative families, including families with children.262

257. See Sexual Orientation and the Law, supra note 31, at 1608 (citing Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (discussing the function of marriage)). In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Court struck down a housing ordinance that prohibited an extended family from living together. The Court stated that "[e]specially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." Id. at 505. Indeed, it is apparent that promoting stability at home is yet another important aspect of marriage and the family.

258. See Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution, supra note 31, at 213 (concluding the state has no legitimate interest in prohibiting same-sex marriage). See generally, Maxwell S. Peltz, Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights, 3 Mich. J. GENDER & L. 175 (1995) (referring to cases in which lesbian couples have been allowed to adopt even though they could not marry). But see Nancy E. Dowd, Stigmatizing Single Parents, 18 HARV. WOMEN'S L.J. 19, 51 (1995) (observing that the law perpetuates single parenthood by prohibiting same-sex marriages and by limiting or prohibiting "the use of adoption [by same-sex couples] to create a family."). Same-sex couples in stable relationships find themselves caught in a catch-22 situation when they are not allowed to create families through adoption because the couples are not allowed to marry. If the couples cannot expand their families by raising children, then they supposedly have no need to marry.

259. Dean, 653 A.2d at 333 (emphasis added).

260. Id. (stating that even though not all heterosexual couples procreate, marriage is a fundamental right for heterosexual couples because they have the ability to procreate).

261. See Marks v. Marks, 77 N.Y.S.2d 269, 270-71 (Kings County Super. Ct. 1948) (asserting that individuals need not be fertile to marry as long as they are capable of having intercourse which could result in conception).

2. Equal Protection

Finally, the Dean court improperly granted summary judgment on the equal protection claim. Judge Terry held that because marriage is reserved exclusively for heterosexual couples, it is legally impossible for a prohibition on same-sex marriage to be a denial of equal protection. In other words, gender and sexual orientation discrimination are inherent parts of the institution of marriage.

Judge Terry's analysis is incorrect because of its reliance on the same "circular and flawed" reasoning of the Singer and Baker courts that the Supreme Court in *Loving v. Virginia*, explicitly rejected. Long ago, the Commonwealth of Virginia and many states found interracial marriages impermissible. They held that the definition of marriage itself excluded interracial unions. The Supreme Court struck down this definitional formulation of

263. *Dean*, 653 A.2d at 362 (maintaining that it is inconsistent to conclude it is a denial of equal protection to deny marriage to same-sex couples when it is impossible for them to marry).

264. *See Mohr*, supra note 43, at 221 (arguing that gender and sexual orientation discrimination are built into marriage through a legal definition of marriage which only serves to exclude certain couples from marriage).

265. *See supra* notes 51-52, 55-60 and accompanying text.

266. 388 U.S. 1 (1967).

267. In *Loving*, the Supreme Court rejected the trial court's rationale for upholding an anti-miscegenation statute. The trial judge stated:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

marriage based upon its impermissible racial classifications. Thus, even though the denial of access to marriage for interracial couples applied equally to all races, the ban on such marriages was nothing more than an attempt by Virginia legislators to preserve "white supremacy" by keeping races separate. Accordingly, the prohibitions against same-sex marriages should be struck down because they are based on impermissible sexual classifications.

Yet Judge Steadman of the D.C. Superior Court had difficulty recognizing gender discrimination as an issue in Dean. He proposed that because both men and women are equally restricted from same-sex marriages, it would "stretch the concept of gender discrimination to assert that it applies to treatment of same-sex couples differently from opposite-sex couples." The mere fact that both men and women are equally prohibited from marrying does not mitigate the discriminatory impact. When Craig Dean and Pat Gill applied for a marriage license the Court Clerk denied the license because they are

