

THE RIGHTS TO MARRY AND DIVORCE: A NEW LOOK AT SOME UNANSWERED QUESTIONS

CATHY J. JONES*

In 1978, the United States Supreme Court decided *Zablocki v. Redhail*,¹ invalidating a Wisconsin statute that denied a marriage license to any Wisconsin resident who was the noncustodial parent of minor children and who was under a court order to support those children, unless the applicant could prove that the support obligations had been met and that the children neither were public charges nor were likely to become public charges.² Justice Marshall, writing for the majority and employing an equal protection analysis, based the decision on the marriage license applicant's right to marry.³

Although several years have passed since *Zablocki*, a number of questions raised by the opinion remain unanswered. Today, there is little doubt that the right to marry is a "fundamental" right,⁴ but did that right exist as a fundamental right prior to *Zablocki*, as Justice Marshall

* Associate Professor of Law, Western New England College School of Law; B.A., Gettysburg College; J.D., Georgetown University Law Center; LL.M., Yale Law School. The author wishes to acknowledge Howard I. Kalodner, Dean, Western New England College School of Law, for providing institutional support that aided in the completion of this Article and Professor Anne Goldstein, Western New England College School of Law; Professor Jay Katz, John A. Garver Professor of Law and Psychoanalysis, Yale Law School; Professor Mary Margaret Stewart, Graff Professor of English, Gettysburg College; and Professor Walter Wadlington, James Madison Professor of Law, University of Virginia School of Law, for reading and commenting upon an earlier draft of this Article. The author assumes all responsibility, however, for the contents of the Article.

1. 434 U.S. 374 (1978).

2. *Id.*

3. *Id.* at 383-91.

4. See *infra* note 65 and accompanying text.

indicated in his opinion, or did the Court in fact decree the right to be fundamental in that case?⁵ After declaring marriage to be a fundamental right, what standard did the Court apply in determining whether the Wisconsin statute unconstitutionally restricted the right to marry and was that standard appropriate?⁶ Is an equal protection approach appropriate in addressing an infringement on the right to marry or, as Justice Stewart asserted in his concurring opinion in *Zablocki*,⁷ should the Court have adopted a substantive due process approach?⁸

Two additional questions are also appropriate for consideration. First, following *Zablocki*, what restrictions may states validly impose on individuals choosing to marry?⁹ Second, what is the status of the right to divorce? Although the Supreme Court has never held the right to divorce to be "fundamental,"¹⁰ *Zablocki* compels a closer examination of the question.¹¹ As a result of *Zablocki*, what restrictions may states legitimately impose on married individuals desiring to dissolve their marriages through divorce? Specifically, is *Sosna v. Iowa*,¹² a case in which the Supreme Court held valid a one-year residency prerequisite for filing for divorce, still good law?

This Article addresses the questions relating directly to the Supreme Court's decision in *Zablocki* and those relating to state restrictions on marriage and divorce. Part I of the Article explores the status of marriage as a "fundamental" right. Part II examines the standard used by the *Zablocki* Court to invalidate the Wisconsin statute. Part II also addresses the issues of whether the Court applied an appropriate standard in reviewing the statute and whether *Zablocki* and subsequent cases should be addressed as due process rather than as equal protection cases. Part III sets forth some of the traditional restrictions states have placed on individuals' decisions to marry (for example, age, mental competence, incest) and some more modern restrictions (such as tax laws, nepotism rules and prison marriage rules) that may be included within the *Zablocki* approach, and discusses whether these restrictions must now

5. See *infra* notes 13-65 and accompanying text.

6. See *infra* notes 67-120 and accompanying text.

7. 434 U.S. 374, 391-96 (Stewart, J., concurring).

8. See *infra* notes 121-41 and accompanying text.

9. See *infra* notes 142-248 and accompanying text.

10. See *infra* notes 249-54 and accompanying text.

11. See *infra* notes 255-97 and accompanying text.

12. 419 U.S. 393 (1975). See *infra* notes 298-340 and accompanying text for a discussion of state restrictions imposed on individuals seeking to dissolve their marriages through divorce.

fall as unconstitutional restraints on the fundamental right to marry. Part IV extends the right to marry into the realm of divorce and analyzes whether the two rights are in fact opposites and whether the decision in *Zablocki* should signal a new approach to state restrictions on divorce.

Throughout the Article the reader may ask whether states can financially afford to treat marriage as a fundamental right, whether society views such treatment as morally "right," and whether such treatment is even realistic if the outcome is the elimination of most or all current state restrictions on marriage and divorce. Part V, which concludes the Article, reviews this new look at the unanswered questions surrounding the rights to marry and divorce and addresses the issue of theory versus reality in the application of *Zablocki*.

I. MARRIAGE AS A FUNDAMENTAL RIGHT

In beginning the Court's evaluation of the Wisconsin statute at issue in *Zablocki*,¹³ Justice Marshall declared the right to marry to be of "funda-

13. WIS. STAT. § 245.10 (1973) provided:

(1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow said person to submit proof of his compliance with such prior court obligation Upon the hearing, if said person submits such proof and makes a showing that such children are not then and are not likely thereafter to become public charges, the court shall grant such order, a copy of which shall be filed in any prior proceeding . . . or divorce action of such person in this state affected thereby; . . . Any hearing under this section may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by said person of his financial resources that the latter has complied with prior court orders or judgments affecting his minor children, and also has shown that such children are not then and are not likely thereafter to become public charges. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting such marriage is filed with said county clerk.

(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, he must, prior to such marriage, obtain permission of the court under sub. (1)

(5) This section shall have extraterritorial effect outside the state; and [[sections of Wisconsin law] providing that out-of-state marriages to circumvent Wisconsin law are void] are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere.

mental importance."¹⁴ In support of his characterization of the right to

(Language in single brackets in original; language in double brackets added.) Criminal penalties could also attach to a marriage license applicant's failure to comply with § 245.10. WIS. STAT. § 245.30(1)(f) (1973).

The Wisconsin statute challenged in *Zablocki* applied not only to Wisconsin domiciliaries, but also to all residents, to marriage license applicants regardless of where they chose to marry, and to all noncustodial parents owing court-ordered support obligations to minor children regardless of which state's court entered the order. Wisconsin, therefore, could have declared void the marriage of a person who happened to be residing in Wisconsin for the purposes of attending college, even though the person was a domiciliary of any other state, the intended spouse was a domiciliary of any other state, the applicant was under a support order from any other state, and the applicant's minor children were domiciliaries of any other state. The applicant in such a situation also could have been subjected to criminal penalties for failure to comply with the Wisconsin statute.

14. 434 U.S. at 383. It is not altogether clear, however, how a right is determined to be "fundamental." Professors Nowak, Rotunda, and Young state that a court's decision to declare a right to be fundamental "involves a judicial determination that the text or structure of the Constitution evidences the existence of a value that should be taken from the control of the political branches of government." J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW at 594 n.21 (1983). Little more than that can be said, they believe, to describe fundamental rights "because fundamental rights analysis is simply no more than the modern recognition of . . . natural law concepts. . . ." *Id.* at 457.

In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Court stated that it "does not 'pick out particular human activities, characterize them as 'fundamental,' and give them added protection. . . ." To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." *Id.* 411 U.S. at 31 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (Stewart, J., concurring) (emphasis in original)). The Court continued:

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education [the issue in *Rodriguez*] is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. *Id.* at 333-34.

Justice Marshall disagreed with the *Rodriguez* Court's explanation of how a fundamental right is determined to exist. In his dissenting opinion, he rejected the idea that only those rights "explicitly or implicitly guaranteed by the Constitution" are to be deemed fundamental. *Id.* at 100 (Marshall, J., dissenting); see also *id.* at 62 (Brennan, J., dissenting). Especially significant to the *Zablocki* opinion was the statement in Justice Marshall's *Rodriguez* dissent that:

I would like to know where the Constitution guarantees the right to procreate, or the right to vote in state elections, or the right to an appeal from a criminal conviction. These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection.

. . . .

Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws

marry as a “fundamental liberty,”¹⁵ “fundamental,”¹⁶ of “fundamental character,”¹⁷ and a “freedom of choice [which is] fundamental”¹⁸ he cited a long list of prior Supreme Court cases,¹⁹ many of which dealt with privacy issues.²⁰ Although Justice Marshall wrote that these decisions “confirm that the right to marry is of fundamental importance for all individuals[,]”²¹ not a single case cited by the *Zablocki* Court in support of the proposition that marriage is a fundamental right was directly on point and none was a case dealing with a restriction upon marriage.²²

The Supreme Court opinion coming closest to holding marriage to be a

closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. Thus, it cannot be denied that interests such as procreation, the exercise of the state franchise, and access to criminal appellate processes are not fully guaranteed to the citizen by our Constitution. But these interests have nonetheless been afforded special judicial consideration in the face of discrimination because they are, to some extent, interrelated with constitutional guarantees. Procreation is now understood to be important because of its interaction with the established constitutional right of privacy. Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself. This is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental. *Id.* at 101-03 (citations omitted).

15. 434 U.S. at 383.

16. *Id.* at 385 n.10.

17. *Id.* at 386.

18. *Id.* at 387.

19. Justice Marshall cited: *Smith v. Org. of Foster Families*, 431 U.S. 816 (1977); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Whalen v. Roe*, 429 U.S. 589 (1977); *Paul v. Davis*, 424 U.S. 693 (1976); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *United States v. Kras*, 409 U.S. 434 (1973); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Maynard v. Hill*, 125 U.S. 190 (1888).

20. As Justice Marshall stated in *Zablocki*:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of [*Zablocki*] illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. . . . [I]f appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.

434 U.S. at 386 (footnote omitted).

21. *Id.* at 384.

22. Months before deciding *Zablocki*, the Court had decided *Califano v. Jobst*, 434 U.S. 47 (1977), another case concerning marriage. The *Jobst* Court, however, did not declare marriage to be a fundamental right. In terms of direct relevance to the right to marry of those cases cited by the *Zablocki* Court, restrictions upon divorce arguably do restrict the right to marry. See *infra* Section IV(A). But while the Court in *Boddie v. Connecticut* made reference to the right to marry, see, e.g., 401 U.S. 371, 374, 376, 381, the decision in *Boddie* was based primarily upon the facts that the state

fundamental right, and often cited as having settled the issue,²³ is *Loving v. Virginia*.²⁴ While the *Loving* Court referred to the "freedom to marry" as "one of the vital personal rights essential to the orderly pursuit of happiness by free men[,]""²⁵ as "one of the 'basic civil rights of man,' fundamental to our very existence and survival[,]""²⁶ and as a "fundamental freedom,"²⁷ *Loving* did not establish marriage as a fundamental right.

Loving v. Virginia, in which the Court struck down a Virginia statute prohibiting marriages between blacks and whites, was first and foremost an equal protection case dealing with discrimination based on race.²⁸ Six of the opinion's twelve pages dealt directly with constitutional issues. More than five of the six pages focused on the equal protection/race discrimination issue.²⁹ Only a portion of the final page discussed the substantive due process/right to marry issue.³⁰ Although the Court may have added the latter discussion to bolster the equal protection section of its opinion, the due process discussion was unnecessary to the holding and to the remainder of the decision.³¹ The language within the opinion's equal protection section also made clear that the right to marry was of secondary concern to the Court.³² Furthermore, the opinion's due

monopolized the means of dissolving marriage and that state required filing fees and court costs denied indigent divorce litigants procedural due process, rather than upon the right to marry.

23. See, e.g., *Holt v. Shelton*, 341 F. Supp. 821, 822-23 (M.D. Tenn. 1972).

24. 388 U.S. 1 (1967).

25. *Id.* at 12.

26. *Id.* at 12 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) and citing *Maynard v. Hill*, 125 U.S. 190 (1888)).

27. 388 U.S. at 12.

28. *Accord Zablocki*, 434 U.S. 374, 398 (Powell, J., concurring); *Baker v. Nelson*, 291 Minn. 310, 314, 191 N.W.2d 185, 187 (1971).

29. 388 U.S. at 7-12.

30. *Id.* at 12.

31. See Note, *Constitutional Law—Family Law—Right to Marry Deemed Fundamental Right*, *Zablocki v. Redhail*, 434 U.S. 374 (1978), 1979 Wis. L. REV. 682, 685 n.24.

32. The Court stated:

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so. . . .

388 U.S. at 7 (citations omitted). The Court continued, "In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id.* at 9. Later in the opinion the Court explained:

At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some

process section, in which the right to marry was discussed, contained no analysis in terms of what scrutiny should be applied when the right is infringed. In the equal protection section, on the other hand, the Court discussed the standard that the discriminatory classification had to satisfy were it to be held valid.³³

Although some courts, including the District Court in *Zablocki*,³⁴ cite *Loving* for the proposition that marriage is a fundamental right,³⁵ other courts do not interpret *Loving* in that manner.³⁶ In *Califano v. Jobst*,³⁷ for example, the United States Supreme Court mentioned *Loving* only in reference to "stereotyped generalizations about a traditionally disadvantaged group,"³⁸ and to "foist[ing] orthodoxy on the unwilling by banning, or criminally prosecuting, nonconforming marriages."³⁹ Although the Court in *Jobst* made reference to "a decision as important as marriage[.]"⁴⁰ the Court did not cite *Loving* as support.⁴¹

The *Zablocki* Court cited only two other cases with any direct relationship to marriage, *Boddie v. Connecticut*⁴² and *Maynard v. Hill*,⁴³

permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

Id. at 11. (Citation omitted.) The Court concluded its equal protection analysis by stating: "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." *Id.* at 12.

33. *Id.* at 8-11.

34. *Redhail v. Zablocki*, 418 F. Supp. 1061 (E.D. Wis. 1976).

35. *See, e.g., O'Neill v. Dent*, 364 F. Supp. 565, 568-69 (E.D.N.Y. 1973); *Holt v. Shelton*, 341 F. Supp. 821, 822-23 (M.D. Tenn. 1972); *Prout v. Maine Employment Sec. Comm'n*, 462 A.2d 1177, 1178 n.3 (Me. 1983). Likewise, some scholars have found the right to marry enunciated in *Zablocki* to be an extension of the right the Court set forth in *Loving*. *See, e.g., Karst, The Freedom of Intimate Association*, 89 YALE L.J. 624, 667 (1980); *Wadlington, Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 510 n.164 (1983).

36. *See, e.g., Baker v. Nelson*, 291 Minn. 310, 314, 191 N.W.2d 185, 187 (1971); *In re Ann Goalen*, 30 Utah 2d 27, 30 n.6, 512 P.2d 1028, 1030 n.6 (1973). Legal scholars also appear on the side of the argument that *Loving v. Virginia* did not establish marriage as a fundamental right. *See, e.g., Bratt, Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257, 262 (1984); *LeFrancois, The Constitution and the 'Right' to Marry: A Jurisprudential Analysis*, 5 OKLA. CITY U.L. REV. 507, 522 n.48 (1980); *Developments—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1249 (1980).

37. 434 U.S. 47 (1977). *Jobst* involved a challenge to Social Security regulations terminating benefits upon the recipient's marriage to a nonbeneficiary.

38. *Id.* at 54 & n.10.

39. *Id.* at 54 n.11.

40. *Id.* at 54.

41. 434 U.S. at 54 n.11. Subsequently, the Court in *Zablocki* did not cite *Jobst*, involving an asserted restriction on marriage and decided just months before *Zablocki*, in support of its position that marriage constitutes a fundamental right.

42. 401 U.S. 371 (1971).

both divorce cases. Although the *Boddie* Court referred to “the basic position of the marriage relationship in this society’s hierarchy of values[.]”⁴⁴ to marriage as “involv[ing] interests of basic importance in our society[.]”⁴⁵ and to the right to divorce as “the exclusive precondition to the adjustment of a fundamental human relationship[.]”⁴⁶ the issue in the case was whether indigent divorce litigants who could not pay state-required court fees and costs were denied procedural due process. The Court held that their rights were denied. While language in *Boddie*, when combined with the Court’s decision in *Zablocki*, may lend support to the existence of a fundamental right to divorce,⁴⁷ the case is not authority for the holding that marriage is a fundamental right.

Maynard involved property in the estate of a husband previously granted a legislative divorce in the Territory of Oregon without notice of the divorce having been given to the nonresident wife. Again, while the Court referred to marriage “as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution,”⁴⁸ the Court’s primary concern in talking of marriage was the power of the state to regulate all aspects of marriage and divorce.⁴⁹

The remaining cases the majority opinion cited in *Zablocki* to support the proposition that marriage is a fundamental right⁵⁰ are even less persuasive authority. Three of the cases the Court cited involved issues of procreation.⁵¹ Several concerned other family-related issues.⁵² A final

43. 125 U.S. 190 (1888).

44. 401 U.S. at 374.

45. *Id.* at 376.

46. *Id.* at 383.

47. *See infra* Section IV(A).

48. 125 U.S. 190, 205 (1888).

49. *Id.*

50. *See supra* note 19 and cases cited therein.

51. *Skinner v. Oklahoma*, 316 U.S. 535 (1942), which referred to marriage and procreation as being “fundamental to the very existence and survival of the race[.]” *id.* at 541, and which is the source of the “one of the basic civil rights of man” language, *id.*, quoted in so many of the privacy/procreation/family-related decisions, invalidated a statute compelling sterilization of certain felons. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court held unconstitutional as a violation of marital privacy a state statute forbidding married couples to use contraceptives. The Court there referred to marriage as:

a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred . . . [A]n 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.

Id. at 486. *See also* Justice Goldberg’s concurring opinion in *Griswold v. Connecticut* in which he

group was totally unrelated to marriage or other family matters.⁵³ Furthermore, many of the later cases the Court cited in *Zablocki* relied for their authority upon the earlier cases cited in *Zablocki*.⁵⁴ Rather than “confirm[ing] that the right to marry is of fundamental importance for all individuals,”⁵⁵ these cases form an interlocking network of citations

finds a fundamental right to marital privacy in the penumbras of the ninth amendment to the Constitution. *Id.* at 486-87, 491-92, 495-96. In *Carey v. Population Servs. Int'l.*, 431 U.S. 678 (1977), a case concerning a New York law placing restrictions on the sale of contraceptives, the Court referred to marriage as a decision “that an individual may make without unjustified government interference.” *Id.* at 685.

52. *Meyer v. Nebraska*, 262 U.S. 390 (1923), in which the Court included the right to marry within the concept of “liberty,” *id.* at 399, involved a statute forbidding the teaching of any modern language other than English to children before they entered the ninth grade. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), in which the Court referred to recognition of “that freedom of personal choice in matters of marriage and family life[.]” *id.* at 639, concerned a challenge to school board regulations mandating maternity leave for pregnant teachers five months before their expected childbirth date. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), in which the Court repeated the above-quoted passage from *LaFleur*, *id.* at 499, involved a challenge to a housing regulation containing a restrictive definition of the word “family.” (See also the references in Justice Stewart’s dissenting opinion to aspects of private family life such as the freedom to marry a person of another race that is constitutionally protected from state interference and to “fundamental decisions to marry and to bear and raise children.”) *Id.* at 536, 537 (Stewart, J., dissenting). Finally, *Smith v. Org. of Foster Families*, 431 U.S. 816 (1977), in which the Court quoted language from both *Griswold*, *id.* at 843-44, and *LaFleur*, *id.* at 842, concerned a challenge to a New York regulation governing the removal of children from foster families.

53. *Whalen v. Roe*, 429 U.S. 589 (1977), where “‘matters relating to marriage’” were given as an example of an “‘interest in independence in making certain kinds of important decisions[.]’” *id.* at 599-600 & n.26 (quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976)), involved a challenge to drug law record keeping requirements. *Paul v. Davis*, 424 U.S. 693 (1976), which characterized “matters relating to marriage” as “fundamental,” *id.* at 713, concerned an allegation of a civil rights act violation, 42 U.S.C. § 1983 (1981). Finally, *United States v. Kras*, 409 U.S. 434 (1973), in which the Court distinguished *Boddie* and referred to the marital relationship as “fundamental,” *id.* at 444, 446, involved a challenge to filing fees in a bankruptcy case brought by an indigent petitioner. See also Justice Stewart’s dissenting opinion in *Kras* in which he rejected the notion that the Court’s decision in *Boddie* was based on “any subjective conception of the ‘fundamentality’ of marriage, or divorce” 409 U.S. at 456 n.7 (Stewart, J., dissenting). Rather, Justice Stewart indicated, the Court decided *Boddie* as it did because the state monopolized the means for dissolving a marriage. *Id.* (Stewart, J., dissenting).

