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Liberty and Marriage – *Baehr* and *Beyond*: Due Process in 1998

Lynne Marie Kohm*

I. INTRODUCTION

When John Stuart Mill wrote his treatise on liberty, he had in mind a sense of justice, fairness and equality.¹ Likewise, the founding fathers contemplated freedom, justice, and the inalienability of certain God-given rights when they penned the Declaration of Independence.² When the Supreme Court of the United States reviewed the concept of liberty in the context of marriage, it determined that such liberty extends to the fundamental right to marriage, regardless of race. *Loving v. Virginia* determined

* Copyright © 1998 by Lynn Marie Kohm. Assistant Professor, Regent University School of Law; B.A. 1980, Albany University; J.D. 1988, Syracuse University. This text was originally delivered in November, 1997 at *Law and the Politics of Marriage: Loving v. Virginia After Thirty Years*, at the Catholic University of America, co-sponsored by the Columbus School of Law, Howard University School of Law, and the J. Reuben Clark School of Law at Brigham Young University.

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This article is dedicated to my family, with whom it is a privilege to serve on the same team. Thanks to my husband, Joseph, for making it a joy to work together to build better children for our future, rather than wait for a better future for our children. Bo and Kathleen, with all my love and support, heaven is counting on you.

1. See generally JOHN STUART MILL, ON LIBERTY, (reprinted 1975, from the original in 1859). The work of enlightenment philosophers formed the basis for the American concept of liberty. Nonetheless, they have also been the basis for post modern American liberalism. See GERTRUDE HIMMELFARB, ON LIBERTY AND LIBERALISM: THE CASE OF JOHN STUART MILL (1974) (discussing Mill's balancing of liberty, freedom of action and individuality with fundamental principles of stable social unions); GERTRUDE HIMMELFARB, ON LOOKING INTO THE ABYSS: UNTIMELY THOUGHTS ON CULTURE AND SOCIETY 103 (1994) (suggesting that post modern liberalism of our culture is seduced by the individual's independence as a matter of right lacking the necessity of social balance, which Mill also promoted). See also JOHN STUART MILL, THE SUBJECTION OF WOMEN 427 (World's Classics ed. 1912) (1869) (stating Mill's claim that social relations between the sexes ought to be replaced by a principle of perfect equality).

2. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

that liberty necessitated the invalidation of state laws proscribing and punishing interracial marriage on due process grounds.³

Richard Loving, a white man, and Mildred Jetter, a black woman, both residents of Virginia, were married in the District of Columbia and returned to their home state to live.⁴ They were charged and convicted by the Commonwealth of Virginia of violating Virginia's miscegenation statutes banning interracial marriage.⁵ Their one-year jail sentences were suspended on the condition that they not return to Virginia for twenty five years, and they promptly moved to Washington, D.C.⁶ In the midst of the civil rights movement of the 1960s they appealed these convictions, and the United States Supreme Court heard their case.⁷ Holding that liberty and freedom to marry is indeed a fundamental right, the Court ruled that Virginia's statute was an unconstitutional denial of liberty.⁸ The Court observed:

We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race

These statutes . . . deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.⁹

The current question is whether that same liberty is extended to marriage regardless of the parties' genders. Thirty years after the *Loving* decision, the same legal arguments are being used to expand the fundamental right to marriage to include same-sex couples. These arguments rest on equal protection rationale, namely, discrimination based on gender.¹⁰ This article will review the due process argument offered in the context of same-sex marriage.

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

4. *Id.* at 2.

5. *Id.*

6. *Id.* Mildred preferred the opportunity to live near her family, and wrote to President Kennedy, asking for his assistance. The Justice Department took the case. Robert A. Pratt, *The Drama of Loving, Address at the Law and the Politics of Marriage: Loving v. Virginia After Thirty Years*, How. L.J. (forthcoming Spring 1998).

7. *Loving*, 388 U.S. at 2.

8. *Id.* at 10-14.

9. *Id.* at 11-12.

10. See Richard Duncan, Loving, *Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239 (1998).

Since liberty is inherent in any due process argument, the debate over same-sex marriage has spawned the following questions: What is meant by liberty in the context of state-sanctioned marriage today? What is meant by a right to marriage as a substantive due process right today? Or how broadly are courts to construe the substantive due process right to marriage?

These questions can only be answered with a thorough analysis of the Supreme Court's treatment of liberty and marriage in *Loving*, recent scholarship, and judicial treatment of liberty and due process in a current constitutional context. Others have clearly examined and explained the concept of marriage as a fundamental right.¹¹ We need to discuss what that means in 1998, particularly in light of the cases that are pending in courts across the nation. This article offers answers to these questions. It will also begin the discussion of how we can expect the Supreme Court to treat this issue in the future.

To fully understand this discussion, remember that there is no Family Law in the national, unified sense. Family law springs from several sources: the common law, state constitutional law and statutory law, federal administrative and regulatory law, and federal constitutional law.¹² The fifty states have their own sovereign rules on the subject, and individual state legislatures legislate many important family law relationships.¹³ Marriage is an institution that is generally and routinely regulated by state statute, because of the state's important nexus with the family unit and the general welfare of its citizens.¹⁴ As the United States Supreme Court has stated:

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which the parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obliga-

11. See, e.g., Lynn D. Wardle, *The Meaning of Loving: Liberty and Marriage*, HOW. L. J. (forthcoming Spring 1998) [hereinafter *The Meaning of Loving*]; and Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1 [hereinafter *A Critical Analysis*].

12. JOHN DEWITT GREGORY, PETER N. SWISHER, SHERYL L. SCHEIBLE-WOLF, UNDERSTANDING FAMILY LAW 1-3, 12-13 (1997) (adding to this list the role of the legal practitioner in shaping family law).

13. *Id.* at 12.

14. *Id.* at 2. See also *Simms v. Simms*, 175 U.S. 162, 167 (1899) ("The whole subject of the domestic relations of husband and wife . . . belongs to the laws of the State, and not the laws of the United States.").

tions it creates, its effects upon the property rights of both . . . and the acts which may constitute grounds for its dissolution.¹⁵

As *Loving* indicates, however, since marriage is a fundamental right subject to constitutional protection, a state cannot prohibit the exercise of this liberty in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments.¹⁶

Section II will examine the procedural posture of pending due process claims regarding marriage. Many of these cases are actually awaiting the final decision of the Hawaii judiciary in *Baehr v. Miike*.¹⁷ Section III will discuss the meaning and parameters of substantive due process at the end of 1997 in the context of the most current United States Supreme Court decision on the Due Process Clause. Section IV will address whether a fundamental right to same-sex marriage exists. In that context the article will discuss whether these standards require the recognition of a new fundamental right, or dictate that one already exists which is infringed upon by state prohibition. Section V will outline what is necessary to support the recognition of a new fundamental right and gives the strengths and weaknesses of the arguments and their analysis. Finally, section VI will conclude with a likely prospectus on the issue of liberty and due process in same-sex marriage claims, should such a claim ever reach the United States Supreme Court.