268. Loving, 388 U.S. at 10-11. See also Trosino, supra note 53, at 116 (noting that the Supreme Court in Loving phrased the question in terms of whether there was a fundamental right to marry and whether that right could be restricted because of race, instead of whether there was a fundamental right to interracial marriage). If the Court had asked whether there was a fundamental right to interracial marriage, the answer would have been "no" because interracial marriage was neither "a right 'implicit in the concept of ordered liberty' nor 'deeply rooted in this nation's history.'" Trosino, supra note 53, at 115-16 (citations omitted). The Dean court did not approach the due process issue in the same fashion. The Dean court phrased the question in terms of whether there is a fundamental right to same-sex marriage, rather than first asking whether there is a fundamental right to marry, and then asking whether that right could be restricted by sex or sexual orientation. See Id. at 331. By phrasing the issue as whether there is a fundamental right to same-sex marriage, the court concluded that there is not a fundamental right to same-sex marriage because same-sex marriages are not "deeply rooted in the Nation's history and tradition." Id. (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)). As a consequence, the court avoided the critical issue of whether marriage may be legitimately restricted by sex or sexual orientation. See Trosino, supra note 53, at 116 (noting that at the trial level the Dean court followed this same approach, thus avoiding the more difficult issue of whether marriage may be legitimately restricted by sex or sexual orientation).

269. Loving v. Virginia, 388 U.S. 1, 7, 11 (1967) (noting that cases upholding anti-miscegenation laws endorsed white supremacy, but that those decisions rested solely on impermissible distinctions based on race).

270. See Sunstein, supra note 68, at 19-20 (noting that the prohibition of same-sex marriage is sex discrimination, but that most courts thus far have cast the issue as one of discrimination based on sexual orientation). If the prohibition of same-sex couples from marriage is discrimination based on sexual orientation, such discrimination should be subject to rational basis review. Bowers, 478 U.S. at 191-92 (stating there is no fundamental right to practice sodomy. If there is no fundamental right involved, then heightened scrutiny generally will not be applied.). See also supra notes 170, 176.

271. Dean, 653 A.2d at 363 n.2. The Court in Loving refuted a similar argument, stating "we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations ..." Loving, 388 U.S. at 8. The Hawaii Supreme Court also rejected the same argument. As Judge Heen argued, the Hawaii statute treats both sexes equally so that "neither sex is being granted a right or benefit the other does not have, and neither sex is being denied a right or benefit that the other has." Baehr v. Lewin, 852 P.2d 44, 71-72 (Haw. 1993) (Heen, J., dissenting).
both men. If Pat were a nickname for “Patricia,” then “Patricia” and Dean would have received the marriage license. Just as the ban on interracial marriages was an attempt to prevent people of color and whites from mixing—to preserve white supremacy—the underlying basis for preventing same-sex marriages is not to prevent the sexes from mixing, but to ensure that a female-male relationship is the only acceptable or legally recognized and therefore privileged, union.272

Therefore, denying the marriage license to Dean and Gill is sex

---

272. See Sunstein, supra note 68, at 20 n.65. For more insight on this sex discrimination argument, see also Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, 69 N.Y.U. L. REV. 197 (1994) (arguing that discrimination against gays and lesbians is sex discrimination and that laws permitting sex discrimination cannot survive heightened scrutiny. Additionally, Koppelman argues that laws that discriminate against lesbians and gay men perpetuate the “hierarchy of males over females.” Id. at 199. See also Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 WIS. L. REV. 187 (arguing that disapproval of homosexuality stems from “reaction to the violation of gender norms, rather than simply scorn for the violation of norms of sexual behavior” in the practices of gays and lesbians). Id. at 187.
discrimination and the State must demonstrate important

273. At first, the Supreme Court determined that sex-based classifications should be subject to strict judicial scrutiny because "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subject to strict judicial scrutiny." Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (striking down statutes which assumed female spouses of male military officers were dependent but under which male spouses of female military officers must be dependent for over one-half of their support to be considered dependent).