54. The Court in *Boddie v. Connecticut* cited *Loving*, *Skinner*, and *Meyer*. 401 U.S. 371, 376. The Court in *Kras* cited *Boddie*, *Loving*, *Griswold*, *Skinner*, and *Meyer*. 409 U.S. 434, 444. In *Cleveland Bd. of Educ.*, the Court cited *Loving*, *Griswold*, *Skinner*, and *Meyer*. 414 U.S. 632, 639-40. The Court in *Whalen v. Roe* cited *Davis*, *Loving*, *Griswold*, and *Meyer*. 429 U.S. 589, 600 n.26. In *Moore v. City of East Cleveland*, the Court cited *LaFleur*, *Loving*, *Skinner*, and *Meyer*. 431 U.S. 494, 499. In *Carey v. Population Servs. Int'l.* the Court referred to *LaFleur*, *Loving*, *Skinner*, and *Meyer*. 431 U.S. 678, 685. And in *Smith v. Org. of Foster Families*, the Court cited *Moore*, *LaFleur*, *Loving*, *Griswold*, *Skinner*, and *Meyer*. 431 U.S. 816, 842, 843, 844, 845.

55. *Zablocki*, 434 U.S. at 384.

that, at best, relate only peripherally to the right to marry.⁵⁶

Two other factors indicate that prior to the Court's decision in *Zablocki* the right to marry was not afforded "fundamental" status for purposes of Constitutional review.

First, in *Sosna v. Iowa*,⁵⁷ the divorce residency requirement case, Justice Marshall dissented from the Court's refusal to apply a fundamental rights analysis, arguing that "it is clear beyond cavil that the right to seek dissolution of the marital relationship is of such fundamental importance" that a heightened scrutiny should be applied in evaluating the requirement.⁵⁸ In his dissent, however, Justice Marshall did not pinpoint any precise authority declaring marriage to be a fundamental right. Instead, he quoted some of the same language and cited some of the same cases that he later relied upon in *Zablocki*.⁵⁹

Second, the separate opinions of Justices Stewart, Powell, and Rehnquist in *Zablocki* indicate that the right to marry did not exist as a fundamental right prior to *Zablocki*. Although agreeing that "in regulating the intimate human relationship of marriage, there is a limit beyond which a State may not constitutionally go[.]"⁶⁰ Justice Stewart rejected the notion that a constitutional right to marry existed.⁶¹ Justice Powell, although stating that "it is fair to say that there is a right of marital and familial privacy which places some substantive limits on the regulating power of government[.]" also concluded that "the Court has yet to hold that all regulation touching upon marriage implicates a 'fundamental right' triggering the most exacting judicial scrutiny."⁶² Justice Powell

56. It also may be that the Court's early use of the word "fundamental" in privacy related areas such as the childbearing cases was not meant to afford the right so described special deference under the Constitution, but rather was employed only "as a way of expressing the importance of the interest." Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 Nw. U.L. REV. 978, 987 n.40 (1981).

57. 419 U.S. 393 (1975).

58. *Id.* at 420 (Marshall, J., dissenting).

59. The previous decisions of this Court make it plain that the right of marital association is one of the most basic rights conferred on the individual by the State. The interests associated with marriage and divorce have repeatedly been accorded particular deference, and the right to marry has been termed "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). In *Boddie v. Connecticut*, 401 U.S. 371 (1971), we recognized that the right to seek dissolution of the marital relationship was closely related to the right to marry, as both involve the voluntary adjustment of the same fundamental human relationship. *Id.* at 383.

419 U.S. at 419-20 (Marshall, J., dissenting).

60. 434 U.S. 374, 392 (Stewart, J., concurring).

61. *Id.* (Stewart, J., concurring).

62. *Id.* at 397 (Powell, J., concurring) (footnote omitted). See *infra* notes 103-14 and accompa-

wrote in his concurring opinion that while the privacy-liberty line of cases that the majority cited “indicate[s] that there is a sphere of privacy or autonomy surrounding *an existing marital relationship* into which the State may not lightly intrude, *they do not necessarily suggest that the same barrier of justification blocks regulation of the conditions of entry into or the dissolution of the marital bond.*”⁶³ Justice Rehnquist in dissent rejected the propositions that marriage is a fundamental right and that the right justifies anything greater than rational basis scrutiny.⁶⁴

Whether or not the right to marry existed as a fundamental right prior to *Zablocki*, it has clearly been referred to as fundamental since that decision.⁶⁵ Traditionally, when states have restricted fundamental rights,

nying text for a discussion indicating that the majority’s opinion in *Zablocki* could be read as affording marriage fundamental right status, but not according it “the most exacting judicial scrutiny” standard of review.

63. *Id.* at 397 n.1 (Powell, J., concurring; emphasis added; citation omitted).

64. *Id.* at 407 (Rehnquist, J., dissenting).

65. *Druker v. Comm’r*, 697 F.2d 46, 49 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 2429 (1983) (income tax “marriage penalty” held valid); *Murillo v. Bambrick*, 681 F.2d 898, 902, 903 n.9 (3d Cir. 1982), *cert. denied*, 459 U.S. 1017 (1982) (upheld special matrimonial litigation fee imposed by New Jersey); *Ensminger v. Comm’r*, 610 F.2d 189, 193 (4th Cir. 1979) (challenge, in tax case, to local law prohibiting adult individuals from living together without benefit of marriage; held question of constitutionality of local law is matter to be left to state, not Commissioner); *Mapes v. United States*, 576 F.2d 896, 901 (Ct. Cl. 1978) (upheld validity of different tax rates applicable to married and unmarried taxpayers); *Salisbury v. List*, 501 F. Supp. 105, 108 (D. Nev. 1980) (held prison regulation concerning inmate marriage procedure unconstitutional); *Southwestern Community Action Council, Inc. v. Community Servs. Admin.*, 462 F. Supp. 289, 296 (S.D. W. Va. 1978) (upheld agency regulation prohibiting employment of person by agency in position over which member of employee’s immediate family exercised supervisory authority or served on board or committee with personnel authority); *Helvey v. Rednour*, 86 Ill. App. 3d 154, 158, 408 N.E.2d 17, 21 (1980) (parent’s due process and equal protection rights violated by section of adoption act giving guardian ad litem of mentally ill parent authority to consent to adoption of parent’s child); *Miller v. Morris*, 270 Ind. 505, 507, 386 N.E.2d 1203, 1204 (1979) (held unconstitutional *Zablocki*-type statute providing that person with dependent children would be denied marriage license unless person could prove compliance with court-ordered support); *Browder v. Harmeyer*, 453 N.E.2d 301, 305 (Ind. App. 1983) (no due process violation occurred in proceedings awarding adoption to maternal grandparents); *Prout v. Maine Employment Sec. Comm’n*, 462 A.2d 1177, 1178 n.3 (Me. 1983) (Court need not reach question of violation of constitutional right to marry where employee denied unemployment compensation benefits for leaving employment prior to marriage in light of company’s policy against employing persons related to each other because at time employee left employment company had not decided whether to enforce rule); *People v. De Stefano*, 121 Misc. 2d 113, 121, 467 N.Y.S.2d 506, 513 (Suffolk Co. 1983) (statute granting husband immunity from prosecution for rape of wife violates equal protection clause); *but see Wool v. Hogan*, 505 F. Supp. 928, 932 (D. Vt. 1981) (prison inmate’s right to go through marriage ceremony absent ability to cohabit, have sexual relations or procreate, does not in and of itself amount to a fundamental right).

Legal scholars have agreed with the courts that marriage is now a fundamental right. *See, e.g., Bennett, supra* note 56 at 978, 1003 n.99; Garfield, *The Transitory Divorce Action: Jurisdiction in the*

courts have applied strict scrutiny in evaluating the validity of the restrictions.⁶⁶ Questions remain, however, concerning the standard of review applied to the Wisconsin statute in *Zablocki* and the standard to be applied in future marriage restriction cases.

II. THE STANDARD OF REVIEW

A. *The Test*

In characterizing the scrutiny to be accorded Wisconsin's infringement on the right to marry, Justice Marshall wrote, "Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination' of the state inter-

No-Fault Era, 58 TEX. L. REV. 501, 518-19 (1980); Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 509 (1983); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 627, 668 n.203 (1980); Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1400, n.233 (1979); LeFrancois, *supra* note 36 at 507, 523; Comment, *A Constitutional Analysis of Pennsylvania's Restrictions Upon Marriage*, 83 DICK. L. REV. 71, 72, 73 (1978); *Developments, supra* note 36 at 1156, 1165; Note, *Califano v. Jobst, Zablocki v. Redhail, and the Fundamental Right to Marry*, 18 J. FAM. L. 587, 587 (1979-80); Note, *supra* note 31, at 682, 684, 689; Note, *Marital Status Discrimination: A Survey of Federal Caselaw*, 85 W. VA. L. REV. 347, 360 (1983); Note, *The Constitutionality of Parental Consent Requirements in Minor Marriages*, 12 U.C.D. L. REV. 301, 308 (1979); Note, *Zablocki v. Redhail: Due Process or Equal Protection*, 12 U.C.D. L. REV. 165, 166 (1979). *But see Address of Professor Anthony Amsterdam, Annual Judicial Conference, Second Judicial Circuit 1982*, 97 F.R.D. 545, 617 (1982) ("the right to marry is not, as such, one which is explicitly or implicitly guaranteed by the Constitution"); Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1625-26 (1979) ("[T]here is a range of rights—some more fundamental, some less. . . . Marriage and divorce seem both to be 'somewhat' fundamental." (Footnotes omitted, but comparing *Zablocki* with *Jobst*, and *Boddie* with *Sosna*)); Recent Cases, *Constitutional Law—Fourteenth Amendment—Equal Protection—Domestic Relations—Marriage—A Wisconsin Statute Restricting the Right to Marry of Those Under an Obligation to Support Minor Children Not in Their Custody Violates the Equal Protection Clause of the Fourteenth Amendment.—Zablocki v. Redhail*, 434 U.S. 374 (1978), 47 U. CIN. L. REV. 334, 339 (1978) (because the Court did not apply "strict scrutiny" to the statute in *Zablocki*, "it would seem that the right to marry is less fundamental than those other fundamental rights").

66. See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *id.* at 319 (Marshall, J., dissenting); *United States v. Kras*, 409 U.S. 434, 446 (1973); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Seoane v. Ortho Pharmaceuticals, Inc.*, 660 F.2d 146, 149 (5th Cir. 1981); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1172 (5th Cir. 1979); *Mapes v. United States*, 576 F.2d 896, 901 (Ct. Cl. 1978); *Dixon v. McMullen*, 527 F. Supp. 711, 720 (N.D. Tex. 1981). See also J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 14, at 591-92 (1983); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6 at 1000 (1978); Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CALIF. L. REV. 1049, 1054 (1979); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

ests advanced in support of the classification is required.”⁶⁷ Later, in limiting the cases to which *Zablocki* would apply, Justice Marshall explained, “By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny.”⁶⁸ Finally, Justice Marshall stated specifically the test to be applied: “When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”⁶⁹

The unresolved question, however, is the exact nature of the scrutiny to be applied when states attempt to restrict marriage. Is it strict scrutiny, requiring the classification to serve a compelling state interest and to be the least restrictive alternative available to the state to achieve its objective? Or, has *Zablocki*, with its “sufficiently important state interests” and “closely tailored” language, established that a lesser scrutiny is appropriate when dealing with restrictions on marriage, even if the right to marry is “fundamental?”

Justice Stevens, concurring in *Zablocki*,⁷⁰ a number of courts,⁷¹ and

67. 434 U.S. at 383.

68. *Id.* at 386.

69. *Id.* at 388.

70. “Neither the fact that the appellee’s interest is constitutionally protected, nor the fact that the classification is based on economic status is sufficient to justify a ‘level of scrutiny’ so strict that a holding of unconstitutionality is virtually foreordained.” *Id.* at 406 n.10 (Stevens, J., concurring). See Gunther, *supra* note 66, at 8 for a description of strict scrutiny as strict in theory but often fatal in fact.

71. *See, e.g.*, *Seoane v. Ortho Pharmaceuticals, Inc.*, 660 F.2d 146, 149 & n.6 (5th Cir. 1981) (challenge to constitutionality of legislation mandating review of malpractice claims by medical malpractice review boards); *DuPlantier v. United States*, 606 F.2d 654, 671 n.37 (5th Cir. 1979) (constitutional challenge to Ethics in Government Act of 1978 applying financial disclosure requirements to federal judges, spouses, and children); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1172 (5th Cir. 1979) (challenge to legislation mandating mediation prior to filing of medical malpractice claim); *Baker v. Wade*, 553 F. Supp. 1121, 1135 & n.32 (N.D. Tex. 1982) (constitutional challenge to Texas statute proscribing deviate sexual intercourse between individuals of same gender); *United States ex rel. Martin v. Strasburg*, 513 F. Supp. 691, 706 (S.D.N.Y. 1981) (habeas corpus action concerning juveniles held in preventive detention); *Farrington v. Adjutant General of the State of Michigan*, 492 F. Supp. 1362, 1369 (W.D. Mich. 1980) (challenge to residential qualifications for Michigan veterans’ bonus); *Commercial Fisheries Entry Comm’n v. Apokedak*, 606 P.2d 1255, 1261 & n.25 (Alaska 1980) (appeal by Fisheries Commission from Superior Court reversal of Commission order denying permit to commercial fisher pursuant to Limited Entry Act); *Helvey v. Rednour*, 86 Ill. App. 3d 154, 158, 408 N.E.2d 17, 21 (1980) (challenge to section of Adoption Act giving guardian ad litem of mentally ill parent authority to consent to adoption of parent’s child); *Commonwealth ex rel. Platt v. Platt*, 266 Pa. Super. 276, 307-08, 404 A.2d 410, 426 (1979) (Spaeth, J., concurring and dissenting)

several writers⁷² interpret *Zablocki* to mean that strict scrutiny should apply when the right to marry has been restricted. Justice Powell,⁷³ and several courts⁷⁴ and scholars⁷⁵ interpret the case to mean that strict scrutiny will apply, but only if the state restriction "significantly interferes" with the right to marry. A few court decisions⁷⁶ and commentators⁷⁷

(appeal from Common Pleas Court decision affirming certificate for involuntary commitment of patient into emergency psychiatric treatment); *Boucher v. Sayeed*, 459 A.2d 87, 91 & n.14 (R.I. 1983) (challenge to legislation creating medical malpractice review boards).

72. See, e.g., *Developments, supra* note 36, at 1192 n.231; Note, 18 J. FAM. L., *supra* note 65, at 603; Note, *supra* note 31, at 684; Note, 12 U.C.D. L. REV., *supra* note 65, at 166 & n.13.

73. "The Court apparently would subject all state regulation which 'directly and substantially' interferes with the decision to marry in a traditional family setting to 'critical examination' or 'compelling state interest' analysis." 434 U.S. at 396 (Powell, J., concurring) (emphasis added).

74. See, e.g., *Moran v. Beyer*, 734 F.2d 1245, 1246 (7th Cir. 1984) (challenge to state interspousal immunity statute used as basis for dismissing former wife's tort claim for intentional injuries inflicted during marriage); *Parsons v. County of Del Norte*, 728 F.2d 1234, 1237, *cert. denied*, 105 S. Ct. 158 (1984) (challenge to county anti-nepotism rule prohibiting spouses from working as permanent employees in same department); *Druker v. Comm'r*, 697 F.2d 46, 50 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 2429 (1983) (taxpayer challenge to "marriage penalty" on married taxpayers); *Sturgell v. Creasy*, 640 F.2d 843, 853 (6th Cir. 1981) (challenge to decision reducing family's AFDC grant because father received veteran's nonservice related pension); *Martin v. Bergland*, 639 F.2d 647, 649 (10th Cir. 1981) (challenge to Department of Agriculture regulation treating husband and wife as one person for purposes of statute placing limit on amount of farm program supplements person could receive); *Mapes v. United States*, 576 F.2d 896, 901 (Ct. Cl. 1978) (challenge to income tax rates distinguishing between married and unmarried taxpayers); *Cahoon v. Heckler*, 574 F. Supp. 1021, 1023 (D. Mass. 1983) (review of Health and Human Services Secretary's decision reducing divorced wife's Social Security benefits by amount of government pension); *Salisbury v. List*, 501 F. Supp. 105, 109 (D. Nev. 1980) (challenge to Nevada prison regulation affecting inmate marriage procedure); *Wiesenfeld v. State of New York*, 474 F. Supp. 1141, 1150 n.40 (S.D.N.Y. 1979) (challenge to increase in child support obligation); *Southwestern Community Action Council, Inc. v. Community Servs. Admin.*, 462 F. Supp. 289, 296 (S.D. W. Va. 1978) (challenge to agency regulation prohibiting employment of person in job over which member of person's immediate family exercises supervisory authority or serves on board or committee with authority over personnel matters); *Vannier v. Superior Court*, 32 Cal. 3d 163, 171, 650 P.2d 302, 306, 185 Cal. Rptr. 427, 431 (1982) (appeal from decision of Superior Court ordering petitioners to appear as witnesses before grand jury in Florida); *San Francisco v. Superior Court*, 125 Cal. App. 3d 879, 885, 178 Cal. Rptr. 435, 439 (1981) (Grodin, J., concurring) (city challenge to Superior Court order of disclosure of police officer's personnel files); *Dawson v. Public Employees' Retirement Ass'n*, 664 P.2d 702, 708 (Colo. 1983) (appeal from Retirement Association's denial of annuity from survivors' benefit reserve fund); *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 653, 458 A.2d 758, 788 (1983) (challenge to constitutionality of state's scheme of financing public schools); *Attorney General v. Johnson*, 282 Md. 274, 310, 385 A.2d 57, 78 (1978) (challenge to constitutionality of medical malpractice legislation requiring arbitration of medical malpractice claims before trial).

75. See, e.g., *Garfield, supra* note 65, at 518-19; *Karst, supra* note 65, at 627-28, 668; *LeFrancois, supra* note 36, at 527; Note, 85 W. VA. L. REV., *supra* note 65, at 360 n.120.

76. See, e.g., *Joyner v. Dumpson*, 533 F. Supp. 233, 241-42 (S.D.N.Y. 1982), *rev'd on other grounds*, 712 F.2d 770 (2d Cir. 1983) (challenge to statute requiring parents to relinquish custody of their children to state as condition of admission of children to state-financed residential care facility);

cite *Zablocki* as establishing an intermediate standard of review. Some do not characterize the standard of review at all, but simply quote the “sufficiently important state interests” and “closely tailored” language from *Zablocki*.⁷⁸ And, finally, some talk of more than one standard⁷⁹ or express uncertainty over what standard the Court applied.⁸⁰

A review of the authorities the *Zablocki* Court referred to supports the conclusion that the test applied in examining restrictions on marriage was really strict scrutiny by another name. An examination of Justice Marshall’s own opinions prior and subsequent to *Zablocki*, however, indicates that the standard applied may not have been intended as strict scrutiny, but rather as a form of analysis somewhere on the “sliding scale” between rational basis and strict scrutiny.

In support of the position that “‘critical examination’ of the state in-

Hawkins v. Superior Court, 22 Cal. 3d 584, 599, 586 P.2d 916, 926, 150 Cal. Rptr. 435, 445 (1978) (Mosk, J., concurring) (petitioners subject to grand jury indictment seeking adversarial preliminary hearing); State ex rel. Coats v. Johnson, 597 P.2d 328, 331 n.3 (Okla. Crim. App. 1979) (challenge to statutes relating to detention of juveniles).

77. See, e.g., Strickman, *Marriage, Divorce and the Constitution*, 15 FAM. L.Q. 259, 269 (1982); Note, *Constitutional Law—Equal Protection—A state statute violates the equal protection clause of the fourteenth amendment to the United States Constitution when it requires a state resident to obtain a court’s permission to marry if that resident has support obligations to minor issue not in his custody*, *Zablocki v. Redhail*, 434 U.S. 374 (1978), 56 U. DET. J. URB. L. 537, 546 (1979); Note, 12 U.C.D. L. REV., *supra* note 65, at 310; Recent Cases, *supra* note 65, at 337. See also *Address of Professor Anthony Amsterdam*, *supra* note 65, at 616-17.

