11-1-2001

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Recommended Citation
Available at: https://digitalcommons.lmu.edu/llr/vol35/iss1/3
TOLERATION, APPROVAL, AND THE RIGHT TO MARRY: ON CONSTITUTIONAL LIMITATIONS AND PREFERENTIAL TREATMENT

Mark Strasser*

I. INTRODUCTION

Some commentators who disapprove of same-sex marriages or civil unions claim that the state should not legally recognize such relationships because the state’s doing so would endorse rather than merely tolerate them. These theorists explain the difference between endorsement and toleration by pointing to the endorsement test in Establishment Clause jurisprudence, or by discussing the difference between constitutionally protected activity on the one hand and activity subject to statutory regulation on the other. Yet, the existing Establishment Clause jurisprudence in particular and the Court’s constitutional jurisprudence more generally suggest that the state is precluded from expressing approval of some citizens to make other citizens feel like outsiders. Further, the difference between legislative permission and constitutional protection does not support the state’s refusal to recognize same-sex unions but, instead, helps illustrate why such unions must not only be recognized but also afforded constitutional protection.

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1. See Vermont Governor Signs ‘Civil Unions’ Bill, THE CHRISTIAN CENTURY, May 10, 2000, at 532 (describing civil unions as a “parallel track [to marriage] . . . which would give homosexual partners the property and other legal rights already given to heterosexual spouses”).
Part II of this Article explores the concept of toleration, concluding that the tolerant state must not adopt policies to make some members of society feel like second-class citizens. Part III suggests that commentators pointing to the difference between constitutionally protected and legislatively permitted activities misapply that distinction when seeking to explain why states should refuse to recognize same-sex relationships, since these commentators conflate privileging a status with privileging particular citizens. The Article concludes that those commentators who distinguish between tolerance and endorsement to justify the state’s refusal to recognize same-sex relationships help establish why the state must, rather than should not, recognize those unions.

II. ON TOLERANCE AND ENDORSEMENT

Some commentators suggest that same-sex relationships should not be legally recognized by the state because doing so would imply some sort of approval of those unions. Yet, that thesis is incorrect both because legal recognition does not imply approval and because, even if it did, that would not be a reason to refuse to recognize such relationships. Indeed, the thesis that states should or even may refuse to recognize same-sex unions simply because they disapprove of them ignores and, in fact, contradicts the developing right-to-marry jurisprudence.

A. The Background Marriage Jurisprudence

Some commentators suggest that the state should not express approval of same-sex unions by legally recognizing them—Richard Duncan and Lynn Wardle claim that such a recognition would confer on such unions “a legally preferred status.” This argument implies that: (1) the state endorses those marriages that it recognizes, and (2)

2. Lynn D. Wardle, Legal Claims for Same-Sex Marriage: Efforts to Legitimize a Retreat from Marriage by Redefining Marriage, 39 S. Tex. L. Rev. 735, 752 (1998); see also Richard F. Duncan, Homosexual Marriage and the Myth of Tolerance: Is Cardinal O’Connor a “Homophobe”?, 10 Notre Dame J.L. Ethics & Pub. Pol’y 587, 593 (1996) (“[T]he demand for same-sex marriage laws is a call not for tolerance but for approval, encouragement and preferred status .... A tolerant society might decide that homosexual behavior, although permitted between consenting adults, should nevertheless be discouraged or at least deprived of public encouragement.”).
the conviction after having explained that "[m]arriage, the most elementary and useful of all, must be regulated and controlled by the sovereign power of the state." Because the state did not recognize the validity of his marriage, Kinney’s conviction for nonmarital cohabitation could stand.

The Indiana Supreme Court expressed a similar view when that state’s interracial marriage prohibition was challenged. In State v. Gibson, the court upheld the state’s anti-miscegenation statute, explaining that “[t]he right in the states, to regulate and control, to guard, protect, and preserve this God-given, civilizing, and Christianizing institution [marriage] is of inestimable importance, and cannot be surrendered, nor can the states suffer or permit any interference therewith.” The Supreme Courts of Georgia and Tennessee also found that their respective state legislatures had the power to preclude interracial marriage.

In 1967, the United States Supreme Court made clear in Loving v. Virginia that the states do not have the power to prohibit interracial marriage, even if the states disapprove of such marriages. The Court pointed out that the freedom to marry is “one of the vital personal rights essential to the orderly pursuit of happiness,” and that “the freedom to marry, or not marry, a person of another race resides

11. See id. at 870.
12. Id. at 869.
13. 36 Ind. 389 (1871).
14. Id. at 403.
15. See Scott v. State, 39 Ga. 321, 324 (1869) ("The Legislature certainly had as much right to regulate the marriage relation by prohibiting it between persons of different races as they had to prohibit it between persons within the Levitical degrees, or between idiots."); Doc. Lonas v. State, 50 Tenn. (3 Heisk.) 287, (1877) stating:

These police powers of the state extend to every conceivable subject, where the good order, the domestic peace, the private happiness or public welfare of the people demand legislation. Unless that legislation is inhibited in the fundamental law, no State has acquitted itself of the duties of government without it. We hold that such legislation is not, never has been, and never should be, prohibited to the States, in reference to the intermarriage of the races.

17. Id. at 12.
the bare desire not to endorse a union suffices as a justification for a state's refusing to recognize it. Neither thesis is correct or even plausible, although these theses might have been thought persuasive had they been offered at an earlier time in our constitutional history.

In 1877, the United States Supreme Court suggested in *Pennoyer v. Neff* that the state "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved" and, eleven years later, suggested in *Maynard v. Hill* that "[m]arriage, 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, . . . [is] subject to the control of the legislature." Further, during that same period, various state supreme courts made clear their understanding that the state has almost unlimited discretion with respect to which marriages it will recognize.

Often, the issue arose in the state courts in the form of a challenge to a state's anti-miscegenation statute. For example, *Kinney v. Commonwealth* involved an interracial couple, domiciled in Virginia, who had married in the District of Columbia in accord with local law. The Virginia Supreme Court of Appeals had to determine the validity of the marriage because Kinney had been charged with and convicted of lewd association and cohabitation, a conviction which could only stand if in fact he was not legally married to Mahala Miller, the woman with whom he was cohabiting in Virginia and whom he had married in Washington, D.C. The court affirmed

3. See Duncan, supra note 2, at 595-96.
4. 95 U.S. 714 (1877).
5. Id. at 734-35; see also Atherton v. Atherton, 181 U.S. 155, 163 (1901) ("The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.").
6. 125 U.S. 190 (1888).
7. Id. at 205.
8. See, e.g., Green v. State, 58 Ala. 190 (1877) (suggesting that marriage is subject to the control of the state); State v. Kennedy, 76 N.C. 251 (1877) (suggesting that the state may determine the conditions under which its domiciliaries will be prohibited from marrying).
9. 71 Va. (30 Gratt.) 858 (1878).
10. See id. at 858-59.
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the bare desire not to endorse a union suffices as a justification for a state's refusing to recognize it.\textsuperscript{3} Neither thesis is correct or even plausible, although these theses might have been thought persuasive had they been offered at an earlier time in our constitutional history.

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\item \textsuperscript{9} 71 Va. (30 Gratt.) 858 (1878).
\item \textsuperscript{10} See \textit{id.} at 858-59.
\end{itemize}
their "expressive" value,\textsuperscript{29} despite the fact that the laws prohibiting such unions have been unenforceable since \textit{Loving}.