II. CURRENT STATE OF DUE PROCESS CLAIMS IN MARRIAGE

Under the Due Process Clause, people who are married or are interested in being joined in marriage have a constitutional liberty interest that must be recognized when state proceedings are instituted *against them*.¹⁸ This is what happened in *Loving*. It is another matter to discern whether individuals interested in being joined in state sanctioned marriage have a constitutional liberty interest that must be recognized when *they seek state*

15. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

16. *Loving*, 388 U.S. 1.

17. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *reconsideration granted in part by Baehr v. Lewin*, 875 P.2d 225, *appeal after remand*, *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996), *on remand to Baehr v. Miike*, No. Civ. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. 1996).

18. See also Joe A. Tucker, *Assimilation to the United States: A Study of the Adjustment of Status and the Immigration Marriage Fraud Statutes*, 7 YALE L. & POL'Y REV. 20, 83 (1989). Professor Tucker examines the constitutional due process implications for denial of hearing to resident aliens and their unadmitted spouses, stating that citizens and permanent residents may have the fundamental right to marry and associate with the mate of their choice without forfeiting residence in the United States. *Id.*

The situation presented by same-sex marriage arguments is neither analogous, nor similar, due to the fact that there is no state intervention in these relationships, but same sex couples are seeking to achieve state intervention in the recognition of their relationships. This comparison leads to the necessary discussion regarding what is needed to establish a new fundamental right. See Section V.

intervention to establish that they are entitled to such a right. This is the situation presented in *Baehr*. It is an altogether different matter when parties request state intervention, seeking to be afforded those rights, than the situation in *Loving*, where the state interfered in these fundamental relationships.¹⁹ This request for state intervention is not contemplated in due process; rather, the clause protects an individual from state intervention. Many same-sex marriage proponents confuse the two concepts and lump them all under due process protection.²⁰ Due process does not require states to sanction certain relationships, nor was substantive due process meant to deprive states of their rights to enact statutes reflecting that state's standard of conduct.

In cases pending, plaintiffs implore the state to establish this liberty on their behalf, arguing they have a fundamental right to such liberty. The central case of course is *Baehr v. Miike*.²¹ When Ninia Baehr and Genora Dancel were denied an application for a marriage license in Hawaii, they, along with two other couples, brought their claim to court, suing on grounds that requiring parties to a marriage to be of different sexes was sex discrimination under the Hawaii State Constitution and was a denial of

19. In his article, Professor Robert Pratt explains that the Lovings were actually arrested in their own bedroom one night when the Caroline County Sheriff and his deputies let themselves into the Loving home to make the arrest for violation of the Virginia statute. (A more explicit example of state intervention I cannot imagine.) Robert A. Pratt, *The Drama of Loving: An Interracial Couple Meets the Courts*, How. L. J. (forthcoming Spring 1998).

20. See 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. Lewin*, 32 J. FAM. L. 551 (1993-94) [hereinafter *Will Same-sex Marriages Be Recognized in Sister States?*]. Henson uses *Roe v. Wade* to demonstrate personal liberty and restrictions upon state action. *Id.* at 593 (quoting *Roe v. Wade*, 410 U.S. 113, 152 (1973)). Principles of substantive due process as protective of personal privacy do require freedom from state interference in intimate relationships, as in *Loving*. Due process protects one from governmental intrusion. Substantive due process, however, does not require states to sanctify relationships. Furthermore, Henson takes issue with the Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), stating that deciding cases based on majoritarian morality is specious at best. Henson, *Will Same-sex Marriages Be Recognized in Sister States?*, 32 J. FAM. L. 551, 595 (1993-94). On the contrary, *Bowers* is a mandate to limit the reach of substantive due process in the protection of private conduct. Conduct inherent in homosexual relationships (and thus in same-sex marriage) is not deeply rooted in this Nation's history and tradition, and the *Bowers* holding clarifies that no constitutional right to homosexual sodomy exists. 478 U.S. at 194. To twist substantive due process to afford protection to such conduct in a state sanctified marriage is to pull due process rationale out from under its judicial legacy. Lynn Wardle further clarifies the importance of the precedent in *Bowers* in his definitive article, *A Critical Analysis*, *supra* note 11, at 34-44. In the context of privacy and *Bowers* he states,

[t]he notion of a right to same-sex marriage . . . is unsupported by the principle of a zone of . . . sexual privacy. If privacy protects consenting adult sexual behavior, such behavior, under zone of privacy analysis, is also beyond the reach of government to endorse. Thus, the zone of privacy doctrine does not justify legalization of same-sex marriage.

Id. at 44 (quoting *Bowers*, 478 U.S. at 203).

21. 1996 WL 694235. For the case history, see *supra* note 17 and David Orgon Coolidge, *Playing the Loving Card: Same-sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201.

a fundamental right in violation of due process, equal protection and privacy.²² The Hawaii Supreme Court ruled that the couples could marry unless the State of Hawaii could show a compelling state interest in denying the plaintiffs the right to marry.²³ Upon reconsideration and appeal, the court appointed a commission to study the issue.²⁴

*Storrs v. Holcomb*²⁵ is a New York case involving two gay men who applied for a marriage license in 1995. The court stated that there need be only a rational relation between a similar classification and a legitimate state purpose.²⁶ The rational relationship test is the lowest level of due process scrutiny and is applied in the absence of a fundamental right. *Callender v. Corbett*²⁷ is a pending same-sex marriage case in Arizona, where the same-sex plaintiffs have announced they would not appeal but would await the outcome of the pending *Baehr* case.²⁸

Among the cases that have been decided previously are *Dean v. District of Columbia*,²⁹ *Baker v. Nelson*,³⁰ *Jones v. Hallahan*,³¹ and *Singer v. Hara*.³² Contending that the denial of a marriage license violated their fun-

22. *Baehr*, 852 P.2d at 44.

23. *Id.* at 60. In a concurring opinion, Chief Judge Burns of the Intermediate Court of Appeals, sitting in place of Chief Justice Lum who was recused, instructed the plaintiffs to prove that homosexuality was biologically fated. *Id.* at 69-70. The dissenting opinion of Justices Heen and Hayashi asserts that the *Baehr* majority sought to "manufacture a civil right which is unsupported by any precedent." *Id.* at 74. For a thorough treatment of the inherent contradiction in the opinions, see Lynne Marie Kohm, *A Reply to "Principles and Prejudice": Marriage and the Realization that Principles Win Over Political Will*, 22 J. CONTEMP. L. 293 (1996). See also Coolidge, *supra* note 21.

24. 875 P.2d 225. During this period of time, the Hawaii legislature passed HAW. REV. STAT. § 572-1 (1994), to be confirmed by referendum of the people in November of 1998.

25. 645 N.Y.S.2d 286 (N.Y. Sup. Ct. 1996).

26. *Id.* (relying on *In re Cooper*, 592 N.Y.S.2d 797 (N.Y. App. Div. 1993)).