Three years later, the Supreme Court toned down its language somewhat and ruled that discrimination based on sex triggers an intermediate form of review whereby "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976) (declaring that a statute prohibiting males under age 21 from buying beer while allowing females to buy the same beer at age 18 is discrimination against males).

It is improbable that the District of Columbia would be able to demonstrate the requisite "important governmental objectives." Id. Judge Steadman suggests that the states interest in procreation qualifies as an important governmental interest. Dean, 653 A.2d at 363-64. But see discussion supra note 27 (noting that gay and lesbian couples can create families). In addition to the procreation argument, other, equally faulty arguments have been advanced to demonstrate "important governmental objectives." Craig, 429 U.S. at 197. First, opponents of same-sex marriages have argued that marriage should be limited to heterosexuals in order to protect children. See Andrew H. Friedman, Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage, 35 HOW. L.J. 173, 200 (1992) (observing that only prejudice would keep same-sex couples from being able to marry and raise children). Cf. Barry M. Parsons, Bottoms v. Bottoms: Erasing the Presumption Favoring a Natural Parent Over Third Parties—What Makes this Mother Unfit?, 2 GEO. MASON IND. L. REV. 457, 472 (1994) (explaining that same courts rebuttably presume that homosexual parents are unfit). Opponents of same-sex marriage fear that if children interact with gays and lesbians, they will be molested. Koppelman, supra note 278, at 280 n.314 (noting that anti-homosexual rights advocates claim lesbians and gays are child molesters). Others fear homosexuals will influence children's sexual identity and the children will become homosexuals. See William E. Adams, Jr., Whose Family Is it Anyway? The Continuing Struggle for Lesbian and Gay Men Seeking to Adopt Children, 30 NEW ENG. L. REV. 579, 592 (1996) (examining the claims of groups who oppose gays and lesbians becoming parents). But see Marc E. Elorita, Adoption By Lesbian and Gay People: The Use and Mis-use of Social Science Research, 2 DUKE J. GENDER L. & POL'Y 207, 213 (1995) (citing research showing that "being raised by a lesbian or gay parent does not increase the likelihood that a child will become lesbian or gay"). Research has indicated that "parental lifestyle simply is not the single most significant factor in determining a child's psychosexual development." David J. Kleber et al., The Impact of Parental Homosexuality in Child Custody Cases: A Review of the Literature, 14 BULL. AM. ACAD. PSYCHIATRY L. 81, 83 (1986).

Additionally, the incidence of sexual abuse in homosexual families is no greater than the incidence of sexual abuse in heterosexual families. "The great majority of adults who perpetuate sexual abuse are [heterosexual] males; sexual abuse of children by adult women is extremely rare.... [T]he overwhelming majority of child sexual abuse cases can be characterized as heterosexual in nature..." Patterson, supra note 26, at 1034 (citations omitted). Second, opponents of same-sex marriages argue that allowing same-sex marriages would increase the incidence of illegal homosexual activity. See Zambrowicz, supra note 210 at 947 (commenting that no studies show the denial of same-sex marriage to lesbians and gays decreases homosexual activity) (citing Comment, Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution, 128 U. PA. L. REV. 199, 211 (1979)).
governmental interests to uphold the classification.274

Judge Steadman also declared that the marriage statute is constitutional because the legislature did not intend for it to reflect a discriminatory purpose.275 This argument is unsound because even if the legislature did not consider or even recognize the discriminatory effect of the statute at the time the legislature enacted it, that does not mean that the statute lacks a discriminatory purpose. For instance, when the Virginia legislature prohibited interracial marriages through the enactment of its anti-miscegenation statute,276 the legislature did not consider the statute to be racially discriminatory because "the idea of interracial marriage was an oxymoron—a perceived abomination that violated divine