Individuals might disagree about the expressive content of an unenforceable anti-miscegenation statute that remains on the books. Some would claim that it expresses societal disapproval of interracial marriage, while others would claim that it expresses racism\textsuperscript{30} or, perhaps, provincial attitudes\textsuperscript{31} indicating that the state would not be a good place in which a business should locate or expand.\textsuperscript{32} Regardless of which expressive content is most plausibly ascribed when a state keeps such a law on the books, it is quite clear that South Carolina, which only repealed the relevant constitutional provision preventing interracial marriage in 1998,\textsuperscript{33} and Alabama, which repealed the relevant provision in 2000,\textsuperscript{34} can hardly be said to have given interracial unions their stamp of approval over the past thirty years, despite having recognized such marriages since \textit{Loving}. The fact that South Carolina and Alabama kept the anti-miscegenation statutes on the books even after those states had begun recognizing such

\textbf{29. See Couples Find Interracial Marriage Draws Mixed Acceptance Locally,} \textit{HERALD} (Rock Hill, SC), Mar. 8, 1998, at 1A ("While the interracial ban lacks legal clout and is largely symbolic, it still reflects a widely held sentiment."). So, too, repealing the provision from the South Carolina Constitution was viewed as symbolic. \textit{See Controversial Amendments, supra} note 27 (stating that "[t]his amendment was, in large part, a symbolic one"). Of course, the fact that over a third of the electorate opposed ending the ban might also be viewed as symbolic. \textit{See id.}

\textbf{30. See Ban Is an Embarrassment,} \textit{HERALD} (Rock Hill, SC), Feb. 12, 1998, at 11A (stating that "the interracial ban is inarguably motivated by racism"); \textit{The Mobile Register on Amendment Two,} \textbf{ASSOCIATED PRESS NEWSWIRES}, Sept. 7, 2000, LEXIS, Nexis Library, News Group File ("Instead of banning the marriages themselves, the constitution dances defiantly around the issue by prohibiting the state from allowing them . . . . That's racism. And no amount of discombobulating can obscure the fact.").

\textbf{31. See Ban Is an Embarrassment, supra} note 30 ("Even a narrow margin in favor of removing it could make the state look backward.").

\textbf{32. See Rawls, supra} note 28 ("Defeating Amendment Two will send the wrong message to the corporate world," Siegelman said Tuesday.").

\textbf{33. See Controversial Amendments, supra} note 27 (stating that the provision had been repealed by the voters on Election Day, November 3, 1998).

\textbf{34. See Sharon Cohen, Voters Reject School Vouchers, Back Billions for Public Education,} \textbf{ASSOCIATED PRESS NEWSWIRES}, Nov. 8, 2000, LEXIS, Nexis Library, News Group File ("In Alabama, voters lifted a 99-year-old, unenforceable ban on interracial marriage. Alabama was the last state in the nation to have in its constitution this relic from the era of segregation.").
marriages suggests at least two weaknesses in the argument that states should not endorse same-sex marriages by recognizing them: (1) claims to the contrary notwithstanding, states can legally recognize unions without endorsing them, and (2) if states are not permitted to refuse to recognize interracial marriages, even if in fact they disapprove of such unions, it is not at all clear why the disapproval of same-sex unions justifies a refusal to recognize those unions.35

C. Toleration Versus Acceptance

Part of the disagreement over whether states should recognize same-sex unions involves differing analyses concerning whether toleration and endorsement are compatible. Commentators disagree about whether an individual who is tolerant of another’s practices implicitly disapproves of those practices or, instead, has no implicit position about those practices whatsoever. Yet, even were it clear what an individual would be saying were she merely to tolerate another’s beliefs or practices, that would not establish what the state would be saying were it tolerant of different groups. Whether or not one assumes that the “tolerant” individual implicitly disapproves of those whom she tolerates, one should not make such an assumption about the tolerant state.

Michael Walzer suggests that individuals who “make room for men and women whose beliefs they don’t adopt, whose practices they decline to imitate,”36 i.e., who “possess the virtue of tolerance,”37 have that quality “without regard to their standing on the continuum of resignation, indifference, stoical acceptance, curiosity, and enthusiasm”38 of the beliefs or practices at issue. Thus, according to Walzer, individuals may appropriately be said to be tolerant even if in fact they have no objections to and, in fact, approve of the attitudes or practices of which they are tolerant.39

35. Cf. WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 216-17 (1999) (“But surely the state cannot encourage people to feel attraction only for those of their own race. If not, why can the state encourage people to feel attraction only for those of the opposite sex?”).
37. Id. at 12.
38. Id.
39. See also Barbara Herman, Pluralism and the Community of Moral
Other commentators offer a different view. For example, Bernard Williams distinguishes between indifference and tolerance. He points out that if, for example, a same-sex relationship "arouse[s] no hostile comment or reaction," the lack of a reaction might be based on "indifference rather than, strictly speaking, toleration." While this lack of reaction might be thought "toleration as a matter of practice," Williams would hesitate to call these people merely "tolerant" if they had ceased to think the behavior "a matter for disapproval or negative judgment at all." Strictly speaking, he is tempted to call a group tolerant only when it "as a matter of fact puts up with the existence of the other, differing, group." Thus, in his view, tolerance is not only to be distinguished from endorsement, but also from indifference, and "toleration" should only be used when the object of toleration elicits disapproval.

Steven Smith's analysis is similar to Williams'. Smith writes, "Properly speaking, one can 'tolerate' only beliefs or practices of which one disapproves." He offers an example to illustrate his point, suggesting that while a community might tolerate prostitution or pornography, it would not tolerate honesty, compassion, or artistic achievement. Yet, Smith's analysis is less persuasive than it first appears. For example, it would be perfectly coherent for someone to say that a community not only tolerates but positively encourages a particular quality such as honesty—it is not as if "tolerates" would have been used incorrectly or improperly there.

Judgment, in TOLERATION: AN ELUSIVE VIRTUE 60, 61 (David Heyd ed., 1996) ("If, for example, we are to be tolerant of diversity in private consensual sexual conduct, our tolerance is compatible with private disdain for, or abhorrence of, some of the tolerated activity.") (emphasis added). By suggesting that tolerance is "compatible" with disdain, Herman is also suggesting that it is compatible with approval, i.e., that tolerance is neutral with respect to the possessor's attitude toward the activity in question.

41. Id.
42. Id.
43. Id. at 19.
44. See Williams, supra note 40 and accompanying text (suggesting that indifferent actions might be thought tolerant as a matter of practice).
46. Id.
As a separate point, Smith may have been misled by his own examples. Consider a community that tolerates different religious or political views. The community is presumably not saying that it disapproves of those religious or political views, even if it would, in fact, disapprove of prostitution or pornography. Thus, while a community might disapprove of some of its objects of toleration, that same community might approve of or be indifferent towards other objects of its toleration.

In Webster's Third New International Dictionary, the definition of "tolerate" includes both "to permit the existence or practice of: allow without prohibition or hindrance: make no effort to prevent" and "to endure with forbearance or restraint: put up with: bear." The former definition suggests nothing about the tolerant individual's attitudes, since she might make no effort to prevent the expression of attitudes of which she disapproves or, for that matter, approves. The latter definition suggests some sort of disapproval, since one would not need to "put up with" attitudes with which one agreed. Thus, there would seem to be at least two senses of "tolerance," a broader sense that does not imply any particular attitude toward that which is tolerated, and a narrow sense that implies disapproval.