27. No. 196666 (Ariz. Super. Ct. filed Apr. 13, 1994).

28. *Same-Sex Couples Drop Lawsuit, May Refile Marriage Case After Similar Hawaii Trial is Resolved*, ARIZ. REPUBLIC, May 22, 1994, at B3. Additionally, a same-sex marriage case was filed in Alaska Superior Court entitled *Brauser v. Bureau of Affairs*, as well as a case in Vermont titled *Baker v. Vermont*, but these cases are as yet unreported.

29. 653 A.2d 307 (D.C. 1995) (holding (1) District of Columbia marriage statute prohibited clerk from issuing marriage license to same sex couples; (2) clerk did not unlawfully discriminate against plaintiffs under District of Columbia Human Rights Act by refusing to issue them marriage license; and (3) same sex marriage was not fundamental right protected by Due Process Clause).

30. 191 N.W.2d 185 (Minn. 1971) (holding that statute governing marriage does not authorize marriage between persons of the same sex, such marriages are accordingly prohibited, and that such statute does not offend the First, Eighth, Ninth or Fourteenth Amendments of the United States Constitution), *appeal dismissed*, 409 U.S. 810 (1972) (dismissing appeal for want of substantial federal question).

31. 501 S.W.2d 588 (Ky. Ct. App. 1973). The court summarily dismissed the appellants' claims, as "[m]arriage was a custom long before the state commenced to issue licenses for that purpose." *Id.* at 589. They added that the relationship proposed by these petitioners does not authorize the issuance of a marriage license because what they propose is not a marriage. *Id.* at 590.

32. 522 P.2d 1187 (Wash. Ct. App. 1974) (statutory prohibition against same-sex marriage did not violate constitutional provision that equality of rights and responsibility under the law shall not be denied or abridged on account of sex). The conclusions in *Singer* were similar to those reached in *Jones*.

damental rights, the petitioners in *Baker* relied, as do petitioners in *Baehr*, on *Loving v. Virginia*.³³ The Minnesota Supreme Court rejected these arguments:

Loving does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in commonsense [sic] and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.³⁴

The Minnesota Supreme Court declared that the Due Process Clause is not a charter for restructuring marriage by judicial legislation.³⁵ Because marriage is an institution based on the nation's deeply rooted history and tradition, an asserted contemporary concept of marriage could not expand the reach of a fundamental rights interest.³⁶

A three-judge panel in *Dean* unanimously arrived at the conclusion that the Due Process Clause does not protect a fundamental right for same-sex marriage.³⁷ The *Baehr* ruling reviewed the due process and equal protection claims, finding that an abridgment of the right based on sex or sexual orientation could, in fact, be afforded heightened or strict scrutiny, at least under Hawaii constitutional law.³⁸ The other forty-nine states have not found any state or federal constitutional right to same-sex mar-

33. 388 U.S. 1 (1967).

34. 191 N.W.2d at 187.

35. *Id.* at 186.

36. *Id.* The court supported its conclusion by stating that marriage is "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

37. 653 A.2d 307, 331 (D.C. 1995). Professor William N. Eskridge, Jr., of Georgetown University Law School, a prominent gay rights proponent, argued the case for the appellants, with plaintiff Craig Dean as co-counsel on the brief. See *D.C. Court of Appeals Rejects Gay Marriage Appeal*, LESBIAN/GAY LAW NOTES 13, 14 (Arthur Leonard ed.) (Feb. 1995).

38. 852 P.2d 44, 68 (Haw. 1993). The Hawaii State Constitution explicitly prohibits discrimination based on "sex." HAW. CONST. art. 1. In the original ruling, Justices Heen and Hayashi joined in a dissenting opinion that clearly stated why a prohibition on same-sex marriage did not violate the Hawaii Constitution.

[These same-sex couples] complain that because they are not allowed to legalize their relationships, they are denied a multitude of statutory benefits conferred upon spouses in a legal marriage. . . . Those benefits can be conferred without rooting out the very essence of a legal marriage. This Court should not manufacture a civil right which is unsupported by any precedent, and whose legal incidents—the entitlement to those statutory benefits—will reach beyond the right to enter into legal marriage and overturn long standing public policy encompassing other areas of public concern. This decision will have far-reaching and grave repercussions on the finances and policies of the governments and industry of this state and all the other states in the country.

Id. at 74 (footnote omitted) (Heen, J., dissenting).

The Hawaii legislature has responded with a proposal to afford marriage-like benefits to same-sex couples, but will retain the legislative power to limit the licensure of marriage to opposite sex couples only. See generally Kohm, *supra* note 23.

riage—Hawaii stands alone.³⁹ Because substantive due process claims invoke fundamental rights to privacy, marriage and intimate association, same-sex marriage proponents routinely use due process arguments to challenge the boundaries of marriage. The concept of due process has evolved over the twentieth century, and it is of critical necessity to determine its meaning today.

III. WHAT IS DUE PROCESS IN 1998?

Over the two centuries of American government, due process has been divided into two components: procedural and substantive. Procedural due process refers to citizens rights to have notice and a hearing of his or her grievances before government intervention or interference abridges the individual's firmly established rights.⁴⁰ Substantive due process rights refer to more comprehensive and subjective perspectives of liberty and have largely become based in privacy rights.⁴¹

The essence of due process safeguards has always been to protect individual liberty *against* government action.⁴² The concepts used in *Loving* are being used today to argue that marriage is a fundamental right that cannot be denied based on gender, just as *Loving* pronounced that liberty in marriage cannot be denied because of race.

The central problem in making the *Loving* analogy to same-sex marriage petitions is that race is afforded the strictest scrutiny for constitutional protection, while gender or sex is not and has never been afforded the strictest scrutiny under the federal constitution.⁴³ Rather, gender is afforded a heightened level of scrutiny, an intermediate level of review between the rational basis test and the compelling state interest standard.⁴⁴ This standard provides that any restriction based on sex must be substan-

39. For a discussion of the uniqueness of the State of Hawaii as the situs for a same-sex marriage action, see Coolidge, *supra* note 21.

40. See LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 682-83 (1988).

41. See Moore v. East Cleveland, 431 U.S. 494 (1977), and Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1017 (demonstrating that Moore is an especially dramatic indication of the rebirth of substantive due process doctrine as a preferred method of analyzing privacy cases).

42. Professor Lynn D. Wardle of Brigham Young University has given an overview of due process safeguards in the context of *Loving*. Wardle, *The Meaning of Loving*, *supra* note 11.

43. Suspect classifications are generally those which discriminate on the basis of race, alienage, or national origin, and receive strict scrutiny. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41 (1985).

44. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (a landmark sex discrimination case recognizing some sort of intermediate level of scrutiny for gender based classifications). See *infra* notes 90 and 102.

tially related to an important governmental objective.⁴⁵ This is important in beginning to understand that *Baehr* is clearly not analogous to *Loving*.⁴⁶

To justify its decision, the Court in *Loving* added to the wealth of judicial support for the institution of marriage in the context of liberty that holds this nation together. After citing to the landmark cases of *Skinner v. Oklahoma*⁴⁷ and *Maynard v. Hill*,⁴⁸ the *Loving* Court emphatically stated:

To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.⁴⁹

Liberty inherent in the choice to marry cannot be proscribed based on race. Martin Luther King, Jr. articulated the standard of liberty set for America by Jefferson and affirmed by Lincoln in the Emancipation Proclamation.⁵⁰ The standard for liberty was set long ago and was doc-

45. *Craig*, 429 U.S. at 197.

