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**THE LAWRENCE READER:
STANDHARDT AND LEWIS ON WOMEN IN LOVE**

MARK STRASSER*

I. INTRODUCTION

In *Lawrence v. Texas*, the Supreme Court struck down a Texas statute criminalizing same-sex sodomy.¹ The *Lawrence* Court made clear that it was not deciding whether the United States Constitution required recognizing same-sex unions,² although Justice Scalia in dissent suggested that the *Lawrence* majority had paved the way for establishing that such unions were constitutionally protected.³ Since that decision was issued, at least two courts in two different states have examined whether same-sex marriage bans violate federal constitutional guarantees.⁴ While both courts expressly mention *Lawrence*, neither analyzes the most important aspects of the *Lawrence* decision. Both courts offer analyses of the right to privacy which cannot account for those liberties that the Court has found protected by that right, even bracketing the liberty which the Court found protected in *Lawrence*. Both courts offer rationales which are so implausible that they would likely never be offered in any other context. While *Lawrence* did not hold that same-sex marriages must be recognized, the refusal of these courts to take the case seriously suggests that the decision may be very important as cases continue to be brought and courts begin to acknowledge that *Lawrence* has important implications for the right to privacy generally and the right to marry in particular.

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1. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

2. *Id.* (noting that the case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”).

3. *Id.* at 604 (Scalia, J., dissenting) (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”).

4. See *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Law Div. Nov. 5, 2003). In *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), the Supreme Judicial Court of Massachusetts held that the state’s same-sex marriage ban was unconstitutional on state constitutional grounds.

Part II of this article discusses *Standhardt v. Superior Court*, in which an Arizona appellate court held that the state's same-sex marriage ban passed constitutional muster.⁵ This part shows that the *Standhardt* court not only misconstrued the relevant constitutional jurisprudence, but state public policy as well. Ironically, although it upheld the statute, the *Standhardt* court offered powerful ammunition to those seeking to establish that same-sex unions are protected by the Federal Constitution, since the decision suggests that such bans undermine rather than promote *both* the interests of the state and the interests of those families whose members would benefit if such relationships were legally recognized.

Part III of this article discusses *Lewis v. Harris*, in which a New Jersey trial court rejected a constitutional challenge to New Jersey's same-sex marriage ban.⁶ The court offered an essentialist understanding of marriage as a union of one man and one woman,⁷ thereby ignoring developments that had already taken place before the decision had been written. Further, the court implied that the right to marry a same-sex partner did not implicate an important interest, thereby suggesting either that same-sex couples are different from different-sex couples in very significant, albeit non-disclosed, ways or that the right to marry does not implicate an important interest for *any* couples, current right to privacy jurisprudence notwithstanding. The *Lewis* court's reasoning is no more persuasive than is the *Standhardt* court's, and the decision by each court to pay mere lip service to *Lawrence* suggests that the decision may significantly transform the law once courts start to take it seriously.

This article concludes by pointing to some of the different facets of *Lawrence* which must be considered when addressing the constitutionality of same-sex marriage bans. While *Lawrence* was notably silent about whether the Constitution protects such unions, the *Lawrence* Court began a new chapter in right to privacy jurisprudence which calls out for examination. It can only be hoped that other courts will reject the example offered by the *Standhardt* and *Lewis* courts and, instead, heed that call.

II. STANDHARDT ON THE CONSTITUTIONALITY OF SAME-SEX MARRIAGE PROHIBITIONS

In *Standhardt v. Superior Court*, an Arizona appellate court examined whether the state's same-sex marriage ban violated federal constitutional guarantees.⁸ The court correctly understood that the *Lawrence* Court did not

5. *Standhardt*, 77 P.3d at 465.

6. *Lewis*, 2003 WL 23191114, at *28.

7. *Id.* at *3.

8. *Standhardt*, 77 P.3d at 453.

hold that the Federal Constitution required the recognition of same-sex marriage, but seemed to ignore much of the rest of the decision.⁹ The court seemed to come close to admitting that its own rationales for upholding the ban defied both logic and common sense,¹⁰ but refused to take the final step in its own analysis and instead upheld the rationality of the statute.¹¹ While the court's refusal to strike down the state's same-sex marriage ban was itself unsurprising, the court's willingness to offer rationales which would have been embarrassing to offer in any other context was quite surprising—many readers of the opinion will wonder whether the court was unaware of the implications of its own opinion or, instead, was aware but unwilling for other reasons to reach the result dictated by the very arguments offered.

A. *On Right to Privacy Jurisprudence*

When the Clerk of the Superior Court denied a marriage license to Harold Standhardt and Tod Keltner three days after the United States Supreme Court issued *Lawrence*,¹² they challenged the denial as a violation of their state and federal constitutional rights.¹³ Standhardt and Keltner petitioned the court of appeals to compel the Clerk to issue the license and to declare the state's same-sex marriage ban unconstitutional.¹⁴ The court accepted jurisdiction, reasoning that there were no issues of fact that needed to be established below and that the review of the trial court ruling on a constitutional challenge to a statute would be *de novo* in any event.¹⁵

The United States Supreme Court recognized in *Zablocki v. Redhail* that “the right to marry is of fundamental importance for all individuals”¹⁶ and the *Standhardt* court began its analysis by recognizing that the right to marry is a fundamental right.¹⁷ The issue before the court was not whether individuals

9. *Id.* at 456 (“Neither the United States Supreme Court nor any Arizona court has explicitly recognized that the fundamental right to marry includes the freedom to choose a same-sex spouse.”).

10. *See, e.g., id.* at 462-63 (noting that the State is allegedly reserving marriage for different-sex couples for the sake of children but same-sex couples also have children who need and deserve the benefits that would accrue were their parents permitted to marry).

11. *Id.* at 463 (finding that though the “line drawn between couples who marry (opposite-sex) and those who may not (same-sex) may result in some inequity for children raised by same-sex couples, such inequity is insufficient to negate the State’s link between opposite-sex marriage, procreation, and child-rearing”).

12. *Id.* at 453.

13. *Standhardt*, 77 P.3d at 453.

14. *Id.* at 454.

15. *Id.*

16. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

17. *Standhardt*, 77 P.3d at 455 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

with a same-sex orientation have the right to marry, but whether the right to marry includes the right to marry someone of the same sex.¹⁸

Perhaps it could be argued that same-sex relationships do not have value and thus should not be recognized by the state. Yet, the *Lawrence* Court made clear why such a claim and analysis are mistaken. For example, as the *Standhardt* court noted, the *Lawrence* Court “spoke of a person’s liberty interest to engage in same-gender sexual relations . . . as ‘one element in a personal bond that is more enduring,’”¹⁹ implying that the sexual relations were protected, at least in part, because of the role that they can play in such relationships. The *Lawrence* Court made clear that “adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”²⁰ Such reasoning at least suggests that the personal bond is itself constitutionally protected.

Recognizing that the *Lawrence* Court “acknowledg[ed] a homosexual person’s right to define his or her own existence, and achieve the type of individual fulfillment that is a hallmark of a free society, by entering a homosexual relationship,” the *Standhardt* court declined to recognize that “such a right includes the choice to enter a state-sanctioned, same-sex marriage.”²¹ Certainly, the court was correct that *Lawrence* did not establish the right to marry a same-sex partner,²² but that does not end the inquiry. The relevant issue is whether the reasoning of *Lawrence* implies that the right to marry a same-sex partner is also constitutionally protected.

Justice Scalia suggested in his *Lawrence* dissent that the Court’s “opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”²³ Such an observation would seem to merit discussion and analysis. Instead, the *Standhardt* court summarily dismissed Justice Scalia’s observation by noting that “with due respect to Justice Scalia, we do not read the Court’s comments so broadly,”²⁴ and by suggesting that *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁵ does not stand for the proposition that couples have “the choice to enter a state-

18. *Id.* at 454.

19. *Id.* at 457 (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

20. *Lawrence*, 539 U.S. at 567.

21. *Standhardt*, 77 P.3d at 457.

22. *Id.* See also *Lawrence*, 539 U.S. at 578 (noting that case does not involve whether the “government must give formal recognition to any relationship that homosexual persons seek to enter”).

23. *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

24. *Standhardt*, 77 P.3d at 457 n.7.