Arguably, an individual who merely tolerates another might be inferred to be "putting up with" that person and, in addition, not to be giving that person "equal concern and respect." Yet, even if that is so, it is unclear whether such an inference is justified because of the word "tolerate" or, instead, because of the word "merely." Arguably, use of the words "merely tolerates" implies disapproval or, perhaps, indifference, which would not have been implied by use of the word "tolerates" alone.

Even if a person's toleration of something or someone else implies indifference or disapproval, a separate question is whether a

47. WEBSTER'S THIRD NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2405 (3d ed. 1986).
48. See George P. Fletcher, The Instability of Tolerance, in TOLERATION: AN ELUSIVE VIRTUE, supra note 39, at 158, 169 ("Among those more tolerant of homosexuality, the problem is distinguishing among the sentiments of indifference, acceptance, and tolerance in the narrow sense.").
49. Cf. Smith, supra note 45, at 306 ("[A] proponent of liberal democracy is likely to believe that one should not merely 'tolerate' those who are different, but should extend to them an 'equal concern and respect.'").
state’s toleration of particular religions or races, for example, implies disapproval of those races or religions. Whether or not it is appropriate to infer the narrow sense of "tolerate" when describing the attitude of an individual who (merely) tolerates others, the broad sense of "tolerate" both is and should be used when the state is tolerating someone or something. A state that tolerated, but disapproved of, particular races or religions would hardly be thought particularly tolerant, and the same might be said of a state that tolerated, but disapproved of, some of its citizens on the basis of their sexual orientation.

These two different issues should not be conflated. Certainly, it is correct to suggest that individuals working to secure rights for lesbians, gays, bisexuals, and transgendered people “do not like to be treated as second best . . . [nor] merely to be tolerated.” Further, acceptance might be distinguished from tolerance, which itself might be distinguished from indifference. That said, it is a mistake to claim that “acceptance would be expressed by legally recognizing same-sex marriages,” at least insofar as one would thereby be implying either that such unions should not be recognized until such acceptance exists, or that the recognition of such unions would automatically bring about that acceptance.

As an examination of the recent history of the anti-miscegenation laws of South Carolina and Alabama reveals, racial acceptance should not be assumed merely because a state recognizes

50. See William N. Eskridge, Jr., A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law, 106 YALE L.J. 2411, 2412 (1997) (“America has internalized the idea of benign religious variation, that there are a number of equally good religions, and one’s religion says little or nothing about one’s moral or personal worth.”).

51. See SUSAN MENDUS, TOLERATION AND THE LIMITS OF LIBERALISM 150 (1989) (“Similar points can be made about religious toleration and sexual toleration.”).

52. Fletcher, supra note 48, at 170.


54. See Fletcher, supra note 48, at 170.

55. Id. The claim here is not that Professor Fletcher is against such acceptance, for he has "confess[ed] to a certain amount of sympathy for this push toward acceptance rather than tolerance or indifference toward homosexuality.” Id.
interracial marriages. This is true both because recognition of interracial marriage occurred before everyone accepted such unions and because the recognition of those unions did not suddenly cause people to discard their biased attitudes. While the refusal to recognize interracial marriage involved invidious racial discrimination, the removal of those bans did not suddenly extirpate the prejudicial attitudes that motivated such bans.

In *Loving v. Virginia*, the Supreme Court recognized that Virginia’s anti-miscegenation law was a manifestation of the state’s preference for some of its citizens over others. The Court explained, “The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.” This attempt by the state to indicate its preference for some of its citizens over others was a reason to invalidate the statute—there was no “legitimate overriding purpose independent of invidious racial discrimination which justifie[d] [the] classification.” While the Court would have struck down the statute as “repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the ‘integrity’ of all races,” it was clear that the Court was especially offended by the racial classifications which were “so directly subversive of the principle of equality at the heart of the Fourteenth Amendment.” Thus, while the Court clearly understands the difference between toleration and preference, the Court has not endorsed the preference model for

56. See supra notes 32-34 and accompanying text (discussing the recognition but nonacceptance of interracial marriage in South Carolina and Alabama).

57. Twenty-four years after *Loving* was decided, a significant number of whites still disapproved of interracial marriage. See Elizabeth Kristen, *The Struggle for Same-Sex Marriage Continues*, 14 BERKELEY WOMEN’S L.J. 104, 114 n.98 (1999) (“A 1991 Gallup Poll found that 45% of white people in the U.S. still disapprove of interracial marriages, while only 44% approve.”).

58. 388 U.S. 1 (1967).

59. See id. at 11.

60. Id.

61. Id. (striking down the statute as an attempt to maintain White Supremacy).

62. Id. at 11 n11.

63. Id. at 12.
determining which marriages should be recognized. Indeed, it is especially ironic that some commentators want to use the endorsement test in Establishment Clause jurisprudence as the appropriate model for determining the kinds of preferences the state may manifest, since that model undermines the very position that these commentators propose.

D. Establishment Clause Jurisprudence

Professor Lynn Wardle points out that "states universally draw distinctions between tolerance and preference," citing the endorsement test in Establishment Clause jurisprudence to establish that point. Yet, even a brief consideration of that jurisprudence helps to prove why the state should—rather than should not—recognize same-sex unions.

In Lynch v. Donnelly, the Supreme Court suggested that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any," explaining that "[a]nything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." Justice O'Connor made clear in her Lynch concurrence, however, that accommodation is not the equivalent of endorsement. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." The Court will pay "particularly close attention to whether [a] challenged governmental practice either has the purpose or effect of ‘endorsing’ religion, a concern that has long had

65. See id. at 58 n.257 (citing Edwards v. Aguillard, 482 U.S. 578 (1987)).
67. Id. at 673.
68. See id. at 688.
69. Id. (O'Connor, J., concurring); see also Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309-10 (2000) ("School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’") (citing Lynch, 465 U.S. at 688 (O’Connor, J., concurring)).
a place in our Establishment Clause jurisprudence.\textsuperscript{70} Further, in this jurisprudence, the issue is not whether the state has "endorsed" rather than, for example, merely "preferred" one religion over another. As the Court made clear in \textit{County of Allegheny v. ACLU},\textsuperscript{71} "[w]hether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same."\textsuperscript{72}

Commentators are correct to suggest that there is an important difference between permitting and endorsing a practice. However, they draw exactly the wrong inference from that acknowledged distinction. The state should tolerate and even accommodate different religions, but must not endorse one over another or even religion over nonreligion.\textsuperscript{73} Just as the endorsement test in Establishment Clause jurisprudence precludes the state from treating nonadherents of a particular faith as outsiders who are not full members of the community, an endorsement test should preclude the state from denying individuals the right to marry because it wants to tell those individuals that they are outsiders who are not full members of the community.

\textbf{E. On Different Classes of Citizenship}

It might be argued that worries about the state's endorsement or preference of some groups over others is relevant in the context of

\textsuperscript{70} County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989).
\textsuperscript{71} 492 U.S. 573 (1989).
\textsuperscript{72} Id. at 593. For further discussion of the issue see Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763-64 (1995).

We must note, to begin with, that it is not really an "endorsement test" of any sort, much less the "endorsement test" which appears in our more recent Establishment Clause jurisprudence, that petitioners urge upon us. "Endorsement" connotes an expression or demonstration of approval or support. The New Shorter Oxford English Dictionary 818 (1993); Webster's New Dictionary 845 (2d ed. 1950). Our cases have accordingly equated "endorsement" with "promotion" or "favoritism." \textit{Id.} (citing Allegheny, 492 U.S. at 593).