46. See also Wardle, *A Critical Analysis*, *supra* note 11 at 75-87, where Professor Wardle discusses the fact that race and homosexual behavior are not equivalent legal categories in the section entitled "Why the *Loving* Analogy Fails."

The underlying meaning of the term "sex" as used in *Baehr* is sexual preference. The classification of sexual preference has never been afforded any heightened scrutiny whatsoever, but merely calls for the rational basis test. This concept is explained further in Section IV.

47. 316 U.S. 535, 544 (1942). *Loving v. Virginia* stated that "[m]arriage is one of basic civil rights of man, fundamental to our very existence and survival." 388 U.S. 1, 12 (1967) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 544 (1942)).

48. 125 U.S. 190 (1888).

49. 388 U.S. at 12. These are the last comments the Court makes before ultimately ordering that the convictions of the parties be reversed. *Id.*

50. See MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.*, 14-15 (James M. Washington ed. 1986). More specifically, King stated:

I never intend to adjust myself to the tragic effects of the methods of physical violence and to tragic militarism. I call upon you to be maladjusted to such things. I call upon you to be as maladjusted as Amos who in the midst of the injustices of his day cried out in words that echo across the generation, "Let judgment run down like waters and righteousness like a mighty stream." As maladjusted as Abraham Lincoln who had the vision to see that this nation could not exist half slave and half free. As maladjusted as Jefferson, who in the midst of an age amazingly adjusted to slavery could cry out, "All men are created equal and are endowed by their Creator with certain inalienable rights and that among these are life, liberty and the pursuit of happiness." As maladjusted as Jesus of Nazareth who dreamed a dream of the fatherhood of God and the brotherhood of man. God grant that we will be so maladjusted that we will be able to go out and

umented in the early history of this nation, but the Civil Rights Movement illustrated the fact that we as a nation were not living that standard. It was not the standard that needed updating. It was man's need to conform to the standard.⁵¹

In the same vein, we need to review, now thirty years later, the standard of marriage as exclusively between a man and a woman. Should such a model or pattern continue to be the standard? Or is that standard errant, having evolved? Or are we simply having difficulty living up to that standard? A contemporary analysis of due process is welcomed to help determine whether the standard of liberty itself is evolving.

The most current Supreme Court case focusing its decision and rationale on due process is *Washington v. Glucksberg*,⁵² which is supported by a host of family law cases.⁵³ *Glucksberg* was the *Compassion in Dying*⁵⁴ case that was ultimately heard by the Court in January of 1997 with a companion case, *Vacco v. Quill*.⁵⁵ *Glucksberg* focused primarily on due process as it extends to a liberty interest in the right to die. The plaintiffs in the original case were a non-profit organization called Compassion in Dying, Dr. Harold Glucksberg, three of his colleagues, and three terminally ill patients (who died before the final outcome of the case).⁵⁶ They brought the action against the State of Washington for a declaratory judgment regarding the constitutionality of the state's ban on assisted suicide as a violation of liberty and the Due Process Clause.⁵⁷

"The plaintiffs asserted the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician assisted sui-

change our world and our civilization. And then we will be able to move from the bleak and desolate midnight of man's inhumanity to man to the bright and glittering daybreak of freedom and justice.

Id.

51. Cal Thomas, *Bill Clinton's Evolutionary Morals*, THE VIRGINIAN-PILOT, Nov. 13, 1997, at B11 (referring to the fact that Jefferson owned slaves and illustrating the fact that his actions do not match the liberty standards he drafted for the new nation).

52. 117 S. Ct. 2258 (1997).

53. The opinion and citations in *Glucksberg* appear to be a review of classic constitutional family law cases, including *Loving v. Virginia*, 388 U.S. 1 (1967), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Moore v. East Cleveland*, 431 U.S. 494 (1977), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973). See *Glucksberg*, 117 S. Ct. at 2267, 2271 n.19.

54. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996). The en banc Court of Appeals emphasized *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and *Cruzan v. Director, Mo. Dept. Of Health*, 497 U.S. 261 (1990).

55. 117 S. Ct. 2258 (1997). *Vacco* dealt chiefly with the equal protection claims presented by assisted suicide proponents.

56. *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994).

57. *Id.* See also 117 S. Ct. at 2258.

cide.”⁵⁸ After the district court agreed that the Washington statute did indeed violate the Due Process Clause, a panel for the Court of Appeals for the Ninth Circuit reversed.⁵⁹ Upon rehearing en banc, the Ninth Circuit reversed the panel’s decision, affirming the District Court.⁶⁰

The State of Washington appealed to the Supreme Court of the United States, asking the Court to consider whether liberty includes the right to suicide and, derivatively, assisted suicide.⁶¹ The resulting opinion is the most current constitutional description of the use and rationale of due process in the law today. In a very simple and quite traditional due process analysis, the Supreme Court concluded in a unanimous decision that there is no liberty interest in a right to die, reversing the decision of the en banc Court of Appeals.⁶² “[O]ur decisions lead us to conclude that the asserted ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.”⁶³ This request to find a fundamental right in assisted suicide is strikingly similar to that presented by the same-sex marriage proponents who are asking for state intervention to consider whether liberty includes the right to same-sex marriage. In what was possibly the most closely watched case of 1997, the legal arguments in *Glucksberg* focused on the Due Process Clause.

The Justices in *Glucksberg* used a two-pronged analysis to examine the asserted liberty interest.⁶⁴ The respondents, Dr. Glucksberg, his colleagues, and Compassion in Dying, relied on *Casey* (which gave the Court the opportunity to further clarify the parameters of that decision) and asserted that a personal choice to commit physician assisted suicide was protected by the Due Process Clause of the Fourteenth Amendment.⁶⁵ The Supreme Court of the United States was not persuaded. The Court said:

We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices. In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States’ assisted suicide bans are not innovations. Rather, they are longstanding expressions of the States’ commitment to the protection and preservation of all human life.⁶⁶

58. 117 S. Ct. at 2261 (quoting *Compassion in Dying*, 850 F. Supp. at 1459).

59. *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995).

60. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996).

61. *Washington v. Glucksberg*, 117 S. Ct. at 2261-62 (1997).

62. *Id.* at 2271, 2275.

63. *Id.* at 2271.

64. *Id.* at 2262-75.

65. *Id.*

66. *Id.* at 2262-63 (citations omitted).

The Court emphasized that condemnation of the inferred conduct (suicide or assisted suicide) is a "consistent and enduring theme[] of our philosophical, legal and cultural heritages."⁶⁷ The Court explained its use of a two pronged analysis early in the opinion.