25. 505 U.S. 833 (1992).

sanctioned, same-sex marriage.”²⁶ Yet, Justice Scalia was not implying that *Casey* or *Lawrence* stated that same-sex couples had the right to marry but, instead, that after *Lawrence* the Court would be unable to offer a plausible explanation for why such unions were not protected by the Federal Constitution.²⁷

The *Standhardt* court offered an analysis of *Lawrence* which yielded the surprising conclusion that the decision undermined the claim that same-sex unions were protected by the Federal Constitution.²⁸ To reach that result, the court had to misconstrue not only *Lawrence* but the entire right to privacy jurisprudence.

The *Standhardt* court pointed out that although the *Lawrence* Court struck down the Texas same-sex sodomy statute, the Court “did not declare that participation in such conduct is a fundamental right.”²⁹ In an amazing interpretation of the existing jurisprudence, the *Standhardt* court then concluded, “If the Court did not view such an intimate expression of the bond securing a homosexual relationship to be a fundamental right, we must reject any notion that the Court intended to confer such status on the right to secure state-sanctioned recognition of such a union.”³⁰ The *Standhardt* court thereby made several mistakes. First, after *Lawrence*, the statutes abridging the right to engage in adult, consensual relations³¹ will now be given close scrutiny because the Court has found this interest to be protected by the right to privacy—the right to engage in adult, consensual, non-marital relations may now be constitutionally protected to the same extent as, for example, the right to have access to contraception.³² Second, the *Standhardt* court assumes that an interest will be deemed fundamental only if it is so described in the very decision in which the Court finds it constitutionally protected. Yet, if that were so, many of the interests which are now considered fundamental would not be so considered.³³ Third, even if the right to engage in non-marital relations with a same-sex partner were not a fundamental right, this would hardly mean that

26. *Standhardt*, 77 P.3d at 457.

27. *Lawrence*, 539 U.S. at 604-05 (Scalia, J., dissenting).

28. *Standhardt*, 77 P.3d at 457.

29. *Id.*

30. *Id.*

31. The Court may well not include the right to commit adultery within this right, since that might be thought an “abuse of an institution the law protects.” See *Lawrence*, 539 U.S. at 567.

32. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing that right of married persons to have access to contraception is protected by the right to privacy). See also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (establishing rights of single persons to have access to contraception).

33. See *infra* notes 34-80 and accompanying text.

the right to marry a same-sex partner would therefore also not be a fundamental right.

B. How Fundamental Is the Right to Engage in Non-Marital Relations?

The *Standhardt* court made much of Justice Scalia's point in his *Lawrence* dissent³⁴ that the *Lawrence* Court did not once "describe homosexual sodomy as a 'fundamental right' or a 'fundamental liberty interest.'"³⁵ Justice Scalia then claimed that according to the *Lawrence* majority "the application of Texas's statute to petitioners' conduct fails the rational-basis test"³⁶ because the "Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."³⁷ He thus implied that the State's interest at issue in *Lawrence* was not a particularly important one.

Yet, the Court's failure to describe same-sex sodomy as a fundamental right does not have the import that Justice Scalia or the *Standhardt* court implies. Many of the interests that are now recognized as fundamental were not so described in the opinions in which their constitutionally protected status was recognized. Rather, the Court simply noted, as it did in *Lawrence*, that the state's interests were not sufficiently robust to justify the state's intrusion into these protected areas.³⁸

In *Roe v. Wade* the Court explained that "only personal rights that can be deemed 'fundamental' . . . are included in this guarantee of personal privacy."³⁹ The *Roe* Court explained that the rights protected by the right to privacy include marriage,⁴⁰ procreation,⁴¹ contraception,⁴² family relationships,⁴³ and child rearing and education.⁴⁴ Yet, many of these rights implicating fundamental interests were not described as fundamental in the decisions in which they were found to be constitutionally protected.

Consider, for example, the right to make decisions about one's child's education. In *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, the Court examined and struck down an Oregon law precluding parents

34. *Standhardt*, 77 P.3d at 457.

35. *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting).

36. *Id.*

37. *Id.*

38. *Id.* at 578.

39. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

40. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

41. *Id.* (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942)).

42. *Id.* (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972)).

43. *Id.* at 153 (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

44. *Roe*, 410 U.S. at 153 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) and *Meyer v. Nebraska*, 262 U.S. 390, 393 (1923)).

from sending their children to private school.⁴⁵ The Court found that such a law “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”⁴⁶ However, the *Pierce* Court did not describe the right or interest at issue as fundamental. The Court noted that “rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.”⁴⁷

By the same token, when the Court in *Meyer v. Nebraska* struck down a law which prohibited teaching modern foreign languages to children who had not yet passed the eighth grade,⁴⁸ the Court noted that the liberty to direct the education of one’s children “may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.”⁴⁹ While the *Meyer* Court suggested that “the individual has certain fundamental rights which must be respected,”⁵⁰ the Court did not state that parents have a fundamental right not to have their children precluded from learning modern foreign languages.

In *Prince v. Massachusetts*, the Court recognized that “the custody, care and nurture of the child reside first in the parents” and that there is a “private realm of family life which the state cannot enter.”⁵¹ However, the *Prince* Court did not describe the interest implicated in that decision as fundamental and, indeed, upheld the State’s power to prevent a child from handing out the Jehovah’s Witness publications in exchange for donations.⁵²

In *Griswold v. Connecticut*, the Court spoke eloquently about marriage, describing it as “a coming together for better or for worse,” and something which is “intimate to the degree of being sacred.”⁵³ The Court further described it as “an association for as noble a purpose as any involved in our prior decisions.”⁵⁴ However, the *Griswold* Court was not asked to decide whether marriage was a fundamental interest, but rather whether access to contraception for married couples involved a fundamental interest. While striking down the Connecticut law that limited access to contraception for

45. *Pierce*, 268 U.S. at 530 n.1, 534.

46. *Id.* at 534-35.

47. *Id.* at 535.

48. *Meyer*, 262 U.S. at 401-02.

49. *Id.* at 399-400.

50. *Id.* at 401.

51. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

52. *Id.* at 168-69.

53. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

54. *Id.*

married couples, the Court nowhere described the right to access contraception as a fundamental right.⁵⁵

In *Eisenstadt v. Baird*, the Court addressed whether unmarried persons have a right to have access to contraception.⁵⁶ The court below had suggested that a fundamental human right was at issue,⁵⁷ but the *Eisenstadt* Court expressly declined to address that issue.⁵⁸ Instead, the Court merely suggested that “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the married and unmarried alike.”⁵⁹ Once again, the Court nowhere mentioned that the right to access contraception was a fundamental interest, liberty or right.

The *Roe* Court noted that “a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution,”⁶⁰ that this “right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy,”⁶¹ and that “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’⁶² are included in this guarantee of privacy.”⁶³ Here, the Court suggests but never explicitly states that the right to an abortion is a fundamental right.

The *Lawrence* Court suggested that the conduct at issue before the Court was protected by the Due Process Clause’s protection of liberty.⁶⁴ To reach that result, the Court cited *Pierce*, *Meyer*, *Griswold*, *Eisenstadt* and *Roe*, the very cases which establish the contours of the right to privacy.⁶⁵ By doing so, the Court suggests that the right to engage in adult, consensual relations has the same kind of constitutional protection as do those other interests, although the Court never states that the right to engage in adult, consensual relations is fundamental.

While Justice Scalia and the *Standhardt* court are correct that the *Lawrence* Court never described the right to engage in adult, consensual relations as fundamental, that hardly establishes that such relations are not due constitutional protection. Most of the fundamental rights protected by the right of privacy were not called fundamental in the decisions in which the Court established that they were constitutionally protected, and thus the Court’s

55. *Id.*

56. *Eisenstadt v. Baird*, 405 U.S. 438, 441-42 (1972).

57. *Id.* at 453.

58. *Id.* (“We need not and do not . . . decide that important question in this case . . .”).

59. *Id.*

60. *Roe v. Wade*, 410 U.S. 113, 152 (1972).

61. *Id.* at 153.

62. *Id.* at 152 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

63. *Id.*

64. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

65. *Id.* at 565-66.

failure to describe adult, consensual non-marital relations as fundamental hardly has the significance suggested by the *Standhardt* court.

