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MARRIAGE, DIVORCE AND THE CONSTITUTION†

LEONARD P. STRICKMAN*

During the past two decades, the Constitution has played an increasingly important role in the resolution of family law issues. This "constitutionalization" of family law is in part a result of a perception that social institutions have failed to preserve traditional normative family values in a mobile, technologically advanced society.¹ An otherwise conservative Supreme Court has contributed to these new developments with a burgeoning activism in the field of family law, creating and giving substance to new civil rights and liberties in an attempt to restore some of these traditional family values.² This article will

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* Dean and Professor, Northern Illinois University College of Law. The author would like to acknowledge the able research assistance of Gary Buseck, Mark Nowak and David Linsky, while students at Boston College Law School, in the preparation of this article. A particular debt of gratitude is owed to Gregory Golazeski who provided extraordinary assistance at the critical stages in the article's development.

¹ See D. RIESMAN, *THE LONELY CROWD* (1961); P. SLATER, *THE PURSUIT OF LONELINESS* (1976). See generally T. VEBLIN, *THE THEORY OF THE LEISURE CLASS* (1899). For a controversial contemporary analysis see C. LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* (1977) and *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* (1979).

² Much of the judicial activity in this area has centered on procreation, children's and parents' rights in child-parent-state relationships, and on the constitutional rights of members of family units other than the traditional nuclear family. See, e.g., *Harris v. McRae*, 100 S.Ct. 2671 (1980) (government funding of abortion); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (access to contraception); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (state-imposed maternity leave); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (access to contraception); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives by married couples). See also *Pennhurst State School v. Halderman*, 49 U.S.L.W. 4363 (Apr. 20, 1981); *H.L. v. Matheson*, 101 S.Ct. 1164 (1981) (notice to parents of minor's abortion decision); *Bellotti v. Baird*, 443 U.S. 622 (1979) (minor's abortion decision free from parental interference); *Parham v. J.R.*, 442 U.S. 584 (1979) (civil commitment of minor by parents); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976) (consent of spouse to abortion decision); *Goss v. Lopez*, 419 U.S. 565 (1975) (suspension from school); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (parental right to control education of minors for religious reasons); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (minors' right to express political views in school); *In re Gault*, 387 U.S. 1 (1967) (juvenile delinquency adjudication and commitment); and *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (living together); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (extended families); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977) (foster families); *Caban v. Mohammed*, 441 U.S. 380 (1979) (consent to adoption, illegitimacy); *Parham v. Hughes*, 441 U.S. 347 (1979) (recovery for

examine the constitutional issues posed by the exercise of the rights of marriage and divorce.³

In the first section, the article will trace the development of equal protection and due process jurisprudence since the early part of the twentieth century. This discussion will illustrate how the Supreme Court has evolved several standards of review for equal protection analysis, from which it has derived standards for assessing substantive due process claims. Within this analytical framework of equal protection and substantive due process, the article will then consider the constitutional aspects of marriage. In examining the notion of marriage as a fundamental right and the state's role in marital concerns, the article will consider the legitimacy of certain state-imposed prohibitions on whom an individual may marry, treating prohibitions based on race, sex, incest and affinity. In addition, the discussion will analyze the constitutional ramifications of certain state-imposed requirements which restrict the choice of whether to marry — wealth, age, health, and monogamy — as well as penalties on marriage short of prohibition, such as the denial of government benefits. The marriage section will conclude with a discussion of the evolving notion of marital privacy, as developed by the Supreme Court in *Griswold v. Connecticut* and its progeny.

The article will then turn to a consideration of the constitutional issues surrounding divorce. In analyzing the concept of divorce as a fundamental right, the discussion will point out the contrast between marriage and divorce in the Court's developing treatment of family law issues — namely, that the Supreme Court has not yet fully considered the constitutional limitations on state-imposed requirements for divorce, as it has done for state-imposed limitations on marriage. In this section, the article will review the concept of divorce from the perspective of procedural access, substantive due process, and equal protection. It will be suggested that the Court should apply a high-intermediate standard of review to restrictions on divorce.

In addition to considering divorce as a fundamental right, the article will discuss the post-divorce issues of custody, visitation rights, and child support. With respect to child custody, the discussion will treat the legitimacy of con-

wrongful death); *Lalli v. Lalli*, 439 U.S. 259 (1978) (inheritance); *Trimble v. Gordon*, 430 U.S. 762 (1977) (inheritance); *Stanley v. Illinois*, 405 U.S. 645 (1972) (custody).

³ Other recent articles discuss the history of family law, trends in the area generally and in specific matters, and extensions of current principles to new issues. The literature reviews both state law and federal constitutional law issues. *E.g.*, *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980) [hereinafter cited as *Developments*]; Becker & Honig, *Family Law*, 1979 ANN. SURV. AM. L. 511; Riga, *The Supreme Court, Marriage, and the Family: Tradition or Transition?*, 39 JUR. 325 (1979); Beck, *Nontraditional Lifestyles and the Law*, 17 J. FAM. L. 685 (1978-79); Zainaldin, *The Emergence of a Modern American Family: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038 (1979); Gelfand, *Authority and Autonomy: The State, the Individual and the Family*, 33 U. MIAMI L. REV. 125 (1978); Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769 (1978); Kinney, *Legal Issues of the New Reproductive Technologies*, 52 CAL. ST. B.J. 514 (1977); *Family Law Symposium*, 1976 B.Y.U. L. REV. 605, 659, 693, 709, 715, 723 (1976); Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663 (1976).

sidering factors such as the best interests of the child, and the parents' gender, race, religion or moral character. It will be suggested that constitutional issues are present in almost every aspect of custody and visitation matters, and courts must be aware of rights emanating from the first amendment, as well as the fourteenth amendment due process and equal protection clauses. The article will also explore the constitutional implications of child support determinations under equal protection and due process analysis. Having suggested considerations that the Court must address in reviewing divorce and post-divorce family issues, the article will conclude with an examination of the problem of discrimination against the divorced.

I. EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS: AN ANALYTICAL FRAMEWORK

It is important to establish at the outset a consistent analytical model for due process and equal protection within which consideration of substantive family law issues may be undertaken. In many respects, one model can serve both substantive due process and equal protection analyses. Indeed, the Supreme Court has managed over the past three decades to blend these conceptually distinct concepts. The Court has employed notions of "fundamental rights" to invoke similar standards of review for both due process and equal protection cases.⁴ Nevertheless, while it is possible to construct a model employing uniform standards of review which may be applied to either due process or equal protection claims, it remains critical for a deeper understanding of these constitutional limitations to mark the subtle distinctions between them.

A. *The Development of Equal Protection*

In theory, the equal protection clause places less embracing limits on popular government than does the due process clause. The fourteenth amend-

⁴ There is much discussion in the literature of the Court's blend of due process and equal protection. Some of the commentators contend that the equal protection clause has been the Court's vehicle to strike down laws objectionable in substance without returning to a *Lochner* era-type substantive due process. Others offer theoretical justification for the blend. See, e.g., *Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine*, 14 HARV. C.R. - C.L. L. REV. 529, 554-73 (1979); Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383, 383-88 (1977); Redlich, *A Black-Harlan Dialogue on Due Process and Equal Protection: Overheard in Heaven and Dedicated to Robert B. McKay*, 50 N.Y.U. L. REV. 20, 31-33, 38-46 (1975); Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223, 242-66 (1970); Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 58, 59, 76-77 & n.131. See generally *Developments*, *supra* note 3, at 1116-93.

In addition to the discussion by commentators, several justices of the Court have criticized the Court's selection of one doctrine in lieu of the other, as well as the expansion of the equal protection doctrine itself. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 391-92, 395-96 (1978) (Stewart, J., concurring); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 652-53 (1974) (Powell, J., concurring); *Eisenstadt v. Baird*, 405 U.S. 438, 467 (1972) (Burger, C.J., dissenting); *Williams v. Illinois*, 399 U.S. 235, 259-60 (1970) (Harlan, J., concurring); *Shapiro v.*

ment's due process clause extended the protection individuals enjoyed against arbitrary actions by the federal government to actions taken by the states. In contrast, the equal protection clause introduced a new civil rights concept to the constitution. The clause attempts to assure comparable treatment of persons similarly situated.⁵ The early cases interpreting the equal protection clause properly ascribed to its framers the summary intent of assuring racial equality before the law.⁶

Against this backdrop, the Supreme Court has in the contemporary development of equal protection jurisprudence placed a very heavy burden on government to justify racial classifications.⁷ Such classifications will pass constitutional challenge only if they are supported by "overriding" or "compelling" governmental interests,⁸ and if they adopt the least restrictive means⁹ for the achievement of such interests. This classic statement of "strict judicial scrutiny," has been extended by the Court to provide the standard of review for "suspect"¹⁰ classifications other than race as well.¹¹

Thompson, 394 U.S. 618, 658-63 (1969) (Harlan, J., dissenting); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 675-76 (1966) (Black, J., dissenting).

⁵ Justice Jackson distinguished equal protection from due process as follows:

Invocation of equal protection clause [unlike due process] does not disable any governmental body from dealing with the subject at hand. It merely means that prohibition or regulation must have a broader impact. . . . [S]tates . . . must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation.

Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

⁶ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70-72, 81 (1873); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880); *Virginia v. Rives*, 100 U.S. 313, 318 (1880); *Ex parte Virginia*, 100 U.S. 339, 344-45 (1880); *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896); *Nixon v. Herndon*, 273 U.S. 536, 541 (1927).

⁷ The equal protection concept contained in the fourteenth amendment, as applied to racial discrimination, has been extended to the federal government by way of the due process clause of the fifth amendment. *E.g.*, *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954). See generally Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977).

For cases bearing on racial classifications, see *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 299, 305 (1978) (opinion of Powell, J.).

⁸ *Fullilove v. Klutznick*, 100 S.Ct. 2758, 2784 (1980) (Powell, J., concurring); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (opinion of Powell, J.); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192-93, 196 (1964); *Korematsu v. United States*, 323 U.S. 214, 216, 223 (1944).

⁹ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, White, Marshall and Blackmun, JJ., concurring and dissenting) (least restrictive alternative).

¹⁰ *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

¹¹ See *In re Griffiths*, 413 U.S. 717, 721-22 (1973) (alienage); *Graham v. Richardson*, 403 U.S. 365, 372, 376 (1971) (alienage); *Hernandez v. Texas*, 347 U.S. 475, 477-78, 480-81 & n.12 (1954) (national origin); *Oyama v. California*, 332 U.S. 633, 640, 646-47 (1948) (national origin).

The Court has flirted with several standards of equal protection in cases examining laws classifying upon the basis of gender. At one time, four justices of the Court advocated strict scrutiny in gender cases and treated gender as a suspect classification. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (Brennan, J., announcing judgment of Court in a plurality opinion) ("classifications based upon sex . . . are inherently suspect, and must therefore be subjected to

After flirting briefly with an activist employment of the equal protection clause to strike down economic legislation during the latter part of the *Lochner* due process era,¹² the Court retreated to a lower level of scrutiny for non-suspect classifications.¹³ In a number of cases, the Court reverted to the minimum scrutiny standard of review it had announced in 1911 in *Lindsley v. National Carbonic Gas Co.*¹⁴

1. The equal-protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Under the minimum rationality standard, statutes which did not effect suspect classifications would be sustained if the court could conceive of any rational

strict judicial scrutiny"). Even those justices, however, have retreated from that position. *Caban v. Mohammed*, 441 U.S. 380, 388 (1979); *Craig v. Boren*, 429 U.S. 190, 197-99, 204 (1976) (Brennan, J.) (substantial relation to important government objective).

In alienage classifications, the Court's purported adoption of strict scrutiny is seriously called into question by *Ambach v. Norwick*, 441 U.S. 68, 72-75 (1979), and *Foley v. Connelie*, 435 U.S. 291, 294-97 (1978).

¹² See, e.g., *Smith v. Cahoon*, 283 U.S. 553, 561-63 (1931); *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 402 (1928); *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 493 (1927); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 516 (1926); *Kentucky Fin. Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544, 551 (1923); *Truax v. Corrigan*, 257 U.S. 312, 336-38 (1921); *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421, 424-26 (1921); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415-16 (1920); *McFarland v. American Sugar Ref. Co.*, 241 U.S. 79, 86-87 (1916). See text and notes at notes 40-49 *infra*.

¹³ This standard of restraint is similar to that employed for due process review in *United States v. Carolene Products*, 304 U.S. 144 (1938). See text and notes at notes 46-47 *infra*.

¹⁴ 220 U.S. 61, 78-79 (1911). See also *Ferguson v. Skrupa*, 372 U.S. 726, 732-33 (1963); *McGowan v. Maryland*, 366 U.S. 420, 425-28 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109-10 (1949); *Goesaert v. Cleary*, 335 U.S. 464, 465-67 (1948); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 556-64 (1947). The only minimum rationality equal protection case in which the Court struck down a piece of economic legislation during the period between the *Lochner* era and the Burger Court was *Morey v. Doud*, 354 U.S. 457, 467-69 (1957). The *Morey* case, however, was expressly overruled in *New Orleans v. Dukes*, 427 U.S. 297, 306 (1976). Two recent applications of minimum rationality equal protection review upheld legislation struck down by lower courts. *Minnesota v. Clover Leaf Creamery Co.*, 101 S.Ct. 715, 724-27 (1981) (upholding ban of plastic milk containers); *United States R.R. Retirement Bd. v. Fritz*, 101 S.Ct. 453, 458-61 (1980) (upholding withdrawal of windfall retirement benefits).

basis on which the legislation might rest. The two-tier equal protection analysis employed by the Court thus invoked strict scrutiny for suspect classifications, and minimum rationality for non-suspect classifications.¹⁵

In 1942 the Supreme Court applied strict scrutiny for the first time to an equal protection case not involving a suspect classification. At issue in *Skinner v. Oklahoma*¹⁶ was a statute authorizing the sterilization of persons convicted more than twice of "felonies involving moral turpitude." The statute exempted from its coverage certain non-violent felonies, such as embezzlement. Rather than addressing in due process terms the individual's arguable right not to be sterilized for convictions of a crime, the court employed an equal protection analysis. The state, it held, had established a classification distinguishing between larcenists and embezzlers. While this was surely a non-suspect classification, the statute nonetheless had to satisfy the demanding requirements of strict scrutiny because by authorizing sterilization the statute had impinged upon "one of the basic civil rights of man."¹⁷ Consequently, the statute was found in violation of the equal protection clause.

The *Skinner* decision was the watershed case in the Court's adoption of a "fundamental interest" approach to equal protection. The term "fundamental interest" refers to those personal interests which either do not qualify for independent protection under the due process clause as "fundamental rights," or whose relation to the due process clause has not been specifically addressed by the Court.¹⁸ Nevertheless, the comparative abridgement of such funda-

¹⁵ A fuller explanation of the two-tier approach is presented in Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as *Gunther Newer Equal Protection*].

¹⁶ 316 U.S. 535 (1942).

¹⁷ *Id.* at 541.

¹⁸ The Court has stated that the fundamental interest in voting in state elections qualifying for equal protection strict scrutiny does not merit independent due process protection. The early decisions noted specifically that states need not conduct elections for local offices. The cases merely held that when a state grants the franchise, it must do so even-handedly. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 629 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966).

In contrast to the voting cases, other fundamental interest cases do not contain explicit statements. The Court's reliance on equal protection analysis, though, is persuasive evidence that the due process clause does not provide independent protection. In the seminal fundamental interest case, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court, through Justice Douglas, relied on the equal protection clause to strike down the statute. *Id.* at 538. Chief Justice Stone, however, found a deprivation of liberty and offered the lack of procedural due process as an alternative basis for the decision. *Id.* at 543-45 (concurring opinion).

An even subtler distinction occurred in the penalty on interstate travel or migration cases. Although the Court found interstate travel to be a fundamental interest protected by the equal protection clause, the source of the interest was not specifically decided. *See Shapiro v. Thompson*, 394 U.S. 618, 630 (1969). One frequently discussed source is the due process clause. *Id.* at 666-71 (Harlan, J., dissenting) (reviewing potential sources and concluding that due process clause appropriate source); *United States v. Guest*, 383 U.S. 745, 763-70 (1966) (Harlan, J., concurring and dissenting) (reviewing sources). Conceivably, then, a due process right lurking in the opinions was the ultimate basis for the holdings. The Court did not indicate whether such a right would suffice in itself to justify the decisions. The Court's rejection of Justice Harlan's due

mental interests activates strict scrutiny.¹⁹ After two decades of disuse, the fundamental interest analysis of *Skinner* recently re-emerged. As currently used by the Court, the analysis requires that the fundamental interest be "explicitly or implicitly protected by the Constitution."²⁰ This approach has been employed by the Court in equal protection cases bearing on the personal interests in voting,²¹ and interstate migration.²²

Against the backdrop of two-tier equal protection — minimum rationality virtually guaranteeing judicial approval, and strict scrutiny virtually requiring judicial invalidation of classifications under challenge — a more complex response pattern has emerged from the Burger Court to equal protection claims.²³ The Supreme Court has employed the following intermediate standards of review in equal protection cases:

(1) *Strict rationality*. The Court has at times employed the language of

process approach implies that it would not be sufficient. See *Shapiro v. Thompson*, 394 U.S. at 655 (Harlan, J., dissenting).

¹⁹ A *sine qua non* of a successful challenge under the equal protection clause, unlike one under the due process clause, is that the challengers establish a classification which discriminates between two groups. Early on, the Supreme Court discussed the difference between due process and equal protection:

It may be that [the clauses] overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. . . . The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, . . . so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. . . .

The [equal protection clause] was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination . . . on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. . . . Class legislation, discriminating against some and favoring others, is prohibited, but legislation[,] . . . if . . . it affects alike all persons similarly situated, is not within the amendment.

Truax v. Corrigan, 257 U.S. 312, 332-33 (1921) (citations and internal quotation marks omitted). A statute, therefore, may violate the due process clause even though it deprives everyone equally of the right in question. It may violate the equal protection clause if it treats similarly situated persons unequally, whether or not due process is also violated.

²⁰ *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

²¹ *Dunn v. Blumstein*, 405 U.S. 330, 335-37, 342 (1972); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 625-29, 633 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665-69, 670 (1966); *Reynolds v. Sims*, 377 U.S. 533, 554-55, 561-62 (1964).

²² *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254-55, 261-62, 269 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 334-35, 338-45 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 627, 629-31 & n.8, 634, 641-42 (1969) & 642 (Stewart, J., concurring). *Accord*, *Sosna v. Iowa*, 419 U.S. 393, 406-09 (1975) (without explicitly discussing whether infringement on interstate travel amounts to penalty, Court upheld durational residency requirement for obtaining a divorce as "reasonably . . . justified" and distinguished *Maricopa County*, *Dunn* and *Shapiro*).

²³ See *Gunther Newer Equal Protection*, *supra* note 15. The variegation of equal protection standards was supported by Justice Marshall in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting). While a majority of the Court has refused to acknowledge explicitly intermediate review standards at variance with two-tier scrutiny, this article will identify those additional standards and assess the employment of both intermediate and traditional standards in equal protection cases arising in the areas of marriage and divorce.

minimum rationality by requiring a statute to bear a rational relation to a legitimate state interest, while placing the burden on the government to demonstrate that the classification is a reasonable means to the articulated actual purpose of the legislation.²⁴ The challenger is thus relieved of the impossible burden of proving that the statute bears no rational relation to any number of hypothetical governmental objectives. This approach seems to be employed in cases where the Court can identify a classification²⁵ abridging an interest

²⁴ See, e.g., *James v. Strange*, 407 U.S. 128 (1972) (state recoupment statute); *Jackson v. Indiana*, 406 U.S. 715 (1972) (striking down state commitment statute which treated criminal defendants incompetent to stand trial more harshly than other types of feeble-minded individuals); *Stanley v. Illinois*, 405 U.S. 645 (1972) (custody hearing prior to terminating unmarried father's parental rights); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (distribution of contraceptives to unmarried persons).

The primary difference between minimum and strict rationality is the shift of the burden of demonstrating the legitimacy of the governmental purpose (ends) and the rational relationship of the classification (means). The telltale sign of the shift is the Court's refusal to imagine *any* conceivable purpose to justify the classification. Instead, the government must articulate expressly its end. Not only must the government articulate its purpose, but the legislative history must support the government's assertion. Concomitantly, the government must show that the classification is rationally related to the articulated purpose. Professor Gunther's article also included in this strict rationality category cases in which the classification must substantially further the purpose with little tolerance for substantial over- and under-inclusiveness. *Newer Equal Protection*, *supra* note 15, at 20-21, 23, 29, 33. As used in this article, such a tolerance is allowable under minimum and strict rationality. When strict rationality review is applied to state legislation, legislative history is often unavailable. Pinning down the government's articulated purpose, then, becomes problematical because the Court has only statutory context to work with. As a result, strict rationality is less demanding of state government defendants.

The Supreme Court Justices recently disagreed over the applicability of strict rationality. In *United States R.R. Retirement Bd. v. Fritz*, 101 S.Ct. 453 (1980), Justice Brennan, joined by Justice Marshall, contended that the statutory entitlement to retirement benefits, a curtailment of which was at issue, demanded that the government bear the burden of articulating a legitimate purpose. He thought that the Court should be wary of post-hoc rationalizations and that the classification was not rationally related to the purposes reflected in its legislative history. *Id.* at 463-66 (dissenting opinion). Justice Rehnquist, writing for the majority, however, gave broad deference to the government in assuming a legitimate purpose and held that the classification was neither arbitrary nor irrational. *Id.* at 458-61. Even Justice Brennan, however, has agreed that in purely economic legislation cases minimum rationality is the appropriate test. A few months after *Fritz*, he wrote the opinion of the Court upholding Minnesota's law banning non-reusable plastic milk containers, but not cardboard ones, despite a contrary conclusion by the state supreme court. *Minnesota v. Clover Leaf Creamery Co.*, 101 S.Ct. 715 (1981).

²⁵ The equal protection analysis which has emerged in recent years acknowledges four types of classifications: suspect, quasi-suspect, disfavored, and nonsuspect. See Strickman, *The Tuition-Poor, the Public University, and Equal Protection*, 29 U. FLA. L. REV. 595, 610 & nn.83-86 (1977) [hereinafter cited as Strickman]. Wealth, for example, is a "traditionally disfavored" classification. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966). When wealth, or more accurately indigency, is the basis of the classification, the Court applies strict rationality even though no other basis exists for more than minimum rationality. See, e.g., *James v. Strange*, 407 U.S. 128 (1972) (state recoupment statute). When an important or a fundamental interest is infringed on by a disfavored classification, intermediate scrutiny results. See *Harper v. Virginia Bd. of Elections*, *supra* (voting in state elections); Strickman, *supra*, at 610. See also text at notes 32-33 *infra*. In his lengthy dissenting opinion in the public school financing case, Justice Marshall pointed out that the Court's approach to equal protection analysis belies the traditional suspect-nonsuspect dichotomy. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting). He observed that "*James [v. Strange]* and *Reed* can only be understood

which falls short of being "fundamental," but which may qualify, in the Court's view, as important.²⁶ It has been described by Professor Gunther as a "new bite for the old equal protection."²⁷

(2) *Low-intermediate scrutiny*. The area of gender-based classifications has produced an equal protection standard of review which may be identified as low-intermediate scrutiny. The Court briefly flirted with the concept of gender as a suspect classification,²⁸ but in the 1976 case of *Craig v. Boren*²⁹ settled on a standard which inquired whether the classification in question "serve[d] important governmental objectives and [was] substantially related to [the] achievement of those objectives."³⁰

The *Craig v. Boren* standard differs from both minimum rationality and strict scrutiny with respect to the ends and means tests to be applied. First, the governmental interest must be more than merely "permissible" or "legitimate" — it must be "important." Yet an "important" interest apparently can be of lesser magnitude than the "compelling" interests required to satisfy strict scrutiny. Second, in requiring a "substantial" relationship of

as instances in which the particular individious character of the classification [wealth and gender, respectively] caused the Court to pause and scrutinize with more than traditional care the rationality of state discrimination." *Id.* at 107 (Marshall, J., dissenting). Justice Marshall cited *Reed v. Reed*, 404 U.S. 71 (1971), as an example of a strict rationality case. 411 U.S. at 106-08 (Marshall, J., dissenting). At that time, gender-based classifications were treated as disfavored. Since then, however, *Reed* has been superseded by *Craig v. Boren*, 429 U.S. 190 (1976), making gender-based classifications quasi-suspect, Strickman, *supra*, at 610, and subject to low intermediate scrutiny. See text at notes 29-31 & 114 *infra*.

Age-based classifications are another type of disfavored classification and are accorded strict rationality review. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). Without regard to its classification status when employed by states, alienage is probably at most a disfavored basis for classifications by the federal government. Compare *Ambach v. Norwick*, 441 U.S. 68 (1979) with *Graham v. Richardson*, 403 U.S. 365 (1971). See *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); Strickman, *supra*, at 620. Other groups which, when set apart by the government, constitute a disfavored classification basis are illegitimates, see *Lalli v. Lalli*, 439 U.S. 259 (1978) (Court limited analysis to the governmental purpose as articulated in legislative history and allows substantial over-inclusiveness), and criminal defendants, see *Jackson v. Indiana*, 406 U.S. 715 (1972).

²⁶ *E.g.*, *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 17, 44-55 (1973) (education); *Jackson v. Indiana*, 406 U.S. 715 (1972) (liberty interest in avoiding unnecessary commitment); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (access to contraceptive devices); *Lindsey v. Normet*, 405 U.S. 56 (1972) (housing and appellate review); *Dandridge v. Williams*, 397 U.S. 471 (1970) (welfare).

Recently, Justice Brennan advocated the use of strict rationality in a case where a statutorily-created entitlement (retirement benefits) was the important interest at issue. See *United States R.R. Retirement Bd. v. Fritz*, 101 S.Ct. 453, 463-66 (1980) (dissenting opinion). The majority of the Court did not go along with his approach and applied minimum rationality instead. See *id.* at 458-61.

²⁷ Gunther, *Newer Equal Protection*, *supra* note 15, at 20.

²⁸ See *Frontiero v. Richardson*, 411 U.S. 677 (1973). In *Frontiero*, Justices Douglas, Brennan, White, and Marshall would have ruled that classifications based upon gender are "inherently suspect" and subject to strict scrutiny under the principles of equal protection embodied in the due process clause of the fifth amendment. *Id.* at 688 (plurality opinion).

²⁹ 429 U.S. 190 (1976).

³⁰ *Id.* at 197.

means to ends, the Court was apparently adopting a test of underinclusiveness; the *Craig v. Boren* standard allows on its face for overinclusive classifications.³¹

(3) *High-intermediate scrutiny*. The early fundamental interest cases employed the rhetoric of strict scrutiny to review equal protection challenges.³² It is arguable, however, that the government was allowed more latitude in defining its compelling interests than it would have been in supporting racial classifications.³³ Perhaps reflecting a more honest reading of its prior cases, the Court has of late seemed to retreat from the rhetoric of strict scrutiny in deciding fundamental interest cases. Thus, in *Zablocki v. Redhail*,³⁴ the Court held that the classification in issue could not be upheld unless it was supported by sufficiently important state interests³⁵ and was closely tailored to effectuate only those interests.³⁶

This standard might be fairly characterized as one whose rigor falls between low-intermediate and strict scrutiny. The talismanic requirement of a "compelling" state interest, for example, is avoided. In addition, the "closely tailored means" component seems to add a check on the overinclusiveness permitted by the *Craig v. Boren* test, but falls short of the "least restrictive means"³⁷ requirement of strict scrutiny.

B. *Substantive Due Process Before 1965*

During the first three decades of the twentieth century, legislation which suffered from no procedural due process infirmities was nonetheless frequently struck down by the Supreme Court as violative of due process. Most of the

³¹ See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (the Court used a standard of scrutiny allowing over-inclusive classifications). The Court has arguably adopted analyses in some gender discrimination cases which incorporate an overinclusiveness component into the *Craig* standard. See, e.g., *Wengler v. Druggists Mutual Ins. Co.*, 100 S.Ct. 1540 (1980); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Orr v. Orr*, 440 U.S. 268 (1979).

³² See, e.g., *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

³³ Compare *Burns v. Fortson*, 410 U.S. 686, 686-87 (1973) (fundamental interests in voting and interstate travel — challenged restrictions upheld because "'necessary to promote . . . the orderly, accurate, and efficient administration of state and local elections'") and *Marston v. Lewis*, 410 U.S. 679, 679-80 (1973) (fundamental interests in voting and interstate travel — challenged restrictions pass constitutional muster because they "are supported by sufficiently strong local interests") with *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29-31 (1971) (racial classification — affirming authority of district court to order busing to achieve integration despite evidence showing that busing would substantially increase costs; see 431 F.2d 138, 143-44 & n.4 (4th Cir. 1970) (discussion of costs by the court of appeals below)). Of course, *Swann* may be distinguished as a remedy case rather than a case testing the basic constitutionality of a racial classification, but it seems clear that such classifications could not be justified by cost savings considerations.

³⁴ 434 U.S. 374 (1978). See discussion in text at notes 125-35 *infra*.

³⁵ 434 U.S. at 388. The Court in *Zablocki* interchanged the phrase "legitimate and substantial interests" with "sufficiently important interests." *Id.*

³⁶ *Id.*

³⁷ See note 9 *supra*.

legislation which the Court invalidated during this period involved regulation in the marketplace of products, services and labor.³⁸ Yet judicial activism under the due process clause also extended to legislation, whose neither primary means nor ends could be fairly characterized as economic.³⁹

The famous case of *Lochner v. New York*⁴⁰ exemplifies the mode of analysis employed by the Court during this period. The *Lochner* Court struck down a statute which established a sixty-hour maximum work week for certain employees. The New York statute in question, like all regulations of conduct, was uncontestably a restriction on, or deprivation of, liberty.⁴¹ The primary question, therefore, was whether the deprivation of liberty affected by the New York statute was undertaken without due process.⁴² The Supreme Court held that the burden was on the state to establish that the challenged statute had, on its face, a direct and substantial relation to a purpose approved by the Court as proper under its subjective view of the police power.⁴³ Although New York's announced purpose of protecting public health was legitimately within its police powers, the Court was persuaded that the state had not demonstrated sufficient directness or substantiality of the law's effect to withstand a due process attack.⁴⁴ The Court did not make clear whether it would provide a comparable level of protection for all deprivations of liberty, or whether there was something unique about the identified liberty to contract which required greater judicial deference. During the subsequent three decades, however, the companion words "liberty" and "property" in the due process clause were interpreted liberally by the Court. A heavy, often insuperable, burden was placed upon the government to justify the deprivation of such constitutionally protected interests.⁴⁵

After a thirty year reign of such analysis, the Supreme Court began displaying a reluctance to invalidate legislation on substantive due process

³⁸ See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929); *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Coppage v. Kansas*, 236 U.S. 1 (1915).

³⁹ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923) (statute which required all instruction in schools to be conducted in the English language invalidated). See also *Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1925); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Bartels v. Iowa*, 262 U.S. 404 (1923).

⁴⁰ 198 U.S. 45 (1905).

⁴¹ In a dissenting opinion, Justice Holmes noted that it had been well settled by the Court that state constitutions and statutes may regulate life in ways that are restrictions or deprivations of liberty. Holmes noted also Sunday laws, usury laws, the prohibition of lotteries, and the general interference with liberty by school laws, the Post Office, and taxation. *Id.* at 75 (Holmes, J., dissenting).

⁴² The fourteenth amendment provides, *inter alia*, that no state "shall deprive any person of life, liberty, or property without due process of the law." U.S. CONST. amend. XIV.

⁴³ 198 U.S. at 64. See also cases cited in note 38 *supra*.

⁴⁴ *Id.* at 57-58.

⁴⁵ See, e.g., *Adams v. Tanner*, 244 U.S. 590 (1917); *Adair v. United States*, 208 U.S. 161 (1908). Accord, *Muller v. Oregon*, 208 U.S. 412 (1908) (state statute upheld as satisfying *Lochner*-type due process burden). See also cases cited in note 38 *supra*.

grounds.⁴⁶ The culmination of its new restraint came in the 1938 decision of *United States v. Carolene Products*.⁴⁷ In *Carolene Products*, a federal statute purportedly aimed at protecting consumers was challenged on due process grounds. The Court announced that:

a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

. . . [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.⁴⁸

No longer, then, was the government required to meet unsurmountable burdens of proof in order to justify the regulation of commercial conduct. Such regulation was to be presumed constitutional unless the Court found it inconceivable that the legislation rested upon some rational basis.

The limitation of this "minimum rationality" standard to "regulatory legislation affecting ordinary commercial transactions" left open the question whether there were some deprivations of liberty or property which would, like the deprivations found in *Lochner*, impose a greater burden of justification upon government. That the Supreme Court struck down no legislation on substantive due process grounds between *Carolene Products* and *Griswold v. Connecticut*⁴⁹ in 1965 seemed to suggest that substantive due process had met its end.

⁴⁶ The Supreme Court's abandonment of the *Lochner* approach has most often been identified as beginning with *Nebbia v. New York*, 291 U.S. 502 (1934). *Nebbia* upheld a New York statute which fixed minimum and maximum milk prices.

⁴⁷ 304 U.S. 144 (1938).

⁴⁸ *Id.* at 152 (footnote omitted).

⁴⁹ 381 U.S. 479 (1965). A forerunner to *Griswold* may have been *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), in which the Court struck down a section of the Subversive Activities Control Act of 1950 which prohibited the use of passports by members of organizations required to be registered under the Act. *Id.* at 501-02, 505. When leading members of the Communist Party challenged the Secretary's revocation of their passports, *id.* at 503-04, the Court held that the statute was unconstitutional on its face, as too broad and indiscriminate a restriction on the liberty interest in traveling abroad protected by the due process clause of the fifth amendment, *id.* at 505, 514. The Court noted that the statute was not the least drastic means of achieving the government's asserted goal, and was, in fact, only tenuously related to that goal. *Id.* at 512-14. The Court stressed that membership in the controlled organization was the sole criterion for denial of a passport. *Id.* at 510. There were no procedural due process questions at issue. *See id.* at 503 n.3.

Although the decision seems to be founded on substantive due process grounds, *see id.* at 504 n.4, the result apparently was influenced by the first amendment values involved. At one point, the Court described the statute as infringing on a liberty interest closely related to values protected by the first amendment. *Id.* at 517. In addition, the concurring opinions relied on the

C. Substantive Due Process Since 1965

Substantive due process re-emerged as a viable constitutional claim in the 1965 case of *Griswold v. Connecticut*,⁵⁰ where the Supreme Court struck down a Connecticut statute prohibiting the use of contraceptives. Justice Douglas, author of the Court's opinion, was apparently reluctant to confront the danger — implicit in substantive due process jurisprudence — that the judiciary will select only those values it subjectively deems as important to be worthy of substantive due process protection. The opinion seeks to rationalize the Court's decision as stemming from the incorporation of rights arising from penumbras of the first, third, fourth, fifth and ninth amendments⁵¹ into the due process clause of the fourteenth amendment. Focusing on the specific impact the state's categorical prohibitions of contraceptive use had upon married couples, the Court identified a protected zone of privacy which seemed to find its roots more in the procedural protections of the third, fourth and fifth amendments than in notions of substantive right.⁵² Significantly, however, the Court cited two *Lochner* era substantive due process cases.⁵³ In addition, the opinions of five concurring justices⁵⁴ seemed to reflect the view that the due process values being protected in the case were more substantive than procedural in nature. Although the Court attempted to base its decision on procedural due process grounds, it seems nevertheless to have reopened the door — to some extent — to consideration of substantive due process claims.

While it is clear that the *Griswold* decision at least partially revived substantive due process, the decision is not so clear as to the standard of review to be applied in such cases. A more detailed picture of the new substantive due process arose in the companion cases of *Roe v. Wade*⁵⁵ and *Doe v. Bolton*⁵⁶ where they found anti-abortion statutes to be violative of due process. After identifying a "fundamental right" to personal privacy which embraced the abortion decision, the *Roe* Court stated:

Act's violations of the first, fourth, fifth, and sixth amendments and the bill of attainder prohibition, *id.* at 518-19 (Black, J., concurring), and on the ties of the liberty to travel to the first amendment and the privileges and immunities clause, *id.* at 519-21 (Douglas, J., concurring). In *Griswold* itself, Justice Black rejected the idea that *any* case, including *Aptheker*, between the end of the *Lochner* era and *Griswold* was based on substantive due process. 381 U.S. at 517 n.10 (Black, J., dissenting).

⁵⁰ 381 U.S. 479 (1965).

⁵¹ *Id.* at 484-85.

⁵² *Id.* at 484-86. Justice Douglas' discussion of the privacy issue culminates with the question, "Would we allow the police to search the sacred precincts of marital bedrooms for the telltale signs of the use of contraceptives?" *Id.* at 485.

⁵³ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (statute prohibiting children from attending private schools invalidated); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (statute prohibiting schools from teaching foreign languages invalidated).

⁵⁴ Justice Goldberg wrote a concurring opinion in which Chief Justice Warren and Justice Brennan joined. 381 U.S. at 486. Justices Harlan, *id.* at 499, and White, *id.* at 502, also wrote concurring opinions.

⁵⁵ 410 U.S. 113 (1973).

⁵⁶ 410 U.S. 179 (1973).

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," (citations omitted) and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.⁵⁷

Where "fundamental rights" are involved in a substantive due process claim, then, a standard akin to the strict scrutiny of equal protection jurisprudence will be applied by the Court. The principal authorities relied upon by the Court in adopting this standard were equal protection cases involving fundamental interests,⁵⁸ and first amendment cases involving the free exercise clause.⁵⁹

Since *Roe*, the Supreme Court has applied standards of review other than strict scrutiny to substantive due process cases. The equivalent of low-intermediate equal protection scrutiny was extended to substantive due process in a plurality opinion by Justice Powell in *Moore v. City of East Cleveland*.⁶⁰ Striking down a municipal ordinance prohibiting a living arrangement in which two first cousins lived with their common grandmother, the plurality of four recognized that some liberties — like those relating to family living arrangements — were entitled to more than minimal scrutiny protection. Thus, Justice Powell determined that the Court "must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."⁶¹ Employing an analysis akin to the underinclusiveness test of its low-intermediate equal protection review, the plurality concluded that the regulation had "but a tenuous relation" to the city's asserted purposes.⁶² The concurring opinion of Justice Stevens, necessary to create a majority, saw the principal interest at stake as a property interest rather than an interest in family decision-making, and required the city to demonstrate a "substantial relation to the public health, safety, morals, or general welfare."⁶³ He did not, as Justice Powell had done, seem to impose on the city any need to show a governmental interest which rose above "permissible" to "important."

It has thus become clear that the Court often employs the various standards of review derived from its equal protection cases in assessing substantive due process claims. Yet it is more difficult to identify distinct intermediate levels of review in substantive due process analyses than in equal protection. In light of the preceding discussion of the development of both substantive due

⁵⁷ 410 U.S. at 155 (1972) (citations omitted).

⁵⁸ *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

⁵⁹ *Sherbert v. Verner*, 374 U.S. 398 (1963); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁶⁰ 431 U.S. 494 (1977).

⁶¹ *Id.* at 499 (citation omitted).

⁶² *Id.* at 500.

⁶³ *Id.* at 520 (Stevens, J., concurring in the judgment).

process and equal protection analyses, this article will proceed to consider the constitutional aspects of marriage and divorce.

II. MARRIAGE

At common law, the act of marriage was seen as the entry into a contract between a man and a woman, imposing upon each individual duties to the other defined by law.⁶⁴ The marital contract differed from ordinary contracts in that, in significant respects, it could not be varied by the parties.⁶⁵ The marriage ceremony was deemed to confer a status upon the husband and wife. Not only did the state define this status, but it also retained a significant continuing interest in its maintenance.⁶⁶ Today, the state's regulation of the incidents of marriage remains significant. The exercise of the state's interest in determining both who may enter an enforceable marriage contract and what legal rights and responsibilities are conferred upon those who have achieved marital status, raises issues of constitutional dimensions. This section will explore the due process and equal protection claims such state regulation of marriage provokes.

A. Marital Choice as a Fundamental Right

If the personal interest in choosing whether or whom to marry can be characterized as a fundamental right, then all laws restricting such choices must be subjected to rigorous substantive due process review. The argument that this interest is a fundamental right derives principally from an oft-cited, albeit secondary, holding of the Supreme Court in *Loving v. Virginia*.⁶⁷ *Loving* considered a challenge to two Virginia statutes prohibiting any interracial marriages to which a white person was a party.⁶⁸ In the principal portion of its opinion, the Court found the laws to create racial classifications violative of the equal protection clause.⁶⁹ But eight of the nine justices also explicitly found a violation of due process.⁷⁰ The Court declared:

⁶⁴ See, e.g., *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973); *Department of Mental Hygiene v. O'Connor*, 246 Cal. App. 2d 24, 27, 54 Cal. Rptr. 432, 434-35 (1966); *Morris v. Morris*, 31 Misc. 2d 548, 549, 220 N.Y.S.2d 590, 591 (Sup. Ct. 1961); *Jambrone v. David*, 16 Ill. 2d 32, 34-35, 156 N.E.2d 569, 571 (1959); *Powell v. Powell*, 97 N.H. 301, 302, 86 A.2d 331, 332 (1952); *Pashko v. Pashko*, 45 Ohio Op. 498, 500, 101 N.E.2d 804, 806 (1951); *Seuss v. Schukat*, 358 Ill. 27, 35, 192 N.E. 668, 671 (1934).

⁶⁵ See, e.g., *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888); *Buchholz v. Buchholz*, 197 Neb. 180, 182, 248 N.W.2d 21, 22-23 (1976); *Washington v. Washington*, 486 S.W.2d 668, 669 (Mo. App. 1972); *Gagnon v. Gagnon*, 23 Conn. Supp. 368, 371, 183 A.2d 858, 860 (1962); *In re Campbell's Estate*, 260 Wis. 625, 628, 51 N.W.2d 709, 711 (1952).

⁶⁶ See *Koerner v. N.J. Dep't of Correction*, 163 N.J. Super. 433, 436, 394 A.2d 1262, 1263 (1978); *Wash. Statewide Org. of Stepparents v. Smith*, 85 Wash.2d 564, 566-69, 536 P.2d 1202, 1205-06 (1975); *Washington v. Washington*, 486 S.W.2d 668, 669 (Mo. App. 1972); *Haas v. Haas*, 227 Cal. App. 2d 615, 617, 38 Cal. Rptr. 811, 812-13 (1964); *Pashko v. Pashko*, 45 Ohio Op. 498, 500-01, 101 N.E.2d 804, 806-07 (1951).

⁶⁷ 388 U.S. 1 (1967).

⁶⁸ *Id.* at 2.

⁶⁹ *Id.* at 7-12. See discussion of equal protection aspect of case in text at notes 88-94 *infra*.

⁷⁰ Justice Stewart, the ninth justice, filed a two-sentence concurring opinion which did not discuss the due process issue. See 388 U.S. at 13.

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

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival (citations omitted). To deny this fundamental freedom on so unsupportable a basis as the racial classification embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State.⁷¹

The Court cited *Maynard v. Hill*⁷² and *Skinner v. Oklahoma*,⁷³ for the proposition that marriage is a basic civil right of man, "fundamental to our very existence." The citation of *Maynard* seems inapt since that case ruled that the strength of the state's interest in regulating marriage overrode an asserted personal interest.⁷⁴ The citation of *Skinner* is also curious, since that case did not directly involve the choice to marry. The reference to marriage as a "basic civil right" of man, it seems, was really the barest dictum.⁷⁵ Nevertheless, the above-cited language in *Loving*, not critical to the decision, has been alluded to frequently by the Supreme Court and other federal courts in cases recognizing marriage as a right which warrants substantive due process protection,⁷⁶ and as a fundamental interest warranting heightened equal protection scrutiny.⁷⁷

While *Loving* remains cited for the proposition that marriage is a fundamental right, the continued validity of the Supreme Court's 1879 opinion of *Reynolds v. United States*⁷⁸ raises questions as to how zealously the Court will pro-

⁷¹ *Id.* at 12.

⁷² 125 U.S. 190 (1888).

⁷³ 316 U.S. 535 (1942).

⁷⁴ In *Maynard v. Hill*, the Court upheld a territorial statute dissolving the marriage of the appellants' parents and cited the continuing interest of the state in the purity of the institution of marriage. 125 U.S. 190, 192, 211 (1888).

⁷⁵ See 316 U.S. 535, 541 (1942). At issue in *Skinner* was the forced sterilization of certain criminals. *Id.* at 536. See discussion in text at notes 16-17 *supra* and 110-11 *infra*.

⁷⁶ *Zablocki v. Redhail*, 434 U.S. 374, 392-93 (1978) (Stewart, J., concurring); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Boddie v. Connecticut*, 401 U.S. 371, 374, 376 (1971); *Southwestern Community Action Council, Inc. v. Community Servs. Adm.*, 462 F.Supp. 289, 296 (S.D. W. Va. 1978). See generally *Developments*, *supra* note 3, at 1248-56.

⁷⁷ *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Darnell v. Lloyd*, 395 F.Supp. 1210, 1214 (D. Conn. 1975).

⁷⁸ 98 U.S. 145 (1879).

test that right under certain circumstances. In *Reynolds*, the Court sustained the territory of Utah's criminal bigamy statute. The statute had been challenged as a violation of the first amendment's free exercise of religion clause, and as a violation of due process.⁷⁹ The Court seemed to apply a single standard of review to both issues, and presumed that the statute was valid on its face.⁸⁰ While the Court never explicitly identified the standard if applied, it did examine at useful length the Government's asserted justification for its prohibition of polygamy, stating:

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law the second marriage was always void. . . .

. . . [T]here never has been a time in any State of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity. . . . Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or lesser extent, rests. . . .⁸¹

The legitimacy of the government's interest in discouraging bigamy seems based in part on the Court's recognition that the monogamous or polygamous character of the country has a profound impact on society. Since the government's view that monogamy was to be preferred over polygamy was shared by many other legal systems, the Court ruled that it must be a sufficient assertion of public morality. The individual's right to marry — fundamental or not — must yield to such an assertion. *Reynolds*, therefore, is not necessarily inconsistent with *Loving*. It can be argued that the *Reynolds* Court recognized the fundamentality of the defendant's right to marital choice, and, applying strict scrutiny, found the government's justification to be a compelling state interest. The opposite result reached by the *Loving* Court can be explained in two ways. The Court may have found that the control of inter-racial marriages was not as important to Virginia's social structure as the control of bigamy was to Utah's culture. Or, it could be said that Virginia's perception of the moral desirability of white supremacy was not widely enough shared by comparable legal systems⁸² to warrant presumptive judicial respect as an assertion of public

⁷⁹ See *id.* at 146, 152, 162.

⁸⁰ See *id.* at 166-67.

⁸¹ *Id.* at 164-66 (citation omitted).

⁸² Comparable legal systems include northern and western nations and every state in the union. Western Europe qualifies, but Asia and Africa do not.

morality. The latter distinction would seem more persuasive. Nevertheless, salient objections can be raised to a theory which allows the judiciary to rule on the constitutionality of statutes based upon a computation of how widely comparable legal systems share the policy or moral premise of the legislation.⁸³

Of course, *Reynolds* may also be distinguished from *Loving* on the grounds that marital choice is fundamental only for the unmarried. Under such a view the *Reynolds* Court's meanderings about the widespread subscription to monogamy by western legal systems only served to provide a classical minimum rationality for the Utah prohibition.

Apart from the *Loving-Reynolds* mode of analysis, there exists an alternative theoretical route to the conclusion that marriage is a fundamental right. The Supreme Court has made rhetorical gestures at extending the fundamental right of marital privacy identified in *Griswold v. Connecticut*⁸⁴ to a right of marital choice as a function of the right to privacy.⁸⁵ On its face, *Griswold* extended privacy rights only to those who had already achieved married status.⁸⁶ Nevertheless, as the meaning of constitutional privacy has expanded to include a right to be free from governmental interference in important personal decision-making,⁸⁷ *Griswold* would seem to offer more support to the assertion of a right to marital choice as a function of such privacy.

B. Prohibitions on Choosing Whom to Marry

Since judicial authority would seem to leave in doubt the existence of a fundamental right to marry assertable by the individual as a function of substantive due process, litigants have more frequently attacked state restrictions on marital choice as denials of equal protection of law. While the interest in marital choice has been recognized as substantial, it has not been held, in itself, to activate strict scrutiny review. Generally speaking, the standard of judicial review accorded to laws affecting marital decisions will depend upon the character of the statute's classification, rather than the nature of the right affected.

⁸³ It should be noted that in dealing with restrictions on a woman's liberty to elect an abortion in *Roe v. Wade*, 410 U.S. 113 (1973), the Court, explicitly applying a "compelling interest" standard, *id.* at 155, failed to canvass prevailing policy in comparable legal systems in evaluating Texas' asserted moral interest in protecting pre-natal life before the point of viability. *See id.* at 150-52. It can only be assumed that if Texas demonstrated that its moral perceptions were widely shared by comparable legal systems it would not have been sufficient to defeat the plaintiff's fundamental right. Reconciling *Reynolds*, *Loving*, and *Roe*, one might conclude that while a "basic civil right of man," marital choice is not so fundamental as to require judicial scrutiny at the same level of rigor as a woman's liberty to control her body, but that it is substantially greater than an ordinary liberty interest reviewed under a minimum rationality standard.

⁸⁴ 381 U.S. 479, 485-86 (1965).

⁸⁵ *See Zablocki v. Redhail*, 434 U.S. 374, 384-85 (1978); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (Powell, J., announcing judgment of Court in plurality opinion); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-66 (1973); *Roe v. Wade*, 410 U.S. 113, 169 (1973) (Stewart, J., concurring).

⁸⁶ *See* 381 U.S. at 485-86.

⁸⁷ *See cases cited at note 85 supra.*

1. Race

In light of *Loving v. Virginia*,⁸⁸ which struck down Virginia's criminal miscegenation statutes as violative of equal protection,⁸⁹ it may be concluded categorically that restrictions on marital choice based explicitly on race are unconstitutional. The *Loving* Court ruled that Virginia's proscription of only those interracial marriages which involved "white" persons was consistent with the state's legal history of adopting a policy of white supremacy.⁹⁰ This finding was reinforced by an earlier Virginia state court decision in which the court concluded "that the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent . . . 'the obliteration of racial pride.'"⁹¹ The Supreme Court rejected the state's argument that the equal applicability of the statutes' prohibitions to whites and blacks removed the legislation from the category of presumptive invidious discrimination.⁹² The Court found that but for their race, neither Mr. nor Mrs. Loving would have been criminally liable for the act of marriage.⁹³ Thus, the statute created racial classifications, despite its applicability to both whites and blacks. Having identified a penalizing racial classification, the Court went on to apply strict scrutiny to the statute in question:

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. 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. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.⁹⁴

Explicit racial classifications infringing upon the right to marry, then, are clearly violations of equal protection. The question remains, however, as to what standard of review the court would apply to a statute affecting marital choice which, while neutral on its face, had a racially disproportionate impact. The Supreme Court decisions in *Washington v. Davis*⁹⁵ and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*⁹⁶ concluded that racially disproportionate impact, absent a showing of discriminatory purpose, is insuf-

⁸⁸ 388 U.S. 1 (1967).

⁸⁹ *Id.* at 11-12.

⁹⁰ *Id.* at 7.

⁹¹ *Id.* at 7. (quoting *Naim v. Naim*, 197 Va. 80, 89, 87 S.E.2d 749, 756 (1955)).

⁹² *Id.* at 8-10.

⁹³ *See id.* at 11.

⁹⁴ *Id.* at 11-12 (footnote omitted).

⁹⁵ 426 U.S. 229 (1976).

⁹⁶ 429 U.S. 252 (1977).

ficient grounds for treating operative public policy as a racial classification for equal protection purposes.⁹⁷ The *Arlington Heights* Court suggested that even racial motivation will not activate strict scrutiny if the government can establish that the facially neutral statute would have been employed, even absent its racial motivation.⁹⁸ The burden on a party asserting a racial classification will thus often be insuperable. Consequently, a statutory wealth qualification for marriage, neutral on its face but having a greater impact on blacks than whites, could probably avoid the highest level of scrutiny.⁹⁹

2. Sex

At common law, marriage was defined as a contract between a man and a woman.¹⁰⁰ Today marriage is controlled by statute in virtually all American jurisdictions, and not every statute explicitly limits the marriage contract to heterosexual unions. In spite of this omission, every state judiciary which has been called on to decide the question has restricted marriage to parties of opposite sex.¹⁰¹ The Supreme Court has chosen not to confront the question whether a prohibition of marriage between members of the same sex denies equal protection of the law.¹⁰² Cases the Court has decided bearing on the resolution of this question, however, cast considerable doubt on the correctness of the lower court decisions which have sustained the prohibition.

The standard of review for classifications on the basis of sex has been subject to evolutionary development since the Supreme Court first struck down a sex-based classification in 1971.¹⁰³ The present standard of review, as stated by the Court in *Craig v. Boren*,¹⁰⁴ is as follows: "[C]lassifications by gender must

⁹⁷ See *Washington v. Davis*, 426 U.S. at 239; *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. at 264-65.

⁹⁸ *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. at 270 n.21.

⁹⁹ For example, a racially disproportionate impact might have been provable in *Zablocki v. Redhail*, 434 U.S. 374 (1978). See discussion in text at notes 125-35 *infra*.

¹⁰⁰ See, e.g., *Morris v. Morris*, 31 Misc. 2d 548, 549, 220 N.Y.S.2d 590, 591 (Sup. Ct. 1961); *Anderson v. Anderson*, 235 Ind. 113, 118, 131 N.E.2d 301, 304 (1956); *Seuss v. Schukat*, 358 Ill. 27, 35, 192 N.E. 668, 671 (1934); *State v. Bittick*, 103 Mo. 183, 191, 15 S.W. 325, 327 (1891).

¹⁰¹ See, e.g., *M.T. v. J.T.*, 140 N.J. Super. 77, 83-84, 355 A.2d 204, 207-08, *cert. denied*, 71 N.J. 345, 364 A.2d 1076 (1976); *Singer v. Hara*, 11 Wash. App. 247, 264, 522 P.2d 1187, 1197 (1974); *B. v. B.*, 78 Misc. 2d 112, 117, 355 N.Y.S.2d 712, 716-17 (Sup. Ct. 1974); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973); *Baker v. Nelson*, 291 Minn. 310, 311, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972); *Anonymous v. Anonymous*, 67 Misc. 2d 982, 984-85, 325 N.Y.S.2d 499, 500-01 (Sup. Ct. 1971). See also *Hatcher v. Hatcher*, 265 Ark. 681, 696-97, 580 S.W.2d 475, 483 (1979) (Fogleman, J., concurring and dissenting); *McConnell v. Nooner*, 547 F.2d 54, 55-56 (8th Cir. 1976) (construing Minnesota law); *Adams v. Howerton*, 486 F.Supp. 1119, 1122-24 (C.D. Cal. 1980) (construing Colorado law and federal immigration law).

¹⁰² See *Baker v. Nelson*, 409 U.S. 810 (1972), *dismissing, for want of substantial federal question, appeal from* 291 Minn. 310, 191 N.W.2d 185 (1971).

¹⁰³ *Reed v. Reed*, 404 U.S. 71 (1971).

¹⁰⁴ 429 U.S. 190, (1976).

serve important governmental objectives and must be substantially related to achievement of those objectives.”¹⁰⁵ Applying this low-intermediate standard of review, the *Craig* Court struck down Oklahoma’s differential treatment of males and females with respect to “beer drinking age.” Given that freedom of choice in marriage would appear no less weighty an interest than freedom to consume beer, the ban on marriage between members of the same sex should be accorded at least as rigorous a standard of review, provided such a ban qualifies as a gender-based classification.

Some may agree that a statute prohibiting males from marrying males, and females from marrying females is not discriminatory in the least since it applies equally to all persons regardless of sex. It is here that *Loving v. Virginia*¹⁰⁶ is instructive. The *Loving* Court rejected the argument that, because the Virginia statute applied equally to blacks and whites there was no racial classification present.¹⁰⁷ The Lovings would not have been subject to the prohibition were he black or she white.¹⁰⁸ Similarly, a statute which prohibits same-sex marriages for both men and women is nevertheless a gender-based classification. But for a person’s sex, marital union with any individual would be lawful. Indeed, *Loving* could be characterized as equating classifications by racial preference in marriage with classifications based more explicitly on race — both classifications activating the same level of scrutiny. Accordingly, classifications of sexual preference which prohibit same-sex marriages warrant the same standard of review that explicit gender classifications receive.

Assuming, however, that a restriction on marital choice based on sexual preference does warrant low-intermediate scrutiny, the success of challenging state prohibitions on same-sex marriage remains problematical. The constitutional violation would have to outweigh asserted state interests of encouraging child-rearing families and promoting public morality. State assertions of an interest in encouraging child-rearing families would assuredly not survive intermediate scrutiny. Prohibitions on same-sex marriage would be substantially underinclusive, since heterosexual marriages are also often childless, and over-inclusive since same-sex marriages could proceed to build families through adoption. However, a state interest cast in terms of promoting public morality, would seem more likely to satisfy low-intermediate scrutiny. The objective test implied in *Reynolds v. United States*,¹⁰⁹ which sought to assure that such restrictions are both widely imposed and morally rationalized by the legal systems of the Union and the world, would seem to be met here. Whether or not one believes subjectively that the prohibition on same-sex marriages has any relation to the public morality, the “important governmental objective” standard of *Craig* nonetheless appears to be satisfied.

¹⁰⁵ *Id.* at 197.

¹⁰⁶ 388 U.S. 1 (1967). See discussion of case in text at notes 88-94 *supra*.

¹⁰⁷ 388 U.S. at 8-10.

¹⁰⁸ See *id.* at 6, 11. See also *McLaughlin v. Florida*, 379 U.S. 184, 188, 191-92 (majority), 198 (Stewart, J., concurring) (1964) (striking down statute prohibiting interracial cohabitation).

¹⁰⁹ 98 U.S. 145 (1879).

Since prohibitions on same-sex marriages would appear to pass constitutional muster under the *Craig* standard, challengers must pursue alternative avenues of attack. One method would be to claim a fundamental interest in marital choice which, irrespective of its lack of explicit constitutional foundation, creates a right to strict scrutiny review when impinged upon by a sex-based classification. This argument is partly rooted in *Loving v. Virginia*: if the interest in marital choice qualifies as a fundamental right for due process purposes, it surely must qualify as a fundamental interest for equal protection purposes as well. The problem with basing a case on *Loving's* fundamental right implications, as noted above, is that the significance of the Court's holding on that subject does not measure up to its rhetoric, and therefore would not seem to demand a strict scrutiny standard of review for classifications impinging upon the right to marry.

Skinner v. Oklahoma,¹¹⁰ a case cited in *Loving* and decided by the Court in 1942, contains language bearing more directly on the issue of whether a fundamental right to marry exists. In *Skinner*, the Court struck down, as a violation of equal protection, a state law authorizing the sterilization of persons convicted more than twice of "felonies involving moral turpitude" which excepted from its scope offenses such as embezzlement. Justice Douglas, speaking for the Court, noted:

Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. . . . There is no redemption for the individual whom the law touches. . . . [S]trict scrutiny of the classification which a State makes in a sterilization law is essential. . . .¹¹¹

The undifferentiated mention of marriage and procreation in *Skinner* apparently later led the *Loving* Court to conclude each was a comparable interest in its constitutional ramifications. If such a broad reading is correct, *Skinner* supports strict scrutiny on prohibitions of same-sex marriage. It is submitted, however, that *Skinner* should not be so read. Assuming the *Skinner* Court was correct in proclaiming that procreation qualifies as a fundamental interest, it appears that the irreversibility of sterilization accounted for review at a strict scrutiny level. This quality of irreversibility is not apparent in sex-based restrictions on entry into marriage. Thus, the urgency which caused the *Skinner* Court to apply strict scrutiny is simply not present in cases involving sex-based limitations on marriage.

Another argument for applying at least high-intermediate scrutiny to prohibitions on same-sex marriage can be found in the 1978 Supreme Court case of *Zablocki v. Redhail*.¹¹² While scrupulously avoiding the "compelling" or

¹¹⁰ 316 U.S. 535 (1942). See discussion in text at notes 16-17 *supra*.

¹¹¹ 316 U.S. at 541.

¹¹² 434 U.S. 374 (1978). See text at notes 125-35 *infra* for a more detailed discussion of this case. See also text at notes 32-37 for a discussion of the standard of review in *Zablocki*, *supra*.

“overriding” interest language of classical strict scrutiny, Justice Marshall’s opinion identifies the “right to marry” as fundamental for the purposes of equal protection analysis only when it undergoes “significant” interference.¹¹³ But the Court’s application of a very high standard of scrutiny in *Zablocki* is not dispositive of the issue, since the statute in *Zablocki* more significantly interfered with the “right to marry” than do restrictions on same-sex marriages. In *Zablocki*, a certain class of individuals was prohibited from marrying at all; same-sex restrictions merely prevent certain individuals from marrying members of another designated class. This may not be, in Justice Marshall’s language, a “significant” enough interference to warrant heightened scrutiny.

Despite the limitations on the applicability of the *Zablocki* holding, there is Supreme Court authority suggesting that when quasi-suspect classification such as sex, the use of which necessarily activates low-intermediate scrutiny,¹¹⁴ impinges upon an interest having no independent constitutional status, but with constitutional dimension, such as marriage, the legislation establishing such a classification should be reviewed under a strict scrutiny standard.¹¹⁵ If the tendency of the Court to stack the weight of the interest onto the suspectness of the classification to determine the equal protection standard of review is maintained or expanded, prohibitions of same-sex marriages may be subjected to strict scrutiny. The public morality argument, which can probably withstand attack under intermediate scrutiny, is unlikely to withstand strict scrutiny. Such an argument, for example, has been dismissed by the Court as insufficient to justify laws prohibiting abortion during the first two trimesters of pregnancy.¹¹⁶

In summary, although the Supreme Court has not yet decided whether prohibitions against same-sex marriages constitute equal protection violations, the Court’s decisions in related areas raise some questions as to whether lower court decisions upholding such laws are correct. If examined under the low-intermediate standard accorded to normal gender-based classifications, such restrictions would probably be upheld. Challenges to the restrictions would have a better chance of success if the right to marry were explicitly recognized as fundamental for equal protection purposes, or if same-sex restrictions were recognized as the type of “significant” interference with the right to marry which led the *Zablocki* Court to impose high-intermediate scrutiny. In the event

¹¹³ See *id.* at 386-87.

¹¹⁴ See discussion of low intermediate scrutiny in text at notes 28-31 *supra*.

¹¹⁵ Several commentators have noted a stacking of interests theme in Supreme Court opinions. Strickman, *supra* note 25, at 608 n.73, 610-13 & nn.84-86, 619-21 (1977); Comment, *The Evolution of Equal Protection — Education and Wealth*, 7 HARV. C.R. - C.L. L. REV. 105, 106 (1972); Michelman, *The Supreme Court 1968 Term-Foreword; On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 36, 40 n.94 (1969) (speculating on “a piling on of fundamentalities” approach). Justice Marshall exhaustively reviewed Supreme Court precedent that supports the stacking of interests approach in his dissent to the public school financing case, *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 97-110, 121-22, 124-25 (1973) (Marshall, J., dissenting).

¹¹⁶ See *Roe v. Wade*, 410 U.S. 113, 153-54, 159, 162-64 (1973) (protecting prenatal life — must be weighed against interests of mother).

that such arguments fail, however, a successful challenge might be mounted under the theory that the stacking of a quasi-suspect classification with a quasi-fundamental right warrants heightened judicial scrutiny. Under such heightened scrutiny, same-sex restrictions would likely be declared unconstitutional.

3. Incest and Affinity

Broadly considered, prohibitions on incestuous marriages concern men and women related by blood or adoption.¹¹⁷ Statutes outlawing incest are virtually universal in American jurisdictions. They vary only with respect to what parties fall within the scope of the statute.¹¹⁸ Prohibitions against marriages of affinity, that is, marriages between two persons previously related in varying degree by marriage, are less common in the United States.¹¹⁹ Nevertheless, both kinds of prohibitions raise constitutional questions.

The argument against incest prohibitions is most difficult to maintain, when the prohibition is directed against members of the traditional nuclear family. Such incestuous relationships have been so uniformly taboo and unlawful throughout the nation and the world that, as assertions of the public morality, they probably withstand the strictest scrutiny.¹²⁰ It should be noted in passing, however, that, whether challenged as a violation of due process or equal protection, the state probably could not sustain its burden under even low-intermediate scrutiny by arguing that eugenic considerations justify the incest prohibition. The evidence appears to be too ambiguous to support such a conclusion.¹²¹ Similarly, the argument that incestuous marriage has a destructive impact on the development of the nuclear family is insufficiently verifiable to serve as effectively as does the public morality argument in support of such prohibitions.

¹¹⁷ Adoption is not universally a sufficient basis for defining incestuous marriage. See *Israel v. Allen*, 195 Colo. 263, 265-66, 577 P.2d 762, 764 (1978) (en banc); *Bagnardi v. Hartnett*, 81 Misc. 2d 323, 324-25, 366 N.Y.S.2d 89, 90-91 (Sup. Ct. 1975). But most often it is considered to bring a relationship within the reach of the prohibition. See, e.g., MISS. CODE ANN. § 93-1-1 (1973); N.C. GEN. STAT. § 14-178 (1969 and 1979 Cum. Supp.); TEX. FAM. CODE ANN. tit. 1, § 2.21(a)(1), (2), (4) (Vernon Supp. 1980-81); VA. CODE § 20-38.1(a)(2) (Supp. 1980).

¹¹⁸ See Drinan, *The Loving Decision and the Freedom to Marry*, 29 OHIO ST. L.J. 358, 380 app. A. (1968) [hereinafter cited as Drinan]. Accord, UNIFORM MARRIAGE AND DIVORCE ACT § 207(a)(2), (3) & Commissioners' Note. See generally *Developments*, *supra* note 3, at 1264-70.

¹¹⁹ See Drinan, *supra* note 118, at 381 app. B., 382 app. C. Accord, UNIFORM MARRIAGE AND DIVORCE ACT § 207(a)(2), (3). In addition some states prohibit a marriage between a stepchild and a stepparent. Drinan, *supra* note 118, at 381 app. B., 382 app. C. See also CONN. GEN. STAT. § 46b-21 (1981); *Contra*, UNIFORM MARRIAGE AND DIVORCE ACT § 207(a)(2) (not prohibited).

¹²⁰ As pregnancy entered the third trimester, the Court in *Roe v. Wade* was willing to acknowledge a compelling state interest in the protection of fetal life, essentially a moral concern. 410 U.S. at 163-64. The state's assertion of the public morality thus seems to take on more "compelling" qualities as it comes closer to reflecting a universal moral consensus.

¹²¹ See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 71-72 (1968) (noting and rejecting eugenic justification for incest prohibitions) [hereinafter cited as CLARK].

Extending incest prohibitions to uncle-niece, aunt-nephew, first cousin, and second cousin relationships¹²² may become increasingly more difficult to justify as marital choice continues to be recognized as an interest of constitutional dimension. Social interests of the state, even if sufficient to sustain prohibitions on parent-child, grandparent-grandchild and brother-sister marriages, would seem less weighty as the consanguinity widens. The public morality argument, perhaps maintainable with regard to marriages between an aunt and nephew or an uncle and niece, would have difficulty overcoming the widespread permissibility of marriage between cousins.¹²³

The application of incestuous marriage prohibitions to persons in adoptive relationships certainly cannot rely upon eugenic support. It is arguable, however, that the state interest in preserving stable family structures is as important in adoptive families as in biological families. If the courts are unwilling to accept the stacking of social and moral interests, the public morality argument, standing alone, seems weak where the prohibition is not so clearly universal.¹²⁴

¹²² See Drinan, *supra* note 118, at 380 app. A. (uncle-niece or aunt-nephew — universal prohibition; first cousins — slight majority prohibits; second cousins — prohibited in Oklahoma). *Accord*, UNIFORM MARRIAGE AND DIVORCE ACT § 207(a)(3) (prohibiting aunt-nephew and uncle-niece; allowing first cousins) & Commissioners' Note (citing trend to allow marriage between first cousins).

¹²³ See Moore, *A Defense of First-Cousin Marriage*, 10 CLEV. MAR. L. REV. 136, 146-48 (1961).

¹²⁴ The statutes vary on explicit references to adopted relatives. Many explicitly include adopted relatives of one degree of kinship or another. *See*, for example, the statutes of Mississippi, North Carolina, Texas, and Virginia cited in note 117 *supra*. Other states take different approaches to the problem. In Washington, for example, the incestuous marriage statute does not refer to adoption. WASH. REV. CODE ANN. § 26.04.020(2), (3) (1961). The recently recodified criminal statute punishing incestuous sexual intercourse and seemingly including both marriage and fornication, however, contains a separate definition subdivision which explicitly defines "descendant" as including adopted children under eighteen years of age for the purposes of the statute. WASH. REV. CODE ANN. § 9A.64.020(2) (1977). In Washington, therefore, although a marriage between adopted lineal relatives may be legal, if the marriage is consummated, the couple has broken the law. In Massachusetts, although the incest statutes are not explicit, the adoption statute is, at least for those willing to parse their way through its awkward structure. *Compare* MASS. ANN. LAWS ch. 207, §§ 1, 2 (Michie-Law. Co-op. 1969) (incestuous marriages defined; no reference to adoption) *and* MASS. ANN. LAWS ch. 272, § 17 (Law. Co-op. 1980) (definition of incestuous marital relationships applied to fornicative incest) *with* MASS. ANN. LAWS ch. 210, § 6 (Michie-Law. Co-op. 1969) (adoption — effect of adoption is to make incest prohibition applicable to adoptive parent-adopted child relationship, but *not* to other new relationships created by the adoption). Reading the Massachusetts statutes together, then, sexual intercourse or marriage between a parent and an adopted child is incestuous. The Uniform Marriage and Divorce Act is partially explicit. It clearly prohibits marriage within a brother-sister relationship created by adoption. § 207(a)(2). It permits marriage within uncle-niece and aunt-nephew relationships by adoption, even though analogous consanguineous relationships bar marriage. § 207(a)(3). The Commissioners' Note to the incestuous marriage section relies on a morality argument to prohibit brother-sister by adoption marriages, even though it acknowledges that no eugenic considerations are present. The Uniform Act is ambiguous on the lineal relationships arising from adoption. Such relationships are grouped with the brother-sister prohibition, but it is not clear from the text of the Act or from the appended Note whether the "adoption" restriction applies also to lineal relationships. *See* § 207(a)(2) & Commissioners' Note. In any event, the Supreme

Affinity prohibitions on marriage would seem supported by a similar social policy regarding stable family structure if applied to relationships between stepparents and stepchildren, and stepbrothers and stepsisters. More expansive affinity statutes would seem destined to fail as historic relics, since the state lacks any interest substantial enough to meet low-intermediate scrutiny standards.

Incest and affinity statutes, then, seem constitutionally secure where the government's interest in promoting public morality is substantial. As the consanguinity of the proscribed relationships widens, however, and public distaste for the relationships declines, the public morality argument becomes less compelling. In such circumstances, the legislation may be constitutionally infirm.

C. *Prohibitions on Choosing Whether to Marry*

The foregoing section addressed challenges to the state interest in denying two persons, otherwise capable, joint access to the legal status of marriage. The present section will address challenges to state assertions of interest in defining legal incapacity of the individual to enter into any marriage. Once again, the due process and equal protection clauses provide the principal bases of constitutional challenge.

1. Wealth

The Supreme Court's decision in 1978 in *Zablocki v. Redhail*¹²⁵ confronted for the first time the constitutionality of wealth qualifications for entry into the marriage relationship. At issue was a Wisconsin statute which required any state resident having minor children not in his custody whom he is under a court order to support, to demonstrate compliance with that support obligation and show that the children "are not then and are not likely thereafter to become public charges,"¹²⁶ as a condition of his being permitted to marry. The Court found the statute violative of the equal protection clause. It should be

Court of Colorado, where the Uniform Act was adopted, recently struck down the explicit prohibition in the brother-sister by adoption context. *Israel v. Allen*, 195 Colo. 263, 577 P.2d 762 (1978) (en banc).

In states where the incest or incestuous marriage statutes contain no explicit reference to adoption, courts uniformly have construed the statutes *not* to prohibit marriage or sexual intercourse where the relationship derives from adoption. *Commonwealth v. Doe*, 1979 Mass. App. Ct. Adv. Sh. 1748, 1749 & n.2, 393 N.E.2d 426, 427 & n.3 (1979) (dictum); *Bagnardi v. Hartnett*, 81 Misc. 2d 323, 324-25, 366 N.Y.S.2d 89, 90-91 (Sup. Ct. 1975); *State v. Rogers*, 260 N.C. 406, 409, 133 S.E.2d 1, 3 (1963); *Bedinger v. Graybill's Executor & Trustee*, 302 S.W.2d 594, 600 (Ky. 1957) (dictum); *State v. Lee*, 196 Miss. 311, 314-15, 17 So.2d 277, 277-78 (1944); *Ohio v. Youst*, 74 Ohio App. 381, 382-83, 59 N.E.2d 167, 168 (1943); *People v. Kaiser*, 119 Cal. 456, 51 P. 702 (1897). The result in *State v. Lee*, however, was "reversed" by legislation. *See* MISS. CODE ANN. § 93-1-1 (1973). Further, the dictum in *Commonwealth v. Doe* seems to be incorrect. As noted above, even though the incest statute is not explicit, the question is covered in the adoption statute. *Compare* 1979 Mass. App. Ct. Adv. Sh. 1748, 1749 & n.2, 393 N.E.2d 426, 427 & n.2 (1979) (*with* MASS. ANN. LAWS ch. 210, § 6 (Michie-Law. Co-op. 1969).

¹²⁵ 434 U.S. 374 (1978).

¹²⁶ *Id.* at 375.

noted that, unlike the restrictions based on race or gender, the restriction in *Zablocki* impinged not only on the individual's choice of *whom* to marry, but also upon his choice of *whether* to marry at all.

Justice Marshall's opinion for the Court focused on the prohibitory character of Wisconsin's policy. Notwithstanding a recognition of a "right to marry [which] is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause,"¹²⁷ the Court did not find that Wisconsin's statute violated due process. It did find, however, that the above-mentioned nexus between due process rights and the interest in the choice to marry, requires that a "significant" interference with that choice to marry activate a very high level of scrutiny under the equal protection clause.¹²⁸ In such circumstances, the state must show more than that the classification constitutes "reasonable regulation." It must demonstrate that the classification "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."¹²⁹

Justice Marshall did not feel compelled to indicate whether the preservation of support resources is a "sufficiently important state interest" to survive equal protection scrutiny. Instead, he concluded that the classification was in no event "closely tailored to effectuate only those interests."¹³⁰ The test applied by the Court, then, apparently prohibits both overinclusive and underinclusive classifications. The Court found both conditions present since the Wisconsin statute neither limited the financial commitments of the non-custodial parent apart from marriage, nor took into account the possibility that the new marriage might improve the non-custodial parent's financial situation.¹³¹ Additionally, the Court canvassed alternative means the state had for enforcing support obligations and found that these were "at least as effective as the instant statute's [means] and yet do not impinge upon the right to marry."¹³²

It is interesting that the *Zablocki* Court chose not to rely upon those cases that had previously applied heightened scrutiny where indigency had worked an absolute deprivation of an important benefit provided by government.¹³³ The individual's indigency was only deemed important in that it increased the

¹²⁷ *Id.* at 384.

¹²⁸ *Id.* at 383, 386-88.

¹²⁹ *Id.* at 388.

¹³⁰ *Id.* at 388-90.

¹³¹ *Id.* at 388-89.

¹³² *Id.* at 389.

¹³³ The Court had applied heightened scrutiny in a variety of indigency cases available to the *Zablocki* majority. *E.g.*, *Bullock v. Carter*, 405 U.S. 134 (1972) (candidates' filing fees); *Tate v. Short*, 401 U.S. 395 (1971) (incarceration for those unable to pay fines); *Williams v. Illinois*, 399 U.S. 235 (1970) (extension of prison sentence beyond statutory maximum for those unable to pay fines); *Douglas v. California*, 372 U.S. 353 (1963) (assistance of counsel on first appeal as of right from criminal conviction); *Griffin v. Illinois*, 351 U.S. 12 (1956) (trial transcript on appeal from criminal conviction). *See also Boddie v. Connecticut*, 401 U.S. 371 (1971) (due process analysis — fee for access to divorce court).

likelihood that the incapacity the statute inflicted might not be remediable.¹³⁴

In *Zablocki* the Court went no further than it felt it had to in order to invalidate the statute. The standard of review, on its face more rigorous than the low-intermediate scrutiny test of *Craig v. Boren*, fell substantially short of strict scrutiny. The test presumably neither required the statute to serve a "compelling" state interest nor be the least restrictive means of achieving a permissible state objective.¹³⁵

While *Zablocki* seemed to cast a heavy presumption of invalidity upon any explicit wealth qualifications for marriage, it did not directly address standards which would be employed in assessing de facto wealth discrimination precluding the choice to marry. Such preclusion might arise, for example, from a marriage license fee beyond the means of persons seeking to enter into a legal marriage. The likelihood that few persons would in fact be precluded from marriage by presently applicable license fees¹³⁶ may not be constitutionally

¹³⁴ 434 U.S. at 387, 389.

¹³⁵ In his concurring opinion, Justice Stewart stressed that substantive due process was the real tool used by the majority and urged the Court to recognize this fact. *Id.* at 391-92, 395-96. Under Justice Stewart's analysis, the Wisconsin statute violated the due process clause. *Id.* at 392-95. Justice Powell, also concurring, found the statute objectionable under both the due process and equal protection clauses. *Id.* at 400. Justice Powell, however, would not have invoked as high a level of equal protection scrutiny as the Court did, *id.* at 396-99, but would have found the classification so substantially underinclusive as not to meet the more lenient test employed for gender-based classifications. *Id.* at 399-402.

¹³⁶ At this writing, the fees ranged from \$1.00 to \$30.00. At the lower end of the range are Arkansas and South Carolina. Oregon, with a state-wide minimum fee of \$20.00 and a potential local *additional* fee of up to \$10.00, occupies the higher end. Figures for the states and the District of Columbia follow. The figure listed is the minimum the applicant must pay to receive an unexpedited license. The fees pay for a variety of services and some states recently have begun collecting, or permitting governmental subdivisions to levy, an additional fee to fund reconciliation or battered spouse programs. Alabama \$5.00, ALA. CODE § 12-19-90(32) (1977); Alaska (varies), ALASKA STAT. § 25.05.241 (Sept. 1977) (delegating authority to set fee to state supreme court); Arizona \$8.00, ARIZ. REV. STAT. ANN. § 11-554 (A.3.) (1977); Arkansas \$1.00, ARK. STAT. ANN. § 55-202 (1971); California \$10.00, CAL. GOV'T CODE § 26840 (West Supp. 1980); Colorado \$7.00, COLO. REV. STAT. § 14-2-106 (1974); Connecticut \$6.00, CONN. GEN. STAT. § 7-73 (1979); Delaware \$5.00, DEL. CODE ANN. tit. 13, § 108 (1975); District of Columbia \$2.00, D.C. CODE ENCYCL. § 15-717 (West Supp. 1970) (subject to modification by Superior Court); Florida \$20.00, FLA. STAT. ANN. §§ 28.24(29) (\$10.00), 741.01(1) (\$2.00), .01(2) (\$5.00), .02 (\$3.00) (West Supp. 1981), *interpreted in* Op. Att'y Gen. 079-96 (1979); Georgia \$10.00, GA. CODE ANN. § 24.1716 (Supp. 1980); Hawaii \$8.00, HAWAII REV. STAT. § 572-5 (Supp. 1980); Idaho \$9.75, IDAHO CODE § 31-3205 (Supp. 1980), *contra*, § 32-408 (Supp. 1980) (\$4.75); Illinois \$15.00, ILL. ANN. STAT. ch. 53, § 35 (1st and 2d class counties), 73 (3d class counties) (Smith-Hurd Supp. 1980-1981); Indiana \$5.00, IND. STAT. ANN. CODE ED. §§ 31-1-1-3 (\$3.00, marriage certificate fee, collected at issuance of license), 33-1-11-1(d) (\$2.00) (Burns 1980); Iowa \$5.00, IOWA CODE ANN. § 606.15(28) (West Supp. 1980-1981); Kansas \$17.00, KAN. STAT. ANN. §§ 23-108 (\$10.00, registration fee, collected with application for license), 28-171 (\$7.00) (Supp. 1980); Kentucky \$4.00, KY. REV. STAT. §§ 142.010(1)(a),(2) (\$3.50, license tax), 213.330 (50¢, clerk's fee) (Supp. 1980); Louisiana \$5.00, LA. REV. STAT. ANN. § 13:841 (West Supp. 1981); Maine \$10.00, ME. REV. STAT. ANN. tit. 30, § 2352(2) (Supp. 1980-1981); Maryland \$5.00, \$6.00, \$7.00, or \$8.00, varies with residence of applicants and with governmental subdivision issuing license, MD. ANN. CODE art. 62, §§ 6 (\$3.00 total, composed of \$1.00 application fee and \$2.00 fee to county in which ceremony is to be performed), 14 (issuance fee, \$2.00 if one or both are Maryland residents; \$3.00 if both are

relevant to a facial challenge to such fees. In *Harper v. Virginia Board of Elections*,¹³⁷ the Court found that the state's imposition of a \$1.50 poll tax in state elections violated the equal protection clause.¹³⁸ The Court recognized that "the right to vote in state elections is nowhere expressly mentioned in the Constitution"¹³⁹ and that the plaintiffs had not proven the existence of a substantial class of otherwise eligible voters whose indigency precluded their participation.¹⁴⁰ Nevertheless, the Court ruled: "To introduce wealth or payment of a fee as a measure of a voter's qualification is to introduce a capricious or irrelevant factor."¹⁴¹ Although *Harper* could seem to be strong precedent for arguing that marriage fees also add a "capricious or irrelevant factor" to the exercise of a fundamental interest, such fees remain seemingly unassailable to-

residents of other states; \$2.00 *additional* if license is issued in Baltimore City or any of ten enumerated counties, regardless of residence of applicants) (1979); Massachusetts \$4.00, MASS. ANN. LAWS ch. 262, § 34(42) (Law. Co-op. Supp. 1981) (unless modified by city or town); Michigan \$20.00 or \$30.00 (residents and non-residents), MICH. COMP. LAWS § 551.103 (MICH. STAT. ANN. § 25.33(2) (Callaghan Supp. 1981)); Minnesota \$15.00, MINN. STAT. ANN. § 517.08(1b.) (West Supp. 1981); Mississippi \$6.00, MISS. CODE ANN. §§ 25-7-13(3)(b) (\$5.00), 41-57-48(5) (\$1.00 recording fee, collected with application) (Supp. 1980); Missouri \$4.00, MO. ANN. STAT. §§ 193.350 (Vernon Supp. 1981) (\$1.00 recording fee, collected with application), 451.150 (Vernon 1977) (\$3.00); Montana \$25.00, MONT. CODE ANN. § 40-1-202 (1979), *see also* § 40-2-405 (1979) (distributes \$25.00 fee), *contra*, § 25-1-201(1)(m) (1979) (\$15.00); Nebraska \$5.00, REV. STAT. NEB. § 33-126.05 (1978); Nevada \$20.00, NEV. REV. STAT. § 122.060 (1979); New Hampshire \$5.00, N.H. REV. STAT. ANN. § 457:29 (Supp. 1979); New Jersey \$3.00, N.J. STAT. ANN. § 37:1-12 (West 1968); New Mexico \$6.50, N.M. STAT. ANN. §§ 14-8-10(B)(3) (1978) (\$1.50, certificate and seal at recording), -12(A) (Supp. 1980) (\$5.00, license and recording); New York \$5.00 to \$7.00 (New York City) or \$2.00 to \$4.00 (rest of state), N.Y. DOM. REL. LAW §§ 14-a(2)(a) (McKinney Supp. 1980-1981) (up to \$2.00, *additional* fee for couple's copy of certificate, collected from applicant), 15(3) (McKinney 1977) (\$2.00, outside New York City), (4) (McKinney Supp. 1980-1981) (\$5.00, New York City); North Carolina \$10.00, N.C. GEN. STAT. § 161-10(2) (Supp. 1979); North Dakota \$6.00, N.D. CENT. CODE § 14-03-22 (1971); Ohio \$18.15, OHIO REV. CODE ANN. §§ 2101.16(A)(45) (Baldwin 1978) (\$8.00), 3113.34 (Baldwin Supp. 1980) (\$10.00, *additional* fee), 3705.23 (Baldwin 1976) (15¢ registration fee); Oklahoma \$10.00, OKLA. STAT. ANN. tit. 28, § 31 (West Supp. 1980-1981); Oregon \$20.00 to \$30.00, OR. REV. STAT. §§ 107.615(1) (up to \$10.00, *additional* fee), 205.320(7) (\$20.00) (1979 Replacement Part); Pennsylvania \$3.00, PA. STAT. ANN. tit. 48, § 1-19 (Purdon 1965); Rhode Island \$5.00, R.I. GEN. LAWS § 15-2-9 (Supp. 1980); South Carolina \$1.00, S.C. CODE § 20-1-230 (1977); South Dakota \$10.00, S.D. CODIFIED LAWS ANN. § 25-1-10 (Supp. 1980); Tennessee \$4.00, TENN. CODE ANN. §§ 8-21-701(14) (1980) (\$1.00, clerk's fee), 53-461(f) (Supp. 1980) (\$1.00, recording fee, collected with application), 67-4203(62) (1976) (\$2.00, privilege tax); Texas \$7.50, TEX. REV. CIV. STAT. ANN. art. 3930(7) (Vernon Supp. 1980-1981); Utah \$5.00, UTAH CODE ANN. § 21-2-2 (Supp. 1979); Vermont \$6.00, VT. STAT. ANN. tit. 32, § 1712(1) (Supp. 1980); Virginia \$10.00, VA. CODE §§ 14.1-112(b) (Supp. 1980) (\$7.00, clerk's fee), 20-15 (1975) (\$3.00, tax); Washington \$8.00 to \$16.00, WASH. REV. CODE ANN. §§ 26.12.220(1) (up to \$8.00, *additional* fee), 36.18.010 (\$8.00) (Supp. 1981); West Virginia \$5.00, W. VA. CODE § 59-1-10 (1966); Wisconsin \$5.00, WIS. STAT. ANN. § 765.15 (West Special Pamphlet 1980); Wyoming \$5.00, WYO. STAT. § 18-3-402(a)(xvi)(F) (Supp. 1980).

¹³⁷ 383 U.S. 663 (1966).

¹³⁸ *Id.* at 666.

¹³⁹ *Id.* at 665.

¹⁴⁰ *Id.* at 668.

¹⁴¹ *Id.*

day. The interest in voting — characterized by the Court as “preservative of all rights”¹⁴² — may therefore be more “fundamental” for equal protection purposes than the interest in choosing whether to marry, which has been characterized as “fundamental to the very existence and survival of the race.”¹⁴³ There is little in Supreme Court rhetoric, however, to support such a conclusion.

In theory, an argument advanced under a due process rationale, relying on the Court’s 1971 opinion in *Boddie v. Connecticut*,¹⁴⁴ might be more successful than an equal protection challenge in attacking licensing charges for marriage. In *Boddie*,¹⁴⁵ the plaintiffs challenged the application of Connecticut’s court fees — averaging \$60 in divorce actions — to a class of persons who could not afford to pay them, and thus were effectively precluded from access to divorce.¹⁴⁶ In sustaining the challenge, the Court employed an analysis which combined substantive and procedural due process considerations. The Court noted that access to a divorce court “is the exclusive precondition to the adjustment of a fundamental human relationship, hence the state holds a monopoly over the divorce process.”¹⁴⁷ While the same considerations of exclusivity are equally applicable to marriage as to divorce, it is less likely that marriage license fees preclude access to marriage for a large class of persons; the average marriage license fee does not appear to be unduly prohibitive.¹⁴⁸ In addition, unlike the equal protection attack undertaken in *Harper*, a due process challenge could not be used to invalidate all marriage license fees because some indigent persons are precluded from access. Indeed, Connecticut’s divorce fees, in *Boddie*, were invalid only as applied to those individuals who were denied access to divorce as a result of the costs.

In summary, restrictions on the right to enter marriage that are based explicitly on wealth, and significantly interfere with the marital decision, are subject to high-intermediate scrutiny, under *Zablocki*. While constitutional challenges could also be raised against de facto forms of wealth discrimination, the interest in choosing whether to marry does not seem to be significant enough to warrant a complete bar to subtle forms of wealth discrimination such as marriage license fees. In addition, due process challenges could presumably do no more than eliminate the application of the fees to those who are unable to pay them.

2. Age

Virtually all American jurisdictions place a minimum age on access to marriage, typically 16 or 18, and often a somewhat higher age for marriage

¹⁴² See *id.* at 667 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) and *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)).

¹⁴³ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), quoted in text at note 111 *supra*.

¹⁴⁴ 401 U.S. 371 (1971). Justice Stewart relied on a due process argument in his concurring opinion in *Zablocki*, 434 U.S. 374, 394 (1978) (Stewart, J., concurring).

¹⁴⁵ See discussion of case in text at notes 217-25 *infra*.

¹⁴⁶ 401 U.S. at 372-73.

¹⁴⁷ *Id.* at 383.

¹⁴⁸ See note 136 *supra*.

without parental consent. Such limitations derive, at least in part, from common law notions of marriage as a contract, and of the incapacity of minors to contract.¹⁴⁹ To the extent that these age limitations are different for males and females, they quite clearly are invalid as unconstitutional sex-based discrimination. In 1975, in *Stanton v. Stanton*,¹⁵⁰ the Supreme Court struck down a Utah statute which provided different ages of majority for males and females with regard to their right to child support. In so doing the Court made clear that the burden on the state to justify a gender-based differential age of majority for any purpose would be a heavy one — clearly too heavy to sustain its use in determining capacity to marry.

Absent sex discrimination, any claim that a minimum age requirement for marriage violates the constitution is likely to fail. The Supreme Court has rejected the argument that age is a suspect classification when made by a police officer who reached compulsory retirement at age 50.¹⁵¹ While it has not chosen to address claims of age discrimination against the young, it may be hypothesized that, absent some additional factors, such classifications are unlikely in themselves to qualify for any heightened level of scrutiny.

Of course, there is arguably more involved than age discrimination in a restriction on the capacity to marry — *i.e.*, a substantial, if not fundamental, interest in marital choice. But the Supreme Court has shown a disinclination to accord young people the same right of access to sexually explicit material as is accorded to adults under the first amendment.¹⁵² Thus, it appears unlikely that the Court will recognize in minors a constitutional interest in the choice to marry to the same extent as in adults.

Nevertheless, the Court has recognized under due process the right of minors to access to contraceptives,¹⁵³ and the right of mature minors to choose to abort a pregnancy.¹⁵⁴ Granted, the delay of the right to marry is not as irrevocable a deprivation of a liberty interest as is a delay in the right to exercise an abortion decision; even absent a mature minor's independently protectable due process right to marry, however, were the decision to marry be made by a pregnant minor, the implication of a second fundamental interest might require the application of strict scrutiny review. Under such circumstances, it is difficult to see how a state bar to marriage based on age could be sustained.

Unless age restrictions on marital choice implicate other fundamental interests, then, they are unlikely to be declared constitutionally infirm. Age

¹⁴⁹ See *Developments*, *supra* note 3, at 1257-59; Kingsley, *The Law of Infants' Marriages*, 9 VAND. L. REV. 593, 593-94 (1956); Note, *The Uniform Marriage and Divorce Act — Marital Age Provisions*, 57 MINN. L. REV. 179, 187 n.41 (1972); Comment, *The Underage Marriage and Parental Consent Problems in Texas — A Look at the Past as well as the Present*, 22 BAYLOR L. REV. 332, 332 (1970). For the view of the common law treating marriage as a contract, see 1 W. BLACKSTONE, COMMENTARIES 433.

¹⁵⁰ 421 U.S. 7 (1975), *on appeal after remand*, 552 P.2d 112 (1976), *vacated and remanded*, 429 U.S. 501 (1977).

¹⁵¹ *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

¹⁵² *Ginsberg v. New York*, 390 U.S. 629 (1968).

¹⁵³ *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

¹⁵⁴ *H.L. v. Matheson*, 101 S.Ct. 1164 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979).

classifications based on gender, however, are facially invalid under the reasoning of *Stanton*.

3. Health

In theory, mental incompetents are denied access to legal marriage. In practice, however, the question of incompetency almost always arises after a marriage has already taken place, in suits for annulment.¹⁵⁵ As with incapacity based on age, such state policies find their roots in the common law requirement of capacity to contract. As such, there is little doubt that the rules regarding mental competency are constitutionally invulnerable, although should a state attempt to invoke them as a grounds for denying a marriage license, it would no doubt have to satisfy minimum requirements of procedural due process.¹⁵⁶

The more frequently invoked and more vulnerable limitations on marriage involve physical health. Primary among these restrictions is the widely applied requirement that an applicant for a marriage license produce certification of freedom from venereal disease as a condition to the grant of the license.¹⁵⁷ Other less frequently imposed requirements include proof of freedom from tuberculosis¹⁵⁸ and German measles.¹⁵⁹

¹⁵⁵ See, e.g., *Homan v. Homan*, 181 Neb. 259, 147 N.W.2d 630 (1967); *Larson v. Larson*, 42 Ill. App. 2d 467, 192 N.E.2d 594 (1963); *Mahan v. Mahan*, 88 So.2d 545 (Fla. 1956); *Goldman v. Goldman*, 169 Cal. App. 2d 103, 336 P.2d 952 (1959); *Chapline v. Stone*, 77 Mo. App. 523 (1898).

¹⁵⁶ Under the calculus developed by the Court, the applicant threatened with denial of a marriage license due to mental incompetency would probably be entitled to a hearing before denial. See S. BREYER AND R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 672 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976). The applicant has a strong constitutional interest in obtaining the license, see, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978), and mental incompetence seems to require a sufficiently difficult determination of fact that a hearing would be necessary to ensure the legitimacy of the government's decision to deny a license. Several cases have demonstrated the propriety of conducting such hearings in other situations involving allegations of incompetence. E.g., *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *In re Buttonow*, 23 N.Y.2d 385, 393, 244 N.E.2d 677, 297 N.Y.S.2d 97, 103-04 (1968). In addition, the state has a virtual monopoly on access to marriage and the considerations involved in the access to divorce cases, involving a similar state monopoly, should apply equally to obtaining a license. See *Boddie v. Connecticut*, 401 U.S. 371, 377-79, 383 (1971).

One state, North Carolina, requires a statement by a physician, presumably the one performing the venereal disease and tuberculosis tests required, stating that the applicant is mentally competent. N.C. GEN. STAT. § 51-9 (Michie Supp. 1979). If the applicant is found to be mentally incompetent, the license generally will be issued only if the applicant submits to eugenic sterilization. N.C. GEN. STAT. § 51-12 (1976). The applicant's interests under such a statute should be accorded at least as rigorous constitutional protection as an outright denial of a license receives because the fundamental interest in procreation is penalized.

¹⁵⁷ See, e.g., CAL. CIV. CODE § 4300(a) (West Supp. 1981); CONN. GEN. STAT. § 46b-26(a) (West Supp. 1981); GA. CODE ANN. § 53-215 (Harrison Supp. 1980); KAN. STAT. ANN. § 23-301 (Supp. 1980); N.C. GEN. STAT. § 51-9 (Michie Supp. 1979); WASH. REV. CODE ANN. § 26.04.210 (West Supp. 1981).

¹⁵⁸ N.C. GEN. STAT. § 51-9 (Michie Supp. 1979).

¹⁵⁹ CAL. CIV. CODE § 4300(b) (West Supp. 1981). Several states require only that the woman submit to a test for German measles (rubella) and that she be informed of the results and the dangers of mixing rubella and pregnancy. See, e.g., CONN. GEN. STAT. § 46b-26(e) (West Supp. 1981); GA. CODE ANN. § 53-217.1 (Harrison Supp. 1980); IDAHO CODE § 32-412 (Bobbs-Merrill Supp. 1980).

If the dicta of *Zablocki v. Redhail*¹⁶⁰ are to be taken at face value, such requirements of physical health are "reasonable regulations," invulnerable to constitutional attack. The state's interest in promoting health certainly cannot be minimized in view of *Roe v. Wade*'s acknowledgement that the state's interest in the public health is "compelling" enough to override fundamental rights in requiring that second trimester abortions be performed in hospitals.¹⁶¹ In addition, the disability imposed by the statute is temporary in nature, presumably eradicated when the disease is cured. Nonetheless, it is submitted that however temporary the disqualification, it cannot survive beyond the most minimal scrutiny. The classification is vastly underinclusive in identifying, although in part for its own edification, a miniscule part of the population which may be in danger of communicating venereal disease; yet it is also substantially overinclusive in its application to the portion of the marrying population which has engaged in sexual intercourse before applying for a license, and which may or may not be deterred from engaging in intercourse by the denial of a license. The state objective of public health would seem so minimally served as perhaps not to justify even the temporary disqualification from marriage and the small invasion of personal privacy involved.¹⁶²

4. Polygamy

There is no reason to doubt that the Supreme Court's decision in *Reynolds v. United States*,¹⁶³ discussed earlier,¹⁶⁴ remains good law. Thus, no substantive constitutional challenge to monogamy requirements — whether under due process, equal protection, or free exercise of religion rationales — would have any plausible chance of success.

D. Penalties on Marriage Short of Prohibition

In distributing burdens and benefits, the government has often distinguished between people occupying married status and the unmarried. Married persons have often enjoyed greater benefits¹⁶⁵ or have been spared

¹⁶⁰ 434 U.S. 374, 386 (majority), 392 (Stewart, J., concurring) 396, 399 (Powell, J., concurring), 404 (Stevens, J., concurring) (1978).

¹⁶¹ 410 U.S. 113, 162-63 (1973). *Accord*, *Gary-Northwest Ind. Women's Servs. v. Orr*, 496 F. Supp. 894 (N.D. Ind. (1980)), No. 80-1275 (1981), 49 U.S.L.W. 3560 (filed), 3691 (sum), 3806 (aff'd).

¹⁶² Professor Clark approves the result of the one reported case, *Peterson v. Widule*, 157 Wis. 641, 147 N.W. 966 (1914), upholding the constitutionality of a freedom from venereal disease requirement. *See* H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 86 (1968).

¹⁶³ 98 U.S. 145 (1879).

¹⁶⁴ *See* text at notes 78-81 *supra*.

¹⁶⁵ There are numerous instances of greater benefits accorded married persons. Under the Social Security Act and related legislation, married persons are entitled to receive benefits not available to the unmarried. *E.g.*, 42 U.S.C. § 402(b), (c), (e), (f), (i) (1976 & Supp. III 1979). Other examples of the greater benefits available to married persons are found in the Veterans' Benefits laws. *E.g.* 38 U.S.C. §§ 315(1)(A), 1682(a)(1), (c)(2), (1976 & Supp. III 1979).

certain burdens.¹⁶⁶ In such cases, it is difficult for the unmarried to argue, in the absence of judicial identification of marital status as a suspect classification, that they have a fundamental or otherwise protectible interest in remaining unmarried, the penalization of which should activate heightened judicial scrutiny. One could make the case that if the interest in choosing to marry is protectible, the liberty of choosing not to marry must be at least as protectible. Such an argument perhaps highlights a problem with the fundamental interest approach to equal protection analysis.¹⁶⁷

A constitutional challenge is more easily made when the married are denied benefits provided the unmarried, or saddled with burdens not imposed upon the unmarried. In such instances, the argument can be advanced that the classifications discourage marriage, and may therefore be tantamount, for at least some, to prohibition. Such an argument was pursued unsuccessfully in the 1977 case of *Califano v. Jobst*.¹⁶⁸ In that case a recipient of Social Security benefits claimed that the automatic cessation of benefits on the occasion of his marriage was violative of his constitutional rights. In the wake of *Jobst*, however, the law remains unclear on what standards apply to classifications based on marital status — classifications which can be seriously discouraging or prohibitive of the exercise of the choice to marry.

In *Jobst*, the plaintiff, a disabled adult, was considered a dependent child recipient of Social Security benefits. As such, the plaintiff was part of a class of secondary beneficiaries — including minor children, widows, widowers, and parents — whose benefits would automatically terminate upon marriage to an individual not entitled to benefits under the Social Security Act. When he married another disabled person, who was nonetheless not eligible for the benefits, Mr. Jobst's benefits were terminated. Mr. Jobst claimed that the Act penalized the exercise of his fundamental interest in marriage; and that its distinction

¹⁶⁶ In several important instances, the government has spared an individual from burdens caused solely by the individual's married status. Under the Selective Service Act of 1948, the President was authorized to defer any man with a wife, whether or not the man had dependent children. Ch. 625, § 6(h), 62 Stat. 612 (1948) (current version at 50 U.S.C. APP. § 456(h) (1976)).

Married persons also enjoy a tax benefit from the government. Of fundamental importance is the basic rate structure which allows a married individual to split his/her income with a spouse. By filing a joint return, married individuals achieve substantial tax savings even though, and especially when, only one spouse is responsible for the income and deductions. See I.R.C. § 1(a), 6013(a) (1981).

In addition to the general rate structure, there are many other tax advantages for the married. For example, even though only one spouse has income, I.R.C. § 6013(a), when filing jointly, married individuals often are entitled to twice the dollar amount of credits against tax or exclusions from income as a single individual is. E.g., I.R.C. §§ 41(b)(1) (1981) (political contribution tax credit).

¹⁶⁷ A related, if readably distinguishable, problem relates to classifications that withhold government benefits from a person who has chosen to divorce. See *Mathews v. DeCastro*, 429 U.S. 181 (1976). (holding that due process is not violated by § 202(b)(1) of the Social Security Act, 42 U.S.C. § 402(b)(1) (1973), which precludes divorced wives under 62 whose ex-husband retires or becomes disabled from receiving monthly benefits under the Act).

¹⁶⁸ 434 U.S. 47 (1977).

between those beneficiaries who married other eligible beneficiaries and those who did not, without regard to actual dependency, was irrational.¹⁶⁹ In an opinion by Justice Stevens, a unanimous Court found that the challenged rule was not "an attempt to interfere with the individual's freedom to make a decision as important as marriage."¹⁷⁰ In sustaining the termination of benefits for a secondary beneficiary who married, the Court applied a traditional minimal scrutiny rational basis standard.¹⁷¹ It reasoned:

Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families. Frequently, of course, financial independence and marriage do not go hand in hand. Nevertheless, there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried.¹⁷²

Rather than being a penalty on the right to marriage, then, the Court found the legislation to be a reasonable adaptation to likely changes in the recipient's economic condition.

Turning to the plaintiff's second argument, the Court disagreed that the classification was irrational. It found that administrative expediency was a sufficient justification for distinguishing between marriages to eligible and ineligible persons rather than dependent and independent persons. In so doing, the Court implicitly rejected intermediate scrutiny as the proper standard of review for such cases, for it had previously refused to find administrative expediency a sufficient governmental purpose where low-intermediate review standards were applicable.¹⁷³

Prior to *Zablocki v. Redhail*, it would have been difficult to disagree with the reading of *Jobst* which Justice Stevens, its author, provided in his concurring opinion in *Zablocki*. Justice Stevens noted that "[a] classification based on marital status is fundamentally different from a classification which determines who may lawfully enter into the marriage relationship. The individual's interest in making the marriage decision independently is sufficiently important

¹⁶⁹ Because the defendant was the national government, the equal protection principles asserted derived from due process rather than equal protection. *See id.* at 58.

¹⁷⁰ *Id.* at 54 (footnote omitted).

¹⁷¹ *See id.* at 52-54, 55-57. Pertinently, among the cases cited was *Weinberger v. Salfi*, 422 U.S. 749 (1975), which held that a classification under the Social Security Act distinguishing widows who had married more than nine months before their husbands' deaths from those who had married less than nine months before was to be reviewed under a traditional rational basis standard. *Id.* at 768.

¹⁷² 434 U.S. at 53.

¹⁷³ *E.g.*, *Reed v. Reed*, 404 U.S. 71, 76 (1971).

to merit special constitutional protection."¹⁷⁴ Justice Stevens' opinion, then, intimated that because Mr. Jobst was not subject to an absolute prohibition on the right to marry, but only penalized for the exercise of that right, a standard of review greater than minimum rationality was not warranted. A footnote in *Zablocki*, however, distinguished *Jobst* on different grounds, thus reopening the question of whether the difference between the penalization and the prohibition of the exercise of marital choice is a difference in degree or a dispositive difference in kind for the purpose of determining a constitutional standard of review under the equal protection clause. The relevant footnote, in part, reads:

The directness and substantiality of the interference with the freedom to marry distinguish the instant case from *Califano v. Jobst*. . . . The Social Security provisions placed no direct legal obstacle in the path of persons desiring to get married, and . . . there was no evidence that the laws significantly discouraged, let alone made "practically impossible," any marriages. Indeed, the provisions had not deterred the individual who challenged the statute from getting married, even though he and his wife were both disabled.¹⁷⁵

It would seem that the *Zablocki* Court shifted judicial inquiry back to an examination of the interference in fact that a particular regulation has on marital choice.

The *Zablocki* Court has thus spawned new questions regarding the standard of review to be applied to classifications which penalize exercise of the choice to marry. For example, would plaintiff Jobst have been successful had he brought suit before getting married and claimed he did not feel he could marry without the continuation of social security benefits? Would he have fared differently had he secured affidavits or testimony from a number of secondary beneficiaries claiming they would have married but for the contested rule, or perhaps introduced social science data to that effect? While Justice Stevens' reading of *Jobst* would introduce far more certainty into this area, the *Zablocki* Court chose instead to leave open the possibility that a penalty (*e.g.*, withdrawal of benefits) for choosing marriage may be prohibitory for constitutional purposes if it is prohibitory in fact. But even assuming a challenger were able to assert meaningfully the impingement on a fundamental interest in marital choice, it is submitted that *Jobst* was correctly decided. This is not because penalties on the exercise of the choice to marry should be reviewed under a minimum rationality standard, but rather because, even at a higher level of review, the government could satisfy a "fair and substantial relation" test with regard to Jobst's claim that his right to marital choice was penalized. Until further clarification by the Supreme Court, however, it appears that the standard of review to be applied to such classifications will remain subject to the level of interference with the right to marital choice which the Court finds present.

¹⁷⁴ 434 U.S. at 403-04 (Stevens, J., concurring) (footnote omitted).

¹⁷⁵ *Id.* at 387 n.12 (citations omitted).

E. Marital Privacy

Before attempting to understand the unique character of constitutional marital privacy, it is useful to focus on the dual nature of the broader constitutional concept of personal privacy. Writing for the Court in *Whalen v. Roe* in 1977, Justice Stevens noted: "[T]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."¹⁷⁶ At one level, then, there exist privacy rights grounded in an interest in nondisclosure of personal matters. At another level, there is a private right to autonomy inherent in certain important personal decisions faced by individuals. To the extent that cases protecting marital choice may be characterized as privacy cases, they fall into Justice Stevens' second category of rights to personal autonomy. Other decision-making, unique to family relationships, such as whether to terminate a pregnancy¹⁷⁷ or whether to enroll one's child in a private school¹⁷⁸ have also come to be characterized by the court as a function of constitutionally protected personal privacy.

To suggest, as the Court did in *Loving*, that the individual has a presumptive right to broad discretion in the choice of a marriage partner, does not speak to unique rights which may devolve upon the association of two persons within the institution of marriage. Unlike marital choice, the conceptual bases for the assertion of privacy rights unique to the individual *because* he is married, find their roots in Justice Stevens' first category, freedom from disclosure, as well as in the right to personal autonomy.

1. The Griswold Case

Certainly the leading, if not the only, Supreme Court case explicitly identifying a constitutional right to marital privacy is *Griswold v. Connecticut*.¹⁷⁹ There the Court struck down state criminal statutes which indiscriminately prohibited the use of contraceptives by the married and the unmarried. The appellants had informed, instructed and medically advised married persons about contraception, and for this had been convicted as accessories in abetting the prohibited use of contraceptives. By appropriately asserting third person interests, the appellants launched a constitutional attack on the Connecticut statutes for violating the unique rights of married persons.

The *Griswold* Court found it unnecessary to address the constitutional acceptability of banning contraceptive use by the unmarried. The four opinions offered by the seven justice majority all emphasized marital privacy as the value at stake in the litigation. Justice Douglas, writing for the Court, apparently felt constrained to tie the marital privacy right to the text of the Bill of

¹⁷⁶ 429 U.S. 589, 598-600 (1977) (footnotes omitted).

¹⁷⁷ See *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁷⁸ See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

¹⁷⁹ 381 U.S. 479 (1965).

Rights, implicitly restricting judicial identification of fundamental rights to the theories of fourteenth amendment incorporation. Justice Douglas suggested that various provisions of the Bill of Rights have penumbras, "formed by emanations from those guarantees that help give them life and substance."¹⁸⁰

With the exceptions of references to the first and ninth amendments,¹⁸¹ the constitutional provisions cited by the Court are basically within the concept of procedural due process incorporated into the fourteenth amendment. These provisions usually limit the authority of the state to adopt certain methods of enforcing its laws. The privacy concepts emerging from the third, fourth, and fifth amendments, reflected in the cases relied upon by the Court,¹⁸² as well as in the language of the amendments themselves, are rooted in Justice Stevens' first category of privacy — freedom from disclosure. Even with regard to the penumbra of the first amendment, the principal case relied upon by the Court, *NAACP v. Alabama*,¹⁸³ suggested a notion of privacy which related to immunity of conduct from public disclosure rather than to liberty to make particular important decisions.¹⁸⁴

Having identified a privacy right which was fundamentally procedural in nature, the *Griswold* Court had to address the scope of that right. For example, was all conduct in the home to be protected from disclosure? Was all sexual conduct presumptively protected? The Court used the substantive interest in familial choice¹⁸⁵ to define and limit, at least temporarily, the procedurally based right to privacy it had identified. Marriage was "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees," the Court noted.¹⁸⁶ A law forbidding the use of contraceptives could not be constitutionally applied to married couples:

We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁸⁷

¹⁸⁰ *Id.* at 484.

¹⁸¹ Justice Douglas' opinion made no other reference to the ninth amendment, although its importance to the Court's result was stressed in a concurring opinion by Justice Goldberg. *Id.* at 486-99.

¹⁸² See, e.g., *Boyd v. United States*, 116 U.S. 616, 630 (1886); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

¹⁸³ 377 U.S. 288 (1964).

¹⁸⁴ In *NAACP v. Alabama*, the Court found that the state's order requiring disclosure of the names and addresses of all NAACP members violated the first amendment because of its "substantial restraint" on associational rights. *Id.* at 308-10.

¹⁸⁵ 381 U.S. at 482 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

¹⁸⁶ 381 U.S. at 485.

¹⁸⁷ *Id.* at 486.

Such an association, ruled the Court, could not be subjected to the enforcement of Connecticut's proscription of contraception.

As a result of *Griswold*, married people have the right to choose to use contraceptives. Whether that is because birth control decisions are very important to marriage, or because we would not "allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives,"¹⁸⁸ — or both — is unclear. In any event, invoking the standard which had prohibited associational disclosures in *NAACP v. Alabama*, the Court invalidated the Connecticut prohibitions because "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."¹⁸⁹

The concurring opinions, while disagreeing to some extent on the standards which need be employed to identify fundamental rights not explicitly mentioned in the Constitution, shed little light on the conceptual underpinnings of what all agreed was the issue at stake in the case — marital privacy. But four of the concurring Justices in the seven member majority, either by extensive quotation¹⁹⁰ or incorporation by reference,¹⁹¹ adopted the views expressed in Justice Harlan's dissent in the 1961 case of *Poe v. Ullman*.¹⁹² In *Poe*, which also involved a challenge to prohibitions on the use of contraceptives, Justice Harlan said:

Although the form of intrusion here — the enactment of a substantive offense — does not, in my opinion, preclude the making of a claim based on the right to privacy embraced in the 'liberty' of the Due Process Clause, it must be acknowledged that there is another sense in which it could be argued that this intrusion on privacy differs from what the Fourth Amendment, and the similar concept of the Fourteenth, were intended to protect: here we have not an intrusion into the home so much as on the life which characteristically has its place in the home. But in my mind such a distinction is so insubstantial as to be captious: if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. . . . The home derives its pre-eminence as the seat of family life

Of this whole "private realm of family life" it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.¹⁹³

The adoption of Justice Harlan's views in the concurring opinions of *Griswold* thus lends substance to the notion that marital privacy is a hybrid of rights to personal autonomy and rights to freedom from disclosure.

¹⁸⁸ *Id.* at 485.

¹⁸⁹ *Id.* (citation omitted).

¹⁹⁰ *Id.* at 495, 499 (Goldberg, J., concurring).

¹⁹¹ *Id.* at 500 (Harlan, J., concurring).

¹⁹² 367 U.S. 497 (1961).

¹⁹³ *Id.* at 551-52.

Aside from the uncertainties surrounding the roots of the right to marital privacy, questions remain regarding the application of the right. Even assuming that the zone of privacy extends only to married couples, *Griswold's* reach is still unclear. Presumably, married people may be convicted of murder, even if the act is committed in the marital bedroom. Nevertheless, it is arguable, in light of *Griswold*, that the state has to satisfy a greater burden whenever it restricts the activities of married persons consorting within the physical confines of their home or bedroom. Although the Court did not explicitly deal with the question, it is more likely that *Griswold's* privacy rights are limited to consensual sexual conduct.¹⁹⁴ It could be argued that the right should be narrowed even further to protect only potentially procreative sexual conduct because of the greater centrality of such conduct to the historic "purposes" of marriage. There is little in the opinion itself, however, to suggest that the personal interest in preventing conception is what generated the presumption that the Connecticut statute was invalid.

Courts have been unable to agree whether a state may prohibit consensual sodomy¹⁹⁵ or other forms of nonprocreative sexual activity between married people. If constitutional privacy does extend to sexual activity, it is not clear whether that concept is defined by genital involvement or by some broader psychological notions of sexuality. For example, some sexual activity may involve weapons which, even if consensually used, might generate charges of aggravated criminal assault if employed outside the intimacies of marriage. One federal court of appeals has held, over a strenuous dissent, that while consensual sodomy between married persons falls within the zone of constitutional privacy, the right may be waived if the individuals accept the presence of onlookers.¹⁹⁶ If this is a correct statement of the law, it reinforces a reading of *Griswold* which suggests that the right to marital privacy is derived from the interest in not having intimacy disclosed rather than the interest in making important decisions.

While the origins and future applications of *Griswold* remain unclear, it nevertheless appears that the case was properly decided. It is not the existence of any unique interest in sexual privacy held by the married which compelled

¹⁹⁴ As marital privacy attaches to the relationship of two people, protected conduct presumably requires the consent of each. *Cf. Bateman v. Arizona*, 429 U.S. 1302 (1976) (Rehnquist, Circuit Justice) (assuming that state decision which held that the state may regulate conduct by consenting married adults was incorrect).

¹⁹⁵ *E.g., Cotner v. Henry*, 394 F.2d 873 (7th Cir. 1968), *cert. denied*, 393 U.S. 847 (1968) (state may not prohibit consensual sodomy absent a showing of force); *Towler v. Peyton*, 303 F. Supp. 581 (W.D. Va. 1969) (Virginia sodomy statute not unconstitutionally applied as petitioner had been tried and convicted of forcing act upon wife); *Commonwealth v. Balthazar*, 366 Mass. 298, 318 N.E.2d 478 (1974) (Massachusetts sodomy statute could not be construed to include private, consensual conduct of adults, but it did prohibit forced conduct). *Contra, State v. Elliot*, 89 N.M. 305, 551 P.2d 1352 (1976) (upheld constitutionality of New Mexico sodomy statute under which lack of consent was not an element of offense); *Washington v. Rodriguez*, 82 N.M. 428, 483 P.2d 309 (1971) (same result).

¹⁹⁶ *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976).

the result. Rather, it is the principle that any exercise of sexual choice which does not intrude upon the interest of others, should be presumptively beyond the reach of the state. None of the social policy arguments which Connecticut employed could satisfy strict scrutiny review. In addition, the argument that contraception is morally wrong is simply not widely enough shared in comparable legal systems to qualify under strict scrutiny as a compelling state interest.

Finally, one question left open on the facts of the *Griswold* opinion was whether a state could impinge indirectly on contraception decisions by cutting off the sources of contraceptives, *i.e.*, prohibiting their manufacture or sale. Justice Douglas, after rejecting the minimal rationality standard for reviewing economic and social legislation,¹⁹⁷ emphasized that the challenged statute forbade "the use of contraceptives rather than regulating their manufacture or sale."¹⁹⁸ It may be hypothesized that limiting the availability of some contraceptive methods might be sustainable if adequately supported by public health evidence. Notwithstanding the conscious effort of the *Griswold* Court to limit its holding, however, it appears that any state policy which prevents or significantly inhibits married persons from choosing to employ contraception, would violate the due process clause.¹⁹⁹

2. Subsequent Developments in the Supreme Court

While *Griswold* remains the seminal marital privacy case, other Supreme Court decisions have played a significant role in the development of the doctrine. The 1972 case of *Eisenstadt v. Baird*,²⁰⁰ for example, invalidated a Massachusetts statute denying access to contraceptives to *unmarried* persons. The decision is important to a consideration of marital privacy insofar as the *Eisenstadt* Court's interpretations of *Griswold* may cloud its meaning. In *Eisenstadt*, the Supreme Court chose to consider the challenged statute under the equal protection clause, without addressing the appellee's substantive due process claims. It recognized that the classification between married and unmarried persons did not in itself call into play a standard of review more stringent than the rational basis test.²⁰¹ The Court fairly searchingly explored proffered state justifications for the statute, and explicitly rejected as insufficient those to which the means had only a "marginal relation."²⁰² In reality, then, the Court seemed to call into play, at the very least, the "strict rationality" level of scrutiny. Having rejected state justifications for deterring fornication and protecting health, the Court posed the question of whether the state's prohibition

¹⁹⁷ 381 U.S. at 482.

¹⁹⁸ *Id.* at 485.

¹⁹⁹ Indeed, in *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), the Court struck down as violative of due process, restrictions on the sale or distribution of contraceptives to unmarried minors.

²⁰⁰ 405 U.S. 438 (1972).

²⁰¹ *Id.* at 447.

²⁰² *Id.* at 448.

might be sustained "simply as a prohibition on contraception." Justice Brennan, writing for the Court, continued:

We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and married alike.

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital 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. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child

On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious ²⁰³

By Justice Brennan's virtually total equation between the rights of the married and unmarried stemming from *Griswold*, it would appear that what was initially a rather narrowly delineated assertion of marital sexual privacy has become, albeit within the rubric of equal protection analysis, a constitutionally significant interest in procreative privacy. The interest has been rather substantially transformed, or at least expanded, from one principally grounded in non-disclosure to one rooted in the protection of important personal choice.

Griswold and *Eisenstadt* can of course be reconciled if one does not ascribe too much importance to the rhetoric of Justice Brennan's equation. Marriage may only be important in *Griswold* as one of a number of possible manifestations of family privacy.²⁰⁴ Similarly, *Eisenstadt* can be viewed as a decision based on notions of family privacy. The interest in *Eisenstadt*, however, is an interest in whether to form or expand a family unit, irrespective of marriage. Alternatively, it may be argued that *Eisenstadt*, in identifying a constitutionally significant interest rather than a fundamental right,²⁰⁵ has extended some constitutional protection to procreation outside the marriage context, but at a lower level of review.

²⁰³ *Id.* at 453-54 (citations and footnote omitted).

²⁰⁴ Contraception inevitably involves at least an interest in whether to form or expand a family unit, irrespective of marriage.

²⁰⁵ See text accompanying note 18 *supra*.

While *Griswold* and *Eisenstadt* found that unilateral actions taken by the state violated the right to marital privacy, *Planned Parenthood of Missouri v. Danforth*²⁰⁶ ruled that the joint actions of the state and a marital partner might also violate such principles. *Planned Parenthood* considered at length the constitutionality of Missouri's comprehensive legislation regulating abortions.²⁰⁷ Missouri had required prior written consent of the husband of any married woman seeking an abortion during the first twelve weeks of pregnancy unless "the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother."²⁰⁸ The state sought to justify this additional qualification on the individual right to abort based upon its "perception of marriage as an institution" whose value would be preserved by assuring "that any major change in family status is a decision made jointly by the marriage partners."²⁰⁹

The Court acknowledged the husband's significant interest in the fetus, and the state's important interest in preserving harmonious marriages. Nonetheless, it declared the requirements unconstitutional. Expressing doubt that such legislation would foster mutuality and trust in marriages, the Court held that, in any event, "the state has [no] constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy when the state itself lacks that right."²¹⁰

It can be argued that *Planned Parenthood* reduces the value of marital rights asserted in *Griswold* by exalting the individual above the associational entity. Such an argument, however, misstates the decision's true meaning. Although the underlying right that the Court identifies is the personal right of the wife, her right to make the abortion decision is sustained not at the expense of marital privacy, but in furtherance of it. *Planned Parenthood* announces to states that they may not interfere with a conflict that involves procreative decisions within a marriage, at least not without a more compelling justification than dubious speculation that the interference will ultimately promote stability in the marriage.

The nature and scope of the right to marital privacy announced in *Griswold* continues to be subject to further development. Out of a right to marital privacy has grown a further insulation of the family unit from state interference of the type defined in *Planned Parenthood*. In addition, the right to marital privacy has spawned an important individual interest in procreation in general, as illustrated in *Eisenstadt v. Baird*.

²⁰⁶ 428 U.S. 52 (1976).

²⁰⁷ *Planned Parenthood* arose against the backdrop of *Roe v. Wade*, 410 U.S. 113 (1973), which established a woman's constitutional right to an abortion during the first two trimesters of pregnancy, qualified only by the state's interest in regulating medical procedures during the second trimester.

²⁰⁸ 428 U.S. 52, 67-68 (1976).

²⁰⁹ *Id.* at 68.

²¹⁰ *Id.* at 70, citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

III. DIVORCE

"Divorce" has been simply defined by Professor Clark as "the legal termination of a valid marriage."²¹¹ Marriage, whether viewed as a contract, a legal status, or a combination of both, creates, at least in all American jurisdictions,²¹² a restriction on an otherwise constitutionally protected personal liberty — the right of the individual to marry. Because the constitutionality of laws prohibiting polygamy has been unequivocally sustained by the United States Supreme Court,²¹³ governmental determinations of the conditions under which divorce is available implicate interests closely related to the liberty to choose whether and whom to marry.

A. *Divorce as a Fundamental Right*

Historically, divorce has been a legal event requiring a judicial proceeding,²¹⁴ as contrasted with marriage, a legal event of arguably similar dimension, which has not required the trappings of the judicial process. The state's imprimatur upon a marriage demands the satisfaction of certain findings of fact just as its determination to grant divorce does. Because the findings required for marriage are normally easily verifiable and uncontested, and do not involve agonizing questions of fault, the simplest administrative procedures for their determination have been universally viewed as sufficient.²¹⁵ In contrast, the substantive laws controlling divorce — both those establishing standards for whether it shall be granted and those determining what any equitable divorce decree will require of the parties — have demanded fact finding on difficult questions such as personal fault, intent of the parties as to property acquired during a marriage, and the best interests of the children of the marriage. Perhaps reflecting an adoption by the legal system of religious views regarding the sanctity of marriage and the concomitant suspect character of divorce, the exercise of divorce has been uniformly subjected to solemnization by courts in the United States, and administered under the mechanisms of adversarial justice.

An examination of the concept of divorce as a fundamental right differs from a similar analysis of marriage in that the Supreme Court has yet to consider the constitutional limits on the substantive criteria a state may employ for the granting of a divorce.²¹⁶ The cases considering procedural access to

²¹¹ Clark, *supra* note 121, at 280.

²¹² *Id.* at 61.

²¹³ *Reynolds v. United States*, 98 U.S. 145 (1878).

²¹⁴ It is true that in *Maynard v. Hill*, 125 U.S. 190, 209 (1888), the Supreme Court recognized the validity of a divorce granted by the legislature of the territory of Washington, but the decision seemed to imply that the absence of jurisdiction vested in any judicial tribunal required this result. Today, all American jurisdictions have committed divorce jurisdiction to the judiciary.

²¹⁵ See generally Clark, *supra* note 121, at 36-38. Cf. note 156 *supra* (where question of mental fitness is involved, a hearing would be required).

²¹⁶ See generally *Developments*, *supra* note 3, at 1308-13.

divorce, however, can serve as a basis for a discussion of divorce as a fundamental right.

1. Procedural Access

The leading Supreme Court case in the divorce area arising under the due process clause is *Boddie v. Connecticut*,²¹⁷ decided in 1971. The substantive characteristics of Connecticut's divorce laws were not questioned in that class action. The plaintiffs were indigent persons desirous of instituting suits for divorce. Unfortunately, they could not afford the \$45 court costs and the fees for service of process by local sheriffs (averaging \$15) which were authorized by state law. The plaintiffs claimed that the assessment of these costs denied them access to divorce in violation of their rights under the due process and equal protection clauses of the fourteenth amendment.

The Court, in an opinion by Justice Harlan, chose not to address the equal protection claim, but did strike down the Connecticut requirements as violative of due process.²¹⁸ The Court stated:

Our conclusion is that given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.²¹⁹

Thus, there seemed to be two central bases for the result: the fundamentality of marriage (and presumably the choice to dissolve it), and the unique procedural situation of divorce as the only private dispute not legally resolvable without the active intervention of state judicial machinery.

A close reading of Justice Harlan's opinion would seem to suggest that the unique role of the judiciary in the effectuation of divorce was as important to the outcome of the case as were any qualitative judgments about the weight to be given the personal interest involved. While the Court recognized that "marriage involves interests of basic importance in our society,"²²⁰ it relied on this perception only to explain state monopolization of the divorce process. Commercial litigation was distinguished not because it involved interests of lesser constitutional magnitude, but because no judicial imprimatur was required for dispute resolution.²²¹ The Court thus equated the procedural interests of these *plaintiffs* with the procedural due process needs of *defendants*, parties normally subjected to judicial machinery through no voluntary choice on their own part. The Court said: "Just as a generally valid notice procedure may fail to satisfy

²¹⁷ 401 U.S. 371 (1971).

²¹⁸ *Id.* at 374.

²¹⁹ *Id.*

²²⁰ *Id.* at 376.

²²¹ *Id.*

due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard.''²²² As Connecticut's requirements were tantamount to denial of a hearing, they could be sustained only if justified by overriding state interests which could not be achieved by means less intrusive of presumptive constitutional rights. The justifications advanced by the state — the prevention of frivolous litigation and conservation of scarce state resources — were both judged insufficient to meet this standard.²²³ To begin, the filing fee requirement was overbroad, sweeping within its denial of access admittedly good faith plaintiffs such as those who had brought the action before the Court. In addition, alternative means for ferreting out frivolous litigants and for reducing the cost of process service were available to the state.²²⁴ The Court was equally unimpressed by the state's allocation of resources justification with respect to court costs and relied on one of a line of cases rejecting the argument that such a state interest is compelling.²²⁵

That the *Boddie* Court had not established a broad due process right to judicial access for the aggrieved poor in areas not touching marriage became clear in two subsequent cases, *United States v. Kras*²²⁶ and *Ortein v. Schwab*,²²⁷ both decided in 1973. In *Kras*, the Court rejected the extension of *Boddie* to the invalidation of filing fees barring access for indigents to the federal judicial bankruptcy process. The *Ortein* Court sustained the imposition of court fees on those seeking to challenge adverse administrative welfare determinations, even though the fees in fact precluded judicial access for the indigent. In *Kras*, the Court distinguished *Boddie* in part by finding means other than bankruptcy available, at least in theory, for the resolution of disputes within the purview of bankruptcy proceedings.²²⁸ The *Ortein* Court relied on the due process safeguards available to welfare claimants at the administrative level in distinguishing *Boddie*.²²⁹ But both cases focused on the fundamentality of the substantive interests asserted in *Boddie* as well. Justice Blackmun, speaking for the Court in *Kras*, appeared to go further than the *Boddie* opinion itself had in valuing the importance of the personal interest in divorce:

The denial of access to the judicial forum in *Boddie* touched directly on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of

²²² *Id.* at 380.

²²³ *Id.* at 381.

²²⁴ *Id.* at 381-82.

²²⁵ *Id.* at 382. The Court relied on its prior holding in *Griffin v. Illinois*, 351 U.S. 12 (1956), in which substantially the same argument was advanced by the state and rejected by the Court.

²²⁶ 409 U.S. 434 (1973).

²²⁷ 410 U.S. 656 (1973).

²²⁸ 409 U.S. at 445.

²²⁹ 410 U.S. at 659-60.

those interests under our Constitution (citations omitted). The *Boddie* appellants' inability to dissolve their marriages seriously impaired their freedom to pursue other protected associational activities. Kras' alleged interest . . . although important . . . does not rise to the same constitutional level.²³⁰

The Court's characterization of the liberties protected as "associational" suggests a focus on the interest in remarrying as the primary source of the substantive component of the fundamental right identified by *Boddie*. Presumably, therefore, a state might separate the issue of whether a divorce should be granted, for which it may not impose court costs against a plaintiff, from issues such as alimony, child support and custody, which, "although important," probably do "not rise to the same constitutional level."²³¹

If one cannot be denied access to divorce on account of indigency, questions remain about what procedural rights must attend such access. The most frequently asserted procedural right has been the right to counsel, claimed by both indigent plaintiffs and defendants. The Supreme Court has not chosen to consider the question, but the response of both state courts²³² and lower federal courts²³³ has been unequivocal: there is no right to state provided counsel for indigent divorce litigants.²³⁴ The judicial response in right to counsel cases may pose a dilemma, however, in view of state laws, which have been sustained against constitutional attack,²³⁵ prohibiting non-lawyers from engaging in divorce counseling.²³⁶ Yet, in theory, so long as a divorce plaintiff is permitted to conduct a suit without counsel, it would appear that the minimal requirements of *Boddie* have been met.

The sounder conclusion would seem to be that, contrary to the case law, when due process demands access to the courts because of the fundamentality of the personal interests at stake and the state's monopolization of dispute resolution, such access must assure a minimum level of effectiveness for both plaintiffs and defendants. If a state decides to preserve the adversarial character of divorce proceedings (a decision not clearly constitutionally mandated²³⁷) a

²³⁰ 409 U.S. at 444-45.

²³¹ *Id.* at 445. As with conflicts between debtors and creditors, conflicts concerning the conditions of divorce decrees, such as child custody arrangements, can be resolved without direct judicial sanction.

²³² See note 234 *infra*.

²³³ *Id.*

²³⁴ *Kiddie v. Kiddie*, 563 P.2d 139 (Okla. 1977); *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975); *Wilson v. Wilson*, 218 Pa. Super. 344, 280 A.2d 665 (1971); *Parsley v. Knuckles*, 346 S.W.2d 1 (Ky. 1961).

²³⁵ *E.g.*, *State Bar v. Cramer*, 399 Mich. 116, 249 N.W.2d 1 (1976).

²³⁶ See, *e.g.*, *In re Thompson*, 574 S.W.2d 365 (Mo. 1978) (en banc); *Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978); *Oregon State Bar v. Gilchrist*, 272 Or. 552, 538 P.2d 913 (1975) (en banc); *State v. Winder*, 42 A.D.2d 1039, 348 N.Y.S.2d 270 (1973). See generally Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976).

²³⁷ Statutes providing for non-adversarial divorce procedures have been upheld against a variety of constitutional challenges. See, *e.g.*, *Donkin v. Donkin*, 35 Conn. Supp. 123, 399 A.2d

minimum level of effectiveness should require the state to provide counsel for indigent plaintiffs and defendants. Were a state to abandon the adversarial system of divorce, and adopt any one of a number of non-adversarial models which have been proposed,²³⁸ the argument for counsel as a necessary component of procedural due process would obviously diminish.

State policies which have the impact of delaying, rather than denying, access to a state's divorce process, would appear to be constitutionally acceptable, so long as they are reasonably related to legitimate state interests. This was one of the lessons of *Sosna v. Iowa*,²³⁹ a case which sustained a state's one-year durational residency requirement for divorce. Noting that the requirement merely delayed the exercise of an otherwise existing right to access, the Court identified, albeit in the context of an equal protection challenge, a legitimate state interest in insuring that a divorce plaintiff is sufficiently attached to the state before issues of such moment as child custody and support must be resolved.²⁴⁰ Under similar analysis, it is clear that no state can be prevented from mandating "a cooling off" period,²⁴¹ or insisting upon compulsory marriage counseling,²⁴² prior to making its judicial apparatus available to divorce aspirants. The legitimate interests of the state in attempting to stabilize and preserve families in crisis are manifest. Of course, the period of delay occasioned by these interests must be reasonable.

2. As a Function of Substantive Due Process

By demanding state demonstration of an "interest of overriding significance,"²⁴³ and by noting the existence of less restrictive means for the

844 (Super. Ct. 1978); *In re Marriage of Franks*, 189 Colo. 499, 542 P.2d 845 (1975) (en banc), application for stay denied, 423 U.S. 1043 (1976); *Flora v. Flora*, 166 Ind. App. 620, 337 N.E.2d 846 (1975); *Ryan v. Ryan*, 277 So. 2d 266 (Fla. 1973); *Chapman v. Chapman*, 498 S.W.2d 134 (Ky. 1973); *In re Marriage of Walton*, 28 Cal. App. 3d 108, 104 Cal. Rptr. 472 (1972).

²³⁸ For discussions of proposals reflecting a trend to adopt non-adversarial models, see Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Feldman, *A Statutory Proposal to Remove Divorce from the Courtroom*, 29 ME. L. REV. 25 (1977); Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws*, 10 J. FAM. L. 267 (1971); Goldstein & Gitter, *On Abolition of Grounds for Divorce: A Model Statute & Commentary*, 3 FAM. L. Q. 75 (1969).

²³⁹ 419 U.S. 393 (1975).

²⁴⁰ The Court noted that the state's residency requirement could "reasonably be justified on grounds other than purely budgetary considerations or administrative convenience." *Id.* at 406. Suggested justifications included: (a) the state's concern for the consequences of divorce proceedings, (b) the state's interest in avoiding "officious intermeddling" in another state's matters and in protecting its own decrees from collateral attack, (c) the state's "quite reasonable" decision not to become a "divorce mill," and (d) the state's interest in insuring that other states would grant its decrees full faith and credit. *Id.* at 407.

²⁴¹ See, e.g., KAN. STAT. ANN. § 60-1608(a) (Supp. 1980); KY. REV. STAT. § 403.044 (Supp. 1980) (minor children involved); S.C. CODE § 20-3-80 (Supp. 1980); S.D. CODIFIED LAWS ANN. § 25-4-34 (1976); TEX. FAM. CODE ANN. tit. 1, § 3.60 (Vernon 1975); UTAH CODE ANN. § 30-3-18 (1976); WIS. STAT. ANN. § 767.083(2) (West Special Pamphlet 1980).

²⁴² See, e.g., KAN. STAT. ANN. § 60-1608(c) (Supp. 1980) (at judge's discretion when minor children involved); ME. REV. STAT. ANN. tit. 19, § 691 (1981) (at judge's discretion); N.H. REV. STAT. ANN. § 458:7-b (Supp. 1979) (same); TEX. FAM. CODE ANN. tit. 1, § 3.54 (Vernon Supp. 1980-1981) (same); WIS. STAT. ANN. §§ 767.081(1), .083(1) (West Special Pamphlet 1980). See also S.C. CODE § 20-3-90 (1977) (judge must try to reconcile parties).

²⁴³ 401 U.S. at 377.

state to achieve its interest, the *Boddie* Court could be said to have identified divorce as a fundamental right.²⁴⁴ The importance of the element of state monopolization over the processes of divorce to the *Boddie* decision, however, cautions against a hasty conclusion that all substantive barriers to divorce should be tested by strict scrutiny. Indeed, under the reasoning of *Kras*, the constitutional right to divorce would seem to derive from the interest in marital choice. Impairments of that interest, as noted above, may be tested under a standard somewhat less rigorous than strict scrutiny.

A state's categorical refusal to grant divorces would, of course, be tantamount to a denial of both procedural access and a substantive legal right. In this respect, *Boddie* would seem to be controlling. That is, there is an interest in choosing to marry which cannot be lawfully exercised by a person already holding a married status. But that status has been conferred by the state, which has the exclusive prerogative to remove it. Its categorical refusal to do so is a restriction on liberty of a magnitude which demands strict scrutiny. In some instances there are important constitutional distinctions between state action and state inaction. For example, a state which may not constitutionally prohibit abortion, also need not provide it.²⁴⁵ But in the cases of marriage and divorce, where the interest involved is fundamental and *only* the state is in a position to vindicate that interest, the state may refuse to act only if it satisfies the tests of compelling interest and least restrictive means.

While a categorical denial of access to divorce seems properly subjected to strict scrutiny, questions remain concerning the standard of review to be applied to more narrow restrictions on divorce. For example, may a state limit divorce to situations where both spouses are desirous of dissolving their marriage? The state may argue that when it is confronted with a dispute where one party's interest in marital choice will inevitably be defeated, it may reasonably choose between personal interests of similar dimension by favoring the continuation, rather than dissolution, of existing families. This would be an appealing argument were the interests of the moving and contesting parties constitutionally comparable. They are not. There is no protectible liberty interest in being married to the person of one's choice. There is, however, a liberty interest in freedom from state interference with a mutual marital choice. Thus, it is the party seeking divorce whose interest in marital choice is primary; the state may not categorically defeat his interest by interposing the wishes of a non-consenting spouse.

As there is no foreseeable prospect of any American state attempting to abolish the legal action for divorce between consenting or non-consenting spouses, the foregoing discussion bears more importantly on whether married persons unable to meet a state's divorce requirements may seek support from the due process clause in arguing that the substantive requirements of state divorce laws are too restrictive to meet constitutional standards. May it be reasonably advanced, for example, that a state which limits substantive

²⁴⁴ See generally *Developments*, *supra* note 3, at 1310-11.

²⁴⁵ See *Williams v. Zbaraz*, 100 S.Ct. 2694 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

grounds for divorce to adultery and physical cruelty, or other fault criteria, transgresses personal liberty rights protected by due process?

Kras recognized that the "fundamental interest" at stake in divorce was presumptively entitled to freedom from "serious impairment."²⁴⁶ Where a state has not totally precluded access to divorce, but has limited it to those who can satisfy particular substantive criteria, it is submitted that those requirements should be tested by a review standard at high-intermediate scrutiny. In other words, such requirements must bear a substantial relationship to important state objectives and be closely tailored to meeting only those objectives. This standard was developed under an equal protection analysis in the 1978 Supreme Court decision of *Zablocki v. Redhail*.²⁴⁷ Judging from the Court's employment of a means analysis to strike down the Connecticut access requirements at issue in *Boddie*, the inclusion of a means component would seem to follow in the due process context as well.

Where childless spouses both seek a divorce, the conclusion seems unassailable that no justification for fault-based requirements can satisfy any standard more rigorous than minimum rationality. Even where children are affected, it seems difficult to hypothesize a concededly important interest in their welfare which could not be achieved by means more closely tailored to that interest such as case-by-case determinations of how their welfare might be best served.

Where only one spouse is desirous of divorce, state requirements for the demonstration of fault are not on any firmer constitutional ground. There seems to be no substantial reason for denying divorce to a plaintiff who married a faithful and kind spouse, unless a continuing restriction of the plaintiff's liberty is to be the defendant's reward for virtue. Such a justification could not pass the most minimal scrutiny. It is quite another matter, however, to deny divorce to a plaintiff who has behaved in a morally blameworthy manner. In such instances, the spouse's conduct may operate as a voluntary relinquishment of the presumptive right to marital choice resuscitated by the granting of divorce.²⁴⁸

The unacceptability of requiring findings of fault precedent to the granting of divorce are conclusions increasingly reached as a matter of policy by state legislatures.²⁴⁹ The constitutional necessity of this trend has not yet been

²⁴⁶ 409 U.S. at 444-45.

²⁴⁷ 434 U.S. 374 (1978). See discussion in text at notes 32-37 & 125-35 *supra*.

²⁴⁸ Such a theory would be consistent with the common law defense of recrimination, which operated to prevent parties who had themselves been guilty of a marital offense from securing a divorce on the basis of their spouse's misconduct. Simply put, if both parties had been guilty of conduct constituting a ground for divorce, neither party could obtain a decree. The doctrine has been criticized in recent years and many jurisdictions have re-evaluated its use in their courts. See generally Moore, *An Examination of the Recrimination Doctrine*, 20 S.C. L. REV. 685 (1968); Note, *Domestic Relations — Divorce — Restrictions on Recrimination*, 46 TENN. L. REV. 461 (1979).

²⁴⁹ An indication of this trend is that only two states still retain solely fault-based grounds for divorce. Many of the other forty-eight states have added "irretrievable breakdown" to their divorce systems and at least fifteen states use only "irretrievable breakdown." For a

identified by the Supreme Court. Such a result seems to flow logically from cases such as *Boddie* and *Zablocki* which reinforce the great constitutional weight accorded to the liberty interest in marital choice. While it appears that these conclusions are substantively sound, they must be qualified by the oft-expressed recognition of the Supreme Court, within the context of the federal system of power allocation, that the "regulation of domestic relations . . . has long been regarded as a virtually exclusive province of the States."²⁵⁰ Indeed, as the Court stated in 1877: "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. . . ."²⁵¹

That statement is assuredly no longer accurate with regard to marriage, as the discussion in the previous section has repeatedly demonstrated. Yet it is not demonstrably false as to divorce, as the Supreme Court has yet to declare any substantive state requirements for the granting of divorce unconstitutional.

To summarize, the concept of divorce as a fundamental right has not yet been fully addressed by the Supreme Court. The interplay of the interest in marital choice with the state's monopolization of the processes of divorce led the *Boddie* Court to strike down filing fees which restricted access to divorce. To the extent that *Boddie* rested on notions of a fundamental right to divorce, however, the decision has not been read as demanding that procedural safeguards, such as the right to counsel, accompany access to divorce. In addition, legitimate state policies which delay, rather than deny, access to divorce may also pass constitutional muster. Finally, while the Supreme Court has yet to declare any substantive state requirements for divorce unconstitutional, such restrictions must arguably be subjected to a high-intermediate standard of substantive due process scrutiny.

B. Access to Divorce and Concepts of Equality

The kinds of classifications which government has established to control access to marriage by and large have not been invoked to deny access to divorce. Thus, where a particular jurisdiction might have discouraged interracial marriages or marriages between minors, it would be unlikely to discourage dissolution of such marriages formed and recognized elsewhere. And the very existence of some universally prohibitory classifications on access to marriage, *e.g.*, between members of the same sex, removes some frequently challenged classifying traits from the ambit of unequal access to divorce.

survey complete as of August 1, 1977, see Freed & Foster, *Divorce in the Fifty States: An Outline*, 11 FAM. L.Q. 297 (1977). Since the publication of that survey, the two holdout states have not changed their positions. See ILL. ANN. STAT. ch. 40, par. 401(2) (Smith-Hurd 1980); S.D. CODIFIED LAWS ANN. § 25-4-2 (1977).

²⁵⁰ *Sosna v. Iowa*, 419 U.S. 393, 404 (1975), citing *Simms v. Simms*, 175 U.S. 162, 167 (1899); *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877) (dictum); *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859).

²⁵¹ *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877) (dictum).

There have been, however, two notable challenges raised in the Supreme Court to state policies having the effect of creating unequal access to divorce. The earlier of these cases, *Boddie v. Connecticut*,²⁵² discussed at length in the previous section, saw a majority of the Court treat the exclusion of the poor by reason of their inability to pay court costs as a denial of due process. Although the majority opinion did not address the equal protection issue, Justices Douglas and Brennan, in their separate opinions, identified violations of the equal protection clause in the Connecticut fee system.

While wealth-based classifications were identified by the Supreme Court in *Harper v. Virginia Board of Elections*²⁵³ as "disfavored,"²⁵⁴ the Court has since that point continually rejected the position that de facto wealth classifications, in the form of taxes or fees, activate on their own any standard of review more rigorous than minimum rationality.²⁵⁵ Therefore, notwithstanding Justice Douglas' concurring reliance on the wealth basis of the classification worked by Connecticut's imposition of court fees in *Boddie*,²⁵⁶ the principal arguments to be mounted against such fees under the equal protection clause must rely on the tenets of fundamental interest analysis.

Were the interest in access to divorce clearly fundamental, *Harper*, which had struck down a state poll tax as a wealth classification impinging upon the fundamental interest in voting, would clearly control the equal protection issue raised by the plaintiffs in *Boddie*. Indeed, the *Harper* Court had not been content with striking down the poll tax as it applied to those unable to pay it, but invalidated it on its face.

The arguments supporting the existence of a fundamental interest in access to divorce derive from (1) the fundamental right to divorce identified and given due process protection in *Boddie*; and (2) the fundamental interest in marital choice recognized in a number of equal protection cases.²⁵⁷ The obstacle to clearly rooting the fundamental interest in *Boddie* is that the Court there, albeit ambiguously, sought to limit its holding to the identification of procedural rights. Its emphasis on Connecticut's effective denial of a hearing

²⁵² 401 U.S. 371 (1971).

²⁵³ 383 U.S. 663 (1966).

²⁵⁴ *Id.* at 668. See discussion in note 25 *supra*.

²⁵⁵ *E.g.*, *Ortwein v. Schwab*, 410 U.S. 656 (1973); *United States v. Kras*, 409 U.S. 434 (1973); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970).

²⁵⁶ Justice Douglas noted:

An invidious discrimination based on poverty is adequate for this case. While Connecticut has provided a procedure for severing the bonds of marriage, a person can meet every requirement save court fees or the cost of service of process and be denied a divorce

Thus, under Connecticut law divorces may be denied or granted solely on the basis of wealth

401 U.S. at 386.

²⁵⁷ See, *e.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

may have placed divorce aspirants in the same position as polluting manufacturers, who can claim the right to a hearing before they are required by the state to close their factories, but cannot claim a fundamental interest in their manufacturing activities as such for equal protection purposes.²⁵⁸

There are also potential objections to equating the fundamentality of the interest in access to divorce with the fundamentality of the interest in marital choice recognized in cases like *Zablocki v. Redhail*.²⁵⁹ It may be argued that only the unmarried have a fundamental interest in marital choice; thus, there is no interest of constitutional dimension borne by a married person in which his purported fundamental interest in divorce can be rooted. Put another way, the fundamental interest in marital choice is not renewable at the whim of the individual.

But this argument may be refuted. In *Zablocki*, the Supreme Court placed the roots of the fundamental interest in marital choice in the "right to privacy,"²⁶⁰ presumably that component which protects important decisions preservative of personal identity.²⁶¹ The importance of the interest in one's marital status as a function of personal identity is as great with regard to divorce as it is with regard to marriage. If equal protection interest analysis is to extend a high level of scrutiny to infringements of the interest in marital choice it ought to extend a similar level of scrutiny to denials of access to divorce.

Another Supreme Court case, however, decided in 1975 may cast doubt on that conclusion. The plaintiff in *Sosna v. Iowa*,²⁶² filed a class action in federal court challenging the constitutionality under the due process and equal protection clauses of Iowa's one-year residency requirement for the maintenance of a divorce action in that state's courts. In pursuing the equal protection claim, the plaintiff argued that Iowa was penalizing two fundamental interests, interstate travel and access to divorce, thereby triggering strict scrutiny of the classification. Support for this argument was found in *Shapiro v. Thompson*²⁶³ and *Memorial Hospital v. Maricopa County*,²⁶⁴ two cases where the Court had imposed strict scrutiny on the penalization of interstate migration through the imposition of durational residency requirements denying welfare and public health benefits. Reliance was also placed on *Dunn v. Blumstein*,²⁶⁵

²⁵⁸ See, e.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976).

²⁵⁹ 434 U.S. 374 (1978).

²⁶⁰ *Id.* at 384.

²⁶¹ In *Whalen v. Roe*, 429 U.S. 589 (1977), Justice Stevens, writing for a unanimous Court, stated that there are "at least two different kinds of [privacy] interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 599-600. See also, e.g., *Roe v. Wade*, 410 U.S. 113, 152-54 (1973); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 482-86 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

²⁶² 419 U.S. 393 (1975).

²⁶³ 394 U.S. 618 (1969).

²⁶⁴ 415 U.S. 250 (1974).

²⁶⁵ 405 U.S. 330 (1972).

where the Court had applied strict scrutiny to a durational residency requirement for voter registration which had penalized the fundamental interests in voting and interstate travel.

Justice Rehnquist's opinion, rejecting Mrs. Sosna's equal protection claims, was notable for its failure to adopt a clear standard of review. At one point, the Court distinguished *Shapiro, Maricopa County* and *Dunn* on the basis that the challenged requirements in those cases absolutely *denied* a governmental benefit while Iowa's rule merely *delayed* the interest in access to divorce. At another point, the Court distinguished those same cases on the grounds that, unlike Iowa, the states had failed to advance interests of sufficient magnitude to justify the restrictions. The Court explained: "What those cases had in common was that the durational residency requirements they struck down were justified on the basis of budgetary or recordkeeping considerations which were held insufficient to outweigh the constitutional claims of the individuals."²⁶⁶ Iowa's justifications for its rule, however, appeared to strike Justice Rehnquist as of the utmost importance. The state had an important interest in assuring some permanency of a plaintiff's residence before embarking on matters of as much consequence and delicacy as declarations of marital status, adjustment of property rights and decisions regarding the support and custody of children, all of which are elements of a divorce case. The Court also emphasized the state's interest in not becoming a "divorce mill," as well as an interest that its divorce decrees be recognized under the full faith and credit clause of article IV, section 1 of the Constitution.²⁶⁷ These concerns may qualify as "compelling interests," for strict scrutiny purposes; however, the Court made no effort, as Justice Marshall did in his dissenting opinion,²⁶⁸ to suggest less restrictive means of achieving those interests.

The conclusion therefore remains tenable, if not definitive, that access to divorce is a fundamental interest whose denial activates a strict or high-intermediate scrutiny standard of equal protection review. Presumably, that standard is reduced when access is delayed a reasonable period of time rather than denied indefinitely as it was in *Boddie*. Presumably, as well, a state will have an easier time justifying even temporarily delayed access to divorce if it can relate its requirements to the unique difficulties, like full faith and credit, posed for it by the federal system.

²⁶⁶ 419 U.S. at 406.

²⁶⁷ *Id.* at 406-09.

²⁶⁸ In his analysis of asserted justifications for the state's durational residency requirement, Justice Marshall suggested that the state interest in avoiding collateral attacks on its decrees "would adequately be protected by a simple requirement of domicile — physical presence plus intent to remain — which would remove the rigid one-year barrier while permitting the State to restrict the availability of its divorce process to citizens who are genuinely its own." *Id.* at 424. The accompanying footnote emphasizes the impact of a "pure" domicile test as a less restrictive alternative under the "compelling interest" standard Justice Marshall advocated. *Id.* at 424 n.6.

C. *The Family After Divorce*

The issues raised heretofore in this section have concerned access to the dissolution of marriage. A more diverse set of constitutional issues concerns the rights and responsibilities of family members as determined by courts supervising the family's dissolution. Although normally the persons directly subject to the mandates of a divorce decree are the husband and wife, courts granting such decrees must also account for the needs and interests of any minor children involved. This subsection will address the incidents of divorce decrees which most frequently raise constitutional questions, except for those issues implicating concepts of jurisdiction and constitutional conflict of laws.

1. Alimony

Although the practice is by no means uniform throughout the United States,²⁶⁹ state courts in most jurisdictions have the power to include in a divorce decree a provision requiring one of the parties to support the other. While the institution of alimony has fallen into increasing disfavor,²⁷⁰ it remains a component of divorce decrees with sufficient frequency to demand that its principal constitutional problems be identified and examined.

A major issue was resolved by the Supreme Court in 1979 in *Orr v. Orr*.²⁷¹ At common law, the existence of a husband's duty to support his wife, and the absence of a reciprocal obligation for the wife, led courts to impose alimony awards only against husbands and in favor of wives.²⁷² Alabama's statutory adoption of this gender-based distinction was challenged successfully in *Orr*, a case having significant implications for other gender-based distinctions employed by courts in the divorce process.

The *Orr* Court purported to invoke what has become its usual low-intermediate standard of review for classifications by gender: whether such a classification serves important governmental objectives and is substantially related to the achievement of those objectives.²⁷³ It dismissed the contention that sufficient support was to be found in the common law disabilities of women, since Alabama had removed those disabilities by statute. The Court also implied that those elements of the common law which discriminated against women were themselves unconstitutional, and thus could not provide a sufficient basis for the compounding of invidious discrimination.²⁷⁴

²⁶⁹ See Freed & Foster, *Divorce in the Fifty States: An Outline*, 11 FAM. L.Q. 297, 309-10 (1977); Foster & Freed, *Divorce Reform: Brakes on Breakdown*, 13 J. FAM. L. 443, 475 (1973-74).

²⁷⁰ E.g., UNIFORM MARRIAGE AND DIVORCE ACT § 308 & Commissioners' Note. See generally M.A. GLENDON, STATE, LAW, AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE 261-64 (1977).

²⁷¹ 440 U.S. 268.

²⁷² CLARK, *supra* note 121, at 448.

²⁷³ 440 U.S. at 279.

²⁷⁴ *Id.* at 279 n.9.

Justice Brennan, for the majority, was nonetheless willing to acknowledge two possible legislative purposes which might qualify as important: providing help for needy spouses (using sex as a proxy for need) and compensating women for past discrimination during their marriages which arguably left them unprepared to fend for themselves in the working world. The Court decided that this classification, however, was not "substantially related to achievement of those objectives."²⁷⁵ Rather than concluding that sex is not a reliable proxy for need, or that married women have not been significantly impaired by past discrimination, Justice Brennan chose to weigh the costs to Alabama of adjudicative means for determining financial need or economic self-sufficiency.²⁷⁶ He found that the cost of providing individualized determinations was negligible, since the state was already providing hearings in the divorce process at which the parties' relative financial circumstances were considered. Moreover, Justice Brennan found that the classification was not only over-inclusive but also perverse. The gender-based classification under Alabama law did not protect poor women, who even in a gender-neutral scheme would not have had to pay alimony. Instead, rich women with poor husbands, those least related to the statute's purported objectives, were the primary beneficiaries of the statute.²⁷⁷ Justice Brennan concluded: "Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex."²⁷⁸

It would be premature to conclude after *Orr* that the Court adopted a means test for gender-based classifications akin to the means test of high-intermediate or strict scrutiny. The Court examined alternative means only to the extent that such means were already in existence, but not yet directed at the particular purpose purportedly served by the statutory classification. For example, the Court did not demand the establishment of a new adjudicative mechanism, as it might have under high-intermediate or strict scrutiny.²⁷⁹ Nonetheless, because the divorce process in the United States has been traditionally attended by adjudicative procedures,²⁸⁰ *Orr* has had an extensive im-

²⁷⁵ *Id.* at 280-83.

²⁷⁶ *Id.* at 280-81. In his analysis, Justice Brennan assumed that a gender neutral classification would allow poor men the benefits of alimony rather than relieve rich men of its burdens, a choice necessarily left ultimately to the Alabama political process.

²⁷⁷ *Id.* at 282-83.

²⁷⁸ *Id.* at 283.

²⁷⁹ For example, the Court purported to apply strict scrutiny to a classification worked by state durational residency requirements for the receipt of welfare benefits in *Shapiro v. Thompson*, 394 U.S. 618 (1969). Unlike the *Orr* case, invalidation of the classification had the impact of creating new litigation over matters such as the multiple receipt of welfare payments associated with welfare fraud. In every alimony proceeding, the parties are already before the court on the issue of divorce and their relative need is almost invariably already a subject for judicial inquiry.

²⁸⁰ In *Maynard v. Hill*, 125 U.S. 190 (1888), the Court determined that divorces could be legislatively granted. While this may still be good law, it is likely that a state which makes

pact on all gender-based classifications employed in the process, as will be discussed in later subsections.

The other constitutional issues surrounding alimony must be considered in light of the necessary conclusion that there is no fundamental right to alimony. Thus a state may choose never to embrace the concept; and if it does embrace the concept, it has wide discretion in determining the conditions under which awards should or should not be made. Therefore, while there may be a strong argument that due process demands the availability of no-fault divorce,²⁸¹ there is no coordinate argument against the employment of fault criteria, as such, in the granting or modification of alimony awards.

A potential constitutional issue does arise, however, when a court is requested to deny or modify an alimony award because the entitled spouse is cohabiting with a new partner or merely engaging in nonmarital sexual relations. Presumably, a court would be justified in modifying an alimony award on the basis of the financial aspects of such a nonmarital relationship. Were such a decision to be based wholly on the individual's sexual conduct or morality, however, a question of constitutionally protected privacy may be raised. The court may be justified in considering such behavior where the conduct in question predates the granting of a divorce. Indeed, it has been within the traditional purview of a divorce court to examine allegations of adultery. There would appear to be no claim of consequence, therefore, that constitutional privacy extends to adulterous relationships.²⁸² The question remains as to whether a court, in the course of proceedings seeking the modification of an alimony award, may inquire into the sexual practices of a non-married party. While the Supreme Court cases protecting contraception and abortion choices often have been characterized in terms of privacy,²⁸³ since *Griswold v. Connecticut*²⁸⁴ that privacy has been much more clearly identified in decisions concerned with procreation than with freedom from physical intrusion by the state into the arenas of sexual practices. Yet, the protection accorded non-married persons with regard to contraception and abortion²⁸⁵ certainly presumes a degree of personal freedom to engage in sexual relations which must exist in order for

some alimony awards must as a matter of due process provide hearings to divorce parties to determine whether alimony is to be awarded in any particular case. *See generally* Stanley v. Illinois, 405 U.S. 645, 658 (1972).

²⁸¹ See text at notes 245-51 *supra*.

²⁸² Laws proscribing adultery and fornication have generally been sustained against challenges to their constitutionality as violations of a right to privacy. *See* Annot., 41 A.L.R.3d 1338 (1972). *See also* *Griswold v. Connecticut*, 381 U.S. 479, 498-99 (1965) (Goldberg, J., concurring). *But see* *State v. Saunders*, 75 N.J. 200, 381 A.2d 333, 340 (1977); *State v. Pilcher* 242 N.W.2d 348, 358-59 (Iowa 1976).

²⁸³ *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-86 (1977); *Roe v. Wade*, 410 U.S. 113, 152-54 (1973); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 60-61 (1976).

²⁸⁴ 381 U.S. 479 (1965).

²⁸⁵ *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979).

the fundamental procreation interest to be asserted. While a constitutional doctrine can be rationalized which permits a state to ban nonmarital sexual relations, but prohibits it from banning the use of contraceptives in the conduct of such relations, it seems likely that the Court may be prepared to expand upon sexual privacy rights for unmarried adults. In the event that a fundamental right to sexual privacy does exist, the state's interest in maintaining a judicial inquiry into a party's sexual conduct in order to modify an alimony award, would not appear to meet the strict scrutiny standards which would be applied under the due process clause.²⁸⁶

While it is clear, then, that a state may not engage in gender-based classifications regarding alimony awards, it does have wide discretion in other areas of alimony law. Indeed, unless a fundamental right to sexual privacy is recognized, courts will remain free to investigate the most intimate details of an individual's life when deciding whether to grant or modify an alimony award.

2. Custody and Visitation

Custody of minor children in separation or divorce proceedings²⁸⁷ is, in practice, among the most contentious of litigated issues in family law.²⁸⁸ The almost universally applied standard committed to trial courts resolving custody disputes is that of "the best interests of the child."²⁸⁹ This standard permits the broadest exercise of judicial discretion, controlled at times only by the restrictions of the Constitution itself. While the Supreme Court has only spoken directly to issues of federalism that arise in custody suits,²⁹⁰ its decisions in related fields provide some guidance for the identification of individual rights assertable in divorce custody proceedings. Preliminarily, it is useful to note the Court's view that a parent's interest in custody of her child involves "rights far more precious . . . than property rights."²⁹¹

a. "Best Interests of the Child" — A Constitutional Necessity?

While the "best interest of the child" standard derives principally from state law sources,²⁹² it arguably has become a rule of constitutional necessity, based in due process. Such reasoning is based on the premise that the child has a liberty interest in his custody, entitling him to some consideration in what is, in a judicial forum, a dispute between his parents.

²⁸⁶ See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

²⁸⁷ The issues in separation and divorce are sufficiently similar for constitutional purposes to consider them together here under the rubric of divorce.

²⁸⁸ See generally *Developments*, *supra* note 3, at 1313-50.

²⁸⁹ See, e.g., CLARK, *supra* note 121, at 572 *passim*; UNIFORM MARRIAGE AND DIVORCE ACT § 402; Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226 (Summer 1975) [hereinafter cited as Mnookin].

²⁹⁰ See, e.g., *Kulko v. Superior Court of California*, 436 U.S. 84 (1978); *Ford v. Ford*, 371 U.S. 187 (1962); *Kovacs v. Brewer*, 356 U.S. 604 (1958); *May v. Anderson*, 345 U.S. 528 (1953); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

²⁹¹ *May v. Anderson*, 345 U.S. 528, 533 (1953).

²⁹² See generally Mnookin, *supra* note 289, at 236 & n.45.

The strongest argument against constitutionalizing the "best interests" standard would rely on the Supreme Court's 1977 decision of *Smith v. Organization of Foster Families*.²⁹³ In *Smith*, six of nine justices joined in a majority opinion which hinted that no liberty interest was implicated when the state removed the custody of a child from a foster family.²⁹⁴ Furthermore, the remaining members of the Court, concurring, would have been willing to hold that the child had no protectible liberty interest.²⁹⁵ The principal challenges to New York law in *Smith* were, concededly, procedural, since the best interest of the child doctrine had been adopted by New York as the appropriate substantive criterion for custody suits. In addition, the procedures were not challenged by children directly, but by foster parents who asserted both their own rights and the third party rights of foster children. Still, it would be difficult to argue, after *Smith*, that what did not qualify as a liberty interest for a child in a foster home, *i.e.*, his custody, does qualify as such for a child of divorce. Absent such a liberty interest, there would seem to be no requirement that the best interest of the child doctrine is constitutionally mandated.

Nonetheless, *Smith* can and should be distinguished in order to resolve the question. Although the *Smith* Court suggested that no protectible liberty interest was implicated in custody suits, the majority was unwilling to answer the question directly. Instead, the Court held that even if a protectible interest did exist, the procedure accorded the plaintiffs had satisfied due process.²⁹⁶ Moreover, even Justice Stewart, the author of the concurring opinion, recognized that child custody decisions could not be made "for whatever reasons or for no reason at all."²⁹⁷ To suggest that a child of divorce may be "awarded" to one parent or another, as reward or punishment for their conduct, without regard for the child's interests, would be to treat the child as a chattel rather than a person. Such an approach is wholly at odds with a growing body of Supreme Court authority recognizing the "personhood" of children for the purposes of the assertion of constitutional rights.²⁹⁸

If the child is recognized as having a threshold liberty interest in his custody, it can be argued that custody should be awarded in accordance with his best interests, absent overriding countervailing social concerns. It is an argument less persuasive than its premise, which is that the child should be accorded some due process consideration in custody suits. A child's best interests, however, may be contrary to the interests of one or both of the parents. There would seem to be nothing in the constitution demanding that a state favor the interests of children over the interests of adults. It is suggested, therefore, that substantive due process requires consideration of a child's best

²⁹³ 431 U.S. 816.

²⁹⁴ *Id.* at 840-42.

²⁹⁵ *Id.* at 856-63 (Stewart, J., concurring).

²⁹⁶ *Id.* at 847-56.

²⁹⁷ *Id.* at 860.

²⁹⁸ See, e.g., *In re Gault*, 387 U.S. 1 (1967); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *Goss v. Lopez*, 419 U.S. 565 (1975); *Ingraham v. Wright*, 430 U.S. 651 (1977); *Bellotti v. Baird*, 443 U.S. 622 (1979).

interests as a factor in determining custody, but does not require it to be the court's ultimate standard of disposition.

b. *Parental Morality*

If a divorce may be denied to a plaintiff on the basis of his own immorality (*e.g.*, adultery or physical cruelty)²⁹⁹ the question arises whether a court may rely on those same grounds to deny custody to the "blameworthy" parent. The constitutional considerations which inhibit a court from so acting³⁰⁰ appear to arise more from the rights of the child to a consideration of his best interests, than from the rights of the parent to some sort of constitutional privacy. A divorce court, acting as the state for fourteenth amendment purposes, plays a considerably different role from that of state law enforcement authorities exhibited in cases of marital privacy, such as *Griswold v. Connecticut*,³⁰¹ and sexual privacy, such as *Carey v. Population Services*.³⁰² The court does not intrude into the intimacy of a marriage except by the invitation extended by a spouse's presentation of evidence of a personal nature. In addition, the Supreme Court, as noted earlier, has not applied notions of sexual privacy to prohibit judicial recognition of an adulterous relationship. The parent's privacy rights, then, do not prohibit the court from considering immoral conduct in custody decisions.

While a court may take into account a parent's immoral conduct, the child's constitutionally protected interests may prevent this factor from being dispositive in custody decisions. A child's welfare may best be served in the custody of his adulterous, criminal, or otherwise immoral parent. Thus, a categorical rule disqualifying a parent found morally deficient would seem to violate the right of the child not to be deprived of liberty without due process of law. However, since the best interests of the child need not be the exclusive criterion for custody decisions,³⁰³ it is possible that a court might weigh more heavily the interests of the morally blameless parent in reaching a custody determination. It must be reiterated that divorce courts deciding custody contests normally have wide discretion, and can usually relate adjudicated moral deficiencies of one parent to the best interests of the child, thus voiding putative constitutional claims.

Does the situation change when a noncustodial parent seeks a modification of a custody decree on the grounds of "immoral" behavior on the part of the custodial parent? Even if there is a general right of sexual privacy for un-

²⁹⁹ See text at notes 241-51 *supra*; see *Developments*, *supra* note 3, at 1343-45.

³⁰⁰ Even states which had categorical rules barring adulterous parents in a divorce action from being awarded custody over nonadulterous parents seem to be replacing their categorical rules with presumptions against the adulterous parents. See, *e.g.*, *Yates v. Yates*, 284 So. 2d 46 (Miss. 1973); *Lockard v. Lockard*, 197 Neb. 400, 227 N.W.2d 581 (1975). For an extensive treatment of the subject, see Lauerma, *Nonmarital Sexual Conduct and Child Custody*, 46 U. CINN. L. REV. 647 (1977).

³⁰¹ 381 U.S. 479 (1965).

³⁰² 431 U.S. 678 (1977).

³⁰³ See generally Mnookin, *supra* note 289.

married consenting adults, a highly questionable premise,³⁰⁴ the state's interest in the well-being of the child would seem sufficiently compelling to allow it to take into account the sexual behavior of a parent. There would seem to be no constitutional inhibition to removing custody from a parent on the basis of that parent's "immorality," so long as the parental behavior in question could be shown to have some detrimental impact on the child. The trial court would likely be allowed wide discretion in finding such an impact, even if evidence to the contrary were abundant. In this respect, due process considerations would probably serve the purpose of encouraging articulated judicial decision-making, rather than actually affecting the ultimate custody disposition.

While the consideration of a parent's moral character in custody decisions does appear to raise constitutional claims of right to privacy, the role of the court in such proceedings diminishes the odiousness of the intrusion. So long as a court can relate a parent's relevant moral behavior to the best interests of the child, evaluation of such conduct seems unassailable.

c. *Gender-based and Racial Classifications*

In the past, it was not unusual for states to establish a presumption favoring maternal custody of children of broken homes,³⁰⁵ at least during the child's "tender years."³⁰⁶ In light of *Orr v. Orr*,³⁰⁷ discussed at length in the previous subsection,³⁰⁸ it seems unlikely that such a gender-based presumption³⁰⁹ can withstand equal protection scrutiny. The Court in *Orr* found that the *existence* of Alabama's sex-based classification, rather than its *impact*, activated low-intermediate scrutiny. Such a classification "must serve important governmental objectives and must be substantially related to achievement of those objectives."³¹⁰

A presumption favoring the mother may, by the state's perception, serve the important interest of promoting the interests of the children of divorce. But, even assuming that a court is willing to accept that, under certain circumstances, a child's emotional development will be best served if he is in the custody of his mother,³¹¹ such a presumption cannot meet the "substantial relationship" test. As in *Orr*, the state already provides adjudicative

³⁰⁴ See text at notes 200-05 *supra*.

³⁰⁵ See Annot., 70 A.L.R.3d 262 (1976).

³⁰⁶ See Jones, *The Tender Years Doctrine: Survey and Analysis*, 16 J. FAM. L. 695 (1978); Roth, *Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423 (1977); CLARK, *supra* note 121, at 585 (1968).

³⁰⁷ 440 U.S. 268 (1979).

³⁰⁸ See text and notes at notes 261-70 *supra*.

³⁰⁹ It is clear under *Orr* that a rule or irrebuttable presumption precluding paternal custody would be unconstitutional. See also *Stanley v. Illinois*, 405 U.S. 645 (1974).

³¹⁰ 440 U.S. at 279.

³¹¹ See Bradbrook, *The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-Parental Child Custody Disputes*, 11 J. FAM. L. 557, 562-79 (1971); Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969).

mechanisms which can operate as cheaply and efficiently to determine the best interests of the child without the operation of a gender-based presumption which reinforces sexual stereotypes.

A presumption, which has sometimes been employed in cases of individual older children,³¹² is that a child will be best served by custody with a parent of the same sex. Although such a presumption does not categorically discriminate against members of one sex, and is not in accordance with traditional sexual stereotypes, it nonetheless appears to fail under low-intermediate scrutiny. The presence of an adjudicative mechanism which can operate effectively without gender related presumptions would again seem to be the fatal flaw.

The parent's gender is an important factor in other aspects of custody suits as well. For example, may a trial judge determine that the prevalence of maternally-headed single parent households in a particular community will create an environment where the child will have a more successful adaptation if placed in the custody of his mother? In other words, to what extent must the exercise of judicial discretion ignore individual psychological, social or cultural considerations which would make gender a factor in custody determinations? *Orr v. Orr* does not provide a definitive answer because the Court in that case was dealing with a rule of law rather than an exercise of discretion. In addition, *Orr* concerned a dispute solely between the husband and wife, with no juxtaposition of children's interests to complicate matters. The *Orr* Court did recognize, however, that a trial court resolving an alimony dispute may find that discrimination against women in society may become a factor in determining the legitimacy of a wife's claim for alimony.³¹³ *Orr* thus does not seem to preclude gender considerations from influencing the disposition of individual alimony claims, but only gender-based rules of law and presumptions.

While the distinction between gender as a presumption and gender as a factor may be readily employed in alimony determinations, its applicability to custody disputes is more problematical. The *Orr* Court's premise that findings regarding the cultural impact of gender classifications may be legitimately considered in alimony proceedings seems justified. The ultimate facts which a divorce court must resolve involve the financial need of the alimony claimant. This is an area to which the courts' mechanisms are well suited. In the alimony proceeding the factor of sex discrimination, which may be a major cause of the woman's financial predicament, remains secondary to a finding of individual financial need. In addition, the use of gender as a factor in determining alimony awards is an attempt to neutralize, not perpetuate, sexual stereotypes.

In custody disputes, a trial court is dealing in the nether world of the "best interests of the child," where judicial techniques are most suspect for their inability to project accurately the impact of subtle environmental factors on the

³¹² See, e.g., CLARK, *supra* note 121, at 585

³¹³ 440 U.S. at 281-82.

emotional health of human beings.³¹⁴ Yet a court's perception of the desirability of maternal nurturing and the emotional needs it will serve, may become a factor of independent, often decisive, weight in the determination of the best interests of the child. Such a conclusion, unlike one concerning sex discrimination in an alimony dispute, cannot be rooted in independently verifiable findings such as financial need. Moreover, allowing a court to act on such a perception reinforces — to a greater extent than in an alimony proceeding — the sexual stereotyping which has so concerned the Supreme Court in the past.³¹⁵ Nevertheless, allowing a court to award custody of a child on the basis of the parent's sex would seem permissible in those few instances where such a parent could make a substantial showing that the child's unique emotional developmental needs would be most readily met by such an arrangement, assuming of course that other critical factors were in equipoise. The principal differences between this kind of determination and a determination favoring maternal nurturing, solely on the basis of sex, would be the absence of sexual stereotyping and the reliance on individual psychological assessments, however imprecise, rather than more ephemeral sociological or cultural pattern-finding which is beyond judicial competency.

Presumptions determining the custody of children of an interracial marriage on the basis of race, having to satisfy strict scrutiny, could of course not survive.³¹⁶ Judicial determinations about the welfare of such children in a racially hostile society would also seem to fail strict scrutiny; a court's factfinding with respect to the general relationship, between racism and emotional health, would never seem sufficient to meet compelling interest criteria. Conversely, where such a finding was based on substantial psychological evidence regarding the unique needs of the individual child, it would probably be sufficiently within judicial competence to qualify as compelling, given the Supreme Court's understandable solicitude for the perceived interest of children in custody proceedings.³¹⁷

Custody decisions that are founded on presumptions based upon racial or gender-based classifications seem unlikely to pass equal protection scrutiny. Similarly, the use of race or gender as a factor in such decisions is a questionable practice. The cultural data used to support such conclusions is not of the type easily verified by the judiciary. The practice also reinforces existing stereotypes while ignoring the potential for individualized determinations of

³¹⁴ See generally J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); R. MNOOKIN, *CHILD, FAMILY AND STATE* 476-79 (1978).

³¹⁵ See, e.g., *Orr v. Orr*, 440 U.S. 268, 279-80 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 206-07 (1977); *Craig v. Boren*, 429 U.S. 190, 198-99 (1976); *Stanton v. Stanton*, 421 U.S. 1, 15 (1975).

³¹⁶ See generally *Developments*, *supra* note 3, at 1340-43.

³¹⁷ See, e.g., *Ford v. Ford*, 371 U.S. 187, 192-94 (1962); *Kovacs v. Brewer*, 356 U.S. 604, 608 (1958) & 609, 612 (Frankfurter, J., dissenting); *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) & 541-42 (Jackson, J., dissenting); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 615 (1947), 617-18 (Frankfurter, J., concurring) & 619 (Rutledge, J., concurring).

the child's needs which the adjudicative process can provide. Indeed, unless specific verifiable evidence shows that the factor of a parent's race or gender is critical to an individual child's needs, the relevance of such factors should be discounted.

Of course, the entire preceding discussion assumes a judicial articulation of the role played by gender or race in making custody awards. Absent such articulation, a party seeking to challenge an award would probably have to establish a discriminatory pattern or practice in the operation of a particular court or trial judge, a burden most difficult to meet.³¹⁸

d. Religion as a Factor

A frequently disputed issue in custody battles is the religious upbringing of the child. The primary issues of constitutional dimension here are (1) the extent to which the court may take religion into account in determining custody, and (2) having determined custody, the extent to which a court may impose religious conditions on the custodial parent without running afoul of the establishment or free exercise clauses of the first amendment.³¹⁹

The Supreme Court's 1972 decision in *Yoder v. Wisconsin*³²⁰ established for parents an interest in the religious upbringing of their children protected by the free exercise clause. *Yoder* provides little assistance, however, where parents are in conflict over this issue. It is clear that a court may not prefer the religious convictions of one parent over another³²¹ without running afoul of the establishment clause. It is also clear, however, that where a child is sufficiently mature to express a custodial preference for one of his parents based upon their religious beliefs or observance, a court may honor that preference without offending the establishment clause.³²² Indeed, it may be argued that to deny the

³¹⁸ For the constitutional burden of establishing racial and gender-based classifications, see *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273-74 (1979); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 246 (1976).

³¹⁹ The religion clauses of the first amendment are binding on the states through the due process clause of the fourteenth amendment. *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (establishment clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise clause); see *Developments*, *supra* note 3, at 1338-40.

³²⁰ 406 U.S. 205 (1972). See also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

³²¹ *E.g.*, *Harris v. Harris*, 343 So. 2d 762 (Miss. 1977); *Smith v. Smith*, 90 Ariz. 190, 367 P.2d 230 (1961) (en banc); *McLaughlin v. McLaughlin*, 20 Conn. Supp. 278, 132 A.2d 420 (1957). See generally *United States v. Seeger*, 380 U.S. 163 (1965); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *United States v. Ballard*, 322 U.S. 78 (1944). For cases where the choice is between religion and atheism see, *e.g.*, *Wilson v. Wilson*, 473 P.2d 595 (Wyo. 1970); *Welker v. Welker*, 24 Wis. 2d 570, 129 N.W.2d 134 (1964). See generally *Welsh v. United States*, 398 U.S. 333 (1970); *Engel v. Vitale*, 370 U.S. 421 (1962); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

³²² See *Hehman v. Hehman*, 13 Misc. 2d 318, 178 N.Y.S.2d 328 (1958); *Scanlon v. Scanlon*, 29 N.J. Super. 317, 102 A.2d 656 (1954) (where mother raised constitutional challenge to placement of child in Catholic orphanage, which placement was consistent with child's religious preference, court noted that preferences may be considered and upheld placement in orphanage); *Boerger v. Boerger*, 26 N.J. Super. 90, 97 A.2d 419 (1953); *In re Vardinakis*, 160 Misc. 13, 289 N.Y.S. 355 (1936).

mature and sincere child the effectuation of that preference would be to violate his right to the free exercise of religion.³²³

Religion, in practice, of course, may provide more than a set of theoretical beliefs, but a style of life. Where the stability or instability of the child's environment with one parent can be attributed in large part to that parent's religious practices, a court must tread carefully in order to avoid adopting a set of religious values. In recognizing the right of Amish parents to remove their children from schooling at the age of 14, the *Yoder* Court emphasized the law-abiding character of Amish culture.³²⁴ But the *Yoder* Court was not confronted with the graphic conflict of two sets of religious practices or beliefs that a divorce proceeding provides, and therefore was probably less concerned that its words would effect an establishment of the Amish religion. The question remains as to whether a court may determine that a child is better served by a parent who will provide a formal education past the age of 14 rather than by one whose religious conviction forbids it. It is submitted that so long as a court is able to frame neutral principles based on secular values demonstrably embraced by the legal system, it may act on those principles in determining custody, even where the effect of its action is to reject the religious basis for one parent's lifestyle.

Other factors may play a role in the Court's decision as well. Assume, for example, that the parents had entered into a pre-nuptial agreement which provided that the children of the marriage be raised in a particular religion. Presumably, such a covenant would never be specifically enforced by a court since such action would violate both the establishment and free exercise clauses.³²⁵ But, might the court favor the parent who would honor such an agreement over the parent who would not? Arguably, recognizing an arrangement whereby the parties' agreement could be effectuated would be less offensive to both clauses, and would not entangle the Court in enforcing the contract's provisions.³²⁶ No less persuasive is the proposition that a court's incapacity to enforce the contract, for constitutional reasons, carries with it the

³²³ "[T]he Free Exercise Clause . . . recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state." *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963). See generally *Bellotti v. Baird*, 443 U.S. 622 (1979); Comment, *Adjudicating What Yoder Left Unresolved: Religious Rights of Minor Children, After Danforth and Carey*, 126 U. PA. L. REV. 1135 (1978).

³²⁴ 406 U.S. at 222 & n.11.

³²⁵ State action which forces or coerces individuals to adopt a belief or position that is contrary to their own determination has been held violative of the first amendment. *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Judicial enforcement of private agreements having the same effect would constitute state action. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

³²⁶ To avoid running afoul of the first amendment, the government's action must have a secular purpose and a primarily secular effect. Also, the government's involvement must not amount to an "excessive entanglement" with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 671, 674 (1970); Nowak, *The Supreme Court, the Religion Clauses, and The Nationalization of Education*, 70 NW U.L. REV. 883, 885-86 (1976).

requirement that the court not purposefully effect indirectly that which it could not effect by specific enforcement.

Conflicting religious beliefs of parents also raise questions of conditions to be placed upon the custodial parent. The non-custodial parent possesses no obvious rights with respect to his child's religious training or observance. But may a court in reconciling conflict impose religious training or observance on the custodial parent, or restrict the non-custodial parent from religious training or observance inconsistent with the wishes of the custodial parent during visitation periods? The normal practice in state courts has been to leave the religious upbringing of a child wholly within the hands of the custodial parent.³²⁷ The possibility of a court becoming entangled in the administration of an order concerning the religious upbringing of a child³²⁸ may be sufficient reason to recognize the general rule as a constitutional necessity under the establishment clause. Once having established the right of the custodial parent to control religious upbringing, there would be less reason for a court to avoid enforcing the wishes of the custodial parent. A non-custodial parent who sought to introduce inconsistent religious training or practices to the child could justifiably be denied visitation rights without the court becoming entangled in establishment clause problems. In a divided custody situation, a court would seem to have the power to demand a negotiated agreement between the parties concerning religious upbringing as a condition to approving the relationship. It would have considerably more difficulty in designating one parent to be in charge of religious upbringing; and it would probably impose nothing more complex of its own making because of establishment clause considerations.

While a court cannot base a custody decision on its preference of one parent's religion over the other's, it may be possible that the lifestyle imposed by one religion could be viewed by a court as contrary to the best interests of the child. If secular values form the basis for such a decision, it may be valid. Decisions regarding the religious upbringing of the child after the divorce seem best left in the hands of the custodial parent.

e. Visitation

In an important book written in 1973, Goldstein, Freud and Solnit suggested that a "noncustodial parent should have no legally enforceable right to visit the child."³²⁹ This position has been widely criticized as a matter of policy,³³⁰ and the question of whether a non-custodial parent has constitu-

³²⁷ See, e.g., *Beebe v. Chavez*, 226 Kan. 591, 602 P.2d 1279 (1979); *Pardue v. Pardue*, 285 So. 2d 552 (La. App. 1973); *Esposito v. Esposito*, 41 N.J. 143, 195 A.2d 295 (1963) (dictum); *Wojnarowicz v. Wojnarowicz*, 48 N.J. Super. 349, 137 A.2d 618 (1958).

³²⁸ See note 326 *supra*.

³²⁹ J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 38 (1973).

³³⁰ See, e.g., Foster, Book Review, 12 WILLAMETTE L.J. 545, 550-51 (1976); Strauss & Strauss, Book Review, 74 COLUM. L. REV. 996, 1002 (1974); Dembitz, Book Review, 83 YALE L.J. 1304, 1310 (1974).

tionally protected visitation rights remains open. It is submitted that such a constitutional right should be recognized. The parent's right to visitation should be overcome only by an important, if not compelling, state interest, to wit, the service of the best interests of the child. If, as the Supreme Court suggested in *May v. Anderson*, the removal of children from the custody of their mother implicates "[r]ights far more precious to [her] than property rights,"³³¹ then surely the denial of the interest in visiting one's children stands higher on the constitutional spectrum than the normal range of liberty and property interests whose deprivation is tested under a minimum rationality standard. In 1977, in *Moore v. East Cleveland*,³³² the Supreme Court applied a low-intermediate scrutiny standard to a grandmother's substantive due process claim to be allowed to live in the same household with two of her grandchildren. A parent's claim to visitation would seem at least as strong.

Of course, it might be argued that a state could absolve itself of all constitutional responsibility for such matters by awarding custody to one parent and allowing that parent to decide all visitation questions. But the custodial parent ultimately would have to rely upon a court for enforcement of rights claimed under law. Consequently, under the Supreme Court's state action cases³³³ the application of constitutional standards would be required in order to deny visitation to a non-custodial parent.

A recognition of this presumptive right of visitation is not to calcify an invariable result. A divorce court would merely have to conclude on all the evidence that such visitation was not in the child's best interests in order to satisfy a constitutional standard of substantial relationship to an important state interest. When a New Jersey Court concluded that "the fact that one of the parents is a homosexual does not *per se* provide sufficient basis for the deprivation of visitation rights,"³³⁴ it was acting in accordance with intermediate scrutiny standards. Even the important purpose of protecting the best interests of children could not justify a rule so tenuously related to that purpose, and in any event so overinclusive. Yet the same court's order that the defendant father "not cohabit or sleep with any individual other than a lawful spouse; . . . [or] . . . involve the children in any homosexual related activities or publicity,"³³⁵ during periods of visitation, was also constitutionally justifiable, because it was more narrowly drawn. While the father's rights to associate freely and to engage in political activity on behalf of gay rights were themselves worthy of constitutional protection under the first amendment, they could be reasonably limited — although not categorically denied — to reconcile them both to his right to visitation and the service of the best interests of his children.

³³¹ 345 U.S. 528, 533 (1953).

³³² 431 U.S. 494 (1977).

³³³ *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

³³⁴ In re J.S. & C., 129 N.J. Super. 486, 324 A.2d 90 (1974), *aff'd*, 142 N.J. Super. 499, 362 A.2d 54 (App. Div. 1976).

³³⁵ *Id.* at 498, 324 A.2d at 97.

Other constitutional claims have been raised in situations where the decrees providing visitation rights to non-custodial parents have, in order to protect such visitation rights, limited the rights of custodial parents to travel extensively with their children or to move their permanent residence.³³⁶ Relying on equal protection cases such as *Shapiro v. Thompson*,³³⁷ *Dunn v. Blumstein*,³³⁸ and *Memorial Hospital v. Maricopa County*,³³⁹ claimants can argue that a classification which burdens a fundamental interest, such as interstate travel or interstate removal of residence, must be tested by strict scrutiny standards. The problem posed involves the most difficult questions of policy for a court seeking to serve reasonably the interests of both the parents and the child, but it would appear that the constitutional basis for demanding unrestricted travel and choice of residence for the custodial parent is insufficient to invalidate such restrictions.

The principal cases relied upon by custodial parents are distinguishable since they involve either "necessities of life,"³⁴⁰ or a second fundamental interest, such as the interest in voting advanced in *Dunn*. Absent more, residence requirements simply do not create a prima facie case for the application of strict scrutiny standards.³⁴¹ Further, even if strict scrutiny were applied, the existence of a fundamental interest in visitation for the non-custodial parent, as hypothesized earlier, should suffice to justify a court's identification of that interest as "compelling" enough to warrant the restriction on travel.³⁴² Conversely, a supportable judicial finding that allowing the custodial parent to move to a different state or foreign country will serve the best interests of the child should be sufficient to answer the contentions of a non-custodial parent that his right to visitation has been violated by the removal of his child.

One other putative constitutional claim concerning visitation deserves mention. A number of states, by statute³⁴³ and judicial decision,³⁴⁴ have

³³⁶ *E.g.*, *Ryan v. Ryan*, 300 Minn. 244, 251-52, 219 N.W.2d 912, 917 (1974); *Ex parte Rhodes*, 163 Tex. 31, 34, 352 S.W.2d 249, 250 (1961). See Comment, *Restrictions on a Parent's Right to Travel In Child Custody Cases: Possible Constitutional Questions*, 6 U. CAL. D. L. REV. 181 (1973).

³³⁷ 394 U.S. 618 (1969).

³³⁸ 405 U.S. 330 (1972).

³³⁹ 415 U.S. 250 (1974).

³⁴⁰ The Court in *Memorial Hospital v. Maricopa County* emphasized the importance of medical care as a "necessity of life." 415 U.S. at 259-61 & nn.14, 15.

³⁴¹ See, *e.g.*, *Califano v. Torres*, 435 U.S. 1 (1978); *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645 (1976).

³⁴² The Supreme Court's decision upholding state residency requirements for parties wishing to institute divorce proceedings, *Sosna v. Iowa*, 419 U.S. 393 (1975), is not relevant here. In *Sosna*, the Court upheld the state's interest in the integrity of its judicial processes against the individual rights of family choice asserted by the parties wishing to obtain a divorce. While the present situation is similar in that it too focuses on an individual right to family choice, it is unlikely that a third-party interest in visitation, advanced by the state, is as strong as the integrity of judicial processes was found to be in *Sosna*.

³⁴³ For examples of statutes providing for grandparental visitation rights, and the circumstances under which they are granted, see CAL. CIV. CODE § 197.5 (West Supp. 1981); N.J. STAT. ANN. § 9:2-7.1 (West 1976); N.Y. DOM. REL. LAW § 72 (McKinney 1977); TEX. FAM. CODE ANN. tit. 2, § 14.03(d) (Vernon Supp. 1980-1981).

³⁴⁴ See, *e.g.*, *Boyles v. Boyles*, 14 Ill. App. 3d 602, 302 N.E.2d 199 (1973).

established a right of visitation for grandparents. Prior to *Moore v. East Cleveland*,³⁴⁵ the thought of according this right constitutional status would have been wholly untenable. *Moore* established the right of grandparents to live together with their grandchildren without interference by the state. In *Moore*, however, there was no nuclear parent-child family in existence. Hence, it would be vastly overreading *Moore* to conclude that it establishes a categorical visitation right for grandparents. The argument for a constitutional right to visitation by grandparents would be much stronger, for example, were both parents deceased and the grandchildren in foster care.

Constitutional issues, then, lurk behind almost every aspect of decisions regarding child custody and visitation rights after divorce. In custody battles, courts may be required constitutionally to consider the best interests of the child as a factor in the ultimate decision. When considering other factors, such as the moral character, gender, and religion of each parent, courts must tread cautiously to avoid violating the free exercise clause, the establishment clause, and individual rights to privacy. In addition, courts must be cognizant of the parent's presumptive right to visitation when determining post-divorce conditions best suited to the interests of the children.

3. Child Support

By statute,³⁴⁶ if not by common law,³⁴⁷ parents normally have an obligation to support their children. This obligation extends to married, unmarried, and divorced parents. Most of the law of child support, however, arises in a divorce context, as do the principal constitutional issues. Nonetheless, the present discussion is also relevant to constitutional questions regarding child support which may arise absent divorce.

Historically, parental support obligations tended to be imposed only upon fathers,³⁴⁸ but during this century, many states extended a subordinate support obligation to mothers.³⁴⁹ State court decisions striking down the gender-based classification imposing support obligations only upon fathers as violative of

³⁴⁵ 431 U.S. 494 (1977).

³⁴⁶ See, e.g., CAL. CIV. CODE §§ 196, 206 (West Supp. 1981); GA. CODE ANN. § 74-105 (1981); LA. CIV. CODE ANN. art. 227 (West 1952); N.Y. DOM. REL. LAW § 32 (McKinney Supp. 1980); OHIO REV. CODE ANN. § 3103.03 (Baldwin 1976).

³⁴⁷ See, e.g., *In re Custody of Miller*, 86 Wash. 2d 712, 719, 548 P.2d 542, 546 (1976); *In re Estate of Peterson*, 66 Wis. 2d 535, 540, 225 N.W.2d 644, 646 (1975); *Ex parte Holloway*, 490 S.W.2d 624, 628 (Tex. Civ. App. 1973); *Lynch v. Ambruster*, 7 Ohio App. 2d 1, 2, 218 N.E.2d 624, 625 (1966). See generally CLARK, *supra* note 121, at 488; S. KATZ, *WHEN PARENTS FAIL* 9 (1971); Goodman, Oberman & Wheat, *Rights and Obligations of Child Support*, 7 SW. U.L. REV. 36 (1975).

³⁴⁸ CLARK, *supra* note 121, at 189, 488-89; J. AREEN, *FAMILY LAW CASES AND MATERIALS* 654 (1978) [hereinafter cited as AREEN]; *Recent Developments: Conway v. Dana*, 10 TULSA L.J. 485, 486-87 (1975); Case Note, *Domestic Relations: The Expanding Role of the Mother in Child Support*, 27 ARK. L. REV. 157, 157-58 (1973).

³⁴⁹ See, e.g., *O'Leary v. Porter*, 42 Wis. 2d 491, 167 N.W.2d 193 (1969); *Stargell v. Stargell*, 263 Cal. App. 2d 504, 69 Cal. Rptr. 715 (1968). See generally AREEN, *supra* note 348, at 654; Case Note, *Domestic Relations: The Expanding Role of the Mother in Child Support*, 27 ARK. L. REV. 157, 158-59 (1973).

equal protection³⁵⁰ would appear vindicated by the Supreme Court's 1979 decision in *Orr v. Orr*.³⁵¹ There is no greater justification for basing child support obligations on a gender-linked presumption than there is for alimony. As in the case of alimony, even the administrative expediency rationale fails where an adjudicative mechanism is already provided for assessing the financial capabilities of the parties.

The unconstitutionality of gender-based distinctions between recipients of child support was more directly addressed by the Supreme Court in *Stanton v. Stanton*.³⁵² In *Stanton*, a state statute required parents to support their sons until they reached the age of twenty-one, but only required support for daughters up to the age of eighteen. The Court found that the gender classification worked by the Utah statute in issue could not meet the strict rationality test which the Court had adopted for sex-based classifications four years earlier.³⁵³ Given the state's burden to adduce a plausible relationship to a legitimate objective, Justice Blackmun found "nothing rational"³⁵⁴ in the suggestion that the differential age was justified by the greater educational needs of males in our society and the earlier maturity of females.³⁵⁵ Statutes which categorically impose support obligations only upon fathers would appear to be equally lacking in rationality.

Another set of constitutional questions arises when the economic status of the obligated parent undergoes a significant change. Such changed financial circumstances are normally sufficient to justify modification in the existence or extent of child support awards. A parent not involved in a divorce action may presumably change jobs, retire, or otherwise reduce his standard of living, irrespective of the material or educational deprivations such a decision may cause his children. Yet some courts have held that the amount of support payments will not be reduced when a parent obligated under a support order makes occupational choices reducing his resources.³⁵⁶ Even if judicial responses to such decisions were put in prohibitory terms, which they virtually never are, it is unlikely that the interest in changing occupations, or ceasing to work at all,

³⁵⁰ *E.g.*, *Lord v. Lord*, 96 Misc. 2d 435, 409 N.Y.S.2d 46 (Sup. Ct. 1978); *Carole K. v. Arnold K.*, 85 Misc. 2d 643, 380 N.Y.S.2d, 593, *modified on other grounds*, 87 Misc. 2d 547, 385 N.Y.S.2d 740 (Fam. Ct. 1976). Other courts have struck down the placement of a primary support obligation exclusively on the father as a violation of the equal status of men and women under a state constitutional equal rights amendment. *E.g.*, *Cooper v. Cooper*, 513 S.W.2d 229 (Tex. Civ. App. 1974); *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974).

³⁵¹ 440 U.S. 268 (1979).

³⁵² 421 U.S. 7 (1975).

³⁵³ *See Reed v. Reed*, 404 U.S. 71 (1971). The current standard for gender-based classifications is discussed at text and in note 28 *supra*.

³⁵⁴ 421 U.S. at 14.

³⁵⁵ The Court remanded to the Utah courts for a determination of which age, eighteen or twenty-one, was to be considered the age of majority for child support purposes. The case then had another round in the Supreme Court in *Stanton v. Stanton*, 429 U.S. 501 (1977) (*per curiam*).

³⁵⁶ *E.g.*, *In re Marriage of McKeever*, 36 Or. App. 19, 583 P.2d 30 (1978); *Curtis v. Curtis*, 448 S.W.2d 242 (Tex. Civ. App. 1969); *Reed v. Reed*, 260 Iowa 1166, 152 N.W.2d 190 (1967); *Austin v. Austin*, 308 Mich. 139, 13 N.W.2d 237 (1944).

is sufficiently fundamental to warrant extraordinary protection under substantive due process.³⁵⁷ Concerns for the welfare of the children would seem to be more than sufficient to justify such restrictions under minimum rationality. The argument that equal protection principles are violated by imposing upon divorced parents occupational restrictions not imposed on the non-divorced is a more appealing one. Nevertheless, it remains difficult to justify review on a standard more rigorous than minimal rationality, so long as there is no fundamental interest in occupational choice,³⁵⁸ and the classification based on marital status remains non-suspect.³⁵⁹ Under minimum rationality an equal protection claim would probably fare no better than a due process challenge.

Occupational change is not the only financial factor which can lead an obligated parent to seek withdrawal or downward modification of his support obligations. Frequently, remarriage and the advent of a second family increase financial burdens. Many courts have held that such changed circumstances do not justify the modification of previously determined child support awards.³⁶⁰ While, again, the resultant limitations on the conduct of the parent are not often cast in prohibitory terms, they do suggest claims of constitutional violation having considerably more substance than do decisions based on occupational change.

To begin, the obligated parent may claim that a court, in defeating the practical option of remarriage and the birth of additional children, is penalizing the exercise of a fundamental right or interest in decisions concerning marriage and procreation. It is, of course, true that any financial obligation privately incurred and judicially enforced may have the practical impact of limiting individual choices regarding marriage and procreation, but the fundamental interest analysis does seem to possess some merit when the obligation being enforced is to children of a first marriage in preference to children of a second.

The principal support for such an argument comes from *Zablocki v. Redhail*,³⁶¹ which struck down a Wisconsin statute prohibiting any non-custodial parent with outstanding child support obligations from marrying without judicial permission. Under the statute such permission could only be granted upon the applicant's proof of compliance with the support obligation

³⁵⁷ See *Cohen v. Hurley*, 366 U.S. 117 (1961); *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Barsky v. Board of Regents*, 347 U.S. 442 (1954); *Olsen v. Nebraska*, 313 U.S. 236 (1941).

³⁵⁸ In *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), the Court refused to apply a higher level of scrutiny than that called for by the rational basis test in considering a challenge to compulsory retirement rules. The Court did not recognize the claim of the appellee to his occupation as having any type of "fundamental" status. For analysis and commentary, see Abramson, *Compulsory Retirement, The Constitution, and the Murgia Case*, 42 MO. L. REV. 25 (1977).

³⁵⁹ See text at notes 49-51, 76-77.

³⁶⁰ E.g., *Crosby v. Crosby*, 272 N.C. 235, 158 S.E.2d 77 (1967); *Rowley v. Rowley*, 232 Or. 285, 375 P.2d 84 (1962); *Beaird v. Beaird*, 380 S.W.2d 730 (Tex. Civ. App. 1964); *Shipley v. Shipley*, 175 Neb. 119, 120 N.W.2d 582 (1963).

³⁶¹ 434 U.S. 374 (1978). For a fuller discussion of case, see text at notes 112-14 *supra*.

and demonstration that the recipients were not likely to become public charges. Finding that the statute intruded on a fundamental interest,³⁶² the Court employed a high-intermediate standard of review requiring that such a statute, to pass constitutional muster, be supported by "important state interests and . . . closely tailored to effectuate only those interests."³⁶³ Application of that standard to a categorical refusal by courts to reduce or withdraw child support awards for obligated parents who undertake the obligations of a new family, might result in the invalidation of such restrictions. In any event, the policy surely could not satisfy the means component of the test if the restriction had the effect of maintaining a luxurious lifestyle for the first family while leaving a second family at a mere subsistence level of existence.

Nonetheless, however unwise the policy may seem, it would be difficult to conclude that a refusal to modify support obligations violates the constitutional rights of affected parents. Unlike the situation in *Zablocki*, the restriction is not totally prohibitory. Moreover, a judicial refusal to modify a child support award, however inconsistent with judicial responses to other changes in financial circumstances, should not be regarded as infringement upon a fundamental interest. A court is not arbitrarily choosing between two sets of children to which the obligated parent has equal privacy interests. The privacy of his relationship with the children of the first family has already been substantially and legitimately broken down by the need for the invocation of legal machinery to establish the child support obligation. Enforcement of child support obligations can no more be viewed as a penalty on a fundamental interest than can a judgment in favor of a credit company which also acts to discourage the creation of a new family.

The children of the second family also have interests at stake. It could be argued that a state policy which creates a second-class status for such children by diverting family's resources to their parent's previous family establishes a classification in violation of their rights under the equal protection clause. Such a policy would seem unable to survive any more rigorous a standard of review than minimum rationality. The problem, then, is to establish the grounds, either under interest or classification analysis, to lift their claim beyond a minimum scrutiny level. This is problematical. Apparently even the interest in maintaining a subsistence level of existence does not qualify for heightened scrutiny.³⁶⁴ However appealing the "accident of birth" argument may be as an attack on the classification between children of the first and second families, an insufficient history of discrimination against the disfavored class, in addition to their political powerlessness vis-a-vis the favored class,³⁶⁵ probably prevents

³⁶² 434 U.S. at 383.

³⁶³ *Id.* at 388.

³⁶⁴ See, e.g., *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Richardson v. Belcher*, 404 U.S. 78 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970).

³⁶⁵ See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-13 (1976); *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

such children from being accorded even the "quasi-suspect" status which sex-based classifications receive.³⁶⁶

The law of child support, then, raises a varied group of constitutional issues. Clearly, guidelines regarding responsibility for support cannot be based solely on a parent's sex. Once support payments are imposed, the obligated parent may find that liberties others enjoy, such as changing careers, or starting new families, may be legitimately restricted directly or indirectly, by the state.

There are additional issues in the law of child support where constitutional claims may be asserted. These include, for example, the imposition of support obligations for the higher education of children, support of adult children, and the responsibilities of stepparents or paramours.³⁶⁷ But it would appear that such constitutional violations raise issues of substantive due process which must be treated with minimum scrutiny analysis. The claims, therefore, would normally be constitutionally groundless.

D. *Discrimination Against the Divorced*

Marital status has never been acknowledged as a suspect or quasi-suspect classification. The leading Supreme Court case on the question of discrimination against the divorced is *Mathews v. DeCastro*,³⁶⁸ decided in 1976. Under attack in that case was section 202(b)(1) of the Social Security Act, which provided benefits to married women under the age of 62, who had minor or dependent children in their care, upon the retirement or disability of their husbands. The statute excluded from its benefits divorced women similarly situated until they reached the age of 62. The Court, in an opinion by Justice Stewart, employed a traditional minimum rationality standard in sustaining the classification.³⁶⁹ The Court noted:

Divorce by its nature works a drastic change in the economic and personal relationship between a husband and wife. Ordinarily it means they will go their separate ways. Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married . . . For instance, a divorced wife need not forego work in order to stay at home to care for her disabled husband. She may not feel the pinch of the extra expenses accompanying her former husband's old age or disability. In short, divorced couples typically live separate lives. It was not irrational for Congress to recognize this basic fact in deciding to defer monthly payments to divorced wives of retired or disabled wage earners until they reach the age of 62.³⁷⁰

³⁶⁶ See note 25 *supra*.

³⁶⁷ *E.g.*, *Washington Statewide Org. of Stepparents v. Smith*, 85 Wash. 2d 564, 536 P.2d 1202 (1974) (en banc).

³⁶⁸ 429 U.S. 181 (1976).

³⁶⁹ *Id.* at 188-89.

³⁷⁰ *Id.* at 188-89.

The Court was thus willing to engage in extensive speculation about possible rationales for the classification. It did not purport to inquire whether a more narrowly drawn classification might have substantially achieved the same objectives.³⁷¹ The status of divorce, then, seems most assuredly non-suspect.

The alternative arguments for the unconstitutionality of discrimination against the divorced must necessarily employ an interest analysis. As discussed earlier, however, the arguments for a fundamental right to or interest in divorce derive primarily from the right to or interest in marital choice.³⁷² Employing an interest analysis, classifications penalizing divorce would thus seem no more constitutionally vulnerable than those penalizing marriage. *Mathews v. DeCastro*, then, is consistent with both the standard employed and the result reached in *Califano v. Jobst*.³⁷³ *Jobst* sustained a classification under the Social Security Act which terminated benefits for certain disabled beneficiaries upon marriage. The Court employed a minimum rationality standard, and, in reasoning similar to that used in *DeCastro*, rejected the argument that a fundamental interest in marital choice required the invocation of strict scrutiny.

Nonetheless, these cases denying governmental benefits may not be fully dispositive of all classifications discriminating against the divorced. For example, could a state disqualify from public employment as social workers or marriage counselors all divorced persons, on the minimally rational grounds that those unable to maintain their own family units will frequently have problems in helping others achieve stability? This article suggests that penalties on the interest in divorce should be reviewed under a strict rationality standard — “fair and substantial relation to the object of the legislation” — similar to the one employed by an Indiana state court in striking down a rule penalizing marriage.³⁷⁴ Such a standard would not change the result of cases such as *DeCastro*, but would limit the government’s ability to penalize persons who, frequently without fault, or even choice, became divorced.

CONCLUSION

The past two decades have witnessed the significant constitutionalization of marriage and divorce, subjects historically considered the nearly exclusive concern of state law. The Supreme Court has recognized new protectible rights and interests associated with marriage and divorce under the due process and equal protection clauses of the fifth and fourteenth amendments. Yet it is difficult to identify with confidence conceptually clear lines delineating emergent constitutional values. The next two decades should give the Court the opportunity to solidify and clarify the relationship between constitutional limitations on government and individual interests in marriage and divorce.

³⁷¹ *Id.* at 185-89.

³⁷² See text at notes 212-13 & 257-59 *supra*.

³⁷³ 434 U.S. 47 (1977). For a discussion of *Jobst* see text at notes 168-72 *supra*.

³⁷⁴ *Indiana High School Athletic Ass'n v. Raike*, 164 Ind. App. 169, 179, 329 N.E.2d 66, 73 (1975).