A third argument proffered is that limiting marriage to same-sex couples will preserve the traditional family. See Daniel A. Batterman, Evans v. Romer: The Political Process, Levels of Generality, and Perceived Identifiability in Anti-Gay Rights Initiatives, 29 New Eng. L. Rev. 915, 933 (1995) (discussing assertions made by "Colorado for Family Values" in its initiative against gay and lesbian rights in Colorado). This argument presupposes that opposite-sex families and same-sex families cannot co-exist simultaneously. An underlying premise of this argument is the assumption that allowing same-sex marriage will inevitably destroy the preeminence of the traditional family. Id. Proponents of this argument fail to realize that many same-sex couples have successfully created their own families. See Patterson, supra note 25, at 1027. Furthermore, the recent demise of the traditional nuclear family is reflective of societal changes, not due to the existence of same-sex families. See Gottlieb, supra note 287. It is evident that the state cannot advance any reason that justifies excluding homosexuals from marriage and all of its benefits.

276. Loving, 388 U.S. at 4-6. The anti-miscegenation statute provided that "all marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." Id. at 5 n.3.
natural law."\textsuperscript{277}

As society and race relations changed, restrictions on interracial marriages became unacceptable. By analogy, the same is true for same-sex couples.\textsuperscript{278} Excluding same-sex couples from all of the benefits of marriage is not acceptable because same-sex relationships mirror heterosexual relationships in many respects.\textsuperscript{279}

Although Judge Ferren, in his dissent, strenuously urged the court to remand the case for trial on the equal protection claim, he was unable to muster the sympathy of the rest of the Court of Appeals to override the motion for summary judgment. Nonetheless, after examining the issue thoroughly, he opined that lesbians and gays comprise either a suspect or a quasi-suspect class.\textsuperscript{280} Many courts have, however, rejected the approach taken by Judge Ferren.\textsuperscript{281} His detailed exploration of the factors\textsuperscript{282} that determine whether a group will compromise a suspect or quasi-suspect class clearly reveals that homosexuals are subject to invidious discrimination.\textsuperscript{283} Additionally, lesbians and gays are also subject to fallacious stereotypes that do not reflect their ability to raise children in a nurturing and loving environment.\textsuperscript{284} It is disputed, however, whether homosexuality is immutable\textsuperscript{285} and whether homosexuals

\textsuperscript{277} Dean, 653 A.2d at 360 (citation omitted). Judge Ferren alluded to other examples of invidious discrimination without legislative intent to cause such discrimination. For example, "railway passenger cars were racially segregated by law, there was no perceived discriminatory purpose; though 'separate,' they were 'equal.'" Id. (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).

\textsuperscript{278} For an examination of the benefits denied to same-sex couples see Chase, supra note 252, at 359. Benefits that same-sex couples are denied include: public employee life and health insurance, ability to give informed consent in medical emergencies, alimony, maintenance, right to maintain wrongful death actions and to recover damages, dower rights, right of survivorship, right of intestacy, right to petition for hospitalization, life insurance benefits, workers' compensation disability payments, and tax benefits. Dean, 653 A.2d at 323 n.19 (citation omitted).

\textsuperscript{279} Judge Steadman further argues that the appellants cannot make an equal protection claim based upon a quasi-suspect status because "[m]ost if not all of such statutes 'adversely' affect all unmarried couples of whatever status, and presumably would pass the rational relation test normally used in equal protection analysis." Id. at 364 n.7 (citations omitted). It seems as though Judges Steadman and Ferren disregard the fact that even though unmarried heterosexual couples are denied the same benefits as same-sex couples, heterosexual couples have the option to marry whereas same-sex couples do not. Id. at 342-43.

\textsuperscript{280} Id. at 309.

\textsuperscript{281} See supra notes 173, 179 (discussing generally, Dean, 653 A.2d at 340; High Tech Gays, 895 F.2d at 570-73; Ben Shalom, 881 F.2d at 464-66; Woodward, 871 F.2d at 1076; Padula, 822 F.2d at 102-04; Watkins, 875 F.2d at 724-28; Equality Found. of Greater Cincinnati, 54 F.3d at 268).