C. *What Test Determines Whether an Interest Is Fundamental?*

One of the reasons that the *Standhardt* court upheld the state's same-sex marriage ban was that "same-sex marriages are neither deeply rooted in the legal and social history of our Nation . . . nor are they implicit in the concept of ordered liberty."⁶⁶ Yet, one of the questions at hand is whether that is the correct test for determining which rights are fundamental. A brief consideration of the right to privacy jurisprudence or of those rights which are included within the right to privacy suggests that this is simply the wrong test for determining whether a right is fundamental.

Consider the *Roe* Court's suggestion that only rights that are fundamental *or* implicit in the concept of ordered liberty fall within the right to privacy.⁶⁷ By using the word "or" rather than "and," the Court was implicitly rejecting that the criterion for determining whether something was fundamental was whether it was implicit in the concept of ordered liberty. Rather, the Court was suggesting that an interest in having an abortion, for example, could be fundamental even if it was not implicit in the concept of ordered liberty.

It should hardly be surprising that the *Roe* Court was unwilling to say that the test for determining fundamental rights was whether the interest at issue was implicit in the concept of ordered liberty or even that it was deeply rooted in the Nation's history and traditions, even if one believes that abortion could not be so described.⁶⁸ The prohibition at issue in *Griswold* had been on the books for over eighty years⁶⁹ and the prohibition at issue in *Eisenstadt* had been on the books for over ninety years.⁷⁰ Neither could plausibly have been described as fundamental or protected by the right to privacy were the relevant tests whether the interest at issue was implicit in the concept of ordered liberty or even deeply rooted in the Nation's history and traditions.

The *Standhardt* court suggested that those rights and interests which are accorded heightened protection are those "freedoms protected in the Bill of Rights" and those "rights and interests . . . 'deeply rooted in this Nation's

66. *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P. 3d 451, 459 (Ariz. Ct. App. 2003).

67. *Roe*, 410 U.S. at 152.

68. *Id.* at 174 (Rehnquist, J., dissenting) (suggesting that abortion was not so deeply rooted in the Nation's history and traditions as to be fundamental).

69. *Poe v. Ullman*, 367 U.S. 497, 501 (1961) ("The Connecticut law prohibiting the use of contraceptives has been on the state books since 1879.").

70. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) ("Section 21 stems from Mass. Stat. 1879, c. 159, §1, which prohibited without exception, distribution of articles intended to be used as contraceptives.").

history and tradition,' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"⁷¹ Yet, such a test cannot account for those interests which the Supreme Court has previously found fundamental. Not only can it not account for the rights to contraception and abortion, but it cannot account for the right to marry someone of a different race.⁷²

Certainly, the history and traditions of the Nation do not protect the right to engage in non-marital relations, regardless of whether the couple having those relations is composed of individuals of the same sex or of different sexes. However, the *Lawrence* Court nonetheless held that the Constitution protected the right to engage in such relations.⁷³ While the *Lawrence* Court did not "describe homosexual sodomy as a 'fundamental right' or a 'fundamental liberty interest,'"⁷⁴ the Court nonetheless cited several due process cases to ground its holding,⁷⁵ thereby suggesting but not stating that the interest at issue was of fundamental importance.

The *Lawrence* Court suggested that the "Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."⁷⁶ However, this suggestion does not entail that the statute furthers no legitimate interest at all. It could simply indicate that even if the state has a legitimate interest at stake, that interest is not sufficiently important to justify the intrusion into the individuals' private lives. The *Lawrence* Court's comment about the Texas law is very similar to the *Pierce* Court's suggestion that the Oregon law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."⁷⁷ It is also similar to the *Meyer* Court's suggestion that that the liberty to direct the education of one's children "may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."⁷⁸ Basically, in each of

71. *Standhardt*, 77 P.3d at 455 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)).

72. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down Virginia anti-miscegenation law). Virginia's anti-miscegenation laws traced back to the colonial period. *Id.* at 6.

73. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

74. *Id.* at 594 (Scalia, J., dissenting).

75. *Id.* at 564-65 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973), and *Carey v. Population Services, Int'l*, 431 U.S. 678 (1977)).

76. *Id.* at 578.

77. *Pierce*, 268 U.S. at 534-35.

78. *Meyer*, 262 U.S. at 399-400.

these cases, the Court suggested that the state's interests were not sufficiently strong to justify the intrusion that the state was making.

The current right to privacy jurisprudence cannot be understood as somehow having employed the "deeply rooted in this Nation's history and tradition" or the "implicit in the concept of ordered liberty" tests for determining fundamental rights. Were that not reason enough to eschew the test used by the *Standhardt* court, the *Lawrence* Court gave an additional reason to reject that test. Instead of looking to those practices which have historically been protected, the *Lawrence* Court noted that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."⁷⁹ Indeed, the Court almost issued an invitation for "persons in every generation . . . [to] invoke its [the Due Process Clause's] principles in their own search for greater freedom."⁸⁰ Thus, the *Standhardt* court erred in a number of respects. First, the *Lawrence* Court was simply acting as the Court had in the past when, without expressly specifying that the interest at issue was fundamental, it nonetheless recognized that the interest at issue was protected by the Fourteenth Amendment's protection of liberty and thus not permissibly prohibited by the state. Second, the test suggested by the *Standhardt* court for determining which rights are fundamental is simply the wrong test, since it cannot account for the interests that the Court has recognized as fundamental.

D. *Prioritizing Relationships over Sexual Relations*

Suppose that the *Standhardt* court had been correct that the *Lawrence* Court was not recognizing that adult, consensual, non-marital relations implicate a fundamental interest protected by the right to privacy but instead was merely suggesting that the Texas statute could not survive rational basis scrutiny. A separate issue is whether the *Standhardt* court was correct in stating that if the same-sex relations did not implicate a fundamental interest, then same-sex relationships could not either.

Consider *McLaughlin v. Florida*⁸¹ and *Loving v. Virginia*.⁸² In *McLaughlin*, the Court struck down a Florida law which more severely punished interracial, non-marital relations than intra-racial, non-marital relations,⁸³ while expressly refusing to address the state's interracial marriage ban.⁸⁴ The Court reasoned that the State's public policy might be "adequately

79. *Lawrence*, 539 U.S. at 579.

80. *Id.*

81. 379 U.S. 184 (1964).

82. 388 U.S. 1 (1967).

83. *McLaughlin*, 379 U.S. at 196.

84. *Id.* ("We accordingly invalidate § 798.05 without expressing any views about the State's prohibition of interracial marriage . . .").

served by the general, neutral, and existing ban on illicit behavior as by a provision . . . which singles out the promiscuous interracial couple for special statutory treatment.”⁸⁵ Thus, the *McLaughlin* Court did not suggest that the Constitution precluded the State from prohibiting non-marital sexual relations—indeed, the Court was sympathetic to the State’s wish to “prevent breaches of the basic concepts of sexual decency” given that it dealt with “illicit extramarital and premarital promiscuity.”⁸⁶ Nonetheless, the Court suggested that the Constitution precluded the State from treating interracial and intra-racial non-marital coupling differently.⁸⁷ A mere three years later in *Loving*, the Court cited *McLaughlin* with approval and struck down Virginia’s anti-miscegenation law.⁸⁸ Thus, the *Loving* Court recognized the fundamental nature of the right to marry a different-race partner⁸⁹ without also recognizing a fundamental right to engage in non-marital sexual relations with someone of the same or a different race, although the Court cited *McLaughlin* with approval for the proposition that interracial couples could not be punished more severely than intra-racial couples for engaging in non-marital relations.⁹⁰

There was no contradiction in the *Loving* Court’s striking down an anti-miscegenation law while permitting even-handed punishment of fornication and adultery. The Court has long privileged marriage and family over sexual relations *per se*. In *Skinner v. Oklahoma ex rel. Williamson*, the Court had noted that “[m]arriage and procreation are fundamental to the very existence and survival of the race.”⁹¹ Even earlier, in *Meyer v. Nebraska*, the Court had explained in an oft-quoted passage that liberty protected by the Due Process Clause protects “the right of the individual . . . to marry, establish a home and bring up children.”⁹² Given the Court’s long-standing privileging of relationships, especially marriage, over non-marital sexual relations, at least two points might be made: (1) Even if same-sex relations were not recognized as protected by the right to privacy, that would not entail that same-sex marriage would similarly not be protected. As *McLaughlin* and *Loving* illustrate, the Court might well uphold even-handed punishment of non-marital relations while nonetheless recognizing that the right to marry is protected by the right to privacy.⁹³ (2) The *Lawrence* Court held that the conduct at issue in *Lawrence* was protected by the Due Process Clause of the Fourteenth

85. *Id.*

86. *Id.* at 193.