First, the Court has regularly observed that the Clause specially protects those fundamental rights and liberties which are deeply rooted in this Nation's history and tradition.⁶⁸ It gave for example, *Moore v. East Cleveland*, a case about family limitations on residence including extended family (a grandmother).⁶⁹ In that case the Court struck down a zoning ordinance which prohibited extended family from being part of the definition of family in the term "single family dwelling."⁷⁰ The Court found such a restriction to be a violation of substantive due process protections,⁷¹ noting the importance of a careful respect for the teachings of history.⁷² Applying this concept to *Glucksberg*, the Court restated the longstanding history of condemnation (and criminalization) of suicide and assisting in suicide, declaring that such conduct is clearly not in line with deeply rooted history and tradition.⁷³

Second, the Court required a careful description of the asserted fundamental liberty interest.⁷⁴ The Court gave as an example *Reno v. Flores*, where the Court stated "the Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'"⁷⁵ The Court explained the need for this careful description:

In our view, however, the development of this Court's substantive due process jurisprudence, described briefly above, has been a process whereby the outlines of the liberty specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due process judicial reviews. In addition, by establishing a threshold require-

67. *Id.* at 2263.

68. *Id.* at 2268.

69. 431 U.S. 494 (1977).

70. *Id.* at 506.

71. *Id.*

72. *Id.* at 503-504 (explaining that constitutional recognition extends to the tradition of grandparents sharing a household with parents and children).

73. 117 S. Ct. at 2269.

74. *Id.* at 2268.

75. *Id.* (quoting *Reno*, 507 U.S. at 302 (1993)).

ment—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.⁷⁶

In language emphasizing that the Court was indeed looking for a clear description of the asserted right, it found there was no clear description of the asserted liberty interest.⁷⁷

Turning to the claim at issue here, the Court of Appeals stated that “[p]roperly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one’s death,” or, in other words, “[i]s there a right to die?,” . . . and “the liberty to shape death.” As noted above, we have a tradition of carefully formulating the interest at stake in substantive-due-process cases.⁷⁸

The Court’s tradition of careful formulation of the liberty interest was not met. It found that there was no clear description of a constitutional right to die. More particularly, the Court made a very clear distinction between competent rejection of life support assistance and a right to commit suicide with another’s assistance.⁷⁹

Loving, by contrast, had no concern over the careful description of interracial marriage because nothing about *Loving* was contrary to history, nor did such an assertion require any new clear description of marriage.⁸⁰ There have been many attempts to make *Loving* apply to a range of marriage regulations,⁸¹ but none of those endeavors have prevailed. The analysis of the due process claims presented in *Baehr* is clearer in the light *Glucksberg* sheds on asserted liberty interests.

IV. THE ISSUES PRESENTED

The issues presented by *Baehr* are: (1) whether a fundamental right to marry a person of the same-sex exists, or (2) whether a fundamental right to state recognition and protection of same-sex unions that the partners

76. *Id.*

77. *Id.* at 2270.

78. *Id.* at 2268-69 (citations omitted).

79. *Id.* at 2270. The “clear description” that the Court requires carries a generalization that the concept must be implicitly based in history.

80. 388 U.S. 1, 12 (1967).

81. For example, the *Loving* analogy has been applied to state regulation prohibiting polygamy, *Potter v. Murray*, 760 F.2d 1065 (10th Cir. 1985), and before *Baehr* to the different sexes requirement in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). See generally Wardle, *A Critical Analysis*, *supra* note 11. See also Kohm, *supra* note 23, at 277-300.

consider to be marriages exists when the federal constitution requires that liberty cannot be infringed upon without the due process of law.⁸²

There is no express provision in the United States Constitution protecting same-sex marriage. Indeed, there is no constitutional provision protecting marriage in any form. Marriage is above and beyond the Bill of Rights.⁸³ Moreover, legislatures can govern marriage without constitutional violations.⁸⁴ Same-sex marriage proponents rely on this fact, arguing that state regulations limiting marriage to a legally sanctioned union between a man and a woman deprives them of that fundamental right. And as has been discussed, constitutional case law has held that marriage is a fundamental right and a protected liberty interest.⁸⁵ Therefore, do laws that refuse to recognize a fundamental right infringe on the Fourteenth Amendment guarantee that no state may deprive any person of liberty without due process of law? The Court stated in *Glucksberg*:

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the liberty specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *Id. Eisenstadt v. Baird*, 405 U.S. 438 (1972);

82. Memorandum from John Tuskey, Senior Research Counsel, The American Center for Law and Justice (ACLJ Memorandum) to Jay Sekulow, Chief Counsel, The American Center for Law and Justice 10 (July 23, 1997) (on file with author). The ACLJ is a public interest law firm dedicated to preserving religious freedom. The purpose of this memo was to brief the following question: "Can the proposed amendment to the Hawaii Constitution reserving to the legislature the power to limit marriage to opposite sex couples survive a challenge under the Due Process and Equal Protection Clauses of the United States Constitution?" *Id.* at 1.

83. Marriage, and the concept of the union of two individuals in a meaningful lifetime relationship, was originally designed by a Supreme Being before codification of the law of marriage.

84. See *Maynard v. Hill*, 125 U.S. 190, 207-208 (1888). See also *Sosna v. Iowa*, 419 U.S. 393 (1975) (upholding state statutory requirements for residency in filing for divorce, and recognizing a state interest in upholding its own requirements for marriage and divorce); *Simms v. Simms*, 175 U.S. 162, 167 (1899) ("The whole subject of the domestic relations of husband and wife ... belongs to the laws of the State, and not the laws of the United States.").

85. *Loving*, 388 U.S. at 11-12; *Zablocki v. Redhail*, 434 U.S. 374 (1978) (requiring less burdensome state enforcement than prohibiting the marriage of a father who had not paid child support).

to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Casey*, *supra*.⁸⁶

With that background, the Court in *Glucksberg* rejected the asserted right, applying the standard requiring a rational relation to a legitimate government purpose in the substantive due process analysis.⁸⁷ The Court stated:

We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.

But we “ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field,” lest the liberty protected by the Due Process Clause be subtly transferred into the policy preferences of the members of this Court.⁸⁸

In applying this approach of history and a careful description, the Court concluded:

[W]e are confronted with a consistent and a most universal tradition that has long rejected the asserted right and continues explicitly to reject it today To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.⁸⁹

The Court found no fundamental right to die. Therefore, the least amount of scrutiny was applied to the claim in the absence of a fundamental right to die.⁹⁰ Once the Court concluded that the asserted liberty was not

86. *Glucksberg*, 117 S. Ct. at 2267. Note the extensive display and rich application of family law cases to what may not seem like a family law case.

87. *Id.* at 2271.

88. *Id.* at 2267-68 (citations omitted).

89. *Id.* at 2269.