78. See, e.g., *Murillo v. Bambrick*, 681 F.2d 898, 902 (3d Cir.), *cert. denied*, 459 U.S. 1017 (1982) (challenge to special matrimonial fee); *Dike v. School Bd. of Orange County, Florida*, 650 F.2d 783, 787 (5th Cir. Unit B 1981) (challenge to school’s refusal to allow teacher to breast feed baby during her duty-free lunch period); *Bryan v. Kitamura*, 529 F. Supp. 394, 398 n.12 (D. Hawaii 1982) (motion to dismiss by parents sued for injuries caused by parents’ children); *Miller v. Morris*, 270 Ind. 505, 508, 386 N.E.2d 1203, 1204 (1979) (challenge to *Zablocki*-type statute refusing marriage license to persons with dependent children unless those persons could prove they contributed to support of dependent children in compliance with court order).

79. See, e.g., *Fair Political Practices Comm’n v. Superior Court*, 25 Cal. 3d 33, 46-47, 599 P.2d 46, 53-54, 157 Cal. Rptr. 855, 862-63 (1979), *cert. denied*, 444 U.S. 1049 (1980) (Commission petition for writ of mandate compelling Superior Court to vacate judgment enjoining enforcement of Political Reform Act of 1974; court talked of strict scrutiny but later defined strict scrutiny in terms of “sufficiently important state interests” and “closely tailored” language of *Zablocki*); *Bd. of Educ. v. Walter*, 58 Ohio St. 2d 368, 373-74, 390 N.E.2d 813, 818 (1979), *cert. denied*, 444 U.S. 1015 (1980) (class action seeking declaratory judgment that Ohio system of financing public education violates Ohio Constitution; court talked of strict scrutiny but later defined strict scrutiny in terms of “sufficiently important state interests” and “closely tailored” language of *Zablocki*).

80. See, e.g., *Browder v. Harmeyer*, 453 N.E.2d 301, 305 (Ind. App. 1983) (appeal from award of adoption to maternal grandparents); J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 14 at 594 & n.23, 741-42; Hafen, *supra* note 65, at 509.

terests advanced in support of the classification is required[.]”⁸¹ the *Zablocki* opinion relied upon *Massachusetts Board of Retirement v. Murgia*⁸² and *San Antonio Independent School District v. Rodriguez*.⁸³ Both references expressly or by implication equate “critical examination” with strict scrutiny. In the first passage referred to by the *Zablocki* Court, the *Murgia* Court stated, that “equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a *fundamental right*”⁸⁴

The Court did not refer to the right to marry as one of the fundamental rights to be accorded strict judicial scrutiny. It did refer in a footnote to rights “of a uniquely private nature” including abortion and procreation,⁸⁵ which are, of course, included within the privacy rights to which the majority in *Zablocki* equates marriage.⁸⁶ In the second passage from *Murgia* referred to in *Zablocki*, the Court stated:

Under the circumstances [the Massachusetts statute mandating retirement for uniformed police officers at age 50 was found to implicate neither a fundamental right nor a suspect classification], it is unnecessary to subject the State’s resolution of competing interests in this case to the degree of critical examination that our cases under the Equal Protection Clause recently have characterized as “strict judicial scrutiny.”⁸⁷

The *Zablocki* Court’s citation to *Rodriguez* refers to a passage in which the Court did not use the expression “critical examination” but did discuss strict scrutiny analysis.⁸⁸ Furthermore, in both the passage cited and one immediately preceding that reference, the *Rodriguez* Court explained that strict scrutiny applies to legislative judgments interfering with fundamental constitutional rights or suspect classifications.⁸⁹

In establishing that “[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld

81. 434 U.S. at 383.

82. 427 U.S. 307, 312, 314 (1976), cited in 434 U.S. 383.

83. 411 U.S. 1, 17 (1973), cited in 434 U.S. 383.

84. 427 U.S. at 312 (footnotes omitted; emphasis added).

85. *Id.* at 312 n.3.

86. It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child. . . . Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection.

434 U.S. at 386.

87. U.S. at 314.

88. 411 U.S. at 17.

89. *Id.* at 16, 17.

unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests[.]”⁹⁰ the *Zablocki* Court cited four cases as examples.⁹¹ With only one exception, these cases lend support to the position that although using words different from traditional strict scrutiny analysis, the *Zablocki* Court was, in fact, applying strict scrutiny to the marriage restriction at issue.

In *Carey v. Population Services International*,⁹² discussing state restrictions that may be placed upon a woman’s decision to procure an abortion, the Court said “‘Compelling’ is of course the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.”⁹³ This passage again reinforces the reference in *Zablocki* that marriage is related to the other fundamental privacy rights, procreation, childbirth, child rearing, family relationships, and abortion.⁹⁴

The Court in *Memorial Hospital v. Maricopa County*⁹⁵ explained that in evaluating equal protection challenges the Court would determine “what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected.”⁹⁶ The *Zablocki* Court later quoted this language in laying the groundwork for its analysis.⁹⁷ In the passage referred to, however, the *Maricopa County* Court talks of determining whether the residency requirement at issue in the case was supported by a compelling state interest.⁹⁸ As already noted, the *Rodriguez*⁹⁹ passage discussed fundamental rights in terms of strict scrutiny and equated the phrase “critical examination” with strict scrutiny.¹⁰⁰ Only in *Bullock v. Carter*¹⁰¹ did the Court refer to “closely scrutiniz[ing]” a state restriction (on voting)

90. 434 U.S. at 388.

91. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 262-63 (1974); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *Bullock v. Carter*, 405 U.S. 134, 144 (1972).

92. 431 U.S. 678 (1977).

93. *Id.* at 686.

94. 434 U.S. at 386.

95. 415 U.S. 250 (1974).

96. *Id.* at 253.

97. 434 U.S. at 383.

98. 415 U.S. at 262-63.

99. *See supra* note 88.

100. 411 U.S. at 16-17.

101. 405 U.S. 134 (1972).

while applying an intermediate (less than strict scrutiny/more than rational basis) analysis.¹⁰²

The text of *Zablocki* strongly indicates, therefore, that although the Court did not employ traditional strict scrutiny language in evaluating the marriage restriction, the "sufficiently important state interests" and "closely tailored to effectuate only those interests" standard represents merely another way of articulating strict scrutiny. A review of some of Justice Marshall's opinions in other cases, however, raises doubt as to what type of scrutiny he intended to apply in marriage restriction cases.

In a series of opinions, Justice Marshall objected to the Court's traditional two-tiered approach to analyzing equal protection. He argued for the adoption of a sliding scale approach that would be based upon "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."¹⁰³ Justice Marshall asserted that, in fact, the Court had already moved away from two-tiered equal protection analysis and had varied the scrutiny given to various classifications.¹⁰⁴ He be-

102. *Id.* at 144.

103. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 99 (Marshall, J., dissenting). According to Justice Marshall's dissent in *Rodriguez*, the nature of the inquiry into justification for discrimination is essentially the same in all equal protection cases: the Court must consider "the substantiality of the state interests sought to be served" and must "scrutinize the reasonableness of the means by which the State has sought to advance its interests." 411 U.S. at 124 (Marshall, J., dissenting). Differences in the application of the standard are "a function of the constitutional importance of the interests at stake and the invidiousness of the particular classification." *Id.* (Marshall, J., dissenting). In effect, the closer an interest comes to being fundamental, the greater scrutiny it should be accorded. *Id.* at 102-03 (Marshall, J., dissenting).

In *Memorial Hosp. v. Maricopa County*, Justice Marshall seemingly continued his rejection of the traditional two-tiered analysis when he wrote that in an equal protection case, the Court would determine the burden of the justification that the classification must meet by looking to the nature of the classification and the individual interests affected, 415 U.S. at 253, the language later quoted in the majority's opinion in *Zablocki*, 434 U.S. at 383. The Court in *Maricopa County* then went on to discuss "compelling state interest." 415 U.S. at 262-63. When contrasting this with the Court's "sufficiently important state interests" language of *Zablocki*, 434 U.S. at 388, it appears that Justice Marshall's one equal protection standard theory would make the right in *Maricopa County* (travel) more important (more fundamental?) than that in *Zablocki*.

Justice Marshall again objected to two-tiered equal protection analysis in his dissenting opinion in *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318, 321-22 (1976) (Marshall, J., dissenting). Finally, in his dissent from denial of certiorari in *Hollenbaugh v. Carnegie Free Library*, and with reference to *Zablocki*, Justice Marshall objected to the Court's traditional analysis of equal protection cases and argued for a "more sophisticated" analysis based upon the character of the classification and the individual interests at stake. 439 U.S. 1052, 1053-54, 1055 (1978) (Marshall, J., dissenting from denial of certiorari).

104. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 109-10 (Marshall J., dissenting).

lieved, however, that because the Court outwardly adhered to the two-tiered approach, it had “apparently lost interest in recognizing further ‘fundamental’ rights and ‘suspect’ classes.”¹⁰⁵ Justice Marshall reasoned that if every restriction of a fundamental right or every suspect classification is subject to strict scrutiny, and, therefore, almost sure to be invalidated, the Court will be reluctant to recognize “new” fundamental rights or suspect classifications.¹⁰⁶ He stated, however, that many rights or classifications, perhaps not deserving of strict scrutiny, but too important to be relegated to rational basis scrutiny, should be analyzed according to his “sliding scale” approach.¹⁰⁷

Justice Marshall’s fear that the Court is not interested in recognizing “new” fundamental rights or suspect classes may support his treatment of marriage with lesser scrutiny than has traditionally been afforded fundamental rights. His assertion in *Zablocki*, however, that marriage had the status of a “fundamental” right for many years undermines this argument.¹⁰⁸ Marriage, therefore, would not be a “new” fundamental right,¹⁰⁹ like education, which he offered in *Murgia* as an example of a fundamental right that the Court apparently was not interested in recog-

[I]t seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification. In the context of economic interests, we find that discriminatory state action is almost always sustained, for such interests are generally far removed from constitutional guarantees. But the situation differs markedly when discrimination against important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved. The majority suggests, however, that a variable standard of review would give this Court the appearance of a “superlegislature.” . . . I cannot agree. Such an approach seems to me a part of the guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that document.

Id. at 109 (Marshall, J., dissenting).

In his dissenting opinion in *Massachusetts Bd. of Retirement v. Murgia*, Justice Marshall repeated his assertion that, in fact, the Court does not really follow the two-tiered equal protection analysis it claims to employ. 427 U.S. at 318-21 (Marshall, J., dissenting). Rather, Justice Marshall stated, the Court “focused [rightly, in his view] upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification.” *Id.* at 318 (Marshall, J., dissenting).

105. *Id.* at 318-19 (Marshall, J., dissenting).

106. *Id.* at 319 (Marshall, J., dissenting).

107. *Id.* at 319-20 (Marshall, J., dissenting).

108. 434 U.S. at 383-85. The precedents Justice Marshall cited in support of this assertion dated back to 1888. See *Maynard v. Hill*, 125 U.S. 190 (1888). 434 U.S. at 384.

109. But see *supra* notes 13-64 and accompanying text, arguing that, in fact, the Supreme Court did not fully recognize marriage as a fundamental right until its decision in *Zablocki*.

nizing.¹¹⁰ Furthermore, the Court on its own has explicitly recognized an intermediate level of scrutiny applicable in equal protection cases.¹¹¹ The Court has not, however, applied the intermediate standard to fundamental rights cases.¹¹²

A final indication that Justice Marshall intended the *Zablocki* test to be something other than traditional strict scrutiny was his dissent from denial of certiorari in *Hollenbaugh v. Carnegie Free Library*.¹¹³ In *Hollenbaugh*, Justice Marshall again objected to the Court's traditional analysis of equal protection cases and argued for a "more sophisticated" analysis based upon the character of the classification and the individual interests at stake in the case.¹¹⁴

Despite Justice Marshall's description of the *Zablocki* standard and despite his preference for a "sliding scale" rather than a rigid two-tiered equal protection approach, other factors indicate that he may have intended the Court to apply strict scrutiny to marriage restrictions.

In his dissenting opinion in *Rodriguez*, Justice Marshall indicated that there might not be any difference in state interests characterized variously as "compelling," "substantial," or "important."¹¹⁵ Similarly, in his dissenting opinion in *Sosna v. Iowa*, Justice Marshall stated that he would scrutinize the Iowa divorce residency requirement to determine if it constituted a reasonable means of furthering an important state interest, a standard that he equated with the compelling state interest standard.¹¹⁶ In his dissenting opinion in *United States v. Kras*, Justice Marshall objected to what he viewed as the majority's characterization of divorce as a constitutionally protected interest and, therefore, as subject to a compelling state interest analysis.¹¹⁷ Finally, and perhaps most significantly, Justice Marshall in his dissenting opinion in *Mobile v.*

110. 427 U.S. at 318-19 (Marshall, J., dissenting).

111. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (to be valid, a gender-based classification must serve important governmental objectives and must be substantially related to the achievement of those objectives).

112. *Developments, supra* note 36, at 1195 n.252. This same source views the concurring opinions of Justice Powell and Justice Stevens in *Zablocki* as a first endorsement by a member of the Court for the use of intermediate scrutiny when dealing with a fundamental right/equal protection issue. *Id.* at 1192 n.231.

113. 439 U.S. 1052, 1055 (1978) (Marshall, J., dissenting from denial of certiorari).

114. *Id.* at 1053-54 (Marshall, J., dissenting from denial of certiorari).

115. 411 U.S. at 124-25 (Marshall, J., dissenting).

116. 419 U.S. 393, 420 (1975) (Marshall, J., dissenting).

117. 409 U.S. 434, 462 n.4 (1973) (Marshall, J., dissenting).

*Bolden*¹¹⁸ stated that “[u]nder the Equal Protection Clause, if a classification ‘impinges upon a fundamental right explicitly or implicitly protected by the Constitution, . . . strict judicial scrutiny’ is required . . . regardless of whether the infringement was intentional.”¹¹⁹ In a footnote to that passage, he cited *Zablocki* and *Loving* to support the proposition that “Under the rubric of the fundamental right of privacy, we have recognized that individuals have freedom from unjustified governmental interference with personal decisions involving marriage”¹²⁰

It is impossible to determine with absolute certainty what level of scrutiny the *Zablocki* majority intended to apply to restrictions on marriage. The Court, however, has given no indication that it intends to soften the strict scrutiny analysis traditionally applied in the fundamental rights area. Furthermore, application of strict scrutiny to marriage restriction cases would not be inconsistent with Justice Marshall’s approach to equal protection analysis, or with his treatment of fundamental rights in general or the fundamental right to marry in particular. Although it is still possible to argue that some form of intermediate scrutiny is applicable to marriage restriction cases, the better argument is that, until the Supreme Court expressly declares otherwise, marriage is a fundamental right and is entitled to strict scrutiny protection. It is also arguable that none of these analytical problems would have presented themselves had *Zablocki* been approached from a due process, rather than an equal protection, perspective.

B. *The More Appropriate Test?*

Justice Stewart, concurring in *Zablocki*, rejected the majority’s equal protection approach to the case, arguing instead for a substantive due process approach.¹²¹ “The Equal Protection Clause,” he wrote, “deals not with substantive rights or freedoms but with invidiously discriminatory classifications. . . . The problem in this case is not one of discriminatory classifications, but of an unwarranted encroachment upon a constitutionally protected freedom.”¹²²

118. 446 U.S. 55 (1980).

119. *Id.* at 55, 113 (1980) (Marshall, J., dissenting) (quoting *Rodriguez*, 411 U.S. 1, 17).

120. *Id.* at 113-14 n.9 (Marshall, J., dissenting).

121. 434 U.S. at 391-96 (Stewart, J., concurring).

122. *Id.* at 391-92 (Stewart, J., concurring). A number of courts have also interpreted *Zablocki* as a due process rather than as an equal protection case. *See, e.g.,* *Joyner v. Dumpson*, 712 F.2d 770, 777 (2d Cir. 1983); *Moe v. Dinkins*, 669 F.2d 67, 68 (2d Cir. 1982); *Petrey v. Flaughner*, 505 F. Supp. 1087, 1090 & n.15 (E.D. Ky. 1981); *Salisbury v. List*, 501 F. Supp. 105, 109 (D. Nev. 1980); South-

Why does it matter whether the Court applies an equal protection or a due process analysis to restrictions on marriage?¹²³ If marriage is a fundamental right, any restriction on an individual seeking to exercise the right should be subjected to strict scrutiny regardless of the approach used.¹²⁴

Characterization of the analysis employed in *Zablocki* as due process rather than as equal protection made a difference to Justice Stewart for at least one theoretical and one more practical reason. Theoretically, he noted, the issue was not one of discriminatory classification, an equal protection question, but rather one of infringement of a constitutionally protected right, a due process question.¹²⁵ Practically, he believed that a due process analysis would allow the Court more flexibility and would permit it to focus on matters more appropriate to its decision.¹²⁶

western Community Action Council, Inc. v. Community Servs. Admin., 462 F. Supp. 289, 296 (S.D. W. Va. 1978); *Miller v. Morris*, 270 Ind. 505, 507, 386 N.E.2d 1203, 1204 (1979). See also Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1761 n.22 (1981) ("Although the Supreme Court considered the right to marry only under the equal protection clause, it seems likely that it also qualifies as a substantive due process interest."); Howard, *The Burger Court: A Judicial Nonet Plays the Enigma Variations*, 43 LAW & CONTEMP. PROBS. 7, 19 & n.72 (1980).

123.

Substantive due process and the fundamental rights branch of equal protection provide two alternative frameworks within which intrusions upon individual liberties can be analyzed. The Supreme Court has generally treated them as distinct modes of analysis, sometimes suggesting that each may be appropriate on different occasions. But the Court has done little to illuminate the distinction. Indeed, the Court has shown itself capable of recasting virtually any intrusion on substantive due process rights as an equal protection problem.

Developments, supra note 36, at 1193 & n.242 (1980). (Footnotes omitted; citing to *Zablocki* as an example of the Court's recasting an "intrusion on substantive due process rights as an equal protection problem.")

124. *Franz v. United States*, 707 F.2d 582, 603 n.89 (D.C. Cir. 1983); *Plante v. Gonzalez*, 575 F.2d 1119, 1128 n.15 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979); *Holman v. Hilton*, 542 F. Supp. 913, 919 n.9 (D.N.J. 1982); J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 14, at 740; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1455-56 (1968); Westin, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 559-64 (1982).

125. 434 U.S. at 391-92 (Stewart, J., concurring).

126. *Id.* at 395-96 (Stewart, J., concurring). Justice Stewart explained:

[T]o embrace the essence of [substantive due process] under the guise of equal protection serves no purpose but obfuscation. "[C]ouched in slogans and ringing phrases," the Court's equal protection doctrine shifts the focus of the judicial inquiry away from its proper concerns, which include "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen."

To conceal this appropriate inquiry invites mechanical or thoughtless application of mis-focused doctrine. To bring it into the open forces a healthy and responsible recognition of

The standard of review Justice Stewart articulated, however, is strikingly similar to that Justice Marshall advocated.¹²⁷ The similarity between Justice Marshall's and Justice Stewart's positions may indicate that Justice Stewart is proposing for due process analysis the same sliding scale approach that Justice Marshall has advocated for equal protection questions. Like Justice Marshall's approach, it overlooks the traditional strict scrutiny applied by the Supreme Court to cases involving fundamental rights. Justice Stewart's position may be consistent with his refusal to accept marriage as a "fundamental" right.¹²⁸ The position is not consistent with traditional due process analysis, however, because if the right to marry is not fundamental, the rational basis approach is the appropriate analysis. Although Justice Stewart never expressly articulated the standard he used in analyzing the Wisconsin restriction, it fell somewhere between rational basis and strict scrutiny,¹²⁹ a standard that the Supreme Court has not yet recognized in due process cases.¹³⁰

While on practical grounds Justice Stewart's proposed due process analysis sounds similar to the *Zablocki* equal protection approach, his theoretical concern relating to due process and equal protection is distinct.

the nature and purpose of the extreme power we wield when, in invalidating a state law in the name of the Constitution, we invalidate *pro tanto* the process of representative democracy in one of the sovereign States of the Union.

Id. (quoting *Williams v. Illinois*, 399 U.S. 235 at 600 (Harlan, J., concurring in result)).

127. Justice Marshall stated that "under the Equal Protection Clause, 'we must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected.'" *Id.* at 383 (quoting *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 253 (1974)).

128. *Id.* at 392 (Stewart, J., concurring).

129. *See id.* at 393-95 (Stewart, J., concurring).