87. *Id.* at 196.

88. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

89. *Id.* at 12.

90. *See id.* at 10-11.

91. *Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

92. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

93. *See supra* notes 81-90 and accompanying text.

Amendment.⁹⁴ Were the Court to hold that the right to engage in same-sex non-marital relations is protected by the Fourteenth Amendment but that the right to marry a same-sex partner is not, it would invert the traditional prioritization given to marriage and family. It is perhaps for this reason, among others, that Justice Scalia rhetorically asked in his *Lawrence* dissent, “[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘[t]he liberty protected by the Constitution?’”⁹⁵

E. On Loving

The *Standhardt* court understood that *Loving* might seem problematic for its analysis, since the *Loving* Court struck down a Virginia statute which had existed in varying forms since colonial times.⁹⁶ Indeed, the *Standhardt* court expressly recognized that “historical custom supported such anti-miscegenation laws,”⁹⁷ understanding that interracial marriage was not implicit in the concept of ordered liberty nor deeply rooted in the Nation’s history and traditions, but was still protected as a fundamental right. Nonetheless, the court implied that *Loving* supported its position because that decision merely “expanded the traditional scope of the fundamental right to marry.”⁹⁸

The *Standhardt* court distinguished same-sex marriage from interracial marriage, arguing that implicit in *Loving* “is the notion that marriage, often linked to procreation, is a union forged between one man and one woman.”⁹⁹ Yet, this is at best a misleading characterization of the opinion. While it is accurate to suggest that the *Loving* Court was not addressing same-sex marriage, it is inaccurate to suggest that the restriction is implicit in the decision, as if the decision’s reasoning and holding would somehow have been undermined had the Court not been restricting its focus to different-sex marriage.

Suppose, for example, that Virginia were to recognize same-sex marriages but were additionally to say that such marriages could only be celebrated by individuals of the same race. Were such a statute to come before the Supreme Court, the Court would strike it down, quoting the following from the *Loving* opinion in support: “There can be no doubt that restricting the freedom to

94. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

95. *Id.* at 605 (Scalia, J., dissenting).

96. *See Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 541 (Ariz. Ct. App. 2003); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (striking down Virginia’s anti-miscegenation law). *Id.* at 6 (noting that Virginia’s anti-miscegenation laws traced back to colonial period).

97. *Standhardt*, 77 P.3d at 458.

98. *Id.*

99. *Id.*

marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”¹⁰⁰

Insofar as the *Standhardt* court reads *Loving* as “anchored to the concept of marriage as a union involving persons of the opposite sex,”¹⁰¹ it presumably is not talking about the part of the opinion which addresses the impermissibility of restricting marriage on the basis of the races of the would-be marital parties. Rather, the court must be referring only to the part of *Loving* in which the Court recognizes that interracial marriage bans deprive interracial couples “of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.”¹⁰² Yet, here too language employed by the *Loving* Court would support the impermissibility of same-sex marriage bans. For example, the *Loving* Court noted that 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.”¹⁰³ Yet, the right to marry a same-sex partner might also be essential to the pursuit of happiness; thus, this aspect of *Loving* supports rather than undermines that same-sex marriage, like interracial marriage, is protected by the Federal Constitution.

The *Standhardt* court seemed to believe that implicit in *Loving* was the view that marriage is tied to procreation in an important way.¹⁰⁴ As support for that interpretation, the *Standhardt* court noted that the *Loving* Court, quoting *Skinner*, described marriage as “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”¹⁰⁵ Ironically, the *Standhardt* court misunderstood the import of the *Loving* Court’s having selectively quoted from *Skinner*¹⁰⁶ and would have been offering an at best implausible interpretation even if the court had been correct that *Loving* was emphasizing the importance of procreation.

When the *Loving* Court described marriage as essential to our existence and survival, it quoted *Skinner* in support.¹⁰⁷ However, *Loving* only repeated part of the *Skinner* quotation. The *Skinner* Court had stated, “Marriage and procreation are fundamental to the very existence and survival of the race,”¹⁰⁸ and it seems plausible to think that the *Loving* Court was trying to de-emphasize rather than emphasize the role of procreation.

100. *Loving*, 388 U.S. at 12.

101. *Standhardt*, 77 P.3d at 458.

102. *Loving*, 388 U.S. at 12.

103. *Id.*

104. *See Standhardt*, 77 P.3d at 458.

105. *Id.* (citing *Loving*, 388 U.S. at 12); *Id.* n.9.

106. 316 U.S. 535 (1942).

107. *Loving*, 388 U.S. at 12.

108. *Id.*; *Skinner*, 316 U.S. at 541 (emphasis added).

Consider the kinds of arguments offered by Virginia in support of its interracial ban. Many of the reasons involved the state's alleged interest in keeping the races pure—the *Loving* Court noted the claim that “the State’s legitimate purposes were ‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ a ‘mongrel breed of citizens’ and ‘the obliteration of racial pride.’”¹⁰⁹ The *Loving* Court shifted the emphasis from the children that might be produced from the marriage to the implicated fundamental interest of the adults.

That the *Loving* Court de-emphasized the importance of children in the context of marriage was neither surprising nor novel. The Court had decided *Griswold v. Connecticut*¹¹⁰ a mere two years earlier. There, the Court had extolled the virtues and importance of marriage while holding that the United States Constitution accorded protection to contraception for married couples.¹¹¹ Were marriage protected solely because of its link to procreation, the result in *Griswold* would have been very different.

Suppose, however, that the Court had linked marriage to procreation. That still would not dictate the result suggested by the *Standhardt* court. This becomes clear when one considers why the Court believes marriage and procreation are fundamental.

Consider the *Skinner* Court’s point that marriage and procreation are fundamental to the very existence and survival of the human race.¹¹² While the Court did not offer further explanation of the link that it envisioned, it seems plausible that the Court believed that the marital setting provides an environment in which children can flourish. Yet, children can flourish in homes in which they are not biologically related to both or even either of their parents.¹¹³ Thus, the human race will continue as long as members of the next generation have a place in which they will be nurtured and can thrive. While the child’s biological parents might well be able to provide such a setting, others can too, and the human race will continue as long as children are born and these nurturing homes are provided.¹¹⁴

109. *Loving*, 388 U.S. at 7 (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)); see *Loving v. Virginia*, 147 S.E.2d 78, 81 (Va. 1966) (Supreme Court of Virginia citing with approval its own prior decision in *Naim*). See also *id.* at 80 (stating that *Naim* analysis is both controlling and decisive).

110. 318 U.S. 479 (1965).

111. *Id.* at 485-86.

112. *Skinner*, 316 U.S. at 541.

113. Mark Strasser, *Adoption and the Best Interests of the Child: On the Use and Abuse of Studies*, 38 NEW ENG. L. REV. 629, 632, 634 (2003) (discussing studies showing that children thrive in households with same-sex parents that are not biologically related to the child).

114. See *id.*

When discussing the rights to marry, establish a home and bring up children, the *Meyer* Court did not suggest that the right to marry was contingent on one's raising children and certainly did not suggest that it was contingent upon raising children biologically related to both members of the marital couple.¹¹⁵ Rather, the Court was listing essential interests protected by the Due Process Clause of the Fourteenth Amendment.¹¹⁶ Thus, individuals have a fundamental interest in marriage even if they are not raising children and individuals have a fundamental interest in having and raising children even if they are not married. Currently, children are raised in many types of families—the Court has recently recognized the “demographic changes of the past century [which] make it difficult to speak of an average American family.”¹¹⁷

The *Standhardt* court cited *Zablocki v. Redhail*¹¹⁸ as one of the cases establishing the fundamental nature of the right to marry.¹¹⁹ *Zablocki* is important for a number of reasons. For example, it made clear that the “leading decision of this Court on the right to marry is *Loving v. Virginia*,”¹²⁰ and that although “*Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals.”¹²¹ Yet, it is difficult to understand how the Court can recognize that this right is of fundamental importance for all individuals and nonetheless reject that it includes the right to marry a same-sex partner, just as it would have been difficult to understand how this right of fundamental importance for all individuals would not include the right to marry someone of a different race.¹²² Further, lest it be thought that the *Zablocki* Court was not even considering the implications of the decision for same-sex couples, Justice Powell in his *Zablocki* concurrence recognized that the decision might well have import for such couples.¹²³

115. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

116. *Id.* (finding that essential interests protected by the Due Process Clause also include the right to contract, to engage in any of the common occupations of life, to acquire useful knowledge, and to worship God according to the dictates of one's own conscience).