90. An intermediate level of constitutional scrutiny exists for gender based classifications. *See infra* note 103. Furthermore, a federal court has previously ruled that sexual behavior is not a category against which the United States as an employer cannot discriminate, as such behavior has never been afforded a heightened standard of review. *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990). Sexual behavior has yet to rise to the heightened middle-tier scrutiny of gender, *see Wardle, supra* note 11, *A Critical Analysis*, at 83, and “certainly will not rise to be afforded the strictest scrutiny now enjoyed only by the classifications of race, alienage and national origin.” Kohm, *supra* note 23, at 319.

a fundamental right, government regulation of the asserted liberty interest need only be rationally related to legitimate government interests.⁹¹

Baehr asserts a fundamental right to same-sex marriage. Because same-sex marriage is not deeply rooted in history and tradition and requires a new description, a new fundamental right must be recognized. The applicant couples in *Baehr* have admitted that they were asking the court to recognize a new fundamental right.⁹²

What lurks behind the analysis are those subjective elements that are necessarily present in due process judicial review.⁹³ The Court in *Glucksberg* implied that some personal decisions may be identified and explicitly recognized by the Court as deeply rooted in this nation's history and tradition, and which may therefore lead to recognition of new fundamental rights, citing *Roe v. Wade* and *Casey*.⁹⁴ Further explaining this position, the Court clarified its previous language in *Casey*, which effectively back-peddled from a strict scrutiny application to the abortion right, to an undue burden standard of review to any regulation on the right to abortion.⁹⁵ The use of *Casey* allowed the Court to state that previously discerned fundamental rights found in autonomy "do[] not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."⁹⁶ This may appear to give the Court latitude to swing either way on *Baehr*. In determining what the petitioners in *Baehr* must demonstrate to support the recognition of a new fundamental right, how-

91. 117 S. Ct. 2258, 2271 (1997).

92. 852 P.2d 44, 57 (Haw. 1993).

93. 117 S. Ct. at 2268.

94. *Id.* at 2270 (citing *Roe*, 410 U.S. 113 (1973) (finding a fundamental right to abortion) and *Casey*, 505 U.S. 833 (1992) (allowing state regulated limitations on that fundamental right)).

95. 117 S. Ct. at 2271. The *Glucksberg* opinion reads:

Similarly, respondents emphasize the statement in *Casey* that:

"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Citing *Casey* at 851. Brief for Respondents 12. By choosing this language, the Court's opinion in *Casey* described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and tradition, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment. The opinion moved from the recognition that liberty necessarily includes freedom of conscience and belief about ultimate consideration to the observation that "though the abortion decision may originate within the zone of conscience and belief, it is *more than a philosophic exercise*." *Casey*, 505 U.S. at 852, 112 S. Ct. at 2807 (emphasis added). That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-35, 93 S. Ct. 1278, 1296-1298, 36 L.Ed.2d 16 (1973), and *Casey* did not suggest otherwise.

96. *Id.*

ever, very little of this subjective element remains.⁹⁷ *Baehr* asks for judicial discernment and recognition of that new fundamental right.

V. WHAT IS NECESSARY TO SUPPORT THE RECOGNITION OF A NEW FUNDAMENTAL RIGHT?

This analysis will be referred to as the implicit/explicit approach. The implicit element refers to the requirement that the right be deeply rooted in history and tradition. The explicit element refers to the necessity of a clear description of the asserted fundamental liberty interest. Using this implicit/explicit approach laid out in *Glucksberg*, it is clear that *Baehr* would not have the solid constitutional foundation that *Loving* enjoys under this approach.

The arguments for a fundamental right to inter-racial marriage begin with the implicit prong that a right to marry is fundamental, and protection of this right is deeply rooted in our nation's history and tradition. The explicit prong lies in the fact that race is expressly afforded the strictest scrutiny, and has been carefully articulated by statute and case law in the past. These premises lead to the natural conclusion that marriage cannot be prohibited based on race. This is *Loving* in a nutshell.

The arguments for a fundamental right to same-sex marriage would begin with the implicit assumption that the right to marry is fundamental, based in privacy, liberty and autonomy (*Casey*, *Roe*, and *Loving* would be cited), and deeply rooted in our nation's history and tradition. The explicit prong would need to do one of three things: either (a) show there is a careful description of the asserted liberty (*i.e.* same-sex marriage would be recognized as a careful description rather than an anathema), (b) articulate a careful description of marriage as not based on the parties different sexes, or (c) show that sex or gender is an expressly forbidden discrimination and must be afforded the strictest scrutiny.⁹⁸ Thus, if any one of these three explicit alternatives can be met, there is no need for a new fundamental right. These are the strengths of the argument, and they are not compelling.

97. It should be noted that an exception to the rule based on the "subjective elements" would be required for drawing an analogy between *Loving* and *Baehr*, and thus between race and gender. Because the concept of marriage is defined by the requirement that parties be of different sexes, marriage would need to be defined as a fundamental right, regardless of sexual preference, which would then also be a landmark in gender law as well. This is unlikely in light of *Bowers v. Hardwick*, 478 U.S. 186 (1986), *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990), and even *Romer v. Evans*, 116 S. Ct. 1620 (1996). See generally Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, The Culture War, and Romer v. Evans*, 72 NOTRE DAME L. REV. 345 (1997).

98. This is the most pragmatic argument in the Hawaii litigation, based on Hawaii's explicit delineation that discrimination based on sex is constitutionally forbidden, and thus afforded the strictest scrutiny by the Court of that State.

The weaknesses of the argument ultimately disable the reasoning and rationale for same-sex marriage. First, under the implicit prong, same-sex marriage was not contemplated in history and tradition and is not a relationship deeply rooted in our nation's history and tradition. This gravely weakens the fundamental right premise. The right to marry currently does not encompass same-sex marriage, and the concept of marriage carries an implicit assumption that marriage can only occur between a man and a woman⁹⁹ Thus, a same-sex union would be rendered a non-marriage.¹⁰⁰

Secondly, under the explicit prong, sex (or gender)¹⁰¹ is not afforded the strictest scrutiny under federal constitutional law, but rather some middle level of heightened scrutiny at best.¹⁰² If sexual orientation, instead of gender, is the gauge, a more fatal result is likely because sexual orientation has yet to rise to the middle tier of scrutiny that gender enjoys.¹⁰³ Then comes the hurdle of carefully describing the asserted right. There would need to be some description of the right to not be discriminated against based on gender, sex, sexual orientation or sexual preference in choosing a marriage partner. This would have to be combined with a description of this new concept of marriage.

99. *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971) (concluding that "all [definitions] recognize that [marriage] is a union or contract between a man and a woman."). When any marriage is missing a basic requirement, e.g. of suitable age, unrelated by blood, one at a time, of different sexes, it is termed a "non-marriage."

100. *Id.* A sex change operation that took place after the marriage did not change the fact that parties of the same sex cannot complete a marital union by nature, and such is determined at the time of the marriage agreement, not after. *Id.*

101. Because the Hawaii State Constitution prohibits discrimination based on sex, the petitioners in *Baehr* use sex interchangeably with gender and use both terms as substitutes for sexual behavior, to persuade the court that each category is protected in Hawaii by the word "sex" in the Hawaii Constitution. Therefore, any "sex discrimination argument only survives if sexual behavior is interpreted to mean sex." Kohm, *supra* note 23, at 319. "Gender" cannot equal homosexual behavior. See also Richard F. Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL OF RIGHTS J. 147, 155-164 (1998).