\textsuperscript{73} See Allegheny, 492 U.S. at 605 (noting that the Court has held the Establishment Clause "to mean no official preference even for religion over nonreligion") (citing Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989)); \textit{see also} Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985) ("[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.").
religion, but not in other contexts. Such a view is mistaken, even if one brackets the claim that animus against lesbian, gay, bisexual, or transgendered people might be religiously based.\textsuperscript{74} There is a long tradition establishing that the state is precluded from making individuals second-class citizens.\textsuperscript{75}

In \textit{Burton v. Wilmington Parking Authority},\textsuperscript{76} the Supreme Court held that the state could not lease public property to a restaurant that refused to serve individuals because of their race, since the state would thereby be a party to making such individuals second-class citizens.\textsuperscript{77} While "private conduct abridging individual rights does no violence to the Equal Protection Clause,"\textsuperscript{78} notwithstanding that it is "discriminatory or wrongful,"\textsuperscript{79} the state is not entitled to make such distinctions among its citizens. As the Court suggested in \textit{United States Department of Agriculture v. Moreno},\textsuperscript{80} "if the constitutional conception of 'equal protection of the laws' means anything,

\begin{itemize}
\item \textsuperscript{74} See DAVID A.J. RICHARDS, \textit{IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES} 112 (1999) ("The expression through public law of one form of sectarian conscience against another form of conscience, without compelling justification in public arguments available to all, is constitutionally invidious, and therefore constitutionally suspect, religious intolerance."); WALZER, \textit{supra} note 36, at 70 ("[T]he more extreme members of religious majorities aim to control everyone's behavior—in the name of a supposedly common (Judeo-Christian, say) tradition, of 'family values,' or of their own certainties about what is right and wrong. This is surely an example of religious intolerance."); cf. Bowers v. Hardwick, 478 U.S. 186, 211-12 (1986) (Blackmun, J., dissenting) ("A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus."). \textit{See generally} David A.J. Richards, \textit{Sexual Preference As a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives}, 55 \textit{OHIO ST. L.J.} 491 (1994) (arguing that orientation discrimination is a form of religious intolerance prohibited by the United States Constitution).
\item \textsuperscript{75} See Schneider v. Rusk, 377 U.S. 163, 169 (1964) (striking down a law that created "a second-class citizenship" for naturalized citizens); \textit{see also} Hooper v. Bernalillo County, 472 U.S. 612, 623 (1985) (striking down a New Mexico statute which "creates two tiers of resident Vietnam veterans, identifying resident veterans who settled in the State after May 8, 1976, as in a sense 'second-class citizens'")
\item \textsuperscript{76} 365 U.S. 715 (1961).
\item \textsuperscript{77} \textit{See id.} at 724-25.
\item \textsuperscript{78} \textit{Id.} at 722.
\item \textsuperscript{79} \textit{See id.} at 721 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).
\item \textsuperscript{80} 413 U.S. 528 (1973).
\end{itemize}
it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Further, the Court has made clear that this equal protection limitation includes attempts by states to harm on the basis of orientation. Thus, in Romer v. Evans, the Court suggested that because the state constitutional amendment at issue "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else," the amendment was unconstitutional.

Certainly, the claim is not that the state is precluded from making any distinctions among its citizens. The Equal Protection Clause "does not require that all persons be dealt with identically." The "interpretation of constitutional principles must not be too literal [since] . . . the machinery of government would not work if it were not allowed a little play in its joints." Yet, precluding the state from targeting a class to make them unequal to everyone else can hardly be said to be so limiting as to impose a strait jacket on the state.

Commentators are correct to suggest that there is an important difference between toleration or accommodation on the one hand and endorsement on the other. As Establishment Clause jurisprudence makes clear, the state should not be implying that certain citizens are outsiders, who are not full members of the community. The same point has been made in other contexts as well—the state must not create classifications to indicate that certain citizens are "second-class" or are unequal to everyone else. Thus, a state's refusal to recognize same-sex marriages because it wants to communicate that gays, lesbians, bisexuals, and transgendered people are second-class citizens thereby provides a reason to strike, rather than uphold, the legislation at issue.

III. CONSTITUTIONAL PROTECTION VERSUS LEGISLATIVE CREATION

Even if one rejects that the endorsement test analogy supports the claim that the state should refuse to recognize same-sex unions,
one might be tempted to accept a different rationale that has been offered to support that contention. Commentators suggest that some activities or relationships are prohibited, some permitted, and some afforded protection. Those in the latter group are "preferred" and, these commentators suggest, same-sex relationships should at best be permitted, but should not be afforded this special "preferred" status.

A. On Permitting Versus Protecting

Bruce Hafen distinguishes between three different categories of conduct: "(1) protected conduct (such as political speech), which is protected by a preferred constitutional right; (2) permitted conduct (such as driving a car), which is the subject neither of constitutional protection nor of unusual prohibitions; and (3) prohibited conduct (such as robbery) which is forbidden by a criminal sanction . . ."  

He argues that there is a significant difference between protected and permitted conduct, even bracketing the content of the conduct. Thus, suppose that there are two societies. In one, a particular conduct is protected and in another that very same conduct is merely permitted. Although one would not be able to distinguish between the contents of the conduct permitted in the two societies, the conduct in the first society would have a preferred status, if only because the legislature in the second society, but not in the first, could easily criminalize the conduct at issue sometime in the future.

In Trop v. Dulles, the Supreme Court discussed the use of denationalization as a punishment. The Court pointed out that such a "punishment strips the citizen of his status in the national and international political community." Stripping him of that status would not be a physical punishment, and a country might in fact "accord


87. See id. ("Judicial recognition of a substantive due process liberty interest gives extraordinary constitutional protection to the activity involved. Such judicial recognition, however, differs substantially from legislative action to accomplish the same result, no matter how similar the specific decrees may be.").


89. Id. at 101.
him some rights.” Nonetheless, “his enjoyment of even the limited rights of an alien might be subject to termination at any time,” and his very existence would be “at the sufferance of the country in which he happens to find himself.”

The Trop Court was suggesting that denationalization was an extreme punishment, which violated the Eighth Amendment’s bar on cruel and unusual punishment, even if the denationalized citizen might in fact enjoy many of the same rights and privileges that others enjoyed. Precisely because those rights and privileges could be withdrawn at any time, the denationalized citizen would be in a precarious position. Such a citizen might always fear, for example, that because of a change in the political climate he might suddenly be deprived of the rights that he had previously enjoyed. Thus, according to the Trop Court, changing the status of the rights from preferred (constitutionally protected) to permitted (recognized, but only at the sufferance of the legislature) was itself so significant that Eighth Amendment protections were implicated.

In his concurrence in Wieman v. Updegraff, Justice Black discussed the First Amendment right of free expression. He pointed out that “individuals are guaranteed an undiluted and unequivocal right to express themselves on questions of current public interest,” and made clear that this “means that Americans discuss such questions as of right and not on sufferance of legislatures, courts or any other governmental agencies.”