\textsuperscript{282} See supra notes 177-90.

\textsuperscript{283} See supra notes 177-90.

\textsuperscript{284} See supra notes 26, 182, and 237.

\textsuperscript{285} See supra notes 185-90.
are politically powerless.\textsuperscript{286} Perhaps the most plausible avenue to take to attain same-sex marriage rights is by attacking such prohibitions as sexually discriminatory.\textsuperscript{287}

V. RECOMMENDATIONS

The continuing struggle to obtain same-sex marriage rights warrants consideration of whether the desire to enter the institution of marriage is worth the fight. Although it is completely irrational for the courts to continue to condone discrimination against same-sex couples, the immediate solution for same-sex couples seeking marriage rights may lie in the legislature rather than in the courts. It is apparent that even in the 1990s, courts interpret non-gendered marriage statutes\textsuperscript{288} as narrowly as possible to avoid opening the institution of marriage to same-sex couples.\textsuperscript{289} Additionally, as Judge Terry demonstrated in \textit{Dean}, courts are unwilling to step outside their judicial role to create legislation that would allow same-sex couples to marry.\textsuperscript{290} Consequently, state legislatures should re-evaluate and redefine their own marriage statutes to reflect marriage in the 1990s. Several state constitutions already contain provisions

\begin{footnotesize}
\textsuperscript{286} See supra notes 191-92. See also Zambrowicz, supra note 210, at 988-89 (noting that courts are disinclined to characterize homosexuals as politically powerless or possessing immutable characteristics, and as a consequence, homosexuals will not gain same-sex marriage rights by being categorized as a suspect class). One commentator argues that not designating homosexuals as a suspect class masks the true inequality that homosexuals experience, and that homosexuals are deserving of suspect class status. \textit{See, e.g.}, Comment, \textit{The Lessons of the Law: Same-Sex Marriage and Baehr v. Levin}, 78 MARQ. L. REV. 121, 130-31 (1994) (noting that many “schemes” that discriminate against homosexuals will not even survive a rational basis review). \textit{But cf.} Sunstein, \textit{supra} note 68, at 9 (arguing that it is possible that homosexuals comprise a suspect class, but that argument is “unlikely to be accepted by the Court that decided \textit{Bowers}”). The current Court’s willingness to accept the argument that homosexuals comprise a suspect class is unknown as it has not addressed the issue. Stephen Zamansky, \textit{Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law}, 35 B.C. L. REV. 221, 249-50 (1993) (noting that it is unknown how the present Court will classify homosexuals, but arguing that they are a suspect class). Ultimately, Sunstein suggests that discrimination against homosexuals should initially receive rational basis review. In time, “laws against homosexual orientation and behavior will soon come to be seen as products of unfounded prejudice and hostility, and private prejudice and hostility will recede.” Sunstein, \textit{supra} note 69 at 1.

\textsuperscript{287} See supra notes 242-45. The author is not discounting other legal arguments such as due process or discrimination on the basis of sexual orientation as effective legal strategies. Previous courts addressing same-sex marriage claims have, however, refused to adopt such arguments. The only court in the United States that has possibly recognized same-sex marriage rights is the court in \textit{Baehr}. \textit{See generally supra} Part I.D. Although the court was construing the Hawaii Constitution which explicitly prohibits discrimination on the basis of sex, it is not implausible that the United States Constitution or another state constitution could be interpreted to prohibit such discrimination on the same grounds. \textit{Baehr}, 852 P.2d at 67.

\textsuperscript{288} See \textit{supra} Part III.A.

\textsuperscript{289} \textit{Dean}, 653 A.2d at 310 (interpreting the District of Columbia marriage statute narrowly).