117. *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

118. 434 U.S. 374 (1978).

119. *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 458 n.9 (Ariz. Ct. App. 2003).

120. *Zablocki*, 434 U.S. at 383.

121. *Id.* at 384.

122. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The Fourteenth Amendment requires 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.”).

123. *Zablocki*, 434 U.S. at 399 (Powell, J., concurring) (noting that “[s]tate regulation [of marriage] has included bans on incest, bigamy, and homosexuality, as well as various

The *Standhardt* court mischaracterized federal right to privacy jurisprudence, misunderstanding the test for determining which rights are fundamental as well as why marriage is protected. Yet, one of the most disappointing aspects of the decision was the court's willingness to uphold a policy which was destructive of the very interests the State claimed it wished to promote.

F. On Promoting Stability for Children

Even assuming that the State's same-sex marriage ban only merited rational basis scrutiny, a separate question is whether the statute could withstand even that minimal scrutiny, especially if a heightened rational basis test is used. In her concurring opinion in *Lawrence*, Justice O'Connor stated, "When a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."¹²⁴ She made clear that this heightened form of rational basis review would be appropriately used when examining statutes aiming to disadvantage on the basis of orientation.¹²⁵ As an illustration of when such scrutiny should be imposed, Justice O'Connor cited *Romer v. Evans*, which struck down a Colorado amendment which would have precluded the State from affording sexual orientation the protection of its anti-discrimination laws.¹²⁶ Furthermore, she made clear that she would have struck down the Texas same-sex sodomy statute on this basis.¹²⁷

The claim here is not that Justice O'Connor indicated that same-sex marriage bans could not pass muster given this level of scrutiny,¹²⁸ although Justice Scalia in his *Lawrence* dissent suggested that the reason for such bans—"the State's *moral disapproval* of same-sex couples"¹²⁹—would likely not pass constitutional muster.¹³⁰ The claim is merely that Arizona's asserted

preconditions to marriage, such as blood tests" and that "[a] 'compelling state purpose' inquiry would cast doubt on the network of restrictions that that States have fashioned to govern marriage and divorce").

124. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

125. *Id.*

126. *Id.* (discussing *Romer v. Evans*, 517 U.S. 620, 635-36 (1996)).

127. *Id.* at 582.

128. *See id.* at 585 ("Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.").

129. *See Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting).

130. *Id.* ("This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples.").

interest would likely not pass muster under such heightened rational basis review.¹³¹

The rationale offered by Arizona for its same-sex marriage ban was that the State “has a legitimate interest in encouraging procreation and child-rearing within the stable environment traditionally associated with marriage, and that limiting marriage to opposite-sex couples is rationally related to that interest.”¹³² The court interpreted the State’s argument as suggesting that “by legally sanctioning a heterosexual relationship through marriage, thereby imposing both obligations and benefits on the couple and inserting the State in the relationship, the State communicates to parents and prospective parents that their long-term, committed relationships are uniquely important as a public concern.”¹³³ Yet, as the court recognized, “same-sex couples also raise children, who would benefit from the stability provided by marriage within the family.”¹³⁴ Insofar as the State wants to emphasize that long-term committed relationships are uniquely important as a public concern where children would thereby benefit from the stability of such relationships, the State is undermining its own goal by refusing to recognize same-sex relationships.

The State offered a surprising explanation for why it did not have an interest in adding stability to families comprised of same-sex couples and their children. The *Standhardt* court explained, “Because the State’s interest in *committed sexual relationships* is limited to those capable of producing children, it contends it reasonably restricts marriage to opposite-sex couples.”¹³⁵ Apparently, at least according to the *Standhardt* court, the State of Arizona believes that sexual fidelity is important only in those relationships which might produce children.

This is a fairly unusual position to take and one might expect that the position would be reflected in other state laws. For example, Arizona criminalizes adultery.¹³⁶ Were the court’s interpretation of public policy correct, one would expect that there would be no penalty for adultery were there no possibility of procreation for any of the affected parties. Yet, Arizona has no such exception to its criminal adultery statute.

Arizona precludes first cousins from marrying¹³⁷ *unless* “both are sixty-five years of age or older or if one of both first cousins are under sixty-five

131. See *infra* notes 132-147 and accompanying text (discussing the State’s failure to meet its asserted interest in banning such marriages through its statute prohibiting same-sex marriages).

132. *Standhardt v. Superior Court ex rel. Country of Maricopa*, 77 P.3d 451, 461 (Ariz. Ct. App. 2003).

133. *Id.*

134. *Id.* at 462.

135. *Id.* at 461 (emphasis added).

136. ARIZ. REV. STAT. ANN. § 13-1408 (West 2004).

137. *Id.* § 25-101.

years of age, upon approval of any superior court judge in the state if proof has been presented to the judge that one of the cousins is unable to reproduce.”¹³⁸ Yet, one would not expect the State to make a special exception to permit such couples to marry if the state has no interest in marriages which cannot produce children. Basically, the court was misrepresenting Arizona public policy when suggesting that the State had no interest in marriages which would not be procreative.

The court understood that “opposite-sex couples are not required to procreate in order to marry.”¹³⁹ The court was not persuaded, however, that this posed any problem for its analysis, reasoning that a perfect fit was not required under the rational basis test.¹⁴⁰ The court explained that “[a]llowing all opposite-sex couples to enter into marriage under Arizona law, regardless of their willingness or ability to procreate, does not defeat the reasonableness of the link between opposite-sex marriage, procreation, and child-rearing.”¹⁴¹ The court offered several reasons in support: (1) “if the State excluded opposite-sex couples from marriage based on their intention or ability to procreate, the State would have to inquire about that subject before issuing a license, thereby implicating constitutionally rooted privacy concerns,”¹⁴² (2) “in light of medical advances affecting sterility, the ability to adopt, and the fact that intentionally childless couples may eventually choose to have a child or have an unplanned pregnancy, the State would have a difficult, if not impossible, task in identifying couples who will never bear and/or raise children,”¹⁴³ and (3) “because opposite-sex couples have a fundamental right to marry, excluding such couples from marriage could only be justified by a compelling state interest, narrowly tailored to achieve that interest, which is not readily apparent.”¹⁴⁴

Yet, Arizona is already willing to ask couples about their ability to procreate and will not allow first cousins below age sixty-five to marry unless they can establish their inability to procreate.¹⁴⁵ The existence of such a statute has several implications. First, the State obviously does not believe that this information cannot be the subject of inquiry because of privacy concerns. Second, the *Standhardt* court is incorrect that the State places this premium on procreative potential for would-be marital couples, since only first cousins who

138. *Id.* § 25-101(B).

139. *Standhardt*, 77 P.3d at 462.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Standhardt*, 77 P.3d at 462 (citing *Living v. Virginia*, 388 U.S. 1, 12 (1966) and *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

145. *See* ARIZ. REV. STAT. ANN. § 25-101 (West 2004).

cannot procreate are permitted to marry. Third, if the State took seriously the possibility that couples currently unable to procreate might be able to reproduce someday because of medical advances, the State would not allow sterile first cousins to marry because it would fear that someday those cousins might be able to have children because of medical breakthroughs. Thus, the court's claims about public policy are undermined rather than supported by current state law and cannot plausibly be thought to represent the State's actual interests.

As a separate point, the court apparently believed that the possibility of adoption would be one of the ways in which sterile couples might be viewed as potentially procreative.¹⁴⁶ The court might also have noted that couples might make use of artificial insemination or surrogacy so that they could have a child.¹⁴⁷ Yet, same-sex couples might also adopt or make use of other techniques whereby they might have a child so they too should be thought of as potentially procreative.