102. I refer to the "middle-level scrutiny" standard from *Craig v. Boren*, 429 U.S. 190 (1976), where the court settled on an "intermediate" level of scrutiny for gender based classifications. The opinion does not explicitly announce the application of a new standard different from the "strict scrutiny" test, which is reserved for fundamental rights and suspect classes, or from the traditional "mere rationality" test.

103. *Id.* *Bowers v. Hardwick*, 478 U.S. 186 (1986), confirms this, stating also that fundamental rights are only those deeply rooted in this nation's history and tradition. (*Bowers* also cites *Moore v. East Cleveland* extensively.) The *Bowers* majority clearly stated their reluctance to recognize new rights as well:

The Court is most vulnerable and it comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clauses of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental.

Asking the government to recognize a right neither contemplated in our nation's history or tradition, nor clearly described (as something other than a state sanctioned domestic partnership) leaves the argument in ruin, thus requiring more creativity than the Court can supply. With both the implicit and explicit prongs unsatisfied, states would be required to apply the traditional "mere rationality" test to any restrictions placed on marriage. That is indeed what happened to the right to die argument in *Glucksberg*. The same result may befall the right to same-sex marriage argument in *Baehr*, should the case ever reach the Supreme Court.

Some might suggest that Justice Souter's concurrence in the right-to-die cases could function as an opening for same-sex marriage rights in the future. In his concurring opinion to *Glucksberg*, Justice Souter seemed to suggest that he would embrace a substantive due process analysis that examines whether the state statute in question sets up an arbitrary imposition or purposeless restraint.¹⁰⁴ Relying chiefly on Justice Harlan's dissent in *Poe v. Ullman*,¹⁰⁵ Souter distinguished his concurrence from the Court's plurality opinion which clearly desired to block potential exploitation of the Due Process Clause.¹⁰⁶ It is over this very point that the Court emphasized the development of this Court's substantive due process jurisprudence as that which has at least been carefully refined by examples deeply rooted in the nation's history and legal tradition.¹⁰⁷ As the Court attempted to rein in the subjective elements,¹⁰⁸ Justice Souter wanted to supply modern justification for substantive due process review from Harlan's dissent in *Poe*.¹⁰⁹

The opinion of the Court noted that they did rely on Justice Harlan's dissent from *Poe* in the *Casey* decision.¹¹⁰ Specifically, the opinion stated, "but, as *Flores* demonstrates, we did not in so doing jettison our estab-

104. 117 S. Ct. at 2275 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

105. 367 U.S. 497 (1961). In *Poe*, a physician and two married couples challenged Connecticut's anti-contraception laws. The Court ruled that the case was not one that presented a "clear threat of prosecution," and therefore refused to hear the case on appeal. Justice Harlan dissented, contending that the Connecticut statute violated the due process interest in marital privacy. *Id.* Harlan later wrote a simple concurrence in the *Griswold* case (being somewhat vindicated by the Court's ruling in favor of marital privacy) where he developed the "ordered liberty approach." 381 U.S. 479, 496 (1965).

106. 117 S. Ct. at 2262 (referring to "longstanding expressions"), 2268 (referring to "our established method"), 2271 (referring to the fact that this due process assertion does not warrant a "sweeping conclusion"), 2277 (referring to a strong "resistance").

107. *Id.* at 2268.

108. *Id.*

109. *Id.* at 2277. See also *id.* at 2268 n.17 (where the Justices remind Justice Souter that *Poe* was not even cited in *Reno v. Flores*, 507 U.S. 292 (1993)). Nor was it cited in *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278-79 (1990), the most heavily cited authority in the *Glucksberg* opinion, where the court determined in *Cruzan* that rights "so rooted in history, tradition, and practice . . . require special protection under the Fourteenth Amendment." *Cruzan*, at 278-279.

110. 117 S. Ct. at 2268 n.17 (citing 505 U.S. at 848-850).

lished approach. Indeed, to read such a radical move into the Court's opinion in *Casey* would seem to fly in the face of that opinion's emphasis on stare decisis."¹¹¹ Recognizing the potential for abuse of the subjective elements using *Casey* and *Poe*, the Court distinguished its opinion in *Glucksberg*.

With a lengthy concurrence embodying a heavy emphasis on the facts presented by the respondent in *Glucksberg*, Justice Souter laid out a case for confining the hastening of death to a physician-assisted occurrence only that would indeed be under the imposition of reasonable regulation by the state.¹¹² Strengthening this position with the concept that due process has historically protected unremunerated rights,¹¹³ Souter emphasized that

In my judgment, the importance of the individual interest here, as within that class of "certain interests" demanding careful scrutiny of the State's contrary claim cannot be gainsaid. Whether that interest might in some circumstances, or at some time, be seen as "fundamental" to the degree entitled to prevail is not, however, a conclusion that I need draw here, for I am satisfied that the State's interests described in the following section are sufficiently serious to defeat the present claim that its law is arbitrary or purposeless.¹¹⁴

The Court's unanimous opinion, however, supports the notion that if Souter favors same-sex marriage rights in a future case, he will be alone in his use of a due process argument to buttress such a claim because of the Court's clearly stated resistance to the expansion of fundamental liberty interests.¹¹⁵ The holdings of the right-to-die cases present a due process argument against same-sex marriage.

Further analysis of the arguments can be done in light of *Shahar v. Bowers*¹¹⁶ and *Turner v. Safley*.¹¹⁷ Some constitutional law theorists may

111. *Id.* (citing 505 U.S. at 854-869).

112. *Id.* at 2286-88. Souter uses an analogy to *Roe*, 410 U.S. 113. "Like the decision to commit suicide, the decision to abort potential life can be made irresponsibly and under the influence of others, and yet the Court has held in the abortion cases that physicians are fit assistants." 117 S. Ct. at 2288.

113. *Id.* at 2288.

114. *Id.* at 2290 (citations omitted). Justice Souter's concurrence in *Vacco v. Quill*, 117 S. Ct. 2293, 2302, likewise acquiesces to the lack of arbitrariness of the opinion under the due process standard.

Souter often used phrases in both the *Vacco* and the *Glucksberg* concurrences such as "at this time," *Vacco*, 117 S. Ct. at 2302, and "might in some circumstances, or at some time," *Glucksberg*, 117 S. Ct. at 2290. Such phrases generally give cause for future hope on the part of the losing parties. Regardless, Souter's concurrence in *Glucksberg* might suggest that any argument in favor of same-sex marriage would have a stronger base in *Casey*. Otherwise, *Glucksberg* has little to nothing to offer claims to marriage by same-sex parties, even in Souter's estimation.

115. 117 S. Ct. at 2268, 2271.