The difference between having a right protected by the Constitution and having a privilege on sufferance of the legislature does not involve the content of the liberty at issue. Justice Black’s point is

90. Id.
91. Id. at 101-02.
92. Id. at 101.
93. See id. (“We believe . . . that use of denationalization as a punishment is barred by the Eighth Amendment.”).
94. See id. at 102 (“It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.”).
95. See id. (“It subjects the individual to a fate of ever-increasing fear and distress.”).
96. 344 U.S. 183 (1952).
97. See id. at 192-94 (Black, J., concurring).
98. Id. at 194 (Black, J., concurring) (emphasis added).
that the liberty of free expression is greatly diminished if one has that liberty only on sufferance and not as a matter of constitutional right, even if the liberty accorded as a matter of sufferance would permit one to do as much as would a similar liberty accorded as a matter of constitutional right. 99

Professor Hafen illustrates the difference between constitutionally protected and statutorily permitted conduct by suggesting that sexual relations within marriage are protected, whereas sexual relations outside of marriage are either prohibited or merely permitted. 100 Part of his point was to suggest that when a judge strikes down a statute prohibiting particular conduct on constitutional grounds, the conduct moves from the prohibited to the protected category, whereas when a legislature decriminalizes conduct, the conduct moves from the prohibited to the permitted category. 101 While the conduct will be permissible whether the statute was repealed or, instead, struck down as unconstitutional, those engaging in the conduct might feel much more secure if it was constitutionally protected rather than merely legislatively permitted.

B. Sodomy

Consider sodomy. Statutes prohibiting sodomy have sometimes been repealed 102 and sometimes struck down on state constitutional

99. See id. at 193-94 (Black, J., concurring).
100. See Hafen, supra note 86, at 546.
101. See id. at 547.

These cases illustrate that judicial action in removing criminal penalties against sexual conduct can achieve a very different result from legislative action toward the same end. Since the justification for judicial action of this kind must ordinarily be grounded in a constitutional right, decriminalization decisions by the judiciary are likely to move conduct from category (3) all the way across the spectrum to category (1). Legislative decisions to decriminalize are far less significant, because they move a given kind of conduct only from category (3) to category (2).

Id.

102. See R.I. GEN. LAWS § 11-10-1 (2000) (“Every person who is convicted of the abominable and detestable crime against nature with any beast, shall be imprisoned for not more than twenty (20) years nor less than seven (7) years.”). In 1998, the Rhode Island legislature deleted “mankind” from the section. See id. notes to decisions (“Most of the annotations appearing below were decided prior to the 1998 amendment to this section, which deleted...
When the statute is found to violate state constitutional guarantees, it cannot be reenacted unless the state constitution itself is amended, whereas a statute that has been repealed could simply be reenacted. Individuals who foresee that they might wish to engage in sodomitical relations sometime in the future might feel much more secure in a state in which such behavior was constitutionally protected than they would feel in a state in which the law criminalizing such behavior had merely been repealed, given the possibility of reenactment.

It is important to understand what the example involving the sodomy statutes illustrates and what it does not. It does illustrate why a liberty is more secure if constitutionally protected rather than merely legislatively permitted. However, it neither illustrates why states are permitted to impose severe penalties on lesbians, gays, and bisexuals, nor why there cannot be a right to marry a same-sex partner, despite claims to the contrary by members of the judiciary and the academy.

Justice Scalia has suggested that the very possibility that sodomy statutes may be passed without offending the Federal Constitution gives the states great leeway with respect to how they treat lesbians, gays, and bisexuals. In Romer v. Evans, Justice Scalia suggested, "If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual

'...mankind' from the section."); see also Ed Vogel, Few Funds Kept '93 Session in Check, LAS VEGAS REV. J., July 5, 1993, at 1B ("Legislators repealed the 82-year-old sodomy law and legalized homosexual sex acts in private between consenting adults.");


conduct. Thus, a state would not, in fact, have to criminalize same-sex relations to make it permissible for the state to pass other laws adversely impacting lesbians and gays—the mere possibility of criminalization would suffice.

Perhaps it will be thought that this is an unfair interpretation of Justice Scalia’s position. Yet, Justice Scalia argued that Colorado’s Amendment 2 was justified as an expression of hostility to homosexual conduct, notwithstanding Colorado’s having been one of the first states to repeal its sodomy law and the amendment’s not having been limited to sodomy but, instead, having targeted “homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships.”

Several points should be made about the breadth of Amendment 2. Even if it had “merely” been limited to same-sex conduct and practices, it presumably would have included a number of activities that do not involve sodomy, such as handholding, embracing, kissing, etc., since these might also qualify as same-sex practices. But the amendment was much broader than that, since it also targeted orientation and relationships.

The Romer majority recognized that the “broad language” of the amendment could effect a “[s]weeping and comprehensive . . . change” in the law. However, Justice Scalia saw nothing wrong with this broad sweep, characterizing the amendment as “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through [the] use of the laws.”

Justice Scalia’s characterization was surprising on several counts. For example, the “modest” attempt was described by the majority as “unprecedented in our jurisprudence.” The Court further made clear that it was not within the country’s “constitutional

108. Id. at 641 (Scalia, J., dissenting).
109. See id. (Scalia, J., dissenting); see also id. at 644 (imputing to Coloradans hostility and moral disapproval of same-sex relations) (Scalia, J., dissenting).
110. See id. at 645 (Scalia, J., dissenting).
111. Id. at 624 (quoting COLO. CONST. art. II, § 30b).
112. Id. at 627, 630.
113. Id. at 636 (Scalia, J., dissenting).
114. Id. at 633.
tradition to enact laws of this sort.\textsuperscript{115} While Justice Scalia claimed in dissent that "[n]o principle... imagined by this Court in the past 200 years, prohibits what Colorado has done here,"\textsuperscript{116} he later implied in a dissenting opinion that \textit{Romer} involved a fairly standard application of electoral process jurisprudence.\textsuperscript{117}

Justice Scalia referred to lesbians, gays, and bisexuals as a "politically powerful minority," even though (1) they had lost the referendum vote, and (2) the evidence that they had overwhelming power had merely been that they had been included in anti-discrimination ordinances in the cities of Denver, Boulder, and Aspen.\textsuperscript{118} Given

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.} at 644 (Scalia, J., dissenting).
\item \textit{See} Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 518 U.S. 1001, 1001 (1996) (Scalia, J., dissenting) ("The consequence of its [\textit{Romer}'s] holding is that homosexuals in a city (or other electoral subunit) that wishes to accord them special protection cannot be compelled to achieve a state constitutional amendment in order to have the benefit of that democratic preference."). For a discussion of electoral process jurisprudence and its implications for same-sex marriage, see generally Mark Strasser, \textit{From Colorado to Alaska by Way of Cincinnati: On Romer, Equality Foundation, and the Constitutionality of Referenda}, 36 HOUS. L. REV. 1193 (1999) (concluding that the Supreme Court's referendum jurisprudence would not allow the Alaska amendment banning same-sex unions to stand); Mark Strasser, \textit{Same-Sex Marriage Referenda and the Constitution: On Hunter, Romer, and Electoral Process Guarantees}, 64 ALB. L. REV. 949 (2001) (concluding that referenda in four states limiting the marriage rights of same-sex couples are constitutionally vulnerable because those same-sex marriage initiatives violate electoral process guarantees).
\item \textit{See} \textit{Romer}, 517 U.S. at 623-24 (stating that Denver, Aspen, and Boulder had nondiscrimination ordinances).
\end{enumerate}
that such ordinances often include a whole host of groups,\textsuperscript{119} being included is hardly an indication of overwhelming power.

\textsuperscript{119} See, e.g., \textsc{Aspen, Colo. Mun. Code} § 15.04.570 (2000) which states that:

"Discrimination" or "to discriminate" means, without limitation, any act which because of race, color, creed, religion, ancestry, national origin, sex, age, marital status, physical handicaps, affectional or sexual orientation, family responsibility, or political affiliation, results in the unequal treatment or separation of any person or denies, prevents, limits or otherwise adversely affects, the benefit or enjoyment by any person of employment, ownership or occupancy of real property or public services or accommodations.