The *Standhardt* court suggests that different-sex couples have the fundamental right to marry. Yet, individuals rather than couples have the fundamental right to marry.¹⁴⁸ As the *Eisenstadt* Court suggested, a couple "is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."¹⁴⁹ Further, all individuals have the right to marry,¹⁵⁰ and the question at hand is the scope of that right.

If the *Standhardt* court were correct that the fundamental right to marry is linked to procreation in an important way, then one would expect that individuals incapable of procreating would not be permitted to marry. In other words, an individual's right to marry would be construed as involving the right to marry someone with whom that individual would be able to procreate. If it were to turn out that there was no one with whom that individual could procreate, then the individual simply could not marry.

Yet, such an understanding of the fundamental right to marry is not only unfair and rather harsh, but it has no basis in the case law or in the right to privacy jurisprudence. Such an inaccurate and offensive explication of the right to marry could not be used to prevent sterile, different-sex couples from marrying and is no more accurate or fairly used to prevent same-sex couples from marrying.

146. *Standhardt*, 77 P.3d at 462.

147. See ARIZ. REV. STAT. ANN § 25-218 (West 1991) (declared unconstitutional in *Soos v. Superior Court*, 897 P.2d 1356 (Ariz. Ct. App. 1994)).

148. See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1977).

149. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971).

150. See *Zablocki*, 434 U.S. at 384.

G. *On Confusing Means and Ends*

The *Standhardt* court explained why it was important for different-sex couples to be encouraged to marry, noting that “by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children.”¹⁵¹ Here, the court seems to understand that the State’s interest is in providing an advantageous setting for children and the means chosen to achieve that end is to encourage marriage among those who might have children. Yet, the court then seemed to change its focus from the end—providing a stable setting in which children might flourish—to the means—encouraging different-sex couples who might procreate to marry.

The court differentiated different-sex couples from same-sex couples by noting, “Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State’s interest in ensuring responsible procreation within committed, long-term relationships.”¹⁵² Yet, if the *Standhardt* court is correct that the State’s interest is in encouraging those raising children to have a stable environment in which children might thrive, then the State should also be interested in encouraging same-sex couples who raise or might raise children to maintain a stable environment in which children might thrive. Children need an environment in which they can thrive whether they are genetically related to both of the parents raising them, one of the parents raising them or neither of the parents raising them.¹⁵³ Indeed, the court admitted that “[c]hildren raised in families headed by a same-sex couple deserve and benefit from bilateral parenting within long-term committed relationships just as much as children with married parents.”¹⁵⁴

The *Standhardt* court understood that permitting same-sex couples to marry would not somehow affect the decision-making of different-sex couples about whether or when to procreate—the court “agree[d] with Petitioners that allowing same-sex couples to marry would not inhibit opposite-sex couples from procreating.”¹⁵⁵ Further, the court recognized that “the line drawn between couples who may marry (opposite-sex) and those who may not (same-

151. *Standhardt*, 77 P.3d at 462-63.

152. *Id.* at 463.

153. Cassandra S. Haury, *The Changing American Family: A Reevaluation of the Rights of Foster Parents When Biological Parental Rights Have Been Terminated*, 35 GA. L. REV. 313, 343 (2000).

154. *Standhardt*, 77 P.3d at 463.

155. *Id.*

sex) may result in some inequity for children raised by same-sex couples.”¹⁵⁶ Yet, the court failed to appreciate just how damning its own analysis was.

Basically, the court recognized that the statute created inequity because children were being denied a benefit which they needed and deserved. Yet, it is not as if the children are suffering a detriment for the sake of some greater public interest. On the contrary, the State’s interests are also being undermined when children are deprived of this benefit. Thus, the policy adopted by the State undermines its own stated interests as well as the interests of the children whom it claims to want to help and the court nonetheless claims that “plausible reasons exist for placement of the current line.”¹⁵⁷

If those reasons exist, neither the State nor the court saw fit to mention them. Indeed, the court upheld a law based on its own mischaracterization of privacy and right to marry jurisprudence and its attributing policies to the State which are contradicted by existing statutes. While the court is correct that “the only sexual relationship capable of producing children is one between a man and a woman,”¹⁵⁸ the State’s interest is in helping Arizona children to thrive, regardless of how they came into the world. It is thus difficult to understand how the court could uphold the Arizona law as even rationally related to the State’s interests, since the ban is most plausibly understood to undermine the interests of *all* of the concerned parties.

III. LEWIS ON THE RIGHT TO MARRY A SAME-SEX PARTNER

In *Lewis v. Harris*, a New Jersey trial court considered whether New Jersey’s same-sex marriage ban violated constitutional guarantees.¹⁵⁹ The court held that it did not, offering a variety of justifications for its decision. Some of the rationales offered in the *Lewis* opinion mirrored the misunderstandings in the *Standhardt* decision and thus need not be reanalyzed below. However, some of the *Lewis* analyses reflect misunderstandings and improper analyses which did not appear in *Standhardt* and thus merit examination and correction below if only to prevent their reappearance in the case law.

A. *The Fundamental Right to Marry*

156. *Id.*

157. *Id.* (citing *Fed. Communications Comm’n v. Beach Communications, Inc.*, 508 U.S. 307, 313-14, 315-16 (1993)).

158. *Id.* at 462.

159. *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at *1 (N.J. Super. Ct. Law Div. Nov. 5, 2003).

Like the *Standhardt* court, the *Lewis* court noted that *Skinner* suggests that marriage is “fundamental to the very existence and survival of the race”¹⁶⁰ without considering why marriage is so fundamental. Presumably, this is because marriage is envisioned as helping to provide a setting in which the next generation might flourish. Yet, given the connection between marriage and having and raising children,¹⁶¹ one would have expected the *Lewis* court to recognize that *Skinner* lends support to the recognition of same-sex marriage, especially because New Jersey permits second-parent adoptions by same-sex couples.¹⁶² Precisely because same-sex couples are having children through adoption, surrogacy, or artificial insemination and thus have children to raise, *Skinner* suggests that both society and the individuals themselves would benefit if same-sex couples were permitted to marry.

Like the *Standhart* court, the *Lewis* court suggested that only rights “deeply rooted in the Nation’s history and tradition”¹⁶³ can be fundamental, and this court also failed to consider whether those fundamental rights protected by the right to privacy could be so considered were that the appropriate test. Like the *Standhardt* court, the *Lewis* court failed to take *Lawrence* seriously. Indeed, the extent of the *Lewis* court’s analysis of that decision was merely to note that “[i]n *Lawrence*, the Court held that a same-sex couple’s right to liberty under the Due Process Clause gives them a right to engage in consensual sexual activity in the home without government intervention.”¹⁶⁴

The *Lewis* court’s analysis of why same-sex marriage bans pass constitutional muster was partly based on the supposition that the right to marry “by its very essence includes only the union of persons of different genders.”¹⁶⁵ The court explained that “a prohibition on same-sex marriage is not so much a limitation on the right to marry, but a defining element of that right accepted for generations as an essential characteristic of marriage.”¹⁶⁶ Indeed, the court suggested that “such a change [recognizing same-sex marriage] would contradict the established and universally accepted legal precept that marriage is the union of people of different genders.”¹⁶⁷

160. *Id.* at *5 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

161. *See Skinner*, 316 U.S. at 541.

162. *See In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 536 (N.J. Super. Ct. App. Div. 1995).

163. *Lewis*, 2003 WL 23191114, at *8.

164. *Id.* at *23.

165. *Id.* at *13.

166. *Id.*

167. *Id.* *See also Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 458 (Ariz. Ct. App. 2003) (claiming that “recognizing a right to marry someone of the same sex

This was a surprising tack for the court to take. Not only are same-sex marriages being recognized in a sister state in 2004,¹⁶⁸ but same-sex marriages were already recognized in other countries before the *Lewis* opinion was issued.¹⁶⁹ Indeed, Justice Scalia in his *Lawrence* dissent noted that such marriages can be celebrated in Canada.¹⁷⁰ There is no universal understanding regarding the impossibility or even impermissibility of same-sex marriage; thus, this cannot be used to ground a decision not to recognize same-sex unions.