116. 70 F.3d 1218 (11th Cir. 1995), *vacated*, 78 F.3d 499 (11th Cir. 1996), and *reh' g en*

argue that *Shahar*'s panel decision evidences some support for the liberty argument sketched above, based in recognition of the right to intimate association.¹¹⁸ *Shahar* involved the withdrawal of an employment offer by the State Attorney General's office upon it learning of plaintiff's plan to participate in a marriage-like ceremony with her lesbian lover, Greenfield.¹¹⁹ The argument articulates a constitutional protection for same-sex marriages. "Where intimacy and personal identity are so closely intertwined . . . between Shahar and Greenfield, the core values of the intimate association right are at stake."¹²⁰ Another well reasoned argument sounds like this:

Despite the panel's decision in *Shahar*, it is unlikely for two reasons that courts will decide that a fundamental right to same-sex marriage exists. First, all the Supreme Court's cases involving the fundamental right to marry have involved marriages between men and women. Second, the Supreme Court's recent decision in *Glucksberg* signals a retreat from Casey's broad language concerning liberty and the limits of government action. *Glucksberg* emphasized the importance of examining our nation's history and tradition in determining fundamental rights. *Glucksberg* also emphasized that the Court would view asserted rights claims specifically rather than as part of some general right to privacy or autonomy. The asserted right to marry a person of the same sex has no basis in this nation's history and tradition. Moreover, even if the Due Process Clause prevents states from prohibiting homosexuals from forming marriage-like unions, the clause does not require states to recognize those unions by giving them legal recognition and benefits.¹²¹

*Turner v. Safley*¹²² demonstrated that other attributes of marriage deemed important by the Supreme Court outweigh any interest a state would have in promoting procreation by prohibiting same-gender unions. With a litany of critical characteristics that remain in marriage, aside from the physical and biological aspects of that relationship, the Court declared that a state could not withhold from an inmate the right to marry.¹²³ On the other hand, the Court has also historically tied the fundamental right to

banc, 114 F.3d 1097 (11th Cir. 1997).

117. 482 U.S. 78 (1987).

118. 114 F.3d 1097.

119. 70 F.3d at 1220.

120. *Id.* at 1229.

121. ACLJ Memorandum, *supra* note 82, at 15 (citations omitted).

122. 482 U.S. 78 (1987).

123. *Id.*

marriage to the activities associated with procreating and raising children.¹²⁴ It remains a fact that only reproductive cells from heterosexual couples can accomplish procreation.

By tying the right to marriage to the right to procreate, the Court's right to marry cases underscore the context in which they arise—in cases involving the union of men and women. Nothing in those cases suggests that the Court was contemplating any right to same-sex marriage. To draw support for same-sex marriage from those cases would be to rip those cases from their factual context.¹²⁵

The *Glucksberg* opinion demonstrated that the Supreme Court will require litigants to show that the alleged right they assert, which will have to be described with specificity, is deeply rooted in our nation's legal history and tradition. *Glucksberg* indicated that the Supreme Court has an outright and formidable reluctance to find a new fundamental right absent firm grounding in history and tradition, and a clear description of an asserted liberty interest.

VI. CONCLUSION AND PROSPECTUS

In American law there is no liberty interest in same-sex marriage. There is no violation of due process in regulating marriage as the union of a man and a woman. There is no fundamental right to marry another individual of the same gender. The fundamental right to marry has always contemplated unions between men and women. Other relationship formation has not been legally recognized as marriage, but in fact has been termed a non-marriage.¹²⁶ A potential Supreme Court opinion in *Baehr* might read something like this:

We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices. In almost every State—indeed, in almost every western democracy—marriage implicitly is defined by and limited to a union between a man and a woman. The States' marriage regula-

124. Professor Wardle reviews these and other cases in his article, *The Meaning of Loving*, *supra* note 11. See e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding a liberty interest protected by the Fourteenth Amendment which encompasses the right "to marry, establish a home, and bring up children."); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (recognizing family life and procreation as liberties protected by due process); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing the right of married people to use contraceptives based in a liberty interest); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (protecting the fundamental freedom to procreate from state infringement).

125. ACLJ Memorandum, *supra* note 82, at 18.

126. *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971).

tions are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of the institution of marriage. Moreover, the majority of States in this country have laws imposing some sort of criminal penalty on such requisite (homosexual) sexual conduct. (See *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989) The primary and most reliable indication of a national consensus is . . . the pattern of enacted laws.) Indeed, opposition to and denunciation of homosexuality—the physical basis for same sex marriage—are consistent and enduring themes of our philosophical, legal, and cultural heritages.¹²⁷

The importance of the implicit prong cannot be underestimated. *Glucksberg* illustrated the Supreme Court's reluctance to find new fundamental rights absent the firm grounding in history and tradition. Same-sex marriage proponents have made attempts to overcome apparent history and tradition with massaged history.¹²⁸ Likewise, the importance of the explicit prong cannot be underestimated. There needs to be a careful articulation and description of the asserted liberty interest. The problem with a clear description of assisted suicide was in the necessity that the liberty specially protected by the Clause includes a right to commit suicide which, itself, includes a right to assistance in doing so. The problem with a clear description of same-sex marriage is that the right itself requires a right to sodomy and homosexual sexual activity within the carefully crafted description of the asserted liberty. As with assistance in suicide, these are not constitutionally protected privacy rights.¹²⁹

The last hope for *Baehr* and same-sex marriage proponents in the quest for due process and liberty in same-sex marriage is the power of subjective elements and judicial discretion that the Supreme Court used in *Roe* and in *Casey* and distinguished in *Glucksberg*. This would only be possible with some new existential or ontological view of marriage found by the Justices. *Loving* and *Glucksberg* have clearly given the standard for liberty and demonstrate the influence and power of clear legal views that the Justices hold. *Baehr* and same-sex marriage proponents envision societal and cultural approbation of homosexuality. They would like to accomplish this with the use of liberty and the Due Process Clause. But even a move from prohibition to tolerance of committed homosexual relationships does not, however, amount to an endorsement. Such approbation will be difficult, if not impossible, to gain.

127. This is an adaptation of *Glucksberg*, 117 S. Ct. 2258, 2262-63 (1997). *Casey*, *Loving*, *Moore*, *Bowers* and *Glucksberg* citations would be included.

128. See Kohm, *supra* note 23, at 323-324.

129. *Bowers v. Hardwick*, 478 U.S. 186 (1986). See also *Duncan*, *supra* note 101, at 154 (emphasizing that *Bowers* is the law, and inferior courts are required to follow it).

Still today the brilliant truth and purity of *Loving* are undeniable and incorruptible. Liberty manifested itself, and due process protected Richard and Mildred Loving from further state interference in their marital union. Thirty years later, the historical case of *Loving v. Virginia* stands alone in its articulation of the primacy of marriage, and its wisdom and insight into racial concerns. Now in 1998, the Due Process Clause of the Fourteenth Amendment cannot be tortured to demand state intervention in recognizing and sanctioning a new marriage relationship between Ninia Baehr and Genora Dancel. Liberty manifests itself to protect against redefinition of the marital union. *Baehr* will not have the legacy that *Loving* enjoys, as liberty and due process assertions are beyond *Baehr* and the rights asserted in same-sex marriage claims.