(a) It is an unfair housing practice, and no person:

(1) Who has the right of ownership or possession or the right of transfer, sale, rental, or lease of any housing or any agent of such person shall:

(A) Refuse to show, sell, transfer, rent, or lease or refuse to receive and transmit any \textit{bona fide} offer to buy, sell, rent, or lease or otherwise to deny to or withhold from any individual such housing because of the race, creed, color, sex, sexual orientation, gender variance, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of that individual or such individual's friends or associates;

(B) Discriminate against any individual because of the race, creed, color, sex, sexual orientation, gender variance, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of the individual or such individual's friends or associates in the terms, conditions, or privileges pertaining to any facilities or services in connection with a transfer, sale, rental, or lease of housing; or

(C) Cause to be made any written or oral inquiry or record concerning the race, creed, color, sex, sexual orientation, gender variance, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of an individual seeking to purchase, rent, or lease any housing or of such individual's friends or associates, but nothing in this section prohibits using a form or making a record or inquiry for the purpose of required government reporting or for a program to provide opportunities for persons who have been traditional targets of discrimination on the bases here prohibited.

\textit{Id.}
Justice Scalia's comments in his dissent in *Romer* might be contrasted with his comments in dissent in *Board of Education of Kiryas Joel Village School District v. Grumet*. In *Grumet*, the Court held that New York violated the Establishment Clause by setting up a special school district for members of the Satmar religious sect. Justice Scalia wrote, "The Court today finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hasidim." He then suggested that it was absurd to think that "the Satmar had become so powerful, so closely allied with Mammon, as to have become an 'establishment' of the Empire State.

Needless to say, the *Grumet* majority had neither said nor implied that the New York Legislature had been commandeered by the Satmar Hasidim. Justice Scalia's comments were especially surprising because he would seem to be the most likely individual currently on the Court to have made such a charge. One characterizing gays and lesbians as politically powerful when, after all, slightly over 53% of the Colorado electorate voted for Amendment 2, might wrongly be tempted to think a small group very powerful indeed if legislation were passed benefiting them. The point here, of course, is not to suggest that the Satmar Hasidim controlled the New York Legislature but, rather, that Scalia’s suggesting that Amendment 2 proponents were a tolerant group engaging in a modest attempt to defend themselves against a powerful "Kulturkampf" enemy speaks more about Justice Scalia's own particular views concerning lesbians,

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121. See id. at 705, 711-12.
122. Id. at 732 (Scalia, J., dissenting).
123. Id. (Scalia, J., dissenting).
125. See *Grumet*, 512 U.S. at 691 (noting that although the size of the sect was not offered in the opinion, the village of Kiryas Joel was said to have had a population of 8500).
126. See id. at 690 ("[A] special state statute passed in 1989 carved out a separate district, following village lines, to serve this distinctive population. 1989 N.Y. Laws, ch. 748.").
127. See *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).
gays, bisexuals, and transgendered people than it speaks to realistic assessments of power concentrations.\textsuperscript{128}

Justice Scalia is remarkably willing to uphold legislation that imposes burdens on lesbians, gays, and bisexuals, notwithstanding the unacceptable legal positions that are thereby at least implicitly adopted. One infers from Justice Scalia’s comments not only that much same-sex conduct is an acceptable stand-in for same-sex sodomy, but that, “where criminal sanctions are not involved, homosexual ‘orientation’ is an acceptable stand-in for homosexual conduct.”\textsuperscript{129} Lest one not understand just how broad that latter stand-in category is, Justice Scalia explains that an orientation merely involves one’s having a tendency or desire to engage in a particular activity.\textsuperscript{130} Thus, anyone who engages in or desires to engage in same-sex practices or conduct is potentially subject to the amendment’s reach.

According to Justice Scalia, Amendment 2 was constitutional because Colorado could have criminalized sodomy even though it chose not to do so.\textsuperscript{131} The implications of this position are startling. Consider adultery, which Colorado not only could criminalize but in fact does criminalize.\textsuperscript{132} If the state is justifiably thought to have a strong public policy against sodomy despite the state’s having decriminalized it years ago, the state certainly should be thought to have a strong public policy against adultery. Presumably, Justice Scalia would have no objection to the imposition of rather severe civil penalties for anyone who manifested an adulterous “orientation” or who engaged in such “conduct, practices or relationships.”\textsuperscript{133} Not only might married people who, for example, kissed or embraced a nonspouse be at risk, but individuals who even had a desire to

\textsuperscript{128} See id. at 644 (Scalia, J., dissenting) (likening those who engage in same-sex relations to murderers); cf. Bowers v. Hardwick, 478 U.S. 186, 200 (1986) (Blackmun, J., dissenting) (discussing the “Court’s almost obsessive focus on homosexual activity”).

\textsuperscript{129} Romer, 517 U.S. at 642 (Scalia, J., dissenting).

\textsuperscript{130} See id. at 641-42 (Scalia, J., dissenting).

\textsuperscript{131} See id. at 641, 645 (Scalia, J., dissenting).

\textsuperscript{132} See COLO. REV. STAT. § 18-6-501 (1986) (“Any sexual intercourse by a married person other than with that person’s spouse is adultery, which is prohibited.”).

\textsuperscript{133} Romer, 517 U.S. at 624 (quoting Amendment 2).
engage in such activity might be subject to civil penalty. While one would assume that very few on the Court would be willing to uphold the constitutionality of statutes penalizing married individuals for lusting in their hearts, Justice Scalia would seem committed to that position.

Suppose that the focus of the discussion shifts from states that could but do not criminalize sodomy to states that in fact criminalize sodomy. Even so, the implications that such statutes pose have been greatly misrepresented. For example, several commentators have suggested that because several states still have sodomy statutes, the right to marry a same-sex partner cannot be a fundamental right.


Yet, most states with sodomy statutes criminalize both same-sex and different-sex sodomy. If indeed a state criminalizing same-sex sodomy could not recognize same-sex marriage as a fundamental right, then a state criminalizing different-sex sodomy presumably could not recognize different-sex marriage as a fundamental right. Yet, the latter contention is absurd, since the Court has recognized that marriage is a fundamental right, and that right is no less fundamental in states that criminalize different-sex sodomy.

The reason that the existence of a sodomy statute does not preclude the recognition that the right to marry a different-sex partner is fundamental is not that married individuals do not engage in sodomitical relations. On the contrary, they do, but their right to do so is not subject to the statutory prohibition, and probably is protected by the Federal Constitution. So, too, were same-sex marriages recognized, sodomitical relations within marriage would presumably not be subject to the statutory prohibition and, in any event, would likely be protected by the Federal Constitution. Thus, whether consensual sodomy.

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137. See Jennifer Gerarda Brown, Sweeping Reform from Small Rules? Anti-Bias Canons As a Substitute for Heightened Scrutiny, 85 MINN. L. REV. 363, 390 n.114 (2000) (explaining that in thirteen states the sodomy statutes do not distinguish between same-sex and different-sex relations, whereas in five states only same-sex sodomitical relations are prohibited).


139. See Teresa M. Bruce, Note, Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back into the Courtroom, 81 CORNELL L. REV. 1135, 1143 (1996) (discussing briefs for Bowers "prepared by the American Psychological Association and the American Public Health Association indicating that eighty percent of married couples practiced oral and/or anal sex; that ninety-five percent of American men had engaged in oral sex; and that homosexuals were no more likely than heterosexuals to violate sodomy laws").

140. See Strasser, supra note 134, at 760 ("[T]hose states that have sodomy laws have created exceptions for married couples either through their legislatures or their courts.").