B. The Importance of the Interest at Stake

One of the more disturbing aspects of the *Lewis* opinion was the analysis offered when the court balanced the interests affected by refusing to permit same-sex couples to marry against the State's interest in maintaining that ban. The court explained, "The State has an interest in fostering and facilitating the traditional notions of family and to be in harmony with other states that have evaluated and considered the same issue."¹⁷¹ The court gave short shrift to the individual interests implicated, suggesting that "New Jersey's ban on same-sex marriage has, at most, a minimal effect on the ability of these couples to maintain their relationships."¹⁷² After all, the court noted, the "plaintiffs can take steps available to any persons to ameliorate the harms they allege to suffer with respect to property rights, inheritance, and health care decision-making."¹⁷³

It is difficult to tell whether the court was implicitly devaluing the importance of marriage for same-sex couples in particular or for couples in general. Same-sex couples have the same kinds of interests as do different-sex couples: they may be responsible for children or elderly parents; they, too, may wish to make "expressions of emotional support and public commitment,"¹⁷⁴ and for them, too, marriage may be an "exercise of religious faith as well as an

would not expand the established right to marry, but would redefine the legal meaning of 'marriage'").

168. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the State's same-sex marriage ban violated the state constitution). *Goodridge* was decided after *Lewis*. The point here is not that the *Lewis* court should have known what the Supreme Judicial Court of Massachusetts would do, but merely that the court should never have been talking about the established and universally accepted legal precept that marriage is only for individuals of different sexes given what has been occurring in different countries and in different states.

169. See *Standhardt*, 77 P.3d at 459 n.11 (noting that such marriages are recognized in Canada, the Netherlands and Belgium).

170. See *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).

171. *Lewis*, 2003 WL 23191114, at *23.

172. *Id.* at *24.

173. *Id.* at *26.

174. *Turner v. Safley*, 482 U.S. 78, 95 (1987).

expression of personal dedication.”¹⁷⁵ Yet, if same-sex couples and different-sex couples have the same interests implicated in marriage, then the *Lewis* court would seem committed to saying that different-sex couples, if deprived of the right to marry in New Jersey, would only be minimally affected in their ability to maintain their relationships.

Presumably, the *Lewis* court would not have suggested that Virginia could have refused to recognize the marriages of interracial couples in order to foster and facilitate the traditional notions of family if only the State had been willing to decriminalize fornication¹⁷⁶ and allow such couples to “take steps available to any persons to ameliorate the harms they allege to suffer with respect to property rights, inheritance, and health care decision-making.”¹⁷⁷ Nor, presumably, would the court have thought such a statute permissible, even were it true that there was “nothing to preclude these couples from forming relationships and making personal commitments to one another.”¹⁷⁸ Yet, these rationales are no more persuasive for preventing same-sex couples from marrying than for preventing interracial, different-sex couples from marrying.

C. *On the Anti-Miscegenation Analogy*

Understanding that the analogy to interracial marriage might seem persuasive, the *Lewis* court tried to explain why it did not believe *Loving v. Virginia*¹⁷⁹ was analogous. The court explained, “It was entirely appropriate for the courts to enforce those duly enacted Constitutional provisions by striking down statutes that made race a qualifying condition for access to a recognized right to marry.”¹⁸⁰ However, the court reasoned, “no similar Constitutional provisions outlaw statutory classifications based on sexual orientation.”¹⁸¹

Yet, the court’s attempt to distinguish in this way is much too facile. First, the Fourteenth Amendment to the United States Constitution reads in relevant part: “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹⁸² While the Amendment certainly protects individuals from invidious racial discrimination, its protections are not limited to racial discrimination—it suggests that *no* person shall be denied equal

175. *Id.* at 96.

176. *See* VA. CODE ANN. § 18.2-344 (1996) (criminalizing fornication, although *Lawrence* presumably makes such laws unenforceable).

177. *Lewis*, 2003 WL 23191114, at *26.

178. *Id.* at *25.

179. 388 U.S. 1 (1944).

180. *Lewis*, 2003 WL 23191114, at *20.

181. *Id.*

182. U.S.CONST. amend. XIV, § 1.

protection of the laws. Further, the *Lewis* court implies that once the Civil War amendments were passed, it was obvious that interracial marriage bans were unconstitutional.¹⁸³ However, as recently as 1956 the United States Supreme Court suggested that a challenge to Virginia's anti-miscegenation statute was "devoid of a properly presented federal question."¹⁸⁴ It was not until 1967 that the *Loving* Court struck down interracial marriage bans.¹⁸⁵

The *Lewis* court suggested that the statute at issue in *Loving* was constitutionally infirm because it made race a qualifying condition for marriage, whereas the statute at issue before it was constitutionally permissible because it was permissible to make orientation a qualifying condition for marriage.¹⁸⁶ This analysis is flawed for several reasons. First, it is not at all clear that orientation can be made a qualifying condition for marriage without violating the Constitution. The *Zablocki* Court suggested that "the right to marry is of fundamental importance for all individuals."¹⁸⁷ Second, the court misrepresented the nature of the law. Orientation is not a qualifying condition for marriage, even in New Jersey.¹⁸⁸ Indeed, the *Lewis* court itself noted that the plaintiffs, "like anyone else in the state, may receive a marriage license, provided that they meet the statutory criteria for marriage, including an intended spouse of the opposite gender."¹⁸⁹ Third, New Jersey makes sex rather than orientation a qualifying condition for marriage.¹⁹⁰ Just as Virginia made race a qualifying condition by specifying which races could marry, New Jersey made sex a qualifying condition by specifying which sexes could marry.

Justice Scalia in his *Lawrence* dissent noted that the same-sex sodomy prohibition at issue in *Lawrence* "does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women."¹⁹¹ He then pointed out that "it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex."¹⁹² A separate issue is whether the sex-based marital restriction passes constitutional muster, but the

183. *Lewis*, 2003 WL 23191114, at *21.

184. *See Naim v. Naim*, 350 U.S. 985 (1956) (per curiam).

185. *See Loving*, 388 U.S. 1.

186. *Lewis*, 2003 WL 23191114, at * 21.

187. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

188. *Lewis*, 2003 WL 23191114, at *22.

189. *Id.*

190. *Id.*

191. *Lawrence v. Texas*, 539 U.S. 558, 599-600 (2003) (Scalia, J., dissenting); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 323 n.20 (1993) (Souter, J., concurring in part and dissenting in part) ("A classification is sex based if it classifies on the basis of sex.").

192. *Lawrence*, 539 U.S. at 600 (Scalia, J., dissenting).

statute makes the sex of the would-be spouse a qualifying condition for the marriage.

The *Lewis* court seemed unsure whether sex or orientation was the basis of the classification. For example, when explaining why the New Jersey statutes were “facially neutral,”¹⁹³ the court noted that “they apply with equal force to all men and all women in the state.”¹⁹⁴ Yet, if, as the court suggested, orientation is the basis of the classification,¹⁹⁵ then the fact that the statute applies with equal force to men and women would not speak to whether the statute was facially neutral. Rather, the court would have to suggest that the statute applied with equal force to individuals regardless of their sexual orientation.

The court noted that the “[s]tate makes the same benefit, mixed-gender marriage, available to all individuals on the same basis,”¹⁹⁶ suggesting that “[w]hether or not plaintiffs wish to enter into a mixed-gender marriage is not determinative of the statute’s validity.”¹⁹⁷ The important issue “is the availability of the right on equal terms, not the equal use of the right that is central to the constitutional analysis.”¹⁹⁸

Of course, an analogous argument would have supported Virginia’s position in *Loving* where the state made the same benefit, same-race marriage, available to all individuals on the same basis and Richard Loving’s wish not to enter into a same-race marriage would not be determinative of the statute’s validity.¹⁹⁹ Unlike the *Lewis* court, Justice Scalia understood the difficulty posed for his position given *Loving*, and attempted to address it by suggesting that the statutes at issue in *Loving* were invidious because they were designed to maintain white supremacy.²⁰⁰ While he is correct that the anti-miscegenation statutes were designed to maintain white supremacy²⁰¹ and that the statutes at issue were unconstitutional,²⁰² he is incorrect insofar as he is implying that the statutes would not have been held unconstitutional but for their being intended to maintain white supremacy.