\textsuperscript{290} \textit{Id.} at 361-62 (suggesting that the legislature, not the court, should legalize same-sex marriage).
\end{footnotesize}
that are open to same-sex marriage challenges.\textsuperscript{291}

Additionally, states that have enacted statutes to eliminate sexual orientation and sex discrimination\textsuperscript{292} should interpret those statutes broadly to fulfill the legislatures' purpose. Courts that, like the Dean court, are hesitant to legislate from the bench should not shy away from permitting same-sex marriage claims under legislation that mandates the elimination of discrimination based on sex and sexual orientation.

Even though it appears that the immediate solution for same-sex couples seeking marriage rights is to push for legislation, the controversy over same-sex marriages will ultimately have to be resolved by the Supreme Court. Discrimination against homosexuals in all aspects of life has divided the courts and will continue to divide the courts for years to come.\textsuperscript{293} Because the \textit{Bowers} Court decided the issue of consensual homosexual sodomy on due process grounds and not equal protection grounds, many issues affecting homosexuals remain unanswered, including whether homosexuals

\textsuperscript{291} These state provisions include: \textit{Cal. Const.} art. I, § 8 ("A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex "); \textit{Colo. Const.} art. II, § 29 ("Equality of rights under the law shall not be denied or abridged by the State of Colorado on account of sex"); \textit{Conn. Const.} art. I, § 20 ("No person shall be denied the equal protection of the law nor be subjected to discrimination because of sex"); \textit{Haw. Const.} art. I, § 6 (recognizing a right of privacy which "shall not be infringed without the showing of a compelling state interest"); \textit{Ill. Const.} art. I, §§ 17, 18 (prohibiting sex discrimination in employment and in property sale or rental, and sex discrimination generally); \textit{La. Const.} art. I, §§ 3 ("No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of sex"); \textit{MONT. Const.} art. I, § 4 ("The State shall not discriminate against any person in the exercise of his civil or political rights on account of sex"); \textit{N.H. Const.} art. I, § 2 ("Equality of rights under the law shall not be denied or abridged by this State on account of sex"); \textit{N.M. Const.} art. I, § 18 ("Equality under the law shall not be denied on account of the sex of any person."); \textit{Tex. Const.} art. I, § 9 ("Equality of rights under law shall not be denied or abridged because of sex"); \textit{Va. Const.} art. I, § 11 ("[T]he right to be free from any governmental discrimination upon the basis of sex shall not be abridged"); \textit{Wyo. Const.} art. I, § 3 ("The laws of this State affecting the political rights and privileges of its citizens shall be without distinction of sex").

\textsuperscript{292} \textit{See supra} notes 122-24 and accompanying text.

can be restricted from military service, employment or marriage.

If same-sex couples elect to continue to fight for same-sex marriage rights in the courts, same-sex litigants should consider advancing equal protection arguments based on gender discrimination rather than sexual orientation discrimination. First, it is debatable whether homosexuality is immutable and whether homosexuals are politically powerless. Second, the sexual orientation discrimination argument has already been rejected by a number of federal courts. Consequently, same-sex litigants may have more success in court by arguing that the prohibition of same-sex marriage is gender discrimination.

It is apparent that state legislatures and the courts must reevaluate the institution of marriage. Similarly, same-sex couples should consider whether it is worthwhile to exert all their time and energy trying to gain marriage rights when many heterosexual relationships fail after marriage. Several gay rights advocates

294. Ben-Shalom, 881 F.2d at 464-66 (reaffirming Army’s refusal to re-enlist an out lesbian); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (upholding dismissal of a homosexual male from the Department of Navy). But see Matovich v. Secretary of the Air Force, 591 F.2d 852, 857 (D.C. Cir. 1978) (requiring the Air Force to give a reasoned explanation for discharging a serviceman who informed his superiors he is a homosexual, when the person’s ability to serve is not diminished).

295. See Padula v. Webster, 822 F.2d 97, 104 (D.C. Cir. 1987) (permitting the continued exclusion of homosexual applicants for FBI employment). But cf. Pruitt v. Cheney, 953 F.2d 1160, 1166 n.5 (9th Cir. 1992) (arguing that active rational basis review should be used to examine claims of dismissal from employment based solely on employee’s homosexuality).