130. *But see Developments, supra* note 36. Although both equal protection and substantive due process strict scrutiny analyses require a balancing test,

the Court has characterized equal protection as involving a "rigid tier" system rather than the "flexible balancing" afforded under substantive due process.

The nature of the scrutiny applied in substantive due process cases is theoretically different, despite the Court's tendency to use language similar to that found in equal protection cases. . . .

In due process analysis no threshold marks the passage from the most minimal to the most exacting scrutiny. There will be intermediate positions [not to be confused with intermediate equal protection scrutiny] as well.

Id. at 1193-95. (Footnotes omitted). According to the authors, the Court has provided no "simple formula for determining from the degree of intrusion upon a substantive due process right the level of state interest required to outweigh that right." *Id.* at 1196. The key to substantive due process analysis is "flexibility." *Id.* The authors believe that "[w]hatever the truth of the maxim that strict scrutiny is strict in theory but fatal in fact" in equal protection analysis, "it is misleading in substantive due process analysis." *Id.* at 1196 (footnotes omitted).

First, there is simply a difference between a right, a matter of substance to be protected, and a classification, which differentiates between persons for one reason or another, albeit sometimes implicating rights.¹³¹ Second, consistency in characterization and analysis should compel evaluation of the right to marry on due process grounds. The Court in *Loving*, one of the primary cases the *Zablocki* Court relied upon in declaring the right to marry to be fundamental, expressly stated that “[The Virginia] statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.”¹³² Other Supreme Court decisions dealing with abortion,¹³³ procreation,¹³⁴ and other family-related matters¹³⁵ also described the rights involved in those cases in due process terms and applied a due process analysis in evaluating restrictions.

Third, in applying a due process analysis to the alleged infringement of the fundamental right to marry, the court deals more directly with the issue than when applying an equal protection analysis. Even if a fundamental right will be accorded strict scrutiny pursuant to a due process or an equal protection approach, why should courts bypass direct due process review and attempt to relate the fundamental right to a discriminatory classification in order to invoke equal protection analysis?¹³⁶ That is, why should courts do indirectly through equal protection what they could do directly through due process?¹³⁷

131. “The identification of a right as ‘fundamental’ is a substantive decision unrelated to equal protection or technical standards of review.” J. NOWACK, R. ROTUNDA, J. YOUNG, *supra* note 14, at 593-94. The footnote to this statement reads as follows:

This decision invokes a judicial determination that the text or structure of the Constitution evidences the existence of a value that should be taken from the control of the political branches of government. The decision is one that can be best characterized as a substantive due process decision because it involves judicial protection of a substantive value and a limitation in the substance of laws or regulations which restrict that value or right.

132. *Id.* at 593-94 n.21.

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

134. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

135. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion).

136. Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U. L. REV. 89, 109.

137. Westen, *supra* note 124, at 581. Compare *Franz v. United States*, 707 F.2d 582, 603 n.89 (D.C. Cir. 1983) (when a fundamental right is at issue the same result may be reached through a due process approach or through “a more circuitous route: the ‘fundamental rights’ branch of equal protection doctrine” although the difference in practice between the two may be that equal protection analysis is “more rigid, less sensitive to variations in the degree to which access to or exercise of the right at stake has been impaired”) with Barrett, *supra* note 136, at 110 (the use of an equal protection approach “significantly changes the focus of the analysis[,]” possibly resulting in a weak-

If a court insists on applying an equal protection rather than a due process analysis when discussing the right to marry, it is confronted with the need to find a classification. Naturally, whenever a person is denied the right to marry because of a state restriction, one can be classified based upon personal characteristics.¹³⁸ And, when the right to marry is at issue, regardless of what discriminatory classification a litigant may claim, a court can theoretically invoke a demanding level of scrutiny pursuant to an equal protection analysis because of the fundamental nature of the right.

The classifications previously noted, however, are not typical of the classifications to which courts traditionally accord either strict scrutiny or an intermediate standard of review. Typically, the courts give increased scrutiny to classifications based upon race, gender, alienage, illegitimacy—statuses based upon an “immutable characteristic determined solely by the accident of birth”¹³⁹ which their “possessors are powerless to escape or set aside.”¹⁴⁰ Although certain of the marriage classifications discussed may bear some of the indicia of immutability,¹⁴¹ and per-

ening of protection normally accorded to constitutional interests). As an example of such a weakening, Professor Barrett points to the Supreme Court's decision in *Sosna* in which, using an equal protection analysis, the Court upheld the divorce residency requirement. Had the Court used an analysis focusing on whether the residency requirement conflicted with the constitutionally protected freedom to travel, as Professor Barrett believes it should have, the residency requirement would have been invalidated. *Id.* at 119-20.

138. Mr. Redhail, one of a group of noncustodial parents unable to comply with a court order of support for his child, was classified according to wealth. One prohibited from marrying another of the same gender is classified on the basis of affectional preference. One prohibited from marrying a close blood relative is in a class different from those desiring to marry a person who is not a close relative. Persons prohibited from marrying because they are already married are in a class different from those unmarried persons who desire to marry.

139. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion).

140. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 360 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring and dissenting).

141. For example, there is no one known or accepted reason to explain why some individuals are homosexuals. J. GAGNON & W. SIMON, *SEXUAL CONDUCT: THE SOCIAL SOURCES OF HUMAN SEXUALITY* 132-37 (1973); POMEROY, *HOMOSEXUALITY IN THE SAME SEX* 11-13 (R. Weltge ed. 1969). Persons born into poverty, although theoretically able to overcome it, are frequently “powerless” to do so. For example, children born to adolescent mothers are disadvantaged because of poor health and living conditions and the lack of good nutrition and medical care available to their mothers before the children were born. *See, e.g., Equal Rights for Infants*, N.Y. Times, Jan. 17, 1984, at A24, col. 1-3; *Iron Deficiencies in Infants May Have Link to Economy*, N.Y. Times, Apr. 30, 1984, at A13, col. 1-2. Once born, children living in poverty do not receive the nourishment, health care, housing, or education generally afforded those not living in poverty. Thirty-five percent of all babies, many of them children born to young mothers with little education and from a poor socioeconomic background, are currently suffering from an iron deficiency. *Id.* at col. 1. Iron deficiency in children leads to anemia which, in turn, could result in a child's being irritable, anorexic, unable

sons in all of the categories mentioned may be treated differently from other individuals not sharing the characteristic in question, they do not fit the same type of classifications as those classified by race, gender, alienage, or illegitimacy. Yet, if the courts insist upon applying an equal protection analysis whenever the right to marry is implicated, the courts are forced to make classifications out of characteristics traditionally not regarded as such.

How much less complicated and more direct the analysis would be were the courts to analyze the right to marry by treating it as a substantive, constitutional right, rather than manufacturing another form of analysis to which it is only peripherally related.

The right to marry is a fundamental right. Although Justice Marshall may have intended to invoke less than strict scrutiny in evaluating the marriage restriction in *Zablocki*, the case itself, the cases upon which it relies, and the fact that the Court has not expressly adopted a lesser standard of scrutiny in analyzing fundamental rights all support the conclusion that whether courts apply an equal protection or a due process analysis to future marriage restriction cases, the standard should be the same: does there exist a compelling state interest justifying the imposition of the restriction and is the restriction the least restrictive means of achieving the state's purpose?

III. CONTINUING VALIDITY OF RESTRICTIONS UPON MARRIAGE

A. "Significant Interference" With Decisions To Marry

Whatever the test to be applied to restrictions on marriage, the *Zablocki* Court made clear that not "every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."¹⁴² Although the Court was not

to attend to stimuli for more than short periods of time, and unmotivated. These factors may then result in impaired learning capacity and poor scholastic performance. *Id.* at col. 1-2. Accordingly, these children will not be as strong or as prepared for adulthood as their wealthier counterparts. See also L. FERMAN, J. KORNBLOH, & A. HABER, *POVERTY IN AMERICA* xix (1969); M. HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* 14-16; 187-88 (1964); *POVERTY AS A PUBLIC ISSUE* 4 (B. Seligman ed. 1965). Not all characteristics with which one might be born or from which one might be unable to escape, however, are deemed immutable. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (undocumented alien status not immutable characteristic); *Frontiero v. Richardson*, 411 U.S. at 677 (intelligence or physical disability not immutable characteristic).

142. 434 U.S. at 386.

explicit about what constitutes “reasonable regulations that do not significantly interfere with decisions” to marry,¹⁴³ two references in *Zablocki* to *Califano v. Jobst*¹⁴⁴ provide some guidance in determining which regulations “significantly interfere,” and, therefore, deserve the Court’s rigorous scrutiny.

Jobst concerned a Social Security regulation mandating termination of secondary benefits to a disabled dependent child of a covered wage earner if the child were to marry an individual not entitled to Social Security benefits, even if the spouse were also disabled. The Court treated the case as one involving governmental benefits and economic regulation rather than the right to marry and held that the regulation was rationally based upon the assumption that marital status is indicative of children’s independence of their parents.¹⁴⁵ Therefore, the Court held the regulation did not violate Jobst’s rights pursuant to the due process clause of the fifth amendment.

In *Zablocki*, the Court first cited *Jobst* immediately following the language “To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”¹⁴⁶ The Court, therefore, may have believed that the Social Security regulation in *Jobst* did not significantly interfere with Jobst’s decision to marry.

The *Zablocki* Court then explained in a footnote that the “directness and substantiality of the interference with the freedom to marry distinguish [*Zablocki*] from *Jobst*.”¹⁴⁷ The Social Security regulation “placed *no direct legal obstacle* in the path of persons desiring to get married,” nor was there “evidence that the laws *significantly discouraged*, let alone *made ‘practically impossible,’* any marriages.”¹⁴⁸ In fact, the regulation had not deterred Jobst from marrying his wife even though he lost his benefits when he did so.¹⁴⁹

143. *See id.* at 396 (Powell, J., concurring).

144. 434 U.S. 47 (1977).

145. *Id.* at 52-54.

146. 434 U.S. at 386.

147. *Id.* at 387 n.12.

148. *Id.* (emphasis added).

149. *Id.* *Jobst* may have been a different case—perhaps with a different result—had Jobst challenged the Social Security regulation prior to his marriage. While the case still would have involved government benefits and economic regulation, Jobst could have asserted that the regulation constituted an obstacle that not only “significantly discouraged” but “made ‘practically impossible’” his marriage. Had the Court found that to be true and had the Court been ready and willing to adopt the standard it later formulated in *Zablocki*, the Social Security regulation affecting Jobst’s marriage

Chief Justice Burger and Justice Stevens, in separate concurring opinions in *Zablocki*, further distinguished the Court's decision in *Jobst*. The Chief Justice wrote that "Unlike the intentional and substantial interference with the right to marry effected by the Wisconsin statute at issue here, the Social Security Act provisions challenged in *Jobst* did not constitute an 'attempt to interfere with the individual's freedom to make a decision as important as marriage,' . . . and, at most, had an indirect impact on that decision."¹⁵⁰ Justice Stevens distinguished *Jobst* as concerning a classification based upon marital status rather than upon the right to marry.¹⁵¹ Although conceding that such regulations might "significantly interfere with decisions to enter into the marital relationship[.]" Justice Stevens noted that that type of interference need not invalidate legislation reflecting differences between married and unmarried persons.¹⁵² A classification based upon marital status, as in *Jobst*, Justice Stevens explained, is "fundamentally different" from a classification that determines who may enter into a lawful marital relationship, such as in *Loving*.¹⁵³

Juxtaposing *Jobst* and *Zablocki* illustrates the difference between "being married" and "getting married," but does not offer a definitive way to determine which restrictions upon marriage so significantly interfere with the decision to marry that they deserve rigorous scrutiny. Not all restrictions upon marriage fit neatly into categories made obvious by the Court's language in *Zablocki*, or into the *Jobst* "being married" versus "getting married" dichotomy. Rather, various restrictions upon marriage lie along a spectrum between the extremes established by *Zablocki* and *Jobst*.

At the *Zablocki* end of the spectrum lie restrictions that permanently or at least indefinitely preclude individuals from marrying. Those restrictions include financial barriers such as the support obligation in *Zablocki* or marriage license filing fees,¹⁵⁴ prison regulations prohibiting

might have been stricken. Such an argument raises the further issue, however, of whether the regulation would significantly interfere with *Jobst's* right to marry. *Jobst* was not precluded from marrying and retaining his benefits so long as the individual he married was also entitled to Social Security benefits. For a discussion of whether an individual's right to marry encompasses the right to marry any person or whether the right may be restricted so long as the individual has available a reasonable number of prospective spouses, see *infra* notes 175-77 and accompanying text.

150. *Id.* at 391 (Burger, C.J., concurring).

151. *Id.* at 403-04 (Stevens, J., concurring).

152. *Id.* at 403 (Stevens, J., concurring).

153. *Id.* at 403-04 & n.2 (Stevens, J., concurring).

154. See, e.g., CAL. GOV'T CODE § 26840 (Deering Supp. 1984) (\$10.00); ILL. ANN. STAT. ch.

certain prisoners from marrying while incarcerated,¹⁵⁵ statutes prohibiting individuals with certain mental disabilities from marrying,¹⁵⁶ and medical examination requirements.¹⁵⁷ Next along the spectrum are restrictions that prohibit individuals from marrying at a certain point in time, but allow the same marriages to occur at a definite future date. An example of such restrictions are statutes entirely prohibiting marriages between minors below certain ages and permitting marriages between "older" minors with parental or judicial consent.¹⁵⁸ Next on the spec-

53, § 73 (Smith-Hurd Supp. 1984-85) (\$40.00); ME. REV. STAT. ANN. tit. 30, § 2352(2) (Supp. 1983-84) (\$10.00); N.C. GEN. STAT. § 161-10(2) (Supp. 1983) (\$15.00); PA. STAT. ANN. tit. 48, § 1-19 (Purdon 1965) (\$3.00).

155. See *Bradbury v. Wainwright*, 718 F.2d 1538, 1539 (11th Cir. 1983) (Rule 33.3-13 of Florida Department of Corrections prohibiting marriages of prisoners, *inter alia*, under sentence of death or prisoners under sentence of life imprisonment and required to serve no fewer than 25 years before becoming eligible for parole unless, in latter case, prisoner's release date can be determined to be within 1 year and prisoner is participating in community release and furlough program); *Safley v. Turner*, 586 F. Supp. 589, 592 (W.D. Mo. 1984) (Division of Corrections rule placing burden on inmate to prove compelling reason why institution should permit inmate to marry while incarcerated); *Salisbury v. List*, 501 F. Supp. 105, 106-07 (D. Nev. 1980) (Department of Prison's Procedure Manual, Procedure No. 314, setting forth 5 requirements before prisoner permitted to marry, including requirement that prisoner and prospective spouse knew each other for at least 1 year prior to prisoner's incarceration and that the couple presented a strong, compelling reason to marry); *Fitzpatrick v. Smith*, 59 N.Y.2d 916, 466 N.Y.S.2d 318, 453 N.E.2d 547, *cert. denied*, 104 S. Ct. 399 (1983) (statute prohibiting marriages by inmates serving sentences of life imprisonment).

156. See, e.g., CAL. CIV. CODE § 4201 (Deering 1984) ("No license shall be granted when either of the parties . . . is an imbecile [or] is insane . . . at the time of making the application for the license"); ME. REV. STAT. ANN. tit. 19, § 32(1) (Supp. 1983-84) ("No person who is impaired by reason of mental illness or mental retardation to the extent that he lacks sufficient understanding or capacity to make, communicate or implement responsible decisions concerning his person or property is capable of contracting marriage."); N.C. GEN. STAT. § 51-9 (Supp. 1981) (required health certificate "shall state that, by the usual methods of examination made by a regularly licensed physician, the applicant was found to be mentally competent"); PA. STAT. ANN. tit. 48 § 1-5(d) (Purdon Supp. 1984-85) ("No license to marry shall be issued . . . (d) 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 a judge of the orphans' court shall decide that it is for the best interest of such applicant and the general public to issue the license.").

157. E.g., N.C. GEN. STAT. § 51-9 (1981 Supp.); PA. STAT. ANN. tit. 48, § 1-5(a) (Purdon Supp. 1984-85).

158. CAL. CIV. CODE § 4101 (Deering 1984) (applicants under 18 years of age required to have consent in writing of parents or guardian and court); ILL. ANN. STAT. ch. 40, § 208 (Smith-Hurd 1980) (individuals between ages 16 and 18 whose parents or guardians are incapable of or unwilling to consent to marriage may seek court permission; by implication, those younger than 16 may not marry even with parental permission); ME. REV. STAT. ANN. tit. 19, § 62 (1964) (marriage license applicants between ages 16 and 18 must secure written consent from parents or guardian *or*, if no such person is available, from court; marriage license applicants younger than 16 must receive written permission of parents or guardian *and* court); N.C. GEN. STAT. § 51-2(a) & (b) (1976) (applicants between ages 16 and 18 must receive written consent from at least 1 parent or guardian;

trum are restrictions that prohibit individuals from marrying certain other individuals, but that permit the same individuals to marry outside the restricted class. Examples of these restrictions include prohibitions against incestuous,¹⁵⁹ homosexual,¹⁶⁰ or polygamous¹⁶¹ marriages. Finally, at the far end of the spectrum are restrictions that place no direct obstacle in the path of individuals choosing to get married, but that make the individuals' lives less agreeable or less comfortable once they are married. These restrictions include beneficiary provisions such as the one at issue in *Jobst*,¹⁶² nepotism rules,¹⁶³ financial disclosure laws,¹⁶⁴ and tax

unmarried female older than 12, younger than 18 who is pregnant or has given birth, and father of child may marry with written consent of the female's parent or guardian or county director of social services); PA. STAT. ANN. tit. 48, § 1-5(c) (Purdon Supp. 1984-85) (applicants younger than 18 must have consent of parent or guardian given in person or by certified, attested, acknowledged document) & § 1-5(b) (1965) (applicants under age 16 need permission of court). The Uniform Marriage and Divorce Act sets 18 as the minimum age for marriage without consent of parents, guardian, or court and 16 as the minimum age for marriage with consent of parents or guardian *and* court. UNIF. MARRIAGE & DIVORCE ACT § 203(1), 9A U.L.A. 102-03 (1979).

159. *E.g.*, ILL. ANN. STAT. ch. 40, § 212(2)-(4) (Smith-Hurd Supp. 1984-85) (ancestor/descendant, siblings, by whole or half blood or adoption; uncle/niece, aunt/nephew, by whole or half blood; first cousins except when they are 50 years of age or older); N.C. GEN. STAT. § 51-3 (Supp. 1981) (no two people may marry if "nearer of kin than first cousins, or . . . double first cousins"); PA. STAT. ANN. tit. 48, § 1-5 (Purdon 1965) (ancestor/descendant, siblings, uncle/niece, aunt/nephew, first cousins; marriage between certain step relatives and inlaws also prohibited). *See also* UNIF. MARRIAGE & DIVORCE ACT § 207, 9A U.L.A. 108 (1979) (ancestor/descendant, siblings, whether by half or whole blood or by adoption; uncle/niece, aunt/nephew, whether by half or whole blood "except as to marriages permitted by the established customs of aboriginal cultures").

160. Rather than prohibiting marriages between two persons of the same gender, state legislatures may define marriage as a relationship between a man and a woman. *See, e.g.*, CAL. CIV. CODE § 4100 (Deering 1984); ILL. ANN. STAT. ch. 40, § 201 (Smith-Hurd 1980). *Accord* UNIF. MARRIAGE & DIVORCE ACT § 201, 9A U.L.A. 100 (1979). Even in those jurisdictions that do not legislatively define marriage as a relationship between individuals of opposite gender, the courts so interpret state marriage law. *See, e.g.*, *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973).

161. *E.g.*, CAL. CIV. CODE § 4101(a) (Deering 1984); ILL. ANN. STAT. ch. 40 § 212(a) (Smith-Hurd 1984-85); N.C. GEN. STAT. § 51-2(a) (1976).

162. *See also* *Gray Panthers v. Adm'r.*, 566 F. Supp. 889 (D.D.C. 1983) (Medicaid regulation permitting state to "deem" income from noninstitutionalized spouse to be available to institutionalized spouse in determining eligibility for Medicaid benefits is indirect interference with marriage).

163. *See* *Parsons v. County of Del Norte*, 728 F.2d 1234 (9th Cir.), *cert. denied*, 105 S. Ct. 158 (1984) (challenge to county's antinepotism rule prohibiting spouses from working as permanent employees in same department); *Cutts v. Fowler*, 692 F.2d 138 (D.C. Cir. 1982) (career civil servant's challenge to antinepotism policy applied when employee's husband appointed head of her division resulting in her reassignment); *Southwestern Community Action Council, Inc. v. Community Servs. Admin.*, 462 F. Supp. 289 (S.D. W. Va. 1978) (challenge to agency regulation prohibiting employment of person in position over which member of person's immediate family exercises supervisory authority or serves on board or committee with authority over personnel matters).

164. *See* *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978) (five state senators challenged state

laws.¹⁶⁵

Those restrictions which resemble the *Zablocki*-type restrictions appear either to present a direct legal obstacle to marriage or to make "practically impossible" any marriages, thereby requiring courts to determine if the restrictions are supported by sufficiently important state interests and are closely tailored to effectuate only those interests.¹⁶⁶ On the other hand, *Jobst*-type restrictions challenged subsequent to marriage will not be accorded rigorous scrutiny. Such restrictions tend to deal with government benefits or personnel administration matters, issues to which the courts have traditionally applied rational basis scrutiny and have paid great deference to the states.¹⁶⁷

But what of those restrictions in the middle of the spectrum?¹⁶⁸ Age limitations on marriage may be said to be merely a "delay" of the exercise of the right to marry and that on any given day individuals know the date upon which they may exercise that right without the permission of any other person. To state that the restriction is a mere delay, however, is to overlook what might occur during that delay that could affect the lives of those who would choose to marry. Children could be born, indi-

financial disclosure law, FLA. CONST. ART. II, § 8, alleging disclosure would implicate familial financial affairs).

165. See *Druker v. Commissioner*, 697 F.2d 46 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 2429 (1983) (challenge to 26 U.S.C. § 1(a) & (c) (1954) (applying different tax rates to married and unmarried taxpayers); *Mapes v. United States*, 576 F.2d 896 (Ct. Cl. 1978) (same).

166. *Zablocki*, 434 U.S. at 388.

167. See *supra* notes 162-65 and cases cited therein.

168. One might ask why anyone would want to enter into a marriage relationship with a minor, one of the same gender, a close relative, or one who is already married and is planning to stay married to the current spouse? It seems likely that persons prevented from marrying by restrictions based on age, affectional preference, relationship, or marital status want to marry for any and all of the reasons that adult, heterosexual, nonrelated, unmarried individuals choose to marry. Many (one would hope most or all) are in love. Many choose to marry for social or religious reasons—to have the "blessing" of family and church, to have children deemed "legitimate" in the eyes of the law and society, to join together two families, to end loneliness in a socially acceptable and "moral" manner, or to increase the chances of living longer. (Married persons, especially married men, have lower death rates than comparable unmarried persons. H. CARTER & P. GLICK, *MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY* 338-42 (1970)). Some choose to marry for economic reasons—employers may fire or may refuse to hire individuals cohabiting with someone of the opposite sex to whom he or she is not married; marriage may affect tax rates; spouses are often automatic beneficiaries of life insurance policies, pensions, or government payments; certain insurance premiums may be lower for marrieds than for unmarrieds; married persons may fare better than unmarried persons financially should their relationships end; married persons are protected by estate tax laws whether their spouses die with or without a will. Some may marry for reasons of emotional support, for example to be with an ill partner hospitalized in an institution admitting only visitors "related to" the patient.

viduals could undergo severe economic hardship, or would-be spouses may die, all with much different consequences than if the individuals had been married.

Although all of this may seem to argue in favor of evaluating age restrictions with the most exacting scrutiny, the fact that those restricted are minors changes the complexion of the analysis. While recognizing that minors are endowed with constitutional rights,¹⁶⁹ the Supreme Court has traditionally examined those rights with lesser scrutiny than when adults are involved.¹⁷⁰ Because minors are viewed as vulnerable and as possessing less well-developed decision-making ability, because parents are also endowed with constitutional rights concerning child-raising, and because the courts traditionally have paid deference to the state in matters concerning children,¹⁷¹ the Supreme Court is unlikely to apply the strict test enunciated in *Zablocki* to a restriction infringing upon a minor's right to marry. Rather, the Court more likely would apply a test similar to the one announced in *Planned Parenthood of Central Missouri v. Danforth*¹⁷² and reaffirmed in *Carey v. Population Services International*.¹⁷³ That is, the Court would not ask whether the restriction served a compelling state interest, but rather whether it served a significant state interest.¹⁷⁴

Restrictions relating to homosexuality, incest, and polygamy raise a different issue. Without doubt, these restrictions "directly and substantially" interfere with the decision to marry; they place "direct legal obstacle[s] in the path of persons desiring to get married[;]" and they make actually—not just "practically"—impossible some marriages. But, these restrictions do not prohibit or make illegal or impossible all marriages. They restrict a woman from marrying another woman, even though the other woman may be her choice for a lifetime partner. They prohibit, in most instances, an uncle and a niece from marrying even though those individuals want to marry each other and no one else. And, they prohibit one man already married from marrying again as long as he is still

169. *Bellotti v. Baird*, 443 U.S. 622, 633 (1979); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (1977); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

170. See, e.g., *Bellotti*, 443 U.S. at 634; *Carey*, 431 U.S. at 693 & n.15; *Danforth*, 428 U.S. at 74-75; *Ginsberg v. New York*, 390 U.S. 629, 640-41 (1968).

171. See *Bellotti*, 443 U.S. at 634; *Carey*, 431 U.S. at 693 n.15; *Danforth*, 428 U.S. at 102 (Stevens, J., concurring and dissenting); *Ginsberg*, 390 U.S. at 639-40.

172. 428 U.S. 52 (1976).

173. 431 U.S. 678 (1977).

174. 431 U.S. at 693; 428 U.S. at 75.

married even though his present wife and his prospective wife have no objections to the arrangement. But, the woman may marry any man (provided he is an unmarried adult not closely related to her), and the uncle and niece may marry anyone not closely related to them (provided their intended spouses are unmarried adults of the opposite gender), and the married man, once divorced or widowed, may marry anyone he chooses (so long as his chosen partner is an unmarried adult woman not closely related to him).

Given these conditions, should these restrictions be subjected to rigorous scrutiny pursuant to *Zablocki* or are they examples of “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship [that] may legitimately be imposed?”¹⁷⁵ Is it enough that persons are left with a reasonable number of prospective spouses from which to choose, as in cases involving trusts and wills prohibiting potential beneficiaries from marrying members of certain religious or ethnic groups,¹⁷⁶ or does the fundamental right to marry mean that an individual has the right to marry anyone?¹⁷⁷ If *Zablocki* is to be applied literally, the constitutionally protected right of privacy should ensure all persons the right to marry whomever they choose or to have the restriction prohibiting them from doing so judged with strict scrutiny.

Following *Zablocki* then, can restrictions on marriage relating to marriage license fees, mental disability, medical examinations, age, affectional preference, incest, or marital status withstand the rigorous scrutiny prescribed by the Court?¹⁷⁸

175. 434 U.S. at 386.

176. See, e.g., *United States Nat'l Bank of Portland v. Snodgrass*, 202 Or. 530, 275 P.2d 860 (1954).

177. Shortly after the Supreme Court decided *Loving v. Virginia*, Father Drinan wrote that “The freedom to marry cannot in modern society be successfully separated from the freedom to marry the person of one’s choice. For modern man, freedom to marry must be synonymous with the right to marry the person one chooses.” Drinan, *The Loving Decision and the Freedom to Marry*, 29 OHIO ST. L.J. 358, 364-65 (1968). Following *Loving*, Father Drinan would have required the courts to determine whether the marriage restriction had a rational objective and whether the state had a legitimate interest in the area restricted, *id.* at 369, a standard substantially more deferential to the state than that later articulated in *Zablocki*.

178. Discussion of *Jobst*-type restrictions (tax laws, nepotism rules, financial disclosure laws) is omitted because those restrictions, at least if not raised until after marriage, apparently do not warrant the rigorous scrutiny *Zablocki* demands, but rather will be upheld if they serve legitimate state interests and a rational relationship exists between the restriction and the interest sought to be served. Even if raised prior to marriage, such laws or regulations might not rise to the level of a significant interference with the decision to enter into the marital relationship. There might occa-

B. *The Standard Applied*

1. *Financial Restrictions*

In *Zablocki* the Supreme Court determined that even if the state interests sought to be advanced by the restriction on marriage—an opportunity to counsel marriage license applicants on the importance of fulfilling their support obligations and protection of out-of-custody children—were “sufficiently important,” the restriction was not “closely tailored to effectuate only those interests.”¹⁷⁹ There was no evidence that any counseling ever occurred. Even if counseling had occurred, once it was completed the state no longer had a basis to withhold the marriage license from the applicant. Furthermore, while the statute prevented noncustodial parents disobeying court orders of support from marrying, it provided no additional support to the children. Finally, the state had several other means for enforcing court orders of support—wage assignments, civil contempt, criminal penalties—none of which infringed upon the fundamental right to marry.¹⁸⁰

The Court also noted that the restriction was both over and underinclusive. The restriction was overinclusive because among those it prevented from remarrying because of support obligations owed to minor children may well have been parents who would have married employed and/or wealthy spouses who could have assisted the parent in meeting the support obligation. The restriction was underinclusive because while it prevented the license applicant from assuming another financial burden to a spouse and legitimate children, it did not prohibit the applicant from assuming other debts, and it did not prevent the applicant from acquiring a burden to children born out of wedlock, as happened to Redhail.¹⁸¹

sionally exist two individuals who could not marry, for example, because one would lose employment due to a nepotism rule. Most of these restrictions, however, place added burdens on couples who marry or make the couples' lives less comfortable after marriage, but they do not preclude marriage—actually or practically—as do wealth restrictions, time limits, or moral restraints. The Social Security regulation at issue in *Jobst*, if challenged prior to marriage, is distinguishable from tax laws, nepotism rules, and financial disclosure laws. Were one to assert that marriage would be made practically impossible due to a significant loss of income occasioned by the application of the regulation, the challenge would more nearly resemble a wealth-type restriction rather than a regulation that burdens an individual once married but that does not preclude marriage.

179. 434 U.S. at 388. The Court also noted that the statute might prevent the noncustodial parent from incurring more support obligations to later-born children, drawing funds away from those children covered by the court order of support. *Id.* at 390.

180. *Id.* at 388-90.

181. *Id.* at 390.

For all of these reasons, the financial restriction on marriage posed by *Zablocki* failed to meet the “closely tailored” prong of the Court’s scrutiny and, therefore, was held unconstitutional. Any similar legislation, assuming that it also failed to meet the state’s interests in the most narrowly tailored manner, would likewise fail.¹⁸²

Marriage license fees present another form of financial restriction on the decision to enter into the marital relationship. Even though license fees may be quite modest,¹⁸³ the truly indigent may not be able to afford them, thereby being denied the opportunity to marry for an indefinite period of time, if not permanently.

The primary purpose behind license fees is payment of the administrative costs of the state’s regulation of marriage.¹⁸⁴ While that reason is undoubtedly a legitimate state purpose, whether it is a “sufficiently important” state interest is questionable. Administrative convenience is not a sufficient reason to infringe upon a fundamental right.¹⁸⁵ Some may argue that state-sanctioned license fees are required for any number of activities, such as driving a motor vehicle or hunting, and that the state is not required to waive these fees for indigent applicants. These activities, however, have not been declared to be fundamental rights, as has marriage. As with divorce, the state holds a monopoly on the exercise of that right. In those states not recognizing common law marriage,¹⁸⁶ the only way in which a marriage may be accorded state recognition is if those individuals choosing to marry follow state procedure, including payment of a license fee. By analogy to *Boddie v. Connecticut*,¹⁸⁷ therefore, mar-

182. See, e.g., *Miller v. Morris*, 270 Ind. 505, 386 N.E.2d 1203 (1979).

183. See *supra* note 154.

184. E.g., CAL. GOV'T CODE § 26840 (Deering Supp. 1984) (\$1.00 of the fee to be paid to county recorder, \$1.00 to county clerk, \$1.00 to State Registrar of Vital Statistics, and \$7.00 to the County Property Tax Reduction Fund); PA. STAT. ANN. tit. 48, § 1-19 (Purdon 1965) (\$2.50 of the fee to be paid for the use of the clerk of the orphans' court of the county where license issued and \$.50 for use of the state). But see ILL. ANN. STAT. ch. 53, § 73 (Smith-Hurd Supp. 1984-85) (\$25.00 of \$40.00 fee to be paid to Domestic Violence Shelter and Service Fund). While the prevention and alleviation of domestic violence may well be an interest sufficiently important to justify imposition of a marriage license fee, the fee is not closely tailored to effectuate only that purpose (only 60% of the \$40.00 fee is earmarked for the Fund.) There also exist means of supporting a Domestic Violence Fund less intrusive than infringing upon the rights of indigents to marry.

185. See, e.g., *Carey*, 431 U.S. 678, 691 (1977); *Craig v. Boren*, 429 U.S. 190, 198 (1976); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

186. Only 14 jurisdictions still recognize common law marriage. J. AREEN, FAMILY LAW 61 n.1 (2d ed. 1985).

187. 401 U.S. 371 (1971).

riage license fees that prevent indigent applicants from marrying should be held to violate the applicants' fundamental right to marry.

2. *Protective Restrictions*

Some state restrictions on marriage, such as those requiring medical examinations before a license is issued or those preventing marriage by minors, certain prisoners, or those deemed to be mentally incompetent, are justified on the basis of protecting the marriage partners, the partners' potential family, or society in general. In all instances, the restrictions may serve sufficiently important state interests. Likewise in all instances, however, questions arise concerning the closeness of the tailoring between the restriction and the state's objective.

Almost all states require marriage license applicants to submit to a blood test or other type of medical examination before a marriage license will be issued. In most instances, the purpose behind the test is to ensure that neither of the marriage partners has an active case of venereal disease at the time of marriage. Some states also express concern over tuberculosis, rubella, and sickle cell anemia.¹⁸⁸ Protecting the health of the populace is a sufficiently important state interest, perhaps justifying a blood test or other medical examination prior to marriage. Problems arise, however, if one is unwilling or unable to submit to such an examination for financial, religious or privacy reasons.¹⁸⁹

Although a blood test is effective in detecting venereal disease, the restriction is underinclusive. Marriage license blood tests are directed only at detecting active venereal disease, not other diseases that could affect not only the applicants' decision to marry, but also their decisions con-

188. *E.g.*, CAL. CIV. CODE § 4300 (Deering 1984) (rubella; test is not required when female applicant is over 50 years of age, has been surgically sterilized, or presents laboratory evidence of immunity to rubella); IDAHO CODE § 32-412 (1983) (rubella; test not required if applicant is over 45 years old, presents documentation of previous rubella vaccination, or is incapable of bearing children); ILL. ANN. STAT. ch. 40, § 204 (Smith-Hurd Supp. 1984-85) (sickle cell anemia; test given to all persons "if the examining physician determines such a test to be necessary"); NEB. REV. STAT. § 42-121(2) (Supp. 1983) (rubella; test is not required when female is over 50 years of age, has had surgical sterilization, or presents laboratory evidence of immunity to rubella); N.Y. DOM. REL. LAW § 13-a (McKinney 1977) (sickle cell anemia; test given "to each applicant for a marriage license who is not of the Caucasian, Indian or Oriental race"); N.C. GEN. STAT. § 51-9 (Supp. 1981) (tuberculosis).

189. Some state statutes authorize waiver of blood tests if the applicants object to such tests on religious grounds and "the public health and welfare will not be injuriously affected thereby[.]" ILL. ANN. STAT. ch. 40, § 205(2) (Smith-Hurd Supp. 1984-85), or "if the judge is satisfied . . . that an emergency or other sufficient cause for such action exists and that the public health and welfare will not be injuriously affected thereby[.]" CAL. CIV. CODE, § 4306 (Deering 1984).

cerning procreation.¹⁹⁰ For example, a blood test could determine whether the applicants are carriers of recessive genes that could result in various genetic disorders in their children.¹⁹¹ If such a discovery were made, the couple could be offered genetic counseling and advice concerning procreation and contraception, all directed to meeting the state's interest in a healthy society.¹⁹² The restriction is also underinclusive because it merely prevents a marriage license applicant with an active case of venereal disease from securing a marriage license. It does not prevent the applicant from engaging in sexual intercourse and endangering others, theoretically the reason behind the restriction.¹⁹³

State restrictions on marriage based upon an individual's perceived mental disability¹⁹⁴ or age¹⁹⁵ rest upon concerns for the family and the individual. States want to ensure that before individuals marry, they are financially and emotionally able to care for themselves and their families.¹⁹⁶ The state also has a concern that children of the marriage be born

190. *But see supra* note 188.

191. *See* PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, SCREENING AND COUNSELING FOR GENETIC CONDITIONS 2, 17-20 (1983).

192. *See, e.g.*, CAL. CIV. CODE, § 4201.5 (Deering 1984) (mandating that the Department of Health Services publish a brochure indicating the possibility of genetic defects and diseases and listing centers available for testing and treating genetic defects and diseases. The act further directs the Department to make the brochures available to county clerks who are to distribute the brochures to all marriage license applicants).

193. The Uniform Marriage and Divorce Act makes optional state-required premarital medical examinations. UNIF. MARRIAGE & DIVORCE ACT § 203(3), 9A U.L.A. 103 (1979). In a comment following § 203, the Commissioners explained that their decision not to recommend that such examinations or blood tests be required was based on the ineffectiveness of the procedure:

The premarital medical examination requirement serves either to inform the prospective spouses of health hazards that may have an impact on their marriage, or to warn public health officials of the presence of venereal disease. For the latter purpose, the statutes have been proved to be both avoidable and highly inefficient. Moreover, the cursory blood test which satisfies the requirements of most states provides very little service to the prospective spouses themselves.

Id. at 103-04 (citations omitted).

194. *See supra* note 156.

195. *See supra* note 158.

196. The younger individuals marry, the less education they are likely to have completed, the less trained they are for employment, and the less likely they are to find a job that will make them self-supporting. The divorce rate for couples marrying while still adolescents is higher than for any other age group in the United States population. Wives were younger than age 20 in 38.3% of all divorces granted in 1981 and husbands were younger than age 20 in 17% of the divorces granted. U.S. Nat'l Center for Health Statistics, *Advance Report of Final Divorce Statistics*, 32 MONTHLY VITAL STATISTICS REPORT at 12 (Jan. 17, 1984). The best statistical predictor of divorce rates in 1960 and 1970 was the proportion of couples married at young ages. Weed, *Age at Marriage as a Factor in State Divorce Rate Differentials*, 11 DEMOGRAPHY 361, 362 (Aug. 1974). For both men

healthy. The latter concern assumes, however, that all persons who marry have children. Many persons who marry, however, are unable to choose not to have children.¹⁹⁷ A mental disability restriction also assumes that the disability is inheritable, a vastly overinclusive assumption.¹⁹⁸ Even if the disability is inheritable and even given the state's compelling interest in the health of its citizenry, that interest does not necessarily extend beyond promotion of health to prevention of birth.¹⁹⁹

and women, the percentages in the youngest age-at-marriage category were approximately double the percentages of persons aged 22 to 27 or 28 to 69. That figure holds true, with one exception (men aged 28 to 69 and married fewer than 10 years), across all categories of years since first marriage. *Id.* at 364. Women who marry before age 18 have a much higher probability of divorce no matter how long their marriages last. *Id.*

197. Various census reports indicate that the percentage of women expecting to remain childless ranged from 6%, U.S. Dep't of Commerce, Bureau of the Census, *American Families and Living Arrangements*, CURRENT POPULATION REPORTS, SPECIAL STUDIES 2 (Series P-23, No. 104, 1980) (wives between ages 18 and 34 in 1978), to 11.6%, U.S. Dep't of Commerce, Bureau of the Census, FERTILITY OF AMERICAN WOMEN: JUNE 1982, CURRENT POPULATION REPORTS POPULATION CHARACTERISTICS 1 (Series P-20, No. 387, Apr. 1984) (all women between the ages of 18 and 34 in June 1982). These figures indicate a marked increase over census reports showing that in 1967 only 2 to 3% of all wives aged 18 to 34 expected to remain childless. U.S. Dep't of Commerce, Bureau of the Census, AMERICAN FAMILIES AND LIVING ARRANGEMENTS, CURRENT POPULATION REPORTS, SPECIAL STUDIES 2, Chart 3 (Series P-23, No. 104, 1980).

198. Many reasons are advanced to explain the cause of mental retardation. While some of the causes are genetically linked, many are not. See HANDBOOK OF MENTAL RETARDATION (J. Matson & J. Mulick ed. 1983) (see especially Abuelo, *Genetic Disorders*, at 105-20; Lott, *Perinatal Factors in Mental Retardation*, at 97-103; Pueschel & Thuline, *Chromosome Disorders*, at 121-41); MENTAL RETARDATION (H. Stevens & R. Heber ed. 1964) (see especially Anderson, *Genetics in Mental Retardation*, at 348-94); MENTAL DEFICIENCY: THE CHANGING OUTLOOK (A.M. Clarke & A.D.B. Clarke ed. 1975) (see especially Berg, *Aetiological Aspects of Mental Subnormality: Pathological Factors*, at 82-107; Clarke & Clarke, *The Changing Outlook*, at 6-7; Kushlick & Blunden, *The Epidemiology of Mental Subnormality*, at 49-60). Those individuals who are mentally disabled due to genetic reasons may or may not pass on the genetic disability to their children depending upon the combination of dominant/recessive genes related to the disorder carried and transmitted by them and by their sex partners. Abuelo, *Genetic Disorders* in HANDBOOK OF MENTAL RETARDATION 107 (J. Matson & J. Mulick ed. 1983).

199. *But see In re Sterilization of Moore*, 289 N.C. 95, 221 S.E. 2d 307 (1976) (upheld the validity of a statute authorizing sterilization of mentally retarded individuals when, inter alia, the "patient . . . would be likely, unless sterilized, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency. . ."). See N.C. GEN. STAT. § 35-39(3) (1984). Although involuntary sterilization of those deemed mentally incompetent is still statutorily authorized in a number of jurisdictions, the reasons advanced for sterilization frequently refer to the well-being of the person to be sterilized and of potential offspring in terms of having someone to care for them, as opposed to the "health" or potential genetic disabilities with which the offspring might be born. See, e.g., GA. CODE § 31-20-3(b) (1982) (permits sterilization of "persons who, because of mental retardation, brain damage, or both, is irreversibly and incurably mentally incompetent to the degree that such person, with or without economic aid (charitable or otherwise) from others, could not provide care and support for any children procreated by such person in such a way that such children could reasonably be expected to survive to the age of 18 years without

The restriction also ignores those disabled children born to nondisabled parents.²⁰⁰ Finally, restricting marriage will not prevent childbirth.

For those who do have children, a marriage restriction based on mental disability or age is further overinclusive because it assumes that mentally disabled or minor parents could not care for themselves or their children, when many can. There are, however, many mentally competent adults, who are not mentally, emotionally, or financially able to care for themselves and a family. The state does not and cannot prevent such marriages from occurring, despite the fact that the result may be no different from the result of marriages between minors or those labeled mentally incompetent.

Mental disability and age restrictions are also directed at ensuring that persons who marry are able to support themselves and their families. Again, the provision is overinclusive because it includes many persons classified as mentally disabled or minors who are gainfully employed and self-supporting. The restriction is underinclusive because it does not account for the many adults or persons not labeled mentally disabled who are not gainfully employed or self-supporting, yet who are able to marry.

Preventing minors or those individuals deemed mentally incompetent from marrying allows the state to withhold its economic and moral approval from any relationship into which those individuals enter, but does not prevent the occurrences that the state claims to fear in enacting such a restriction.²⁰¹ If the state's concern is promoting the birth of "healthy" children to parents able to care for them, it would seem far wiser and more closely tailored to the state's objective to offer minors or mentally incompetent persons who choose to marry and who are carrying inherit-

suffering or sustaining serious mental or physical harm"); IDAHO CODE § 39-3901(a) (1977) (same, with additional condition that "free from the obligations of parenthood, [the person] could be released from the total care within an institution, or remain in a community program and could reasonably benefit from a more independent, normal life"); VA. CODE § 54-325.12(4) (1982) (among other circumstances, "[t]he nature and extent of the person's mental disability renders the person permanently incapable of caring for and raising a child").

200. See PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, SCREENING AND COUNSELING FOR GENETIC CONDITIONS 13 (1983).

201. Many of the concerns of the state, e.g., whether a minor or a person labeled mentally incompetent would choose to or is able to parent children or whether the individual could financially support a family, could better be addressed in an individualized hearing rather than by presumption. Some state statutes provide that despite a marriage license applicant's mental incompetence, a court may issue a license to the applicant if it is in the applicant's and society's "best interest." See, e.g., PA. STAT. ANN. tit. 48, § 1-5(d) (Purdon Supp. 1984-85). See *infra* notes 210-13 and accompanying text for a discussion of individualized hearings related to minors who want to marry.

able traits health care, genetic counseling and family planning services, and, if warranted, childcare training and assistance.²⁰² Likewise, a better governmental response in terms of those not trained or employed would be for the state not to prohibit marriage, but to provide training and assistance in obtaining employment or incentives to the private sector to do so.

The state's interest in preventing minors from marrying, at least without parental permission, also relates to traditional protection of the family unit. Children are viewed as unable to make decisions as well-reasoned as adults.²⁰³ Furthermore, parents have a right, within broad limits, to raise their children as they wish,²⁰⁴ and such a right implies the authority not to have their children override their parents' decisions. Finally, the state also has a concern with protecting children from abuse or exploitation, either by parents or others.²⁰⁵

Some may argue that because there is no way to determine which individuals will enter into a successful marriage and which will not and because the divorce rate among minors who marry is so high,²⁰⁶ the better course is to prevent all minors from marrying without parental permission; although some good marriages will be prevented, more bad marriages will be prevented.

Three arguments indicate the weakness in that position. First, administrative convenience or difficulty in making a determination cannot support a restriction upon a fundamental interest,²⁰⁷ even when the person seeking to exercise the interest is a minor. Second, some states waive age

202. See CAL. CIV. CODE § 4101 (Deering 1984) requiring court approval of marriages involving individuals younger than 18 and mandating that the court require the applicants "to participate in premarital counseling concerning social, economic, and personal responsibilities incident to marriage, if it deems such counseling necessary." In addition, if children born to mentally disabled or minor parents are not receiving proper care and the parents cannot respond to assistance in caring for their children, the state may invoke its abuse and neglect procedures to remove the children from the custody of such parents just as it sometimes does with adult, mentally competent parents.

203. See *Bellotti*, 443 U.S. 622, 635 (1979); *Carey*, 431 U.S. 678, 693 n.15 (1977); *Danforth*, 428 U.S. 52, 103 (1976) (Stevens, J., concurring and dissenting); *Ginsberg*, 390 U.S. 629, 640 (1968). Marriage has long been perceived as a contract to be entered into only by those competent to contract in terms of age and mental capacity.

204. *Bellotti*, 443 U.S. at 637-39; *Ginsberg*, 390 U.S. at 639; *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

205. *Bellotti*, 443 U.S. at 634-35; *Ginsberg*, 390 U.S. at 640; *Prince*, 321 U.S. at 166, 169-70.

206. See *supra* note 196.

207. See *Carey*, 431 U.S. 678, 691 (1977); *Craig v. Boren*, 429 U.S. 190, 198 (1976); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

restrictions on marriage when the female is pregnant.²⁰⁸ If marriages of minors are at risk, marriages between minors based upon pregnancy are at greater risk, yet some states sanction such marriages. By doing so, the state not only is increasing the failure rate of adolescent marriages, but also is telling adolescents that parental permission may be unnecessary if they conceive a child.²⁰⁹ Surely, this scheme does not serve the state's significant interest in stable, well-cared-for families. Finally, when the state prevents minors from marrying it does not necessarily achieve the goals it intends. As noted, refusal to marry does not preclude, and may even encourage, the creation of a family. What the restriction does is prevent the minors from taking part in a marriage ceremony and from receiving any public benefits or protections to which married individuals are entitled.

The state's concern that children will be exploited by adults is an issue addressed by criminal laws dealing with child abuse or statutory rape.

This is not to say that the marriage of children should be unrestricted. Most minors do have undeveloped decision-making skills and parents do have the right to raise their children as they desire. State age restrictions for marriage, however, could be more flexible and perhaps more successful in achieving the state's purposes. For example, marriage restrictions could be made analogous to restrictions on abortion.²¹⁰ Children, presumably adolescents, denied parental permission to marry, would have the opportunity to prove to a court that they are mature enough to marry and that they could care for themselves if married.²¹¹ At that point, child and court could make the decision.²¹² Judicial review would provide minors with the ability to care for themselves the opportunity to

208. See, e.g., N.C. GEN. STAT. § 51-2(b) (1984) (still requiring permission for woman to marry from a parent, guardian, or director of county social services agency, but permitting females older than 12 to marry if permission secured).

209. Ironically, a minor could terminate her pregnancy without her parents' permission. *Danforth*, 428 U.S. at 72-75. But see *Bellotti*, 443 U.S. at 643-44 (state may require parental consent before minor procures abortion if it provides alternative procedure, e.g., a judicial hearing in which authorization for abortion may be obtained).

210. Note, 12 U.C.D. L. REV., *supra* note 65, at 301.

211. Similar provisions could be made when one or both individuals seeking to marry are deemed mentally incompetent. A parent or guardian could grant permission for the parties to marry or, if the parent or guardian refuses, the parties could seek court permission to marry. See, e.g., PA. STAT. ANN. tit. 48, § 1-5(d) (Purdon Supp. 1984-85).

212. Note, 12 U.C.D. L. REV., *supra* note 65, at 327-30. See ILL. ANN. STAT. ch. 40, § 208 (Smith-Hurd 1980) providing for judicial approval of marriages when the applicants are between the ages of 16 and 18 and are unable to obtain their parents' consent "if the court finds that the under-aged party is capable of assuming the responsibilities of marriage and the marriage will serve his best

prove that ability and would prohibit those unable to do so from marrying. Automatic waiver of the necessary consent system, should not occur merely because the couple has conceived a child.²¹³ The parties would be subject to the same burden of proof as any other individuals, although the pending birth or present existence of a child would be a factor for the court to consider in making its decision.

Parents may argue that such an approach undermines their authority within their family and that the state should not intervene in the ongoing family relationship. Despite parents' constitutional right to raise children as they desire, however, the state commonly intervenes in the family relationship and instructs parents on how they must, for example, educate²¹⁴ or care for²¹⁵ their children.

A system based upon judicial permission would not, of course, be perfect. In all probability, some children unable to care for themselves if married would be permitted to marry and some children able to care for themselves would be denied the right. Those prevented from marrying would not necessarily be deterred from cohabiting and procreating. Still, the individual determination provides greater protection for the adolescents and for the fundamental right to marry than does a blanket prohibition.

State restrictions preventing certain prison inmates from marrying²¹⁶ also may be justified on grounds of protecting the prisoner's family. Such restraints may prevent financial dependence upon the state by the non-prisoner spouse, marital disharmony, instability and dissolution, and exploitation of nonprisoners. Other state interests that such restrictions theoretically advance include prison safety and security, improved discipline, rehabilitation, and morale. Finally, prison marriage ceremonies could cause administrative inconvenience.

A basic flaw with the reasons advanced to support a restriction on prison marriages is that prison regulations do not require prisoners al-

interest." (emphasis added.) *Accord* UNIF. MARRIAGE & DIVORCE ACT § 205(b), 9A U.L.A. 105 (1979).

213. See, e.g., ILL. ANN. STAT. ch. 40, § 208(b) (Smith-Hurd 1980); UNIF. MARRIAGE & DIVORCE ACT § 205(b), 9A U.L.A. 105 (1979).

214. See, e.g., *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 452 (N.D. Ill. 1974); *People v. Turner*, 121 Cal. App. 2d 861, 263 P.2d 685 (1953), *dismissed sub. nom.* *Turner v. People*, 347 U.S. 972 (1954); *In re Franz*, 55 A.D.2d 424, 390 N.Y.S.2d 940 (1977).

215. See, e.g., *Custody of a Minor*, 375 Mass. 733, 379 N.E.2d 1053 (1978) (medical care); *Dumpson v. Daniel M.*, N.Y.L.J. at 17, col. 7 (Oct. 16, 1974) (punishment amounting to abuse).

216. See *supra* note 155.

ready married to divorce once they are incarcerated. The same problems, however, relating to prison security and discipline and to familial stability and well-being should exist with married prisoners. In fact, problems relating to familial stability and support may be even greater among prisoners married before incarceration because they are more likely to have children at the time they enter prison than are inmates who marry after incarceration.

Prisons must have more effective ways to preserve security and safety within the prison walls than by prohibiting inmates from marrying. If the states fear passing of contraband, the prison could tighten visitation regulations. Contrary to the belief that prisoner morale, discipline, and rehabilitation would suffer were inmates allowed to marry, they may well improve if an inmate has a further incentive, a new spouse, for behaving well and gaining weekend furloughs or early release for good behavior.

In terms of family affairs, the restrictions assume that the nonprisoner spouses will be dependent upon the state because there will be no one to support them. The restriction totally overlooks the fact that the spouse may be self-supporting. The restriction is underinclusive, as well, because the state has ignored members of the nonprison population who are financially dependent upon the state, but who may not be denied their fundamental right to marry on economic grounds. Fears that prison marriages will be unstable and may even dissolve while the spouses live separately also support the restriction. Presumably, the nonprisoner spouse will become tired of waiting for the prisoner spouse to be released and will look for someone else or the prisoner spouse will at least suspect that the nonprisoner spouse is doing so. The same scenario, however, could happen between military or foreign service spouses or any spouses separated over long periods of time, but surely the state could not prevent such individuals from marrying. Furthermore, the state could enhance family stability and harmony through family counseling and liberal visitation provisions. If the state fears that prisoners will exploit nonprisoner spouses in terms of property, the state could restrict the prisoner's ability to own or inherit property while incarcerated. Again, means much less restrictive than prohibition of a fundamental right could satisfy the state's interest.

One court, in addressing the issue of a restriction on marriage affecting prisoners, explained that because prisoners would be denied the rights to cohabit, procreate, and raise children with their spouses, a marriage restriction denied them nothing more than the right to go through with a

ceremony.²¹⁷ Such a view completely overlooks the other reasons one has for marrying.²¹⁸ The fact that one might not consummate a marriage or create and raise children while imprisoned is insufficient reason to deprive a prisoner of the fundamental right to marry.

3. "Moral" Restrictions

Historically, the Supreme Court has stated that matters relating to marriage and divorce are almost exclusively within the province of the states and that the courts should be reluctant to interfere with state restrictions affecting family matters.²¹⁹ Probably nowhere would this argument be more strongly raised than with those restrictions on marriage relating to "moral" issues such as homosexuality, incest, and polygamy.²²⁰ But, Justice Powell, concurring in *Zablocki*, expressed the opinion that "A 'compelling state purpose' inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage [earlier citing incest, bigamy and homosexuality as among those restrictions] and divorce."²²¹ Justice Powell's opinion is accurate.

Restrictions on marriage based upon homosexuality, incest, and polygamy advance related state interests. As with protective restrictions, they concern the family in particular and society in general. Some of the state interests may accurately be characterized as sufficiently important. Once again, however, the fit between restriction and objective sought to be achieved is weak.

If one of the purposes of marriage is procreation and if procreation is less likely to occur in a homosexual marriage, states may seek to prohibit homosexual marriages in order to promote procreation. The state may also employ restrictions that prohibit homosexuals from marrying²²² to

217. *Wool v. Hogan*, 505 F. Supp. 928, 932 (D. Vt. 1981); *but see Safley v. Turner*, 586 F. Supp. 589, 594 (W.D. Mo. 1984).

218. *See supra* note 168.

219. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Simms v. Simms*, 175 U.S. 162, 167 (1899); *Maynard v. Hill*, 125 U.S. 190, 205 (1888); *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878).

220. *See Zablocki*, 434 U.S. at 399 (Powell, J., concurring).

221. *Id.* Justice Stewart, also concurring in the judgment in *Zablocki*, expressed the opinion that states "[s]urely . . . may legitimately say that no one can marry his or her sibling . . . or that no one can marry who has a living husband or wife." *Id.* at 392 (Stewart, J., concurring). Although Justice Stewart did not include a ban on homosexual marriages in his list of marriages that the state may "surely" preclude, that restriction also falls within the category of cases to which he refers. It must be remembered, however, that Justice Stewart was advocating a "flexible" due process approach as a guide to evaluating marriage restrictions, not a strict scrutiny, compelling state interest analysis.

222. *See supra* note 160.

prevent, or at least not to encourage, what criminal statutes call "deviate sexual intercourse."²²³ And the state may think that by preventing homosexual marriage it will encourage heterosexuality. The state also has an interest in preventing disease, in this context, venereal disease or acquired immunodeficiency syndrome (AIDS).

To argue that a restriction on homosexual marriages fosters procreation overlooks the facts that many homosexuals have had children prior to entering into the homosexual relationship,²²⁴ that homosexuals in a partnership may adopt children²²⁵ or may choose a partner outside of the relationship for the sole purpose of having children,²²⁶ and that many heterosexual married couples are remaining childless.²²⁷ Similarly, preventing homosexual marriage will not prevent the communication of disease and may in fact work against that goal. Both AIDS and venereal disease are more common among persons who have many sex partners²²⁸ as opposed to those with a single partner in a monogamous relationship.²²⁹ Furthermore, lesbians have a very low incidence of venereal dis-

223. See, e.g., MISS CODE ANN. § 97-29-59 (1972); N.Y. PENAL LAW § 130.00, 130.38 (Consol. 1975); 18 PA. CONS. STAT. ANN. §§ 3101, 3123, 3124 (Purdon 1983).

224. In one study of homosexual couples, 52% of the homosexual men who had at one time been married had children and 56% of the homosexual women who had at one time been married had children. A. BELL & M. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 391, table 17.13 (1978).

225. *But see* 1985 Mass. Legis. Serv. 414, 416 (West) (appropriation bill providing that it shall be the policy of the department of social services to place children in need of foster care exclusively in the care of persons whose sexual orientation presents no threat to the well-being of the child); MASS. ADMIN. CODE tit. 110, § 7.103(3)(a) (1985) (foster parent applicants must disclose the name, date of birth, address, telephone number, sex, sexual preferences/orientation, ethnicity, and occupation).

226. Forty percent of the recipients of sperm donated to the sperm bank of the Feminist Women's Health Center in Oakland, California, are lesbians, most living in couples. *Lesbians' Custody Battle Poses Novel Issues*, N.Y. Times, Sept. 9, 1984, at 37, col. 4.

227. See *supra* note 197.

228. See Curran, *AIDS—Two Years Later*, 309 N. ENG. J. MED. 609, 609-10 (1983). Transmission of communicable diseases will occur in higher rates among individuals with many sex partners than in individuals who are monogamous regardless of the individuals' affectional preference. There is some evidence that fear of contracting AIDS has caused a decline in the number of homosexual men's sex partners, resulting in a decline in other communicable diseases. In a letter to The Lancet, Franklyn N. Judson, Department of Medicine (Infectious Diseases), University of Colorado Health Sciences Center and Denver Disease Control Center, reported that between the first three months of 1982 and the same time period in 1983 cases of infection with *Neisseria gonorrhoea* in homosexual men declined 39%, with no comparable decline in the number of cases among heterosexual men and women. Judson, *Fear of AIDS and Gonorrhoea Rates in Homosexual Men*, THE LANCET 159, 159 (July 1, 1983).

229. Bell and Weinberg report that homosexual couples in what they call "Close-Coupled"—those partners "closely bound together" in a relationship and tending "to look to each other rather than to outsiders for sexual and interpersonal satisfactions"—exhibit many differences when com-

ease and AIDS.²³⁰ The state could better achieve its goal of disease control through education and treatment.

Many states have already enacted criminal statutes making "deviate sexual intercourse" a crime.²³¹ If such criminal laws do not already act as a deterrent to such conduct, a ban on homosexual marriage is unlikely to deter the conduct.

Finally, no evidence exists to support the belief that banning homosexual marriages will promote heterosexual relationships. Most homosexuals prohibited from marrying will simply continue their homosexual relationship without official state recognition. Homosexuals will not reorient their affectional preference and marry a person of the other gender.

Restrictions that prohibit individuals in certain degrees of relationship from marrying attempt to address the state's concern with physical and emotional health and family stability.²³² If two persons within a certain

pared to homosexuals not committed to such a relationship. A. BELL & M. WEINBERG, *supra* note 224, at 219 (1978).

[The Close-Coupled]s were the least likely to seek partners outside their special relationship, had the smallest amount of sexual problems, and were unlikely to regret being homosexual. They tended to spend more evenings at home and less leisure time by themselves, and the men in this group seldom went to such popular cruising spots as bars or baths. . . .

The Close-Coupled's superior adjustment is demonstrated in other aspects of their lives. The men in this group had rarely experienced difficulties related to their sexual orientation such as being arrested, trouble at work, or assault and robbery. They were less tense or paranoid and more exuberant than the average respondent. The Close-Coupled lesbians were the least likely of all the groups ever to have been concerned enough about a personal problem to have sought professional help for it. Both the men and the women were more self-accepting and less depressed or lonely than any of the others, and they were the happiest of all.

Id. at 219-20. There is, of course, no guarantee that any individual will remain monogamous once married. Blumstein and Schwartz, in their recent study of various types of couples, found that 26% of husbands, 21% of wives, 33% of heterosexual male cohabitators, 30% of heterosexual female cohabitators, 82% of homosexual men, and 28% of homosexual women reported instances of nonmonogamy since the beginning of the relationship in which they were then involved. P. BLUMSTEIN & P. SCHWARTZ, *AMERICAN COUPLES* 273, figure 47 (1983). With all classes of couples, percentages of nonmonogamy increase the longer the relationship lasts. *Id.* at 274, figure 49.

230. Fewer than 1% of the lesbians Bell and Weinberg studied reported venereal disease contracted through homosexual contacts. A. BELL & M. WEINBERG, *supra* note 224, at 119, 336, table 11 (1978). Incidences of AIDS among women have been rare and appear to be related to intravenous drug use or sexual relations with men with AIDS. See Curran, *supra* note 228, at 609 (1983).

231. See *supra* note 223. These types of statutes have met with varied results when challenged as a violation of the individual's constitutional right to privacy. See *Baker v. Wade*, 774 F.2d 1285 (5th Cir. 1985) (unconstitutional); *Doe v. Commonwealth's Attorney for City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *summary affirmance without opinion*, 425 U.S. 901 (1976) (constitutional); *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981) (unconstitutional).

232. See *supra* note 159.

degree of consanguinity procreate, the likelihood that their children will be born with a genetic defect is greater than if two individuals unrelated to each other procreate.²³³ Therefore, the state may seek to prevent such people from marrying in order to protect the health of potential offspring in particular and society in general. Assuming that the state has an interest in preventing the birth of children who might be born with genetic-related disabilities,²³⁴ prohibiting marriage between close relatives does not serve that interest very well.

State concerns relating to the transmission of genetic disorders through incestuous marriages are inapplicable to blood relatives who are sterile, past their child-bearing years or not interested in having children. Even for those individuals who are closely related and who bear a higher risk of having children with genetically linked disorders, prohibiting marriage is not the answer to the state's concern. Those individuals may procreate whether or not they are married. Once again the state's response should be genetic and procreative counseling rather than a total prohibition of marriage.

Although no genetic-related concern exists when referring to individuals related by marriage or adoption, concern has been raised over the stability of the family and the emotional health of children involved. As Margaret Mead explained, society wants children to grow in a secure and loving environment. Children should know that they can be cuddled and loved by older, often adult members of their families and that that love is innocent and nurturing rather than exploitative.²³⁵ If incest restrictions that concern individuals related by marriage or adoption are removed, children will not be afforded that protection.²³⁶ An additional concern

233. The probability that two unrelated individuals will share the same recessive gene is one in seventy. A. MONTAGU, *HUMAN HEREDITY* 304 (1959). The probability that biological siblings will possess the same recessive gene is one in two. Should two siblings possessing that gene procreate, the probability is one in four that their child will inherit the recessive gene from both parents and in fact suffer the genetic defect and one in two that the child will be a carrier of the gene. See I. LERNER & W. LIBBY, *HEREDITY EVOLUTION AND SOCIETY* 370-73 (1976); M. STRICKBERGER, *GENETICS* 787-88 (1976). The probability that first cousins share a recessive gene of a common ancestor is one in eight and the probability that a child born to two first cousins will inherit the recessive gene from both parents is again one in four. See I. LERNER & W. LIBBY, *supra*, at 370-73; A. MONTAGU, *supra*, at 304; M. STRICKBERGER, *supra*, at 787-88.

234. See *supra* note 199 and accompanying text for a discussion of whether the state's concern with the birth of "healthy" children extends to preventing childbirth as opposed to taking positive steps to promote health.

235. Mead, *Anomalies in American Postdivorce Relationships*, in *DIVORCE AND AFTER* 114-17 (Bohannon ed. 1970).

236. *Id.* at 117-18.

relates to the voluntary, knowledgeable decisionmaking necessary to enter into a marriage. Fear exists that when two people are closely related, one could exercise undue influence upon or overbear the will of the other, in effect coercing the marriage rather than having it be a product of the free will of the parties.

Preventing marriage between individuals related by adoption or marriage, particularly those in stepparent-stepchildren or stepsibling relationships, will preclude the birth of "legitimate" children and will deny government benefits and protections to those who would be spouses.²³⁷ The restriction, however, will not prevent incest or child abuse or make children more secure in their homes. Ironically, given the increasing number of "reconstituted families" containing stepparents and stepchildren,²³⁸ many marriage statutes do not prohibit marriage between steprelatives.²³⁹ Sexual abuse of children is reaching epidemic proportions²⁴⁰ and in most instances the abuser does not desire to marry the person being abused. In fact, the abused person is frequently of preschool age, often even an infant.²⁴¹ The ineffective response to child sexual abuse, to date, has been legislation making sexual abuse a crime or a ground for removal of the child from the home. Part of the answer to protecting children from sexual abuse by family members related by blood, adoption, or affinity, may be to educate children in terms of what to do if someone is abusing them, to believe children reporting abusive behavior, to provide abused children with medical and psychological care, and to treat and/or prosecute the abuser. The answer, however, does not lie in

237. See *Catalano v. Catalano*, 148 Ct. 288, 170 A.2d 726 (1961) (incestuous marriage between uncle and niece voided following uncle/husband's death resulting in niece/wife's being denied Social Security survivorship benefits and possibly in child's being considered illegitimate). But see ILL. ANN. STAT. ch. 40, § 212(c) (Smith-Hurd Supp. 1984-85) (children born or adopted of prohibited marriages are legitimate); N.C. GEN. STAT. § 51-3 (Supp. 1981) (prohibited marriage followed by cohabitation and birth of issue shall not be declared void after death of either party except in case of bigamy); PA. STAT. ANN. tit. 48, § 1-16 (Purdon 1965) (marriages within prohibited degrees of consanguinity or affinity voidable but if not dissolved during lifetime of parties, lawfulness not to be questioned after death of either party); UNIF. MARRIAGE & DIVORCE ACT § 207(c), 9A U.L.A. 108 (1979) (children born of prohibited marriage legitimate).

238. "One of every eight children living with two parents lives with a natural parent and a stepparent." U.S. Dep't of Commerce, Bureau of the Census, *American Families and Living Arrangements*, CURRENT POPULATION REPORTS, SPECIAL STUDIES 11 (Series P-23, No. 104, 1980).

239. See, e.g., ILL. ANN. STAT. ch. 40 § 212(2)-(4) (Smith-Hurd Supp. 1984-85); N.C. GEN. STAT. §§ 51-3, 51-4 (1984); UNIF. MARRIAGE & DIVORCE ACT § 207, 9A U.L.A. 108 (1979).

240. Brozan, *A Senator Recounts Her Own Experience as an Abused Child*, N.Y. Times, Apr. 27, 1984, at A17, col. 2.

241. *Id.*

preventing marriage between relatives. Like statutes making homosexual conduct a crime, if statutes making incest a crime or a ground for removing a child from a home do not deter incestuous behavior, a prohibition on marriage is unlikely to do so.

In terms of knowing, voluntary consent to marriage, coercion or undue influence may occur in any relationship, whether or not the two individuals to be married are related. If they are adults and not within a prohibited degree of relationship, the law presumes that they are entering the marriage freely and voluntarily. Relationship, alone, should not be a sufficient ground to rebut that presumption.

State restrictions on marriage based upon polygamy,²⁴² more than those based upon homosexuality and incest, are directed at providing an emotionally secure and financially independent environment for the family. The state may also be seeking to prevent the exploitation of the state's resources through multiple marriages.²⁴³

The restriction against multiple marriages is underinclusive on familial and financial stability grounds because there is no similar restriction affecting remarriage or "sequential polygamy."²⁴⁴ One person may marry and divorce four times, parenting a dozen children, yet not be prohibited from marrying a fifth time and parenting more children even though the children live in four different single parent homes and the noncustodial multiple-marrying parent is indigent and cannot support any of them.²⁴⁵ The restriction also does not prevent the individual from cohabitating with more than one person at a time or from causing the birth of several children with several different partners. The law will label the children "illegitimate" and will not provide the cohabitators with any protection or any benefits, but it will not prevent the children's births or the cohabitation.²⁴⁶

The restriction on polygamy is overinclusive because an individual desiring to marry more than one spouse at a time and to have children by

242. See *supra* note 161.

243. For example, if one is allowed to marry multiple times and dies leaving four spouses, government resources could be taxed without limit in providing benefits to all of the spouses.

244. See J. AREEN, *FAMILY LAW* 18 (2d ed. 1985).

245. *Zablocki*, 434 U.S. at 375.

246. *But see* ILL. ANN. STAT. ch. 40, § 212(c) (Smith-Hurd Supp. 1984-85) (children born or adopted of prohibited marriages are legitimate). *Accord* UNIF. MARRIAGE & DIVORCE ACT § 207(c), 9A U.L.A. 108 (1979).

one or more spouses²⁴⁷ may not do so even though the person is financially capable of supporting a large family and is a loving spouse and parent to all members of the "family." The possibility exists that an individual marrying a number of spouses may be doing so to exploit the spouses, particularly in terms of property holdings. The state could alleviate the possibility of such an occurrence by requiring the consent of existing spouses before the spouse may marry again or by limiting the interest of the multiple married spouse in the other spouses' property.²⁴⁸

The state could similarly limit its own exposure to financial risk by placing a cap on any benefits it would pay to survivors or dependents, by providing that all survivors of the same degree of relationship would divide the benefits equally, or by providing that the first spouse would be entitled to the benefits. Similar to the restriction the Court upheld in *Jobst*, that type of restriction probably would be classified as a restriction not significantly interfering with the decision to enter into the marital relationship and, therefore, as not appropriate for rigorous scrutiny pursuant to *Zablocki*.

IV. DIVORCE

The Supreme Court has never held divorce to be a fundamental right entitled to constitutional protection.²⁴⁹ In *Boddie*, the Court held that state-required fees that precluded indigent litigants from filing for divorce violated the litigants' procedural due process rights.²⁵⁰ Several years later, however, the Court refused in *Sosna* to overturn a statute imposing a one year residency requirement upon a divorce litigant.²⁵¹ In so refusing, the Court declined to apply the strict scrutiny analysis applicable to fundamental rights.²⁵² Furthermore, the Court noted that the residency requirement did not foreclose *Sosna* from ever being awarded a divorce in Iowa, but only forced her to delay the action until she had

247. This, again, presumes that all who marry desire to or will have children, an overly broad generalization in itself.

248. It can hardly be denied that certain individuals engage in "sequential polygamy," *i.e.*, marrying and divorcing repeatedly, to take advantage of others.

249. *See, e.g.*, *Murillo v. Bambrick*, 681 F.2d 898, 902-03 (3d Cir.), *cert. denied*, 459 U.S. 1017 (1982); *Cahoon v. Heckler*, 574 F. Supp. 1021, 1023 (D. Mass. 1983), *aff'd*, 740 F.2d 953 (1st Cir. 1984).

250. 401 U.S. 371 (1971).

251. 419 U.S. 393 (1975).

252. *See id.* at 404-09.

resided there for one year.²⁵³

Three years after its decision in *Sosna*, the Court decided *Zablocki*, establishing marriage as a fundamental right and articulating a standard of strict scrutiny applicable to any restriction significantly interfering with an individual's right to marry.²⁵⁴ Two questions remain: Reading *Boddie* together with *Zablocki* has divorce become a fundamental right? If so, which state restrictions on divorce can withstand strict scrutiny analysis?

A. *The Nature of the Right*

One of the sources of the right to divorce is the right to marry. But the right to divorce, as intertwined as it is with the right to marry, must have an even more elementary basis. If it does not, individuals may find themselves with the right to divorce if they choose to remarry, but not if they desire to be unmarried. Furthermore, states could argue that the right to marry is not a continuing right that may be exercised repeatedly, *i.e.*, one may not divorce only to remarry, but rather that the right to marry is a fundamental right only until it is once exercised, or in the case of those unmarried because of the death of a spouse, only when the claimant is unmarried.²⁵⁵

The answer lies in the idea of association. The Court in *Boddie* referred to divorce as "the adjustment of a fundamental human relationship"²⁵⁶ and the Court in *United States v. Kras* referred to "associational interests" surrounding the establishing and dissolving of the marital relationship.²⁵⁷ Courts and legal scholars argue that the first amendment's freedom of association was not intended to protect individual, family-like association.²⁵⁸ Even so, the right to divorce—the right to be unmarried (unassociated) or remarried (associated with another)—can still be based upon the traditional rights of privacy and liberty, and the associational interests those rights implicate, that repeatedly have served as the basis

253. *Id.* at 410.

254. 434 U.S. 374.

255. See *Murillo v. Bambrick*, 681 F.2d 898, 914 (3d Cir.) (Sloviter, J., dissenting), *cert. denied*, 459 U.S. 1017 (1982) and *Locke v. Locke*, 263 N.W.2d 694, 696 (Iowa 1978) for limited references to a fundamental right to remarry and to "resume singlehood."

256. 401 U.S. at 383.

257. 409 U.S. 434, 444 (1973).

258. *Moore v. City of East Cleveland*, 431 U.S. 494, 535-36 (1977) (Stewart, J., dissenting); Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 895 (1979).

for family-related rights.²⁵⁹ The latter is a different type of association, the association Professor Karst refers to as the "freedom of intimate association," the freedom to form and maintain an association, and the freedom to remain uncommitted.²⁶⁰

The Supreme Court's decision in *Boddie*²⁶¹ indicates both that the right to marry does not attach only to the unmarried (in essence, that there is a right to remarry) and that a person has a right to be unmarried. In terms of remarriage, the *Boddie* Court stated, "Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery."²⁶² Both Justice Douglas, concurring in *Boddie*,²⁶³ and Justice Black, dissenting,²⁶⁴ wrote of marriage and divorce as if they were interrelated rights.²⁶⁵ In terms of the right to be unmarried, the *Boddie* Court, without specific mention of marriage or remarriage, repeatedly referred to the litigants' only means of dissolving their marriages²⁶⁶ and to an action in divorce as "the exclusive precondition to the adjustment of a fundamental human relationship."²⁶⁷

The Court's opinion in *Kras*²⁶⁸ similarly supports the argument that divorce is a fundamental right. In *Kras*, dealing with an indigent's inability to file a voluntary bankruptcy petition because he lacked the requisite filing fees, the Court distinguished *Boddie* on the basis of the interests involved. The Court described *Boddie* as "touch[ing] directly . . . on the

259. See, e.g., *Carey*, 431 U.S. at 684-86; *Roe v. Wade*, 410 U.S. 113, 152-56 (1973); *Griswold*, 381 U.S. at 481-86; *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

260. Karst, *supra* note 65, at 637.

261. 401 U.S. 371.

262. *Id.* at 376.

263. *Id.* at 384-85 (Douglas, J., concurring).

264. *Id.* at 389-90 (Black, J., dissenting).

265. Justice Douglas and Justice Black, while agreeing that marriage and divorce are related or perhaps even part of the same right, disagreed as to the treatment to be afforded the rights. Justice Douglas believed that the Court had "put 'flesh' " on the due process clause by concluding that marriage and its dissolution were so important that indigent litigants should have access to the courts for divorce without payment of fees. *Id.* at 384-85. Justice Black believed that both marriage and divorce were solely within the states' province to regulate, absent any specific constitutional limitations, which he did not find in the facts of *Boddie*. *Id.* at 389-90.

266. *Id.* at 377, 381.

267. *Id.* at 383.

268. 409 U.S. 434 (1973).

marital relationship and on the associational interests that surround the establishment and dissolution of that relationship.”²⁶⁹ Those are interests, the Court stated, that “[o]n many occasions we have recognized [to be of] fundamental importance . . . under our Constitution.”²⁷⁰ The inability of the litigants in *Boddie* to dissolve their marriages “seriously impaired their freedom to pursue *other protected associational activities*[.]” an interest more important than one’s right to declare bankruptcy.²⁷¹ In the context of discussing marriage, divorce, and bankruptcy, the Court concluded that bankruptcy does not involve a “fundamental interest,”²⁷² implying that marriage and divorce do. Finally, in concluding its comparison of *Boddie* and *Kras*, the Court stated:

Bankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated.²⁷³

Other Supreme Court Justices, lower courts, and scholars agree and disagree with the notion of divorce as a fundamental right and with the interweaving of the right to marry and the right to be remarried or unmarried. On the initial question of whether divorce is a fundamental right, Justice Stewart, dissenting in *Kras*, disputed the idea that it was “any subjective conception of the ‘fundamentality’ of marriage or divorce” that caused the Court to reach its decision in *Boddie*.²⁷⁴ Rather, Justice Stewart wrote, the Court based its decision on the fact that marriage involves “judicially enforced obligations” and that the state monopolized the means for individuals to free themselves from those obligations.²⁷⁵ The same, he indicated, is true for the indigent filing for bankruptcy.²⁷⁶

Justice Marshall also dissented in *Kras*:

I am intrigued by the majority’s suggestion that, because the granting of a divorce impinges on “associational interests,” the right to a divorce is constitutionally protected. Are we to require that state divorce laws serve

269. *Id.* at 444.

270. *Id.*

271. *Id.* at 444-45 (emphasis added).

272. *Id.* at 445.

273. *Id.* at 446.

274. *Id.* at 456 n.7 (Stewart, J., dissenting).

275. *Id.* (Stewart, J., dissenting).

276. *Id.* (Stewart, J., dissenting).

compelling state interests? For example, if a State chooses to allow divorces only when one party is shown to have committed adultery, must its refusal to allow them when the parties claim irreconcilable differences be justified by some compelling state interest?²⁷⁷

Although Justice Marshall went on to explain that he raised these questions to illustrate that he believed the majority's focus on the relative constitutional importance of divorce and bankruptcy to be misplaced and that both *Boddie* and *Kras* really involved questions of access to the courts,²⁷⁸ the opinion is important in light of his subsequent opinion in *Zablocki*.²⁷⁹ *Zablocki* established marriage as a fundamental right and strict scrutiny as the test to be applied when states infringe on that right.²⁸⁰ Does Justice Marshall's dissent in *Kras* indicate that he would *not* be inclined to give divorce that much importance in the constitutional scheme of things and would not subject to strict judicial scrutiny an infringement on the right to divorce?

Justice Marshall's dissenting opinion in *Kras* must be contrasted with his dissent in *Sosna*.²⁸¹ In *Sosna*, he stated that the first question that the majority should have addressed was "whether the right to obtain a divorce is of sufficient importance that its denial to recent immigrants constitutes a penalty on interstate travel."²⁸² Justice Marshall concluded that it did.²⁸³ Justice Marshall explained that he would scrutinize the Iowa residency law to determine if it constituted a reasonable means of furthering an important state interest, a standard that he equated with the compelling state interest test.²⁸⁴

Justice Marshall may simply have taken inconsistent positions in *Kras* and *Sosna* and neither may be a helpful guide in determining how the

277. *Id.* at 462 n.4 (Marshall, J., dissenting).

278. *Id.* (Marshall, J., dissenting).

279. 434 U.S. 374.

280. *Id.* at 383-87.

281. 419 U.S. 393, 418 (Marshall, J., dissenting).

282. *Id.* at 419 (Marshall, J., dissenting).

283. *Id.* at 419-20 (Marshall, J., dissenting). Justice Marshall stated:

The previous decisions of this Court make it plain that the right of marital association is one of the most basic rights conferred on the individual by the State. The interests associated with marriage and divorce have repeatedly been accorded particular deference. In *Boddie v. Connecticut*, we recognized that the right to seek dissolution of the marital relationship was closely related to the right to marry, as both involve the voluntary adjustment of the same fundamental human relationship. . . . I think it is clear beyond cavil that the right to seek dissolution of the marital relationship is of such fundamental importance that denial of this right to the class of recent interstate travelers penalizes interstate travel.

Id. (citations omitted).

284. *Id.* at 420 (Marshall, J., dissenting).

author of *Zablocki* would decide a case involving a restriction on divorce. The better argument, however, is that Justice Marshall's dissenting opinion in *Sosna* is more indicative of his position on the right to divorce. First, *Sosna* is more clearly on point because it involved a restriction upon divorce. Second, in *Kras*, Justice Marshall was clearly bothered by what he viewed as the Court's overlooking the significant issue of indigent litigants' access to the courts. Third, *Sosna* is closer in time to the decision in *Zablocki*. Finally, while the dissent in *Kras* is rather nonspecific and rhetorical in terms of the right to divorce, the dissent in *Sosna* is quite specific in speaking of the importance of the rights to marry and divorce and the deference courts accord such rights.

The Third Circuit in *Murillo v. Bambrick*,²⁸⁵ challenging New Jersey's special matrimonial litigation fee, suggested that *Boddie*, *Kras*, and *Zablocki* could be interpreted consistently without finding in their interweaving a fundamental right to divorce.²⁸⁶ The court explained that none of the cases explicitly recognized a fundamental right to divorce. *Boddie* and *Kras* were essentially procedural due process cases. *Zablocki*, in contrast, recognized a fundamental right to marry, but not a fundamental right to divorce. And, the restriction at issue in *Sosna*, decided subsequent to *Boddie*, was held to a standard of scrutiny far below that of strict scrutiny.²⁸⁷ The court in *Murillo* further suggested that the fundamental right to divorce need not exist for the fundamental right to marry to be of continuing validity.²⁸⁸ Under *Zablocki*, the court reasoned, if divorce regulations " 'significantly' " or " 'directly or substantially' " interfere with the decision to marry, they will be evaluated pursuant to *Zablocki*'s sufficiently important state interest/closely tailored standard.²⁸⁹

While *Boddie* and *Kras* were procedural due process cases, *Kras* made clear that denial of access to the courts in all matters will not be invalidated. Rather, the denial of access in *Boddie* was considered to be egregious because it affected the ordering of human relationships in terms of marriage and divorce.²⁹⁰ The court in *Boddie* repeatedly discussed the importance of divorce, relating it to the necessity for dissolving existing

285. 681 F.d 898 (3d Cir.), cert. denied, 459 U.S. 1017 (1982).

286. *Id.* at 903 n.9.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Kras*, 409 U.S. at 443-46.

marriages.²⁹¹ Although the Court in *Sosna* gave far less scrutiny to the divorce restriction than is required when a fundamental right is implicated, the Court failed entirely to address the issue of fundamental right.²⁹² Furthermore, the fundamental right to marry was not unequivocally established until three years later. Assuming that *Sosna* was correctly decided, legitimate reason exists to question whether *Sosna* is still good law following the Court's decision in *Zablocki*.

Finally, to argue that a fundamental right to divorce is unnecessary because restrictions upon divorce may be scrutinized pursuant to the *Zablocki* standard by characterizing divorce regulations as an interference with the right to make a decision concerning marriage puts form over substance. Naturally, a restriction on divorce hinders one who desires to marry another spouse, indicating that the two rights are closely connected and that the right to marry gives added support to the right to divorce. But the right to marry does not subsume the right to divorce. Arguing that the right to marry is a sufficient basis for courts' rigorous scrutiny of restrictions upon divorce overlooks those cases in which one desiring a divorce does not wish to remarry. In that instance, if no right to divorce exists, the state may impose restrictions on divorce that will be judged with much less deference than strict scrutiny. That argument also creates a differentiation in classification between those who desire to remarry and those who do not, a distinction that probably could not stand in light of *Eisenstadt v. Baird*,²⁹³ holding invalid a differentiation between married and unmarried individuals in the distribution and use of contraceptives.²⁹⁴

Assuming that the right to divorce is fundamental, what standard should courts apply to state restrictions on divorce? Whether courts use a due process or an equal protection analysis,²⁹⁵ fundamental rights are entitled to strict scrutiny. Because the right to divorce is so closely tied to the right to marry, the courts should employ the standard set forth in *Zablocki*.²⁹⁶ Therefore, if a state restriction significantly interferes with

291. 401 U.S. at 376, 381, 383.

292. 419 U.S. at 419 (Marshall, J., dissenting).

293. 405 U.S. 438 (1972).

294. *Id.*

295. A due process analysis is probably more appropriate for the same reasons that it is the more appropriate analysis to judge restrictions on marriage. See *supra* notes 121-41 and accompanying text.

296. 434 U.S. at 383-88. The *Zablocki* standard is appropriate provided courts interpret it as the equivalent of the traditional strict scrutiny analysis.

one's decision to dissolve the marital relationship, courts must determine whether sufficiently important state interests support the restriction and whether the restriction is closely tailored to effectuate only those interests.²⁹⁷

B. *The Standard Applied*

As with marriage,²⁹⁸ states impose a variety of restrictions on an individual's ability to secure a divorce. The filing fee requirement of *Boddie* represents a restriction much like the support obligation restriction in *Zablocki*. Although in theory the filing fee requirement makes uncertain when the indigent litigant will be able to file for divorce, the requirement in fact poses a permanent restriction on the indigent's ability to be divorced. At the other end of the spectrum, analogous to the "restriction" on marriage challenged in *Jobst*, are regulations and laws that, while not preventing divorce, may make one's life less pleasant or comfortable once one is divorced. For example, an equitable property distribution law²⁹⁹ may make divorce financially unpleasant for a wealthy spouse. Similarly, a father's belief that courts give preference to a child's mother when making custody decisions may make divorce an unattractive option to him.³⁰⁰ These laws may cause potential divorce litigants to forego divorce and remain in unhappy marriages because the alternative is not a positive one, but they neither pose a "direct and substantial" interference or place a "direct legal obstacle" in the path of those desiring to divorce, nor do they make divorce " 'practically impossible.' "³⁰¹

Along the spectrum between the two extremes lie restrictions or potential restrictions that, while not totally precluding an individual's decision to dissolve a marriage, cause enough delay in the procedure to ask whether the interference is significant and, if so, whether the restrictions serve sufficiently important state interests and are closely tailored to ef-

297. *Id.* at 388.

298. *See supra* notes 154-65, 179-248 and accompanying text.

299. *E.g.*, CONN. GEN. STAT. ANN. § 46b-81 (West Supp. 1984); IND. CODE ANN. § 31-1-11.5-11 (Burns Supp. 1984); UTAH CODE ANN. § 30-3-5 (Supp. 1983).

300. Professors Freed and Foster note that "the 'tender years' doctrine has lost ground and is rejected or relegated to a role of 'tiebreaker' in most states." Freed & Foster, *Family Law in the Fifty States: An Overview*, 17 FAM. L.Q., 365, 416 (1984). There is no question, however, that some courts still apply the doctrine. *See, e.g.*, *Brown v. Brown*, 409 So. 2d 1133 (Fla. Dist. Ct. App. 1982); *Albright v. Albright*, 437 So.2d 1003 (Miss. 1983); *Leisge v. Leisge*, 223 Va. 688, 292 S.E.2d 352 (1982).

301. *Zablocki*, 434 U.S. 374, 387 & n.12.

fectuate only those interests. The prime example of such a restriction is the residency requirement in *Sosna*.³⁰² Other examples include a domiciliary requirement³⁰³ or a requirement that married individuals with minor children not divorce until all children have reached the age of majority.³⁰⁴ A final example of such a restriction may be found in statutory grounds for divorce. With the adoption of some form of no-fault divorce in all the states except South Dakota, restrictions imposed by specific statutory grounds are no longer extremely important.³⁰⁵ However, some jurisdictions require spouses to live "separate and apart" for prescribed periods of time before they may file for divorce on a no-fault basis and the phrase "separate and apart" is interpreted differently among the jurisdictions.³⁰⁶

302. Current residency requirements vary from six weeks, e.g., NEV. REV. STAT. § 125.020 (1983), to one year, e.g., CONN. GEN. STAT. ANN. § 46b-44 (West Supp. 1984); NEB. REV. STAT. § 42-349 (1984); W. VA. CODE § 48-2-7 (1980). At least two states, Alaska and Washington, have no residency requirement; three others, Maryland, Oregon, and South Dakota, require residency only under certain circumstances. Freed & Foster, *supra* note 300, at 377.

303. The basis for full faith and credit being given to one state's divorce decree by other states is the fact that the divorce-seeking party was domiciled in the state where the divorce was granted. *See Williams v. North Carolina*, 325 U.S. 226, 229 (1945); *Williams v. North Carolina*, 317 U.S. 287, 297 (1942). *See also* Garfield, *supra* note 65.

304. Although this requirement is not currently imposed in any jurisdiction, it has been proposed as a potential restriction on divorce. *See Younger, Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 61 CORNELL L. REV. 45 (1981).

305. Such was not always the case. For example, until 1967, the only basis for divorce in New York was adultery. N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1976-77) (law changed to include other grounds, N.Y. DOM. REL. LAW § 170 (McKinney 1977)).

306. *See, e.g., In re Marriage of Uhls*, 549 S.W.2d 107 (Mo. Ct. App. 1977) (statute requiring that parties live "separate and apart . . . for a continuous period . . . preceding the filing of the petition[.]" MO. ANN. STAT. § 452.320, 2(1)(d) & (e) (Vernon Supp. 1984), does not apply to deny divorce to parties who lived in same house during separation period); *Ellam v. Ellam*, 132 N.J. Super. 358, 333 A.2d 577 (1975) (statute requiring parties to live "separate and apart in different habitations[.]" N.J. REV. STAT. ANN. § 2A:34-2(d) (West Supp. 1984-85) does not permit divorce to parties who still give appearance to community of being husband and wife, even though actually sleeping in different residences); *DeRienzo v. DeRienzo*, 119 N.J. Super. 192, 290 A.2d 742 (1972) (same New Jersey statute precludes granting of divorce when couple continues to reside in same house even though husband has own bedroom that he keeps locked and to which he has the only key); *In re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976) (N.C. GEN. STAT. § 50-6 (1984) requiring parties to live "separate and apart for one year" interpreted to define cohabitation as living together as husband and wife in more than sexual terms; brief period of living together for social purposes (Christmas holidays spent together in family home with children) not enough to terminate period of separation); *Tuttle v. Tuttle*, 36 N.C. App. 635, 244 S.E.2d 447 (1978) (same North Carolina statute interpreted to mean separation period terminated if parties resume marital cohabitation, thereby holding selves out to public as husband and wife); *Meyerl v. Meyerl*, 21 Pa. D. & C. 3d 729 (Allegheny Co. 1981) (requirement of living separate and apart, defined by statute to mean "com-

1. Filing Fees

The Supreme Court's opinion in *Boddie*³⁰⁷ removed any doubt that filing fees that prohibit indigents from acquiring a divorce violate litigants' procedural due process rights. The result would be the same were courts to apply the rigorous scrutiny standard enunciated in *Zablocki* to such a restriction. The state interests advanced in support of the fees included preventing frivolous litigation, allocating scarce judicial resources, and providing defendants with proper notice of the proceedings.³⁰⁸

The allocation of judicial resources does not rise to the level of a sufficiently important state interest when the alternative is totally precluding indigents from the only form of dispute resolution available to them in divorce cases.³⁰⁹ Therefore, the restriction cannot withstand the scrutiny applicable to infringements on the fundamental right to divorce. Assuming that the frivolous litigation and proper notice justifications are sufficiently important to justify the fees requirement, the restriction would still fail strict examination because the restriction is not closely tailored to the objectives. As the Court noted in *Boddie*, there is "no necessary connection" between litigants' assets and the seriousness of suits they might institute.³¹⁰ Furthermore, less restrictive means exist to deter the filing of frivolous lawsuits, such as actions for malicious prosecution or abuse of process.³¹¹ The Court also noted that there are effective, reliable means for providing defendants with notice of pending proceedings, such as service by mail at the defendant's last known address, that do not rely on costly service of process by a sheriff.³¹²

Boddie cannot be interpreted, either as originally decided or under the standard advanced here, as prohibiting a state from charging fees to

plete cessation of any and all cohabitation[.]" PA. STAT. ANN. tit. 23, § 104 (Purdon Supp. 1985), will not preclude divorce when couple share dwelling during period of separation but do not hold themselves out to public as husband and wife); *Barnes v. Barnes*, 276 S.C. 519, 280 S.E.2d 538 (1981) (statute requiring marriage partners to live "separate and apart without cohabitation" for a period of one continuous year, S.C. CODE ANN. § 20-3-10(5) (Law. Co-op Supp. 1983) interpreted to mean that spouses must live in separate domiciles; living in separate rooms in the marital home, even without sexual relations does not constitute living separate and apart).

307. 401 U.S. 371 (1971).

308. *Id.* at 381.

309. *See id.* at 382.

310. *Id.* at 381.

311. *Id.* at 381-82. Of course, if the state's concern is frivolous litigation, a threatened civil suit against a judgment-proof litigant will probably provide little deterrence.

312. *Id.* at 382.

those litigants who can afford to pay, even if the fee is higher than that charged for other civil actions.³¹³ Focusing on the *Boddie* analysis, such a fee does not foreclose divorce litigants from the only avenue available to them for the dissolution of their marriage. A fee merely requires that the litigants pay the cost of the avenue. Similarly, when analyzed pursuant to the *Zablocki*-type approach, such a fee does not significantly and directly interfere with, impose a direct legal obstacle upon, or make practically impossible a procedure seeking dissolution of a marriage. If these requirements are not met, heightened scrutiny will not be invoked and the fee will be subjected to a lesser degree of scrutiny. Filing fees for those able to pay will probably withstand that lower degree of scrutiny because they represent a reasonable regulation directed to reinforcing and allocating limited judicial resources. If the state charges a higher fee for a divorce action than for other civil actions, the fee will still withstand scrutiny upon a showing that divorce actions are more costly to the judicial system than other actions. A crucial element in the validity of any fee scheme is that the fees be waived for indigents.³¹⁴ Otherwise, the restriction is merely *Boddie* revisited and thus, invalid.

2. Time-Related Restrictions

Restrictions relating to time raise the same issue in terms of delay versus prohibition that was raised in considering age restrictions on marriage.³¹⁵ In fact, the Court in *Sosna* noted:

Appellant was not irretrievably foreclosed from obtaining some part of what she sought. . . . She would eventually qualify for the same sort of adjudication which she demanded virtually upon her arrival in the State. Iowa's requirement delayed her access to the courts, but, by fulfilling it, she could ultimately have obtained the same opportunity for adjudication which she asserts ought to have been hers at an earlier point in time.³¹⁶

The Court was correct. By residing in Iowa a year, *Sosna* could have filed for divorce. Likewise, by maintaining domicile in the state where one desires to be divorced, one may secure a divorce entitled to full faith and credit in other jurisdictions. By meeting statutory requirements for living separate and apart for the required length of time litigants may be granted divorces on no-fault grounds. Therefore, do requirements relat-

313. See, e.g., *Murillo v. Bambrick*, 681 F.2d 898 (3d Cir.), cert. denied, 459 U.S. 1017 (1982).

314. The fees were not required of indigents on the facts of *Murillo*, 681 F.2d at 904.

315. See text accompanying *supra* notes 168-69.

316. 419 U.S. 393, 406 (1975).

ing to time significantly interfere with the right to divorce justifying application of strict scrutiny or are the requirements mere delays?

As with time-related requirements applicable to marriage, time-related requirements applicable to divorce significantly interfere with the fundamental right to divorce. When time requirements delay marriage, the individual suffers potentially severe losses. For example, children may be born out of wedlock or, if one of the prospective spouses dies, the other is not protected by the estate laws of the jurisdiction or accorded either public or private benefits through the would-be spouse. If one currently married desires to remarry, time-related restrictions on divorce cause these same potential losses, just as if the individuals desiring to marry were marrying for the first time.

In addition, time restrictions on divorce may cause exactly the opposite losses. For example, if a woman is pregnant by a man not her husband and the child is born during the marriage, the child is presumably the legitimate child of the woman's husband.³¹⁷ The husband may be required to support the child after the divorce is granted and the child may be entitled to a share in the husband's estate.³¹⁸ The biological father may bear a heavy burden in attempting to prove that he, and not the mother's husband, is the father of the child. Furthermore, during the time that the spouses are still married and are waiting for the statutory time period to be fulfilled so they may divorce, each may be entitled to an intestate share of the other's property should the spouse die without a will, or to common-law dower or curtesy rights or to a statutory forced share if the spouse dies with a will. The surviving spouse may also be entitled to share in life insurance, pension funds, and government benefits.

It is not enough, then, to state that a time-related divorce requirement is a mere delay. That delay could prevent one from enjoying the benefits and protections offered one married to the person of choice and the delay may impose additional burdens on a spouse who is a spouse in name only and only for a limited period of time.

a. Residence and Domicile

The Court in *Sosna* offered a number of state interests in support of the

317. See, e.g., ALA. CODE § 26-17-5(a) (1984 Supp.); GA. CODE ANN. § 19-720(a) (1982); MINN. STAT. ANN. § 257.55(a) (West Supp. 1984).

318. The husband also may be entitled to a share in the child's estate.

one-year residency requirement: both spouses and possibly children are interested in and will be affected by the court decree; with so much at stake, a state has a right to insist that one seeking a divorce have a "modicum of attachment" to the state;³¹⁹ a residency requirement avoids a court's intermeddling into the affairs of another state with a stronger attachment to the parties; likewise, requiring that a litigant have an attachment to the decree-granting state will lessen the likelihood that another state will refuse to give full faith and credit to the divorce decree; and states have an interest in avoiding a divorce mill reputation.³²⁰ Assuming that all of these interests are sufficiently important to withstand the first prong of the rigorous scrutiny standard, the restriction still fails the least restrictive means prong.

First, the phrase "modicum of attachment" is too vague to allow a precise determination of when one is sufficiently attached to a state to enable the state to grant a divorce without interfering with another state's concerns. Does residence in a state for one year guarantee that a court entering a decree is not interfering with another jurisdiction's concerns and that the rights of the other spouse or children of the marriage are not being overridden? For example, what if the spouse seeking a divorce is a law student who has resided in the forum state for only one year before filing for divorce, knowing that two years later, upon graduation, the student will leave the state to accept employment elsewhere? Does that represent a "modicum of attachment?"

In addition, the residency requirement, while furthering the state's desire to avoid divorce mill status, will preclude many earnest individuals from divorcing in the forum state. Ironically, the requirement may drive litigants to other states with lesser or no residency periods, threatening to transform the other states into divorce mill jurisdictions. Furthermore, a residency period will not guarantee that the forum state's divorce decree will receive full faith and credit in other jurisdictions. The basis of jurisdiction in divorce cases is domicile³²¹ and regardless of the length of time individuals have resided in a state if they are not domiciled there the divorce decree may be collaterally attacked in another jurisdiction and not accorded full faith and credit by that other jurisdiction.³²² The other

319. 419 U.S. at 406-07.

320. *Id.* at 407-09.

321. *Williams v. North Carolina*, 325 U.S. 226, 229 (1945); *Williams v. North Carolina*, 317 U.S. 287, 297 (1942).

322. *Williams v. North Carolina*, 325 U.S. at 229.

spouse may attack the decree, however, only in instances of *ex parte* as opposed to bilateral divorce.³²³ If then, in *Sosna*, Mr. Sosna had received notice and participated in Ms. Sosna's petition for divorce, he would have been estopped from later challenging the validity of the decree in other jurisdictions. In most instances there would be no other party interested enough in the proceeding or with standing to challenge it and the question of full faith and credit therefore would not arise.³²⁴

As Justice Marshall noted in his dissenting opinion in *Sosna*, if a state wants to protect those concerned with divorce litigation, avoid interfering in the affairs of other states, protect its own decrees from attack in other jurisdictions, and avoid becoming a divorce mill, it needs only a domicile requirement.³²⁵ Domicile, presence with the intent to stay in the forum for an indefinite period of time,³²⁶ requires no waiting period. Furthermore, the intention to stay for an indefinite period of time provides the indication of attachment a state might require before the state's courts will hear a petition for divorce.

A domiciliary requirement, however, is not a solution without weaknesses. The state's interest in such a requirement—to ensure that the litigant is sufficiently connected with the forum state to justify the court's hearing the divorce action—from the perspective of integrity of court decrees and distribution of judicial resources may rise to the level of "sufficiently important