141. See Mark Strasser, Sodomy, Adultery, and Same-Sex Marriage: On Legal Analysis and Fundamental Interests, 8 UCLA WOMEN'S L.J. 313, 334 n.115 (1998) (listing several courts suggesting that consensual marital sodomy is constitutionally protected).
or not Bowers is still good law, same-sex sodomy within marriage would presumably not be subject to criminal penalty, and the existence of sodomy statutes would have no effect on whether there is a fundamental right to marry a same-sex partner. There is yet another reason to reject the claim that the existence of sodomy statutes precludes the recognition that the right to marry a same-sex partner involves a fundamental interest protected by the Constitution. Before the right to marry someone of another race was recognized as protected by the Federal Constitution, interracial marriage had long been prohibited, in some states for centuries. Indeed, when the Court struck down Virginia's anti-miscegenation statutes in Loving v. Virginia, several states had state constitutional provisions precluding interracial marriage. Were the rationale suggested by these commentators an accurate reflection of constitutional doctrine, the right to marry someone of another race would not have been recognized as constitutionally protected and, indeed, many of the rights recognized as protected by the right to privacy would not have been so recognized.

142. See David A.J. Richards, Identity and the Case for Gay Rights: Race, Gender, Religion as Analogies 131 (1999) (arguing that Bowers "should be regarded as no longer authoritative").
143. For further discussion of this issue, see Strasser, supra note 141, at 333-38.
145. See, e.g., A. Leon Higginbothan, Jr & Barbara K. Kopytoff, Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia, 77 Geo. L.J. 1967, 1967 n.5 (1989) (discussing Act XVI, 3 Laws of Va. 86, 86-87 (Hening 1823) (enacted 1691), which stated that "interracial marriage [was to be] punished by banishment from Virginia within three months"); cf. Loving, 388 U.S. at 6 ("Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period.").
146. 388 U.S. 1 (1967).
147. See id. at 6 n.5 (listing several states with constitutional provisions precluding interracial marriage).

The difficulty with this justification was not that the Court was wrong to conclude that the protection of sodomy was not deeply rooted in this Nation's history and tradition, but merely that the Court might have made the same point about contraception, abortion, and interracial marriage, and each of those is nonetheless protected by the right to privacy.

Id.
C. Hafen’s Tri-Partite Analysis Applied to Relationships

The sodomy example helps illustrate some of the flaws in the arguments offered by same-sex marriage opponents. That there are or even could be laws against sodomy hardly establishes that same-sex marriage could not be a fundamental right. Further, theorists offering such an argument seem not to appreciate its implications, since those states whose constitutions protect sodomy as part of the right to privacy presumably should include same-sex marriage within the right to privacy as well.149 After all, the Bowers Court upheld Georgia’s sodomy law because the Court saw “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other . . . .”150 Yet, considering that there is an obvious connection between same-sex marriage on the one hand and family and marriage on the other, state constitutions that protect sodomy and that reflect the priorities of the Federal Constitution should protect same-sex marriage as well.151

Not only has Professor Hafen’s prohibited/permitted/preferred analysis been applied to types of sexual relations, e.g., sodomy, but Professors Duncan and Wardle have also applied it to types of

149. See Wardle, supra note 64, at 61, stating:
The difference between state tolerance and preference justifies decriminalizing some homosexual relations without legalizing same-sex marriage. Thus, the argument that a state that does not prohibit all homosexual activities may not deny homosexuals the preferred marital status is a fallacious argument because it presumes that the current illegality of same-sex marriage is on par with the current illegality of sodomy when legalizing the latter produces permitted behavior and legalizing the former produces preferred behavior.

Id. The point here is that according to Wardle’s account sodomy is “preferred” if constitutionally protected and thus, presumably, a state which constitutionally protected sodomy would constitutionally protect same-sex marriage as well.


151. See Strasser, supra note 141, at 334, stating:
Ironically, those who link sodomy statutes and same-sex marriage bans risk having that argument turned on its head—in those states in which the sodomy bans have been held unconstitutional on due process grounds, the states’ constitutional due process guarantees might require that the right to same-sex marriage be recognized.

Id.

152. See Wardle, supra note 2, at 752.
personal relationships.\textsuperscript{153} They suggest that same-sex relationships should at best be placed in the "permitted" category, whereas different-sex marriages are and should be placed in the preferred category.\textsuperscript{154} They then argue that same-sex marriage proponents are seeking "special" treatment when attempting to have something currently in the permitted category instead included within the preferred category.\textsuperscript{155} However, there are a number of reasons why this analysis is faulty.

Same-sex marriage proponents are only seeking the same privileges that others have. It is hardly a request for "special treatment" in any common sense of the term when individuals are merely "struggling to change a social order that [has] consistently treated them as second class citizens,"\textsuperscript{156} and are seeking "only the equal respect and equal treatment to which they [are] constitutionally entitled."\textsuperscript{157}

Commentators are correct to talk about marriage as a "preferred relationship."\textsuperscript{158} The right to marry is an extremely important

\begin{footnotesize}
\begin{itemize}
\item[153.] Duncan, \textit{supra} note 2, at 593; Wardle, \textit{supra} note 2 at 758.
\item[154.] See Richard F. Duncan, \textit{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 RTS. J. 147, 163 (1997) (arguing that different-sex marriage is and should be in the preferred category whereas same-sex relationships should not be); Wardle, \textit{supra} note 64, at 61.
\item[155.] See Duncan, \textit{supra} note 2, at 593; Wardle, \textit{supra} note 2, at 752; see also Kevin G. Clarkson et al., \textit{The Alaska Marriage Amendment: The People’s Choice on the Last Frontier}, 16 ALASKA L. REV. 213, 220 (1999), stating:
\begin{quote}
The analysis of the right to privacy in \textit{Brause} confuses tolerance and preference. Relations and conduct may be legally categorized in at least three different ways—as "preferred," "permitted," or "prohibited." Marriage is the classic example of a \textit{preferred} relationship. It is one of the most highly protected, historically favored relations in the law. Thus, the claim for same-sex marriage is not a claim for mere tolerance, but for special preference. The principles of tolerance or privacy do not justify legalization of same-sex marriage because marriage is much more than a \textit{permitted, private} relation, it is a legally \textit{preferred, public} status.
\end{quote}
\textit{Id.} at 220.
\item[157.] \textit{Id.}
\item[158.] See Wardle, \textit{supra} note 2, at 751.
\end{itemize}
\end{footnotesize}
right and, as the Court has made clear, "'fundamental rights may not be submitted to vote; they depend on the outcome of no elections." The issue at hand is not whether marriage will remain "preferred," but who will be entitled to marry.

Some commentators deny that the issue is who should be allowed to marry, claiming that lesbians and gays, like everyone else, can marry—they simply cannot marry someone of their own sex. One could easily imagine the analogous argument having been made when interracial couples wished to marry. Thus, the would-be marrieds had the right to marry—they simply did not have the right to marry someone of another race. Such an argument is no more persuasive in the context under discussion here than it was when rejected in the interracial marriage context. Indeed, Professors Wardle and Duncan seem not to appreciate that the analogs of their arguments might have been offered by those seeking to preclude the recognition of interracial marriage. For example, interracial marriage opponents might have noted that some states permitted interracial marriage and others did not, and then would have argued that the fact that such relationships were permitted would not have made them "preferred." These commentators might further have claimed that interracial marriage proponents were "confus[ing] tolerance with preference."