Basically, Justice Scalia suggests that *Loving* is disanalogous by denying that Virginia made the same benefits available to all.²⁰³ As the *Loving* Court

193. *Lewis*, 2003 WL 23191114, at * 22.

194. *Id.*

195. *Id.* at *20.

196. *Id.* at *22.

197. *Id.*

198. *Lewis*, 2003 WL 23191114, at * 22.

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

200. See *Lawrence*, 539 U.S. at 600 (Scalia, J., dissenting).

201. *Loving*, 388 U.S. at 11.

202. *Id.* at 12.

203. *Lawrence*, 539 U.S. at 600 (Scalia, J., dissenting).

noted, “Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), [but] Negroes, Orientals, and any other racial class may intermarry without statutory interference.”²⁰⁴ Yet, Virginia’s having treated the races differently does not end the matter, since the question then becomes whether the Court would have upheld a statute which made the same benefit, same-race marriage, available to all individuals on the same basis. We need not speculate about the answer. Justice Scalia’s implicit claim to the contrary notwithstanding, the *Loving* Court made clear that “the racial classifications in these statutes [are] repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the ‘integrity’ of all races.”²⁰⁵ As the *Loving* Court explained, “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.”²⁰⁶ Thus, the Virginia statute would have been struck down even had it not been motivated by white supremacy. Marital classifications cannot be made on the basis of race regardless of the state’s motivation and regardless of whether or not the statute is evenhanded in application.²⁰⁷

The Supreme Court has suggested that statutory classifications based on race or sex must be examined closely²⁰⁸ to make sure that they do not involve invidious discrimination.²⁰⁹ Under the Federal Constitution, race-based classifications are subjected to strict scrutiny while sex-based classifications are subject to heightened scrutiny.²¹⁰ Thus, the fact that a race-based marriage statute did not pass constitutional muster does not establish that a sex-based marriage statute would also be constitutionally infirm. Nonetheless, two points might be made about the scrutiny given to classifications on the basis of sex.

204. *Loving*, 388 U.S. at 12 n.11.

205. *Id.*

206. *Id.*

207. *Id.*

208. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 489 (1989) (suggesting that all race-based classifications must be examined closely); *United States v. Virginia*, 518 U.S. 515, 524 (1996) (“[A] party seeking to uphold government action based on sex must establish an ‘exceedingly persuasive justification for the classification.’”) (quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

209. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll government action based on race . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.”); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (noting that the Nation’s long history of sex discrimination “warrants the heightened scrutiny we afford all gender-based classifications . . .”).

210. See *J.E.B.*, 511 U.S. at 154 (Renquist, J., dissenting) (“Classifications based on race are inherently suspect, triggering ‘strict scrutiny,’ while gender-based classifications are judged under a heightened, but less searching, standard of review.”).

First, as the Court made clear in *United States v. Virginia*,²¹¹ “a party seeking to uphold government action based on sex must establish an ‘exceedingly persuasive justification’ for the classification.”²¹² Second, insofar as the *Lewis* court was examining the statute under the state constitution, it would have to have used strict scrutiny, since gender is a suspect classification under the New Jersey Constitution.²¹³

Needless to say, the *Lewis* court did not subject the statutory classification to heightened scrutiny, much less strict scrutiny. Indeed, the *Lewis* court mentioned surprisingly few state interests which would allegedly be supported by such a ban. The court did point to bans on bigamous marriages, common law marriages, and incestuous marriages, justifying each,²¹⁴ but then noted that “a ban on same-sex marriage differs from those listed above.”²¹⁵ Nonetheless, the court concluded without offering additional justification that “the interest of the State in limiting marriage to mixed-gender couples is a valid and reasonable exercise of government authority.”²¹⁶ Apparently, the court believed that the State’s interest in fostering and facilitating the traditional notions of family justified the State’s same-sex marriage ban, notwithstanding the State’s having rejected those notions so that both members of same-sex couples might be recognized as legal parents of the children that they were raising, notwithstanding the fundamental interests of the adults involved, and notwithstanding the State’s interest in providing stable homes for adults and children so that all of these individuals might thrive and be productive members of society.

IV. CONCLUSION

In *Lawrence v. Texas*, the United States Supreme Court struck down a Texas law criminalizing same-sex sodomy.²¹⁷ While the majority was careful not to address whether same-sex marriages are protected by the Federal Constitution, the Court nonetheless suggested that liberties protected by the Due Process Clause of the Fourteenth Amendment could not be ascertained simply by considering which interests had historically been protected.²¹⁸ The Court was not thereby revolutionizing due process jurisprudence, given that some of the liberties that the Court has already recognized as protected by the

211. 518 U.S. 515 (1996).

212. *Id.* at 524.

213. *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at * 18 (N.J. Super. Ct. Law Div. Nov. 5, 2003).

214. *Id.* at *24.

215. *Id.* at *25.

216. *Id.*

217. 539 U.S. 558, 578 (2003).

218. *Id.*

Due Process Clause could hardly have been described as “deeply rooted in this Nation’s history and tradition” or “implicit in the concept of ordered liberty.” Nonetheless, the Court’s explicitly rejecting that approach deserves careful consideration, since it will affect any analysis of whether a particular interest is fundamental or protected by the Due Process Clause of the Fourteenth Amendment.

In her *Lawrence* concurrence, Justice O’Connor suggested that regulations imposing burdens on the basis of sexual orientation should be examined in light of a heightened rational basis test to make sure that state regulations are not merely imposing burdens because of animosity towards the class affected.²¹⁹ While she suggested that there might be legitimate state reasons to restrict marriage to different-sex couples, she did not suggest any, and it is simply unclear what articulated reasons by the State would suffice under this test. Two state supreme courts struck down their respective states’ same-sex marriage bans under their own possibly heightened rational basis tests.²²⁰

In his *Lawrence* dissent, Justice Scalia suggested that the *Lawrence* decision paved the way for the recognition of same-sex marriage²²¹ and that same-sex marriage bans classify on the basis of sex.²²² While he claimed that the Constitution does not prohibit such classifications,²²³ he offered a clearly incorrect reading of *Loving v. Virginia* to justify that assertion.²²⁴

Two state courts examining whether their respective state’s same-sex marriage bans passed muster under federal constitutional guarantees had the benefit of *Lawrence* to help them decide whether such bans pass constitutional muster. That decision notwithstanding, both courts offered implausible interpretations of the right to privacy jurisprudence which cannot account for those rights which have been recognized as fundamental and protected by the right to privacy even bracketing whether same-sex marriage is also protected.

219. *Id.* at 580 (O’Connor, J., concurring).

220. *See Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (“[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection.”); *Baker v. Vermont*, 744 A.2d 864, 889 (Vt. 1999) (suggesting that the state must afford same-sex couples all of the rights and obligations of marriage); *see id.* at 880 n.13 (The court declined to apply heightened or strict scrutiny); *see id.* at 871 (The court instead used a kind of heightened rational basis test which was “broadly deferential to the legislative prerogative to define and advance governmental ends, while vigorously ensuring that the means chosen bear a just and reasonable relation to the governmental objective.”).

221. *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”).

222. *Id.* at 599-600 (Scalia, J., dissenting).

223. *Id.* at 600 (Scalia, J., dissenting).

224. *See supra* notes 200-07 and accompanying text (discussing why Justice Scalia’s analysis of *Loving* is inaccurate).

Each court offered an account of local public policy which is undermined rather than supported by existing state law. Both courts made assertions about the interests implicated in marriage which are so obviously false that they would never be made in any other context. The *Standhardt* court suggested that the state is only interested in marriages which might produce children through the union of the married parties²²⁵ and the *Lewis* court seriously undervalued the individual's interests in marriage.²²⁶

Justice Scalia concluded his *Lawrence* dissent by suggesting that *Lawrence* did not involve same-sex marriage "only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court."²²⁷ The *Standhardt* and *Lewis* decisions seem to illustrate Justice Scalia's point, since both had to misconstrue the relevant constitutional jurisprudence and public policy in order to uphold the same-sex marriage bans before them. It can only be hoped that principle and logic will sometime govern in this area, although *Lewis* and *Standhardt* give little hope that this will occur any time soon.

225. *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 461 (Ariz. Ct. App. 2003) (emphasis added).

226. *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at *24 (N.J. Super. Ct. Law Div. Nov. 5, 2003).

227. *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting).