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The Accidental Procreation Argument for Withholding Legal Recognition for Same-Sex Relationships

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THE "ACCIDENTAL PROCREATION" ARGUMENT FOR
WITHHOLDING LEGAL RECOGNITION FOR SAME-SEX
RELATIONSHIPS

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INTRODUCTION

Since the early 1970s, advocates of rights for lesbian, gay, bisexual and transgender (LGBT) people in the United States have been using litigation as a central part of the attempt to obtain legal recognition for relationships between couples consisting of two people of the same sex. One of the primary arguments that states (and the amicus curiae briefs filed in their support) have made in defense of withholding legal recognition from relationships between same-sex couples involves procreation. Arguments involving procreation have been accepted by courts that have upheld the legality and constitutionality of prohibiting marriage between people of the same sex. According to what I call the standard argument from procreation, the institution of marriage crucially involves procreation; therefore, because couples consisting of two people of the same sex simply cannot procreate, same-sex couples should not be able to marry. While this argument is still embraced in some contexts, this direct argument from procreation to the non-recognition of relationships between people of the same sex is now widely seen as weak, even by some opponents of legal recognition for same-sex relationships and, apparently, U.S. Supreme Court Justice Antonin Scalia. ¹

In place of the standard argument from procreation, a new argument against such legal recognition has emerged that also involves procreation. I call this new argument the accidental procreation argument. This argument

focuses on a specific difference between couples consisting of people of the
same sex and those consisting of people of different sexes: namely, that the
latter—but not the former—can accidentally procreate. Because of this risk
of accidental procreation, proponents of this argument conclude that it is
permissible for the state to provide different-sex couples with the opportu-
nity to marry without providing the same opportunity to same-sex couples.
The accidental procreation argument seems to have been first made in a
dissenting opinion in 2003 and then embraced by the majority in an appel-
late decision in 2005. It has since been embraced by majorities in two state
supreme courts and one federal appellate court as well as by other judges.
This Article critically examines this newly-minted procreation-based argu-
ment for prohibiting legal recognition of same-sex relationships, arguing
that it suffers from many of the same flaws as the standard argument from
procreation.

I. PROCREATION AND THE PROHIBITION OF MARRIAGE FOR SAME-SEX
COUPLES BEFORE 2005

On May 18, 1970, Jack Baker and Michael McConnell filed an appli-
cation for a marriage license in Minnesota. At the time, Baker was finish-
ing his first year of law school at the University of Minnesota. McConnell,
who had been romantically involved with Baker for almost three years, had
recently moved to the Twin Cities after receiving an offer to work as a
librarian for the same university (the University later rescinded McCon-
nell's job offer because of McConnell's attempt to marry Baker).Shortly
after they filed an application for a marriage license, the county attorney
denied it. Undeterred, Baker and McConnell sued the county clerk for de-
nying their application. Baker and McConnell argued, first, that Minnesota
law did not explicitly limit marriage to different-sex couples and, thus, their
marriage was not statutorily prohibited. In the alternative, they argued that
if Minnesota law was interpreted to prohibit the marriage of two people of
the same sex, the law was unconstitutional. In particular, they argued that
the denial of their opportunity to marry violated the fundamental right to
marry, the right to free speech, and the right to equal protection of the law,

2. The first several paragraphs of this Part are adapted from my essay, The Story of Goodridge v.
Department of Public Health: The Bumpy Road to Marriage for Same-Sex Couples, in FAMILY LAW
STORIES 27, 28–35 (Carol Sanger, ed. 2008).
4. The relevant Minnesota law did not explicitly say that a man could only marry a woman and
that a woman could only marry a man; rather it simply said that "[e]very male person who has attained
the full age of 21 years, and every female person who has attained the full age of 18 years, is capable in
law of contracting marriage, if otherwise competent." MINN. ST. § 517.02 (1967).
and that this denial constituted cruel and unusual punishment and a deprivation of liberty and property without due process.\(^5\)

Within a year or so, similar arguments, plus some other ones, were made in Kentucky by Marjorie Jones (a mother of three children) and her partner Tracy Knight, and in Washington by John Singer (a typist for the Equal Employment Opportunity Commission) and Paul Barwick (a Vietnam veteran and former state patrol dispatcher). Singer, like McConnell, lost his job because of his public attempt to marry another man.\(^6\) All three of these early attempts to achieve same-sex marriage through litigation failed. None of the more than ten judges that considered challenges to the prohibition of same-sex marriage in the 1970s decided the cases in favor of the same-sex couples; all of the plaintiffs’ arguments were rejected.

Courts offered three main reasons for rejecting the arguments for marriage between two people of the same sex. First, courts looked to the standard definition of marriage as between one man and one woman, citing dictionaries,\(^7\) custom,\(^8\) the Bible,\(^9\) and to statutory language that referred to “bride and groom,” “husband and wife,” and “the male” and “the female.”\(^10\) Courts appealed to the standard definition of marriage to resist the argument that gender-neutral marriage statutes allowed for same-sex marriage. Further, courts used such definitional arguments as an all-purpose answer to arguments for same-sex marriage. For example, the Kentucky court said that Jones and Knight were “prevented from marrying, not by the statutes of Kentucky... but rather by their own incapability of entering into a marriage as that term is defined” and that “the relationship proposed by [Jones and Knight] does not authorize the issuance of a marriage license because what they propose is not a marriage.”\(^11\)

Second, courts denied that the fundamental right to marry extends to same-sex couples. The court in Jones said “[w]e find no constitutional sanction or protection of the right of marriage between persons of the same sex.”\(^12\) Similarly, the Baker court said that “[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring [marriage] by

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8. Jones, 501 S.W.2d at 589.
11. Jones, 501 S.W.2d at 589–90; see also Singer, 522 P.2d at 1196 (“[T]hey were denied a marriage license because of the nature of marriage itself.”).
12. Jones, 501 S.W.2d at 590.
Third, and most importantly for this Article, courts justified the differential treatment of same-sex and different-sex couples because sexual relations between the latter, but not the former, had procreative potential. The *Baker* court quoted a classic 1942 U.S. Supreme Court case that said, “Marriage and procreation are fundamental to the very existence and survival of the race.”14 The court buttressed this argument with a biblical reference, saying that “[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”15 Further, while acknowledging that some heterosexuals cannot procreate or chose not to do so, the *Baker* court said that the relationship between the ability to procreate and the possibility to marry was “no more than theoretically imperfect” and, thus, survived scrutiny under the equal protection clause.16 The *Singer* court provided the most detailed analysis of the relationship between marriage and procreation:

> [T]he state’s refusal to grant a license allowing the appellants to marry one another is . . . based upon the state’s recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union.17

The *Singer* court continued:

> For constitutional purposes, it is enough to recognize that marriage as now defined is deeply rooted in our society. Although . . . married persons are not required to have children or even to engage in sexual relations, marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman.18

Relatedly, the *Singer* court also argued that the different treatment of same-sex and different-sex couples was justified because a heterosexual marriage

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14. *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).
15. *Id*.
18. *Id.* at 1197.
provided a better context for raising children.19

The basic logic of the standard argument from procreation for the prohibition of same-sex marriages is characterized as follows:

1. Marriage uniquely and crucially involves procreation.
2. Same-sex couples cannot procreate.
3. Therefore, same-sex couples should not be able to marry.20

The courts that embrace this argument realize that some people who cannot or will not procreate are allowed to marry, but these courts deny that this fact is a serious threat to the first premise of the standard argument from procreation. Intuitively, in embracing the standard argument from procreation, these courts are impressed by the fact that there is the possibility that a couple consisting of a man and a woman can procreate, while no such possibility exists for couples consisting of two men or two women. The procreative potential of different-sex couples distinguishes them from same-sex couples, and, according to the standard argument from procreation, that distinction justifies excluding same-sex couples from marriage.21

It is useful to contrast and set aside a related, but conceptually distinct, argument for the prohibition of same-sex marriage according to which couples consisting of people of the same sex are worse parents than couples

19. Id. at 1195.
20. The same argument form can be used more generally against allowing non-marital legal recognition of same-sex relationships, namely, civil unions (as in New Jersey) or robust domestic partnerships (as in Oregon and California):
   A1. Legal recognition of spouse-like relationships uniquely and crucially involves procreation.
   A2. Same-sex couples cannot procreate.
   A3. Therefore, the state should not provide spouse-like legal recognition to same-sex couples.

In the discussion that follows, I will focus on the standard argument from procreation as applied to same-sex marriage, but almost all of what I will say applies to the standard argument from procreation as applied to the legal recognition of same-sex relationships generally.

consisting of people of different sexes. This argument, which I call the “gays make bad parents” argument, was embraced in some form by all three appellate courts that heard challenges to prohibitions against same-sex marriages in the 1970s. This argument remained one of the most common arguments made by opponents of legal recognition for relationships between people of the same sex. The “gays make bad parents” argument, however, faces two serious objections. First, no difference that matters to the well being of children exists between having two parents of the same sex and having two parents of different sexes. In other words, there is no respectable evidence that same-sex couples are worse parents than different-sex couples.

The second objection to the “gays make bad parents” argument is that, even if evidence that same-sex couples were worse parents than different-sex couples existed, the argument that starts with such evidence as a premise and concludes that same-sex couples should not be allowed to get married is invalid. No state looks to whether two intended spouses are likely to be good parents as a condition for allowing them to marry. “Deadbeat” parents and prisoners are allowed to marry, as the Supreme Court has said that laws prohibiting these groups of people from marrying are unconstitutional. This is not to say that people who have at one time been unable to provide financial support for their offspring or who have been prisoners are always or usually bad parents. However, at least as much reason exists for thinking that these types of people will be bad parents as exists for thinking that LGBT people will be bad parents, and, yet, prisoners and “deadbeats”


are allowed to marry while, in most jurisdictions, LGBT people are not.

Responding to the “gays make bad parents” argument is not, however, my main project here, even though this argument is connected to arguments against same-sex marriage that focus on procreation. Henceforth, I set aside the “gays make bad parents” argument and related arguments about the quality of parenting to focus more directly on procreation-based arguments.

Courts in the United States began to reject the standard argument from procreation starting in the late 1990s. In 1996, a trial judge in Hawaii ruled that none of the state’s proffered justifications for prohibiting couples of the same sex from marrying—which included the protection of the health and welfare of children and the fostering of procreation within a marital setting—warranted withholding the legal status of marriage from same-sex couples. Similarly, as explained by the Supreme Court of Vermont in 1999, “The principal purpose . . . advance[d] in support of . . . excluding same-sex couples from the legal benefits of marriage [was] the government’s interest in ‘furthering the link between procreation and child rearing.’” That court rejected this interest for being under-inclusive because “[t]he law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal” of furthering the link between procreation and child-rearing, and, more generally, for failing to “provide . . . a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law.”

Perhaps the strongest rejection of the standard argument from procreation came in Massachusetts in 2003. In his brief defending the constitutionality of the state’s refusal to allow same-sex couples to get married, Massachusetts’s attorney general stated that “the primary purpose for [the] regulation [of marriage] is to provide a favorable setting for procreation.” He further argued that, from a constitutional perspective, this purpose is “at least rational, if not compelling.” The majority of Massachusetts’s highest

25. Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *3, (Haw. Cir. Ct. Dec. 3, 1996), rev’d, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999). The Supreme Court of Hawaii reversed the decision of the trial court in light of an amendment to Hawaii’s constitution that gave the state legislature the power to “reserve marriage to opposite-sex couples” HAW. CONST. art. I, § 23 (1998). The analysis of the trial court discussed in the text was not rejected by the Hawaii Supreme Court; rather, the analysis was rendered moot by this constitutional amendment.
28. Id.
29. Id. at 886.
31. Id.
court rejected this argument as follows:

Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. [They] contain . . . no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married. People who cannot stir from their deathbed may marry. While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.

Moreover, the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual. If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means. The attempt to isolate procreation as “the source of a fundamental right to marry” overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing.\textsuperscript{32}

Even Justice Scalia—a dissenter in two of the most important LGBT rights cases heard by the Supreme Court\textsuperscript{33}—acknowledged the weakness of the standard argument from procreation. As part of criticizing the majority and concurring opinions in\textit{Lawrence v. Texas} for “effectively decree[ing] the end to all moral legislation,”\textsuperscript{34} Scalia argued that the logic of these opinions would lead to same-sex marriages, saying that, after this decision, “what justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.”\textsuperscript{35}

In the 1970s, the standard argument from procreation was one of the leading arguments made by states and accepted by courts.\textsuperscript{36} By the middle of the first decade of the twenty-first century, some states did not even

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\item \textsuperscript{32} Goodridge, 798 N.E.2d at 961–62 (citations omitted) (footnotes omitted); see also Varnum v. Brien, 763 N.W.2d 862, 901–02 (Iowa 2009).
\item \textsuperscript{34} 539 U.S. at 599 (Scalia, J., dissenting).
\item \textsuperscript{35} Id. at 605.
\item \textsuperscript{36} See, e.g., William C. Duncan, The State Interests in Marriage, \textit{2 Ave Maria L. Rev.} 153, 154 (2004) (noting that procreation was the “most common state interest . . . in same-sex marriage case[s]”).
\end{itemize}
make the argument from procreation when defending the prohibition of same-sex marriage. What happened between the 1970s and the 1990s that led states to stop making and courts to start rejecting the direct argument between marriage and procreation?

Part of the answer to this question is that the attitudes and practices relating to marriage, sex, and procreation changed. These and related social changes led to increased acceptance of the idea that marriage does not require procreation and that procreation can occur outside of marriage. These changes are due, in part, to the increased availability, use, and social acceptance of contraception since the late 1960s. Also, people are living longer, women continue to have a longer average lifespan than men, and divorce and remarriage have become more socially acceptable. Partly as a result of these trends, women are, on average, getting married later in life. Additionally, more people are cohabitating and having children outside of marriage. Finally, because of advances in reproductive technologies and the emergence of social networks and commercial enterprises that support various forms of surrogacy arrangements, more people who want to procreate are doing so, often outside of marriage. Different-sex couples who were deemed “sterile” in the past may be able to procreate thanks to new reproductive technologies. The same is true for same-sex couples and single

37. See, e.g., In re Marriages Cases, 183 P.3d 384, 430 (Cal. 2008) (noting that the argument from procreation was made in an amicus brief, not by the state); Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 477–48 (Conn. 2008) (“[D]efendants expressly have disavowed any claim that . . . prohibiting same sex couples from marrying promotes responsible heterosexual procreation . . . .”); Lewis v. Harris, 908 A.2d 196, 217 (N.J. 2006) (“The State does not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children.”).


people who now may avail themselves of sperm donors, egg donors, \textit{in vitro} fertilization, and gestational surrogacy.\footnote{See, e.g., id. at 32–33.} In short, in the last few decades, the gap between marriage and procreation has dramatically widened.

These social changes are synergistically related to legal changes: courts have found that laws prohibiting contraception are unconstitutional;\footnote{See Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).} the divorce process has become much easier (especially because of the move from fault to no-fault divorce);\footnote{See, e.g., J. DiFONZO, supra note 41.} courts have recognized cohabitation for some legal purposes;\footnote{See, e.g., Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (enforcing oral or implied cohabitation contracts); Dunphy v. Gregor, 642 A.2d 372, 380 (N.J. 1994) (applying bystander liability to unmarried different-sex cohabitant); Braschi v. Stahl Associates, 543 N.E.2d 49 (N.Y. 1989) (recognizing same-sex cohabitant as family member under housing law).} non-marital legal relationships have been created;\footnote{Three states (Vermont, New Jersey, and New Hampshire) now allow same-sex couples to enter civil unions, which are the legal equivalent to marriages under the respective states’ law. See, e.g., VT. STAT. ANN. tit. 15, § 1201 (2007). Starting on September 1, 2009, Vermont began allowing same-sex couples to marry. S. 115, 2009–10 Leg. Sess. (Vt. 2009); Abby Goodnough, Gay Rights Groups Celebrate Victories in Marriage Push, NY TIMES, Apr. 8, 2009, at A1. Starting on January 1, 2010, New Hampshire will allow same-sex couples to marry. H. 436, 2009–10 Leg. Sess. (NH 2009). Six states (California, Colorado, Maine, Hawaii, Oregon, and Washington), the District of Columbia, and various local jurisdictions now allow same-sex couples to register as domestic partners (although Hawaii calls them reciprocal beneficiaries and Colorado calls them designated beneficiaries).} courts have upheld surrogacy agreements;\footnote{See, e.g., Johnson v. Calvert, 769 N.E.2d 1133 (Mass. 2001).} people who are not the “biological” parents of their children are listed as the parents on the birth certificates;\footnote{See, e.g., A.H.W. v. D.E.W., 845 A.2d 1146 (Me. 2004) (de facto parent); Jacob v. Shultz-Jacob, 923 A.2d 473, 482 (Pa. Super. Ct. 2007) (three parents); In re Parentage of L.B., 122 P.3d 161 (Wash. 2005) (de facto parent).} and, more generally, the notion of who counts as a parent has been expanded.\footnote{Further, courts now acknowledge that same-sex couples do, in fact, procreate, at least in some sense of the term. As a New Jersey court observed, “reproductive science and technology [now enable] some persons in committed same-sex relationships [to] legally and func-}
tionally procreate."53

These sociological and legal changes have enabled some courts to recognize the problems with the standard argument from procreation. No longer do most courts see the separation of marriage and procreation as "exceptional."54 Today, most courts seem to understand that the standard argument from procreation faces the problem that no state requires that couples intend to procreate or even be able to procreate in order to marry.55 Women at an age that suggests they have gone through menopause are still allowed to marry. Infertile men, people who are on their deathbeds, and prisoners serving life sentences with no chance of parole or conjugal visits are allowed to marry.56 In several jurisdictions, in fact, there are even specially crafted marriage laws for couples who cannot procreate. Wisconsin, for example, allows first cousins to marry if the woman is over fifty-five years old or if either party to the marriage is sterile.57

Returning to the logical form of the standard argument from procreation, courts now recognize that premise (1) is false, because, first, procreation is no longer seen as crucial for marriage now that society has embraced


54. In 1974 the Washington Appellate Court stated in defense of the argument from procreation that while some married couples cannot have children and some couples who have children are not married, such situations are "exceptional." Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974).


57. See Wis. STAT. § 765.03(1) (2007); see also ARIZ. REV. STAT. ANN. § 25-101(B) (2007) ("first cousins may marry if both are sixty-five years of age or older or if one or both first cousins are under sixty-five years of age, upon approval of any superior court judge in the state if proof has been presented to the judge that one of the cousins is unable to reproduce"); 750 ILL. COMP. STAT. ANN. 5/212 (West 2008); IND. CODE § 31-11-8-3 (2008); and UTAH CODE ANN. § 30-1-1 (2008). Such laws have an affinity to laws that prohibited marriage by people with certain mental or physical conditions unless they were over a certain age. See, e.g., CONN. GEN. STAT. § 1354 (repealed 1969) ("Every man and woman, either of whom is epileptic, imbecile, or feeble-minded, who shall intermarry, or live together as husband and wife, when the woman is under forty-five years of age, shall be imprisoned not more than three years."); KAN. STAT. ANN. 23-210 (repealed 1977) (prohibiting women under forty-five from marrying if they or their spouse is epileptic, an imbecile, feeble-minded or afflicted with insanity as well as prohibiting women who were children of insane people from marrying until age forty-five). Somewhat similar laws still are on the books in a few jurisdictions. See, e.g., 23 PA. CONS. STAT. § 1304(c) (2008) ("No marriage license may be issued if either of the applicants for a license is weak minded, insane, of unsound mind or is under guardianship as a person of unsound mind unless the court decides that it is for the best interest of the applicant and the general public to issue the license and authorizes the issuance of the license.").
the companionate view of marriage, and, second, many cohabitating different-sex couples are procreating and, depending on how procreation is defined, single people are procreating.58 Further, as noted above, many courts now acknowledge that premise (2) is false, because, in addition to different-sex couples and single people, same-sex couples are producing children.59

In addition, some courts also seem to recognize that the standard argument from procreation is also invalid. To see this invalidity, consider the following argument (or similar arguments involving infertile men or people on their deathbeds) that is isomorphic to the standard argument from procreation:

4. Marriage uniquely and crucially involves procreation.
5. Women over sixty-five years of age cannot procreate.
6. Therefore, women over sixty-five years of age should not be able to marry.

Every jurisdiction, however, allows women over sixty-five to get married. Therefore, one of the premises of this argument is false or the argument is invalid. Advocates of the standard argument for procreation need to accept premise (4)—this premise is crucial to their argument against same-sex marriage—and they cannot deny premise (5). Thus, they are left with an apparent dilemma. The advocates could either (i) accept (6), which is a radical conclusion, particularly because no jurisdiction accepts it, and it probably violates the fundamental right to marriage of women over sixty-five, or (ii) they could grant that the logical step from premises (4) and (5) to (6) is invalid. However, the latter alternative is not appealing to opponents of same-sex marriage since this would seem to entail that the similar logical step from premises (1) and (2) to (3) is also invalid.

Some legal commentators have responded to analogies like this one involving same-sex couples on the one hand, and different-sex couples involving women over sixty-five on the other, by pointing to what they think is the crucial difference between different-sex couples who cannot procreate and same-sex couples. They say that even though neither type of couple can procreate, infertile different-sex couples, but not same-sex couples, can engage in "reproductive-type" acts, that is, acts of the type that

59. See cases cited supra note 53.
sometimes lead to procreation. According to John Finnis, couples participate in what he calls “the marital form of life”: [B]ecause they can make every commitment and can form and carry out every intention that any other married couple need make, form, and carry out in order to be validly married and to fulfill all their marital responsibilities. By their model of fidelity within a relationship involving acts of the reproductive kind (and no other sex acts), these infertile marriages are, moreover, strongly supportive of marriage as a valuable social institution.

On Finnis’s view, the crucial difference between infertile different-sex couples and same-sex couples that explains why the former, but not the latter, should be able to marry is that some of the sex acts in which infertile different-sex couples engage are of the “reproductive” sort even though, since they are infertile, their sex acts cannot in fact be reproductive.

In response, I note that a same-sex couple in Massachusetts, Iowa, or Connecticut—the three states at present where same-sex couples can legally marry (same-sex couples will also soon be able to marry in New Hampshire, Vermont, and, depending on the outcome of a petition drive, in Maine)—has the same potential to “participate in the marital form of life” as does the infertile different-sex couple except, to be blunt, for engaging in “penis-penetrates-vagina” sex. Procreative capacity aside, what is special about penis-vagina sex as compared to “penis-penetrates-anus,” “penis-penetrates-mouth,” or “tongue-penetrates-vagina” sex? Finnis’s focus on “penis-penetrates-vagina” sex seems arbitrary, once the procreative capacity of such sex is not at issue. Further, some different-sex couples cannot engage in penis-penetrates-vagina sex and are still allowed to marry. Men who have been castrated and women who suffer from vaginismus—a condition involving involuntary tightness of the vagina during attempted intercourse caused by involuntary contractions of the pelvic floor surrounding the vagina—are still allowed to marry even though they cannot engage in penis-penetrates-vagina sex. The response of Finnis and others to the

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60. See, e.g., John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97, 128 (1997); Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. JURIS. 135, 150 (1997). In a similar vein, Justice Cordy’s dissent in *Goodridge* talks about limiting marriage to couples who could “at least theoretically procreate,” attempting to include infertile different-sex couples in the group of couples who can marry while excluding same-sex couples. 798 N.E.2d at 1002 & n.35 (Cordy, J., dissenting); see also *BENNETT*, *supra* note 21, at 133.


62. See, e.g., *T. v. M.*, 242 A.2d 670 (N.J. Super. Ct. Ch. Div. 1968); *Vanden Berg v. Vanden Berg*, 197 N.Y.S. 641 (N.Y. Sup. Ct. 1923). In both of these cases, the courts granted an annulment to a husband whose wife suffered from vaginismus. There was, however, nothing preventing the men in these cases from staying married to their wives and seeking sexual pleasure with them through other marital sex acts or staying married to their wives and simply not having sex with them. The point is
claim that the standard argument from procreation is invalid thus fails.

When confronted with the dilemma that arises when the standard argument from procreation is paired with isomorphic arguments like the argument from premises (4) and (5) to (6), courts until recently treated the dilemma as insignificant or exceptional, simply rejecting such isomorphic arguments by taking judicial notice that most marriages involved (non-assisted) procreation and most procreation took place in the context of marriage. Social and legal changes have, however, undercut this defense of the standard argument from procreation. Today, courts have difficulty dismissing questions about the truth of the premises and the validity of the logical form of the standard argument from procreation.

II. THE “ACCIDENTAL PROCREATION” ARGUMENT AND ITS PROBLEMS

A. The New Argument from Procreation

As courts began to doubt the standard argument from procreation for the prohibition of same-sex marriages, the accidental procreation argument emerged. The goal of this new argument is to justify giving the benefits of marriage to different-sex couples but not same-sex couples by focusing on the risk of having “unplanned” children. Because states are legitimately concerned for unplanned children that might result from the accidental procreation of different-sex couples, a state is justified in offering marriage exclusively to different-sex couples as incentive for them to get married and form stable families. The first published judicial opinion to embrace the accidental procreation argument was Justice Robert Cordy’s dissent in Goodridge v. Department of Public Health, the landmark 2003 Massachusetts case that produced the first legal same-sex marriages in the United States. The first majority opinion to make this argument was in 2005 by an Indiana appellate court in Morrison v. Sadler, where that court upheld that a woman with vaginismus can still legally marry, even though penis-penetrates-vagina sex is difficult, painful, or impossible for them.

63. See, e.g., Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971). When courts today accept the standard procreation argument, they do so as part of a “rational review” analysis. See, e.g., Conaway v. Deane, 932 A.2d 571, 632–34 (Md. 2007); Goodridge, 798 N.E.2d at 1002 n.35 (Cordy, J., dissenting). For a discussion of the accidental procreation argument under rational review analysis, see infra text accompanying notes 125–34.

64. For other discussions of the problems with the standard argument from procreation, see, for example, Laurence Drew Borton, Note, Sex, Procreation, and the State Interest in Marriage, 102 COLUM. L. REV. 1089 (2002); Dale Carpenter, Bad Arguments Against Gay Marriage, 7 FL. COSTAL L. REV. 191, 192–207 (2005); Jamal Greene, Comment, Divorcing Marriage from Procreation, 114 YALE L.J. 1989 (2005).

65. 798 N.E.2d at 995 (Cordy, J., dissenting).
Indiana’s prohibition of same-sex marriages. In the following year, the highest courts of New York and Washington, in the context of similar legal challenges, also embraced this argument. The U.S. Court of Appeals for the Eighth Circuit did the same in a case concerning the constitutionality of a Nebraska constitutional amendment that defined marriage as between one man and one woman and refused recognition to all types of marriage-like relationships between two people of the same sex. In the most developed articulation of this argument, the court in Morrison stated:

[There is a] key difference between how most opposite-sex couples become parents, through sexual intercourse, and how all same-sex couples must become parents, through adoption or assisted reproduction . . . . Those persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. “Natural” procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or planning. All that is required is one instance of sexual intercourse with a man for a woman to become pregnant.

What does the difference between “natural” reproduction on the one hand and assisted reproduction and adoption on the other mean for constitutional purposes? It means that it impacts the [s]tate[s] . . . clear interest in seeing that children are raised in stable environments. Those persons who have invested the significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the “protections” of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place.

By contrast, procreation by “natural” reproduction may occur without any thought for the future. The State . . . may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from “casual” inter-

67. Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) (plurality opinion); Andersen v. King County, 138 P.3d 963, 1002 (Wash. 2006) (Johnson, J., concurring). The reasoning in Andersen, for example, was as follows: Unlike same-sex couples, only opposite-sex couples may experience unintentional or unplanned procreation. State sanctioned marriage as a union of one man and one woman encourages couples to enter into a stable relationship prior to having children and to remain committed to one another in the relationship for the raising of children, planned or otherwise. Id. See also Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 518–20 (Conn. 2008) (Zarella, J., dissenting).
68. Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 867 (8th Cir. 2006) (“[R]esponsible procreation’ theory . . . justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot.”).
course. . . . The institution of marriage not only encourages opposite-sex couples to form a relatively stable environment for the "natural" procreation of children . . . , it also encourages them to stay together and raise a child or children together if there is a "change in plans."

One of the State's key interests in supporting opposite-sex marriage is [to] . . . encourage . . . opposite-sex couples who, by definition, are the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e. a child, to procreate responsibly.69

Also, in the New York case upholding the constitutionality of New York's prohibition on same-sex marriage, in part, because of the accidental procreation argument, the plurality opinion of the state's highest court said the following:

Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. . . . The Legislature could . . . find that [sexual] relationships [between a man and a woman] are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.70

The accidental procreation argument draws on actual biological differences between men and women to distinguish same-sex couples and different-sex couples: because of the different structure of the male and female reproductive systems, couples consisting of one man and one woman are at risk of accidentally procreating, while couples consisting of two people of the same sex are not. According to this argument, the state can respond to the distinctive risk facing male-female couples by providing incentives71 for them to form stable relationships that will provide stable

70. Hernandez, 855 N.E.2d at 7 (plurality opinion). See also id. at 21–22 (Graffeo, J., concurring) stating that:

It is not irrational for the Legislature to provide an incentive for opposite-sex couples—for whom children may be conceived from casual, even momentary intimate relationships—to marry, create a family environment, and support their children. Although many same-sex couples share these family objectives and are competently raising children in a stable environment, they are simply not similarly situated to opposite-sex couples in this regard given the intrinsic differences in the assisted reproduction or adoption processes that most homosexual couples rely on to have children.

Id. The Hernandez plurality consisted of three out of six judges (R. Smith, Read, and G. Smith) who sat for this case. See id. Two judges (Kaye and Ciparick) dissented and one judge (Graffeo) wrote a concurrence, which was joined by one of the two judges (G. Smith) who joined the plurality opinion. See id.

environments for children in case accidental procreation occurs. The focus on actual differences between men and women is useful because such differences seem unassailable; the U.S. Supreme Court has cited such actual differences, although in limited contexts, as surviving constitutional scrutiny. As such, this argument has the potential to take the place of the standard argument from procreation as a way of justifying access to marriage for different-sex couples, but not for same-sex couples.

In his influential article, The Channeling Function in Family Law, Carl Schneider focused on how family law is in some sense a form of social engineering. By creating the legal institution of marriage, providing certain rights, benefits, duties, and responsibilities that go along with it, and offering other incentives to enter into marriages, states encourage and socialize people to get married. According to the accidental procreation argument, the central aim of marriage law is to channel different-sex couples into stable living situations in order to best provide for any unplanned children.

The logical form of the accidental procreation argument is more complicated and harder to characterize than the standard argument from procreation. The accidental procreation argument focuses on the relative risks of accidental procreation for different-sex couples as compared to same-sex couples. The argument also appeals to a state’s interest in providing children with stable living environments, the role that marriage plays in encouraging such stability, and the claim that couples who have children through planning thereby provide such children with a stable environment. Thus, the logical form of this argument could be characterized as follows:

7. Different-sex couples sometimes procreate without intending to procreate.
8. Same-sex couples cannot procreate without intending to procreate.
9. The state has an important interest in child rearing, with a particular focus on trying to keep children out of unstable living situations.
10. Marriage increases the chances of stability for those who enter into it.

11. People who plan to have children are more likely to be able to provide the children that result with a stable environment whether or not they are married.

12. Therefore, the state can restrict marriage to different-sex couples.

The next section of this Part explores the connection between the accidental procreation argument and sociobiology, the multidisciplinary field of study that uses evolutionary theory to try to explain social behaviors of all species by focusing on the selective advantage of such behaviors. The subsequent section reviews several criticisms of the accidental procreation argument, showing that this argument faced some of the same problems faces by the standard argument from procreation, as well as some distinctive problems.

B. The “Sociobiological” Connection

The accidental procreation argument has a noteworthy affinity with sociobiological accounts of the differences between men and women and the role marriage plays in providing a stable environment for children. Consider this typical sociobiological account of the difference between men and women:

Males . . . [have] small sex cells, females . . . [have] the large sex cells. The large female gametes remain reasonably stationary and come loaded with nutrients. The small male gametes are endowed with mobility and swimming speed. Along with differences in the size and mobility of the sex cells comes a difference . . . in quantity. Men, for example, produce millions of sperm, which are replenished at the rate of roughly twelve million per hour, while women produce a fixed and unreplenhishable lifetime supply of approximately four hundred ova.

Women’s greater initial investment does not end with the egg. Fertilization and gestation, key components of human parental investment, occur internally within women. One act of sexual intercourse, which requires minimal male investment, can produce an obligatory and energy-consuming nine-month investment by the woman that forecloses other mating opportunities. Women then bear the exclusive burden of lactation, an investment that may last as long as three or four years.74

Sociobiologists and evolutionary psychologists—who, like sociobiologists, try to use evolutionary theory to explain human behavior, but

instead they do so by focusing on how evolution shaped the mental mechanisms that cognitive science studies—suggest that these biological differences between men and women have important behavioral, psychological, and social consequences. The following analysis offers a standard sociobiological account:

Evolutionary theory predicts that several important consequences will follow [from biological sex differences]. For example, males as a rule have a good deal more to gain by competing for mates. A Don Juan can theoretically become a father every night. There is strong selection pressure to acquire both the power to charm the ladies and the power to conquer other males. As a result males are typically more reckless and ostentatious than females, and extremely intolerant of being cheated.

[For females,] it is to their advantage to be more discriminating: flirtatious to attract many suitors, but also hesitant, socially skilled, and perceptive in order to mate with the males most competent in dealing with other males and most likely to devote himself to childrearing.

In light of the different reproductive systems of men and women and the evolutionary history behind such differences, some have argued that marriage plays an important role in reducing the likelihood that men will abandon the women with whom they have sex. As one popularizer of evolutionary psychology put it:

If we hypothetically accept the Darwinian view that men (consciously or unconsciously) want as many sex-providing and child-making machines as they can comfortably afford, and women (consciously or unconsciously) want to maximize the resources available to their children[,] then we may have the key to explaining why monogamous marriage is with us today.

Or, as Judge Richard Posner wrote in a book that draws extensively on sociobiological theory, “It is not heterosexuality that contributes stability [to a marriage], but the presence of a female.”

Continuing with this sociobiological account, because men sometimes abandon their female sexual partners and because sex between men and women can sometimes lead to unintended procreation, women who have sex with men will often be left to care for their accidentally-produced offspring alone. In the words of Justice Cordy’s dissenting opinion in *Goodridge*:


77. RICHARD A. POSNER, SEX AND REASON 306 (1992) (alteration in original) (citing DONALD WEBSTER CORY, THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH 141 (1951)).
Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child.  

Because a potentially unstable situation results when a child will be cared for by one biological parent rather than two, marriage provides a way to improve the chances of a stable relationship between a father and his offspring and the father and the mother of a child. Or, as the same dissent put it, "marriage . . . formally bind[s] the husband-father to his wife and child, and impos[es] on him the responsibilities of fatherhood."  

Sometimes a woman can find a man other than her child's biological father to co-parent with her. Sociobiologists and other researchers have, however, argued that having a stepfather is a powerful risk factor for severe child maltreatment, because, according to the evolutionary point of view adopted by sociobiologists, the stepfather will see the stepchild as competing with him—and any children he might have—for the care and attention of his wife.  

The connection to the accidental procreation argument is that, in light of this or another sort of biological or social scientific theory, a legislature might believe that children resulting from accidental procreation who live with their married parents will turn out better than children raised by their biological mothers living alone or with men (or women) who are not the fathers of the children. To encourage stable environments for childrearing, a legislature might, therefore, offer incentives to different-sex couples to formalize their relationships. Marriage, it has been argued, provides just such encouragement.  

C. Problems with the Accidental Procreation Argument  

Various problems face the accidental procreation argument, some of which parallel the problems with the standard procreation argument. First,
many couples who, in fact, are allowed to marry cannot accidentally procreate. Infertile couples, for example, are allowed to marry, but there is no risk that they will accidentally procreate. Similarly, there are different-sex couples who, while not infertile, require medical intervention in order to procreate. These couples are not at risk of procreating accidentally, and, yet, they are allowed to marry. Further, even prisoners who have no chance of parole or conjugal visits—and thus who have no opportunity to engage in behaviors that could lead to accidental procreation—are permitted to get married. These and similar examples create a problem for the accidental procreation argument. According to this argument, a state may prohibit same-sex couples from marrying because same-sex couples cannot accidentally procreate, but infertile couples—some of whom could be easily identified at the time they apply for a marriage license (for example, couples that include women over sixty-five)—are not prohibited from marrying. This problem parallels the problem that the standard argument from procreation has regarding infertile couples and the like.

Second, although same-sex couples cannot accidentally procreate, they can, in various ways, wind-up having to take care of children without having planned to be parents. For example, suppose that Adam and Steve are a same-sex couple and that Adam’s sister, Eve, and her husband designate Adam and Steve as the guardians of their young children if they should die. If Eve and her husband unexpectedly die, Adam and Steve could find themselves unexpectedly the guardians of these children (in states that allow second-parent adoption, that is, adoption by two people of the same sex, Adam and Steve could jointly adopt these children). If marriage is supposed to improve the chances of a stable environment for unexpected children, then why do most states fail to provide that same chance at a more stable environment to the unexpected children of parents of the same sex? Why should a state offer marriage as an incentive for only a subset of the class of parents of unexpected children—children who result from accidental procreation—when other accidental children have the very same need for a stable environment as the children of accidental procreation? To return to my hypothetical, if marriage provides stability to relationships, it would be potentially useful for Eve’s children if Adam and Steve were married, as marriage could contribute to the stability of Adam and Steve’s relationship and, thus, to the stability of the environment in

82. See supra text accompanying notes 52–62.
which Eve’s children unexpectedly find themselves.

Third, there is another, more serious, problem for the accidental procreation argument related to same-sex couples who act as parents. If, according to the accidental procreation argument, the goal of marriage is to provide stability for children, then, even though the parents of same-sex couples are more “heavily invested” in their children because of what same-sex couples need to do to have children, children of same-sex couples still need the stability that comes from having parents who are married. Just like relationships between different-sex couples, relationships between same-sex couples sometimes come to an end. When relationships break up and children are involved, the legal status that comes with marriage helps provide stability for children. If, for example, two women living together in a relationship decide to have children and one of them—the bio-mother—is inseminated and, as a result, subsequently has a child, in some jurisdictions, unless the two women are married, in a civil union or in a domestic partnership or unless the non-bio-mother has adopted the child, then the non-bio-mother’s relationship with the child is that of a legal stranger. This scenario has, unfortunately, been played out many times, and the result is instability for children: a child who has developed a parental relationship with each of his two mothers (his bio-mother and his non-bio-mother, although he probably will not conceptualize his relationships with them in this way) will be at risk of losing his relationship with his non-bio-mother, losing the extra security of having two parents to provide emotional and financial support, and the like. Even in jurisdictions where the non-bio-mother can adopt the child, for one reason or another, sometimes a child is not adopted even though the two women are both co-parenting and cohabitating. Allowing same-sex couples to marry would provide their children with improved chances for stability by providing an additional pathway for a child to have a legal relationship with his or her non-bio-parent.

Fourth, more generally, the accidental procreation argument assumes, without any evidence, that couples who plan to have children are going to be better and more stable at raising their children. Couples who adopt or use reproductive technologies to have children may have invested more resources and emotional energy in getting their children, but having made a plan and invested resources to parent is not the same as having good parenting skills. Further, it is well established that many forms of assisted

reproductive techniques can be very stressful and emotionally draining for the prospective parents. Both adoption and reproductive techniques can also be quite expensive and time consuming; parents who make use of these techniques may find themselves in financial difficulty because of the costs involved. In fact, some people who make use of assisted reproduction techniques get drawn into the process without appreciating how much it will eventually cost them. Cost and time considerations are especially significant for gay male couples, who must find both an egg donor and a surrogate to gestate the resulting fertilized egg. This problem relates to premise 11 of the schematic form of the accidental procreation argument in section A above. Given the costs in terms of time, money, and emotional energy and the serious stress that can be involved in getting children using the various forms of assisted reproduction, the children of same-sex couples who result from planned procreation may sometimes find themselves in environments that are no more stable than children that result from accidental procreation.

Fifth, even setting aside these first four problems, allowing same-sex couples to marry would in no way interfere with a state’s ability to use marriage to provide incentives for different-sex couples to enter stable relationships. The dissent in the New York same-sex marriage case pointed out that “while encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the exclusion of gay men and lesbians from marriage in no way furthers this interest. There are enough marriage licenses to go around for everyone.” A state can still incentivize couples at risk of accidentally procreating even if it allows same-sex couples to marry. The incentives for potential accidental procreators to marry are the same whether or not same-sex couples can marry.


89. Hernandez v. Robles, 855 N.E.2d 1, 30 (N.Y. 2006) (Kaye, C.J., dissenting); see also Varnum v. Brien, 763 N.W.2d 862, 901–02 (Iowa 2009); Andersen v. King County, 138 P.3d 963, 1018 (Wash. 2006) (Faircloth, J., dissenting) (“[D]enying same-sex couples the right to marry ... will not encourage couples who have children to marry or stay married for the benefit of their children.”).

90. Some opponents of legal recognition of same-sex relationships have argued that allowing such legal recognition would lead to a decrease in the numbers of heterosexuals who marry. See, e.g., Goodridge v. Dep’t. of Pub. Health, 798 N.E. 2d 941, 1002 (Mass. 2003) (Cordy, J., dissenting); Kmiec, supra note 21, at 661; Robert H. Bork, The Necessary Amendment, FIRST THINGS, Aug.-Sept. 2004, at 17, available at http://www.firstthings.com/article.php3?id_article=369. For empirical evidence that this has not happened in Scandinavia (a favorite example of opponents of same-sex marriage), see WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OF FOR WORSE?
Sixth, there is a further problem facing the accidental procreation argument. According to this argument, marriage for different-sex couples provides stability to children that might result from accidental procreation. For this to be true, the benefits that are associated with marriage need to be substantial enough to convince some different-sex couples who would not marry without the benefits associated with marriage to get married and stay married. While the benefits that are in fact given to different-sex couples are numerous, the collection of benefits provided to people who marry seems inadequate incentive to motivate a person or couple to marry when they are not otherwise inclined to do so. Relatedly, even if some potentially accidental procreators are convinced to marry because of the benefits, it is not clear that the resulting marriages will be stable. After all, shot-gun marriages and marriages procured simply for the benefits are likely to break up.

Seventh, a state has other important interests in marriage besides providing a stable environment for procreation. As the California Supreme Court said, “although promoting and facilitating a stable environment for the procreation and raising of children is unquestionably one of the vitally important purposes underlying the institution of marriage and the constitutional right to marry,... this right is not confined to, or restrictively defined by, that purpose alone.” In Turner v. Safley, which involved restricting prisoners’ opportunities to marry, the U.S. Supreme Court held that such restrictions were unconstitutional, stating:

Many important attributes of marriage remain... after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance;... the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication.... Finally, marital status often is a pre-condition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock).

WHAT WE’VE LEARNED FROM THE EVIDENCE (2006). For further critique of this argument against same-sex marriage, see, for example, Carpenter, supra note 64, at 197–202.

91. See supra note 71.
92. Kerry Abrams & Peter Brooks, Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation, 21 YALE J.L. & HUMAN. (forthcoming 2009) (manuscript at 28, on file with authors) (“It’s far from clear that a potentially irresponsible procreator contemplating marriage would look at the package of goodies offered by the state and conclude that marriage is a good idea.”).
THE "ACCIDENTAL PROCREATION" ARGUMENT

These observations suggest that the accidental procreation argument is based on an overly simple picture of the purpose of marriage, according to which there is only one government interest in marriage: protecting the children of accidental procreation. That picture is not only overly simple, it is historically and descriptively inaccurate. In short, although providing stability to children who might result from accidental procreation may be one of the various purposes that a state has for creating or sustaining marriage, it is hardly the reason a state is interested in marriage.95

Finally, the contrasting picture of the irresponsibility of heterosexuals in sexual relationships compared to the unquestioned altruism of gay men and lesbians who want to be parents and the rock-solid strength of the relationships of lesbians and gay men who decide to have children is so bizarre as to reveal that the accidental procreation argument must have been developed for the very purpose of justifying marriage for different-sex but not same-sex couples. Not very long ago, a central trope of courts and legal commentators was that the instability of same-sex relationships made LGBT people unsuited for marriage, poorly qualified to have custody of their own children,96 ineligible to adopt children or be foster parents,97 and not deserving of (unsupervised) visitation of their children.98 Gay men, in particular, were seen as almost constitutionally unable to form stable relationships.99 In light of this recent history, it is hard to take courts seriously when they talk about how stable same-sex relationships are when children come into the picture.

Additionally, it is especially ironic that the accidental procreation argument, which paints this flatteringly idealistic picture of the stability of same-sex couples who become parents, is embraced in the same briefs as the "gays make bad parents" argument. This tension between two of their primary legal arguments suggests that opponents of same-sex marriage are making any argument they think has a chance of persuading judges, regardless of the argument's plausibility, the strength of its premises, or its validity. When courts embrace both the accidental procreation argument and the

95. See Abrams & Brooks, supra note 92.
97. See, e.g., Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004); In re Opinion of the Justices, 530 A.2d 21 (N.H. 1987).
99. See, e.g., Posner, supra note 77, at 306 ("The male taste for variety in sexual partners makes the prospects for sexual fidelity worse in a homosexual than in a heterosexual marriage.").
“gays make bad parents” argument, as more than one court has in the past few years, this create the appearance that these courts began with the conclusion that the prohibition of same-sex marriage is constitutional and then looked for any arguments, even conflicting ones, that might justify this conclusion.

D. The Constitutional Context

The success or failure of arguments for prohibiting same-sex marriage in court seems to have a great deal to do with the level of constitutional analysis that a court applies. Questions about the appropriate level of constitutional analysis take place in two different jurisprudential contexts: substantive due process and equal protection. Traditionally, in either context, a law may be evaluated under either “heightened scrutiny,”—more specifically, either “strict” or “intermediate” scrutiny—under which courts will approach a law with great skepticism, or “rational review,” under which courts will approach the law with significant deference. Some have suggested that this “tiered” approach has evolved and more tiers have emerged, namely, a “more searching form of rational review” (also known as “rational review with bite”) and/or a weak form of intermediate scrutiny. Others have suggested that the tiered approach has been


101. Typically, in the same-sex marriage cases, this examination takes place at the level of the state constitution, not the United States Constitution, because advocates for legal recognition of same-sex relationships are careful to frame their legal arguments in terms of state constitutional law. State courts often say that they interpret claims relating to their State’s equal protection and substantive due process jurisprudence the same as claims relating to the respective federal constitutional jurisprudence. See, e.g., Hernandez, 855 N.E.2d at 9 (discussing how state equal protection clause is “no broader than the federal provision” and “same analytical framework” used for due process, although state constitutional analysis may lead to a “different result”). But see, Baker v. Vermont, 744 A.2d 864, 870 (Vt. 1999) (distinguishing Vermont’s Common Benefits Clause from Equal Protection Clause of U.S. Constitution).

102. Henceforth, I simplify matters by collapsing the difference between strict scrutiny and intermediate scrutiny. Sex classifications and classifications associated with birth status (that is, whether or not a person’s birth parents were married to each other, sometimes referred to as legitimacy) receive intermediate scrutiny in contrast to the strict scrutiny that racial, ethnic, and nationality classifications receive. See, e.g., Clark v. Jeter 486 U.S. 456, 461 (1988) (“Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.”).


105. See, e.g., Karen A. Hauser, Comment, Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add Up to the Need for Change, 65 U. CIN. L. REV. 891, 911–16 (1997) (arguing that the Supreme Court has developed a weak intermediate scrutiny standard—stronger than rational review, but weaker that the intermediate scrutiny that is applied to sex classifica-
rejected and replaced—or that the Supreme Court is at least moving in this direction—with some sort of general balancing test that looks at the type of classification at issue in a law and the nature of the regulation involved and, from this, produces the appropriate level of review. I focus here on the traditional "tiered" approach, but note that the accidental procreation argument seems unlikely to survive constitutional muster under the aforementioned alternative approaches—that is, under a more searching form of rational review, a weak form of intermediate scrutiny, or a more general balancing test to determine the appropriate level of scrutiny—than under traditional rational review analysis.

Under the rational review test, a law is constitutional so long as it is rationally related to a legitimate state interest. Typically, rational review is a very easy standard to satisfy. Statutes that make use of non-suspect classifications and that do not infringe a fundamental right are afforded "a strong presumption of validity" such that a statute will satisfy rational review "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Although this oft-repeated account of how rational review works seems to suggest that virtually any law will satisfy this minimal level of scrutiny, rational-review jurisprudence is more nuanced than this language suggests, as evidenced by the fact that between 1972 and 1996, in almost 10% of the equal protection cases where rational review was applied, the Court found the statute at issue to be unconstitutional. This more nuanced formulation of rational review was evident in Romer v. Evans in which the Supreme Court said that when applying even "the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained" and that "[this] search for the link between classification and objective gives substance to the Equal Protection Clause."

Under both equal protection and due process analysis, some laws clearly require greater scrutiny than rational review. Under the Due Process Clause of the United States Constitution and under state constitutional provisions that involve substantive due process rights, a statute that infringes a
fundamental right is subject to heightened scrutiny. Starting with Loving v. Virginia, the Supreme Court has acknowledged the existence of a fundamental right to marry arising from the Due Process Clause of the Fourteenth Amendment. State courts typically find a similar right in their respective state constitutions. The existence of a fundamental right to marry does not entail that all restrictions of the right to marry are unconstitutional; rather, "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." Applying due process analysis, various restrictions on the right to marry have been found unconstitutional. Federal courts have, however, upheld some restrictions on this fundamental right, for example, restrictions on the number of people a person can be married to at the same time; restrictions on marriage by minors; and restrictions on prison guards marrying inmates. Additionally, state courts have also upheld restrictions on marriage, including, for example, prohibitions on incestuous marriages and on getting married without being tested for venereal diseases. In general, restrictions on the right to marry will be upheld as satisfying substantive due process if they can be justified by a significant state interest. Most courts that have heard constitutional challenges to the prohibition on same-sex marriage—even courts that ultimately found the prohibition to be unconstitutional—have found that the prohibition does not

111. See 388 U.S. 1 (1967) (overturning Virginia law prohibiting interracial marriages because, inter alia, it violated the fundamental right to marry); see also Turner v. Safley, 482 U.S. 78 (1987) (overturning Missouri prison regulations restricting marriage for prisoners on ground it violated the fundamental right to marry); Zablocki v. Redhail, 434 U.S. 374 (1978) (overturning Wisconsin law putting restrictions on marriage for people in arrears on child support obligations on ground that it violated the fundamental right to marry).

112. See, e.g., In re Marriage Cases, 183 P.3d 384, 419–20 (Cal. 2008); Conaway v. Deane, 932 A.2d 571, 603 (Md. 2007).

113. Zablocki, 434 U.S. at 386.

114. See cases cited supra note 111.


117. See, e.g., Keeney v. Heath, 57 F.3d 579 (7th Cir. 1995) (upholding rule that prohibited prison guards from becoming socially involved with prisoners against challenge that it violated right to marry).


119. See, e.g., Peterson v. Widule, 147 N.W. 966 (Wis. 1914); But see T.E.P. v. Leavitt, 840 F. Supp. 110 (D. Utah 1993) (striking down—without reaching the issue of the fundamental right to marry—state law prohibiting persons with AIDS from marrying on grounds that it violated Americans with Disabilities Act).
violates due process.\footnote{120}

In the equal protection context, the question is whether the law at issue makes use of a suspect classification or whether the law restricts a fundamental right. If a law makes use of a suspect classification or involves a fundamental right, then heightened scrutiny is applied. When heightened scrutiny is applied, the use of a suspect classification in the law or the law's infringement of the fundamental right must be "necessary to the accomplishment of some permissible state objective."\footnote{121} Although it sometimes seems like strict scrutiny is always fatal and that intermediate scrutiny is basically the same as strict scrutiny,\footnote{122} neither is always the case.\footnote{123}

Some courts have applied heightened scrutiny to the prohibition on marriage between people of the same sex,\footnote{124} while others have applied rational review.\footnote{125} Every court that has embraced the accidental procreation


\footnote{121} Loving v. Virginia, 388 U.S. 1, 11 (1967).

\footnote{122} See, e.g., United States v. Virginia, 518 U.S. 515, 533 (1996) (articulating the intermediate scrutiny test for sex classifications in a manner that brings it very close to the strict scrutiny test for race classifications); id. at 571–76 (Scalia, J., dissenting) (criticizing majority for slippage from intermediate scrutiny to strict scrutiny in relation to sex classifications).

\footnote{123} Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test."); see also Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that educational benefits related to diversity are compelling enough interests to justify considerations of race even under strict scrutiny); United States v. Paradise, 480 U.S. 149, 171 (1987) (holding affirmative action plan involving race classifications constitutional under strict scrutiny because narrowly tailored). Regarding the difference between strict scrutiny and intermediate scrutiny, see Nguyen v. INS, 533 U.S. 53, 71 (2001) (upholding in the face of intermediate scrutiny law that provided significantly more stringent requirements for obtaining U.S. citizenship for non-marital children of men who are U.S. citizens as compared to non-marital children of women who are U.S. citizens); see also cases cited supra note 72.

\footnote{124} See, e.g., Brause, 1998 WL 88743, at *5–*6 (applying heightened scrutiny because marriage involves sex classifications and fundamental right to choose life partner); Marriage Cases, 183 P.3d at 432–34, 442 (applying heightened scrutiny under both due process—because marriage is a fundamental right—and under equal protection—because sexual-orientation classifications warrant strict scrutiny); Kerrigan v. Comm't of Pub. Health, 957 A.2d 407, 476 (Conn. 2008) (applying heightened scrutiny under equal protection because sexual-orientation classifications warrant intermediate scrutiny); Baehr, 852 P.2d at 67 (applying heightened scrutiny under equal protection because marriage laws make use of sex classifications); Varnum v. Brien, 763 N.W.2d 862, 896 (Iowa 2009); Lewis, 908 A.2d at 211–12 (applying heightened scrutiny to marriage laws under the first paragraph of the state's constitution); see also Baker v. State, 744 A.2d 864, 878 (Vt. 1999) (applying heightened scrutiny under Common Benefits Clause of state constitution).

\footnote{125} See, e.g., Conaway v. Deane, 932 A.2d 571, 629 (Md. 2007); Goodridge, 798 N.E.2d at 961 (applying rational review because it was not necessary to consider arguments for applying heightened scrutiny since "the [marriage] statute does not survive rational basis review.");}
argument has done so in the context of applying rational review. In contrast, some of the courts that found the failure to allow same-sex couples to marry is unconstitutional have analyzed and rejected the accidental procreation argument in the context of applying heightened scrutiny, while some of the judges who have found that their state constitutions require the legal recognition of same-sex marriages have done so applying rational review.

Courts that have embraced the accidental procreation argument seem to be applying the weakest version of rational review, saying a legislature could believe that prohibiting same-sex marriage is rationally related to the legitimate state interest of providing a stable environment for children that result from accidental procreation. Even though such courts concede that the law in question does not closely fit with the state interest that allegedly justifies state law, these courts have held that the fit is close enough to satisfy rational review. The concurring opinion in Hernandez, for example, said:

[T]he marriage classification is imperfect and could be viewed in some respects as overinclusive or underinclusive since not all opposite-sex couples procreate, opposite-sex couples who cannot procreate may marry, and opposite-sex partners can and do procreate outside of marriage. It is also true that children being raised in same-sex households would derive economic and social benefits if their parents could marry. But under rational basis review, the classification need not be perfectly precise or narrowly tailored—all that is required is a reasonable connection between the classification and the interest at issue.

The Indiana appellate court in Morrison made a similar point:

A reasonable legislative classification is not to be condemned merely because it is not framed with such mathematical nicety as to include all within the reason of the classification and to exclude all others. There was a rational basis for the legislature to draw the line between opposite-sex couples, who as a generic group are biologically capable of reproducing, and same-sex couples, who are not. This is true, regardless of whether there are some opposite-sex couples that wish to marry but one or both partners are physically incapable of reproducing.

According to the Morrison court and both the Hernandez plurality

855 N.E.2d 1, 6, 11 (N.Y. 2006) (plurality opinion); Andersen v. King County, 138 P.3d 963, 980 (Wash. 2006).

126. See Marriage Cases, 183 P.3d at 431–33; see also Lewis, 908 A.2d at 230 (Poritz, C.J., concurring and dissenting).


128. 855 N.E.2d at 22 (Graffeo, J., concurring) (emphasis added); see also id. at 7–8 (plurality opinion).


130. Hernandez, 855 N.E.2d at 7 (plurality opinion).
and concurrence, the prohibition of same-sex marriages survives rational review even though the classification at issue—that is, only different-sex couples can marry—and the objective that is supposed to justify it—that is, providing stable family environments for children—do not fit. To put the point another way, these cases hold that the laws that prohibit same-sex couples from marrying satisfy rational review even though the classification in such marriage laws, which distinguishes same-sex couples and different-sex couples, is both over-inclusive (because some couples who cannot accidentally procreate are allowed to marry) and under-inclusive (because some couples with children who may need the stability that marriage provides are not allowed to marry).

Judges who find that the prohibition of same-sex marriages fails to pass constitutional muster argue that, even applying rational review, the link between the law and its objective is too tenuous. The dissent in Hernandez makes this point as follows:

Defendants primarily assert an interest in encouraging procreation within marriage. But while encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the exclusion of gay men and lesbians from marriage in no way furthers this interest. . . . [T]he statutory classification here—which prohibits only same-sex couples, and no one else, from marrying—is so grossly under-inclusive and overinclusive as to make the asserted rationale in promoting procreation "impossible to credit."\(^1\)

The Goodridge court makes a similar point as follows:

The "marriage is procreation" argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. . . . [T]he marriage restriction impermissibly "identifies persons by a single trait and then denies them protection across the board." . . . There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal.\(^2\)

The core issue that separates the two contrasting analyses of marriage laws that prohibit all same-sex couples from marrying is the strength of the link between the scope of this prohibition and the goal of providing children with a stable environment. Quite possibly no judge thinks that this link is perfect. Further, a few judges seem to claim that legislatures actually were thinking about providing stability for children who result from accidental procreation when the marriage laws were drafted.\(^3\) As the above

\(^1\) Id. at 30–31 (Kaye, C.J., dissenting) (quoting Romer v. Evans, 517 U.S. 620, 635 (1996)).

\(^2\) Goodridge, 798 N.E.2d at 962–63 (quoting Romer, 517 U.S. at 633).

\(^3\) See, e.g., Morrison, 855 N.E.2d at 30 ("[O]pposite-sex marriage is recognized and supported by law in large part to encourage 'responsible procreation' by opposite-sex couples.").
For reasons I discussed in the previous section, the accidental procreation argument is quite weak: it is in various ways over-inclusive and under-inclusive, it is based on a dramatically incomplete picture of the past and present purpose of marriage, an absurdly idealized account of the lives of people who have children as the result of planning, and a dramatic overestimation of the strength of the incentives that marriage provides. These infirmities would render this argument unconstitutional if it were offered as a justification for prohibiting the legal recognition of same-sex relationships under heightened scrutiny, weak intermediate scrutiny, rational review with bite, or under an approach that uses a balancing test to determine the appropriate amount of scrutiny. The question remains whether marriage laws that only allow different-sex couples to marry are a reasonable means for achieving the goal of providing stability to children, in particular, children who might result from accidental procreation by different-sex couples. That question is what divides courts that applied rational review analysis to marriage laws that allow only different-sex couples to marry and that consider the protection of children resulting from accidental procreation as the state interest in such laws.

My aim here is not to advocate for the legal recognition of same-sex relationships or for a particular account of the appropriate level of constitutional scrutiny that should be applied to either laws that make use of sexual-orientation classifications or that restrict the access of same-sex couples to marriage. Rather, my aim is to assess the accidental procreation argument. Although I find this argument to be quite weak, some courts, applying the weakest form of rational review, have found that protecting the children that result from accidental procreation to be a justification for prohibiting same-sex marriage that is strong enough to pass constitutional muster.

In Part I, I argued that the standard argument from procreation—although accepted by every court that heard a challenge to prohibitions on same-sex marriage in the 1970s and although accepted by some courts today—is generally rejected today. In fact, many states have refused to make the standard argument from procreation when defending their marriage laws, finding it too weak. The accidental procreation argument has the same infirmities as the standard procreation argument (as well as sev-

134. See supra notes 128–30 and accompanying text.
eral additional problems). Both arguments have problems with under- and over-inclusiveness and both problematically embrace an overly narrow account of the role of marriage. In light of these similarities, it seems that the accidental procreation argument should, like the standard argument from procreation, eventually wither under both empirical and logical analysis, and subsequently, be rejected by states as plausible justifications of prohibiting same-sex marriages and rejected by courts as not satisfying even the weaker form of rational review.

CONCLUSION

Since the 1970s, same-sex marriage litigation has had to confront various attempts to link marriage to procreation as part of the justification for excluding same-sex couples from marriage. Courts in the 1970s universally accepted the link between marriage and procreation that formed the crucial premise of the standard argument from procreation. Today this argument gets mixed results. The accidental procreation argument attempts to avoid the widely recognized problems with the standard argument from procreation by focusing on real differences between same-sex and different-sex couples: marriage does not uniquely and necessarily involve procreation, but marriage may provide a strong chance at stability for the children of different-sex couples that result from accidental procreation. Generally, the accidental procreation argument fails to provide a viable alternative to the standard argument for procreation. Some courts have, however, found that it satisfies rational review. Advocates of the legal recognition of same-sex relationships can undermine the accidental procreation argument if they can convince courts to ratchet up the scrutiny applied to laws that prohibit same-sex marriages even just a bit. Alternatively, they can try to show that the proffered justification of the same-sex marriage ban provided by the accidental procreation argument fails to satisfy even rational review. Given the similarities between the accidental procreation argument and the standard argument from procreation, there is reason for optimism that both attempts to link marriage and procreation to justify the ban on same-sex marriage will eventually fail.