There are other respects in which the analogs of the Wardle-Duncan arguments might have been used to advantage by those supporting anti-miscegenation laws. In response to the claim that interracial marriage bans manifested impermissible bias, these commentators might have claimed that "society has acted upon a longstanding moral consensus that conceives of marriage as a unique two-person 'community' of individuals of the same race. The interracial

159. See supra notes 16-22 and accompanying text.
162. Wardle, supra note 2, at 751.
163. Duncan, supra note 154, at 159.
164. Indeed, it has been suggested that God conceives of marriage as composed of individuals of the same race. See Loving, 388 U.S. at 3 discussing the
marriage opponents might have continued, "To say that other kinds of relationships are not within society's concept of marriage is not an expression of intolerance or animosity. One kind of relationship gets the benefit of a moral preference, and all others receive tolerance." That these kinds of arguments were rejected in the context of interracial marriage suggests that they should not be given credence in this context either.

The interracial marriage opponents described above, like the same-sex marriage opponents discussed in this Article, have confused types of relationships with types of people. A society might decide to give one relationship (marriage) preference over other kinds of relationships (nonmarital cohabitation) without at the same time endorsing the view that certain classes of individuals will be barred from enjoying that preferred status. Thus, the arguments of the interracial and same-sex marriage opponents are unpersuasive for the same reason—they have confused giving preference to a status with giving preference to particular people.

Proponents of interracial or same-sex marriages are not denying that marriage enjoys a preferred status, and thus hardly are confusing toleration with preference. Instead, they are merely suggesting that the state is not allowed to designate certain people as second-class citizens by refusing to permit them to marry.

Professor Duncan offers some consolation to those same-sex couples who have been denied the right to marry. After all, he suggests, individuals "may enter into committed same-sex relationships, perhaps even with benefit of clergy, and consider themselves married. In this latter case, although same-sex couples are denied the legal and public status of married persons, they are free to live with trial court opinion that:

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

Id. 165. Duncan, supra note 154, at 159.

166. It is of course true that same-sex marriage opponents and proponents can deny that marriage should be preferred—whether marriage is or should be preferred is simply an independent issue about which theorists might have differing views.
and love whomever they wish.”167 Yet, the state would hardly be free to preclude interracial marriage as long as it permitted those thus deprived “to live with and love whomever they wish[ed].” 168

One aspect of the same-sex marriage debate that is underappreciated is that it has important implications for right-to-marry jurisprudence more generally. For example, some same-sex marriage opponents suggest that Loving merely stands for the proposition that interracial marriages cannot be criminalized.169 According to this view, as long as the state does not criminalize the attempt to marry someone of another race,170 it is permitted not only to deny the legal and public status of marriage to interracial couples, but to prevent them from living together. Basically, the state would simply enforce its “neutral” statutes prohibiting nonmarital cohabitation.171 Needless to say, this is a radical reworking of the right-to-marry jurisprudence which is supported neither by Loving itself nor by the subsequent right-to-marry jurisprudence.172

D. The Hafen Analysis Applied to Marriage

Couples who are permitted to live together but not to marry are at a disadvantage, at least in part, because they have been denied the legal and public status of married persons. Suppose, however, that the legislature creates a special status for certain couples called “personal partnerships,” which, by statute, confers all of the benefits of marriage. Even if one brackets the presumed stigma attached to the legislature’s having set up a different status which mirrors marriage

167. Duncan, supra note 2, at 598.
168. Id.
169. For a discussion of the view offered by some same-sex marriage opponents that Loving might have been decided differently if Virginia had not criminalized interracial marriage, see Mark Strasser, Loving, Baehr, and the Right to Marry: On Legal Argumentation and Sophistical Rhetoric, 24 NOVA L. REV. 769, 771-77 (2000).
170. See supra note 166.
171. See McLaughlin v. Florida, 379 U.S. 184, 196 (1964). In McLaughlin, the Court struck down Florida’s punishing interracial cohabitation more severely than intraracial cohabitation. See id. at 196. However, the Court did not strike down nonmarital cohabitation statutes and the Court made clear that McLaughlin could have been prosecuted under the existing (race-neutral) statute. See id.
172. See Strasser, supra note 169, at 771-77.
but does not have that name, there is an additional difficulty, namely, that all of the benefits of “personal partnerships” could disappear were the legislators to have a change of heart and repeal the legislation.

Professor Hafen’s analysis suggests why marriage would be preferable to “personal partnerships,” even if each status accorded the same benefits. Marriage is constitutionally protected, while personal partnerships would be at the sufferance of the legislature subject to repeal with a change in legislative composition or sentiment.

Consider Vermont’s civil union status, which entitles same-sex couples to all of the rights and responsibilities of marriage. Even if the rights and responsibilities were identical to those that would be conferred by marriage, that status is nonetheless significantly inferior because it has been legislatively conferred rather than constitutionally protected. Thus, same-sex marriage opponents’ views notwithstanding, Professor Hafen’s analysis shows why same-sex unions must be constitutionally protected rather than accorded recognition on sufferance of the legislature. It certainly does not show why such unions should not be recognized at all, just as it does not show why states would be permitted to prefer intraracial marriages over interracial unions.

IV. CONCLUSION

Same-sex marriage opponents argue that same-sex unions should not be legally recognized because the state would thereby be endorsing such unions. Yet, this is unpersuasive both because legal recognition does not entail endorsement and, even if it did, this

173. For a discussion of why Vermont’s civil unions may offend state constitutional guarantees because of this imposition of stigma, see Mark Strasser, Mission Impossible: On Baker, Equal Benefits, and the Imposition of Stigma, 9 WM. & MARY BILL RTS. J. 1 (2000).

174. But see id. at 11-16 (suggesting that they are not identical because states are less likely to recognize civil unions than they would be to recognize same-sex marriages).

175. The argument is somewhat more complicated in Vermont because the legislative enactment was in response to the Vermont Supreme Court’s finding that the state constitution guaranteed equal benefits. See Baker v. State, 744 A.2d 864 (Vt. 1999). If the Vermont Legislature repealed the civil union law, it is unclear what the Vermont Supreme Court would do were a challenge to come before it.
would not be a reason to refuse to recognize such unions, since such unions promote the same kinds of state interests that different-sex unions promote and thus should be endorsed by the state.

Same-sex marriage opponents cite the endorsement text of Establishment Clause jurisprudence to support their claim that the state distinguishes between endorsement and toleration. While they are correct that the state recognizes the distinction, they are incorrect to believe that their position is thereby supported, since the endorsement test is used to determine which state practices are impermissible because the state thereby prefers some citizens over others.

Commentators cite Hafen's analysis distinguishing between preferred and nonpreferred activities in an attempt to show why same-sex unions should not be recognized. Yet, they misapply his analysis, since it might be used to distinguish between marriage and other types of cohabitation, but not to distinguish between those who will be allowed to enjoy a particular status and those who will not. Indeed, the Hafen analysis does not establish why the state should refuse to recognize same-sex marriages any more than it establishes why the state should refuse to recognize interracial marriages. On the contrary, the analysis instead establishes why both interracial and same-sex marriages should be recognized as a matter of constitutional right rather than mere legislative sufferance.

Same-sex marriage opponents are correct that the endorsement test of Establishment Clause jurisprudence and the Hafen analysis regarding tolerated and preferred activities are important in the same-sex marriage debate. However, these commentators fail to appreciate that the very arguments upon which they rely support rather than undermine the state's recognition of same-sex unions and, in fact, help to show why these commentators' positions are simply unsupportable in light of current law.