296. Dean, 653 A.2d at 307 (refusing same-sex marriage claim). But see Baehr v. Lewin, 852 F.2d 44, 67 (Haw. 1993) (holding that sex is a suspect category deserving strict scrutiny under the avail Constitution and requiring compelling state interest to deny a marriage license to same sex couples).

297. See supra notes 244-45 (discussing whether lesbians and gays are politically powerless and whether homosexuality is an immutable trait). Dr. Simon LeVay at the Salk Institute in La Jolla, California is a leading proponent of the “gay gene” theory. He claims he found a biological difference between the hypothalami of homosexual men as opposed to the hypothalami of heterosexual men. Michael Bailey & Richard Pillard, Are Some People Born Gay?, N.Y. TIMES, Dec. 17, 1991, at A21.

298. See, e.g., Dean, 653 A.2d at 340; High Tech Gays, 895 F.2d at 870-73; Ben-Shalom, 881 F.2d at 464-66; Woodward, 871 F.2d at 1076; Padula, 822 F.2d at 102-04.

299. See Koppelman, supra note 272, at 199 (arguing that discrimination against gays and lesbians is gender discrimination, and contending that this argument may eventually end discrimination against lesbians and gays because it is more likely to be accepted).
support this proposition.  

Furthermore, same-sex couples form successful and stable relationships without marriage. If same-sex couples can retain the same benefits of marriage through domestic partnership legislation, perhaps same-sex couples should seriously consider whether gay rights are advanced or hindered by entering the institution of marriage.

VI. CONCLUSION

Lesbians and gays are victims of pernicious, heterosexist discrimination which relegates these individuals to second-class citizenship. Consequently, the status of same-sex marriage rights remains at a crossroad. The ruling in *Dean* is a key decision in the movement to obtain same-sex marriage rights because it demonstrates that even after the decision in *Bowers*, a low blow to the gay and lesbian rights movement, same-sex couples may not obtain marriage rights even outside the privacy doctrine. The decision in *Baehr v. Lewin* as well as Judge Ferren's thoughtful dissent, signals judicial reconsideration of the inequity of continuing

300. Professor Nancy Polikoff argues, "I believe that the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism." Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle The Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535, 1536 (1993). See also Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 506 (1994) (arguing that marriage may not be the panacea that same-sex couples are searching for because "[i]t may very well create whole new levels of legal inequality ... the benefits associated with marriage are likely to come in a piecemeal fashion because ... marriage does not create social approval but merely stands in for it."

301. See Alma G. Lopez, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347, 388 n.204 (1993) (noting that homosexual relationships are just as likely to be permanent and successful as heterosexual relationships when the couples have the ability to communicate and compromise); Eskridge, supra note 24, at 1483 (noting that there are more long-term same-sex couples than ever before).
to treat same-sex couples as outcasts of society.\textsuperscript{302} The legalization of same-sex marriage is not a panacea for all of the inequalities that gays and lesbians encounter on a daily basis. However, lifting the ban on same-sex marriages will be one small step in the direction of attaining true equal rights.\textsuperscript{303} Many same-sex couples and heterosexual couples experience love and express love in many of the same ways.\textsuperscript{304} There is simply no justification for society or the courts to continue to deprive same-sex couples of the fulfillment that marriage can bring to a relationship.

Even with the removal of legal restrictions on interracial marriages in 1967, it still took time for society to edge closer to accepting interracial marriages.\textsuperscript{305} Homosexuals have been struggling for marriage rights since the 1970s.\textsuperscript{306} Hopefully, the
courts and society will someday embrace homosexual relationships and will lift the restriction on same-sex marriages. The *Romer* decision does not provide a clear answer as to whether same-sex marriage bans are unconstitutional, but the court’s language will undoubtedly ignite a debate over the constitutionality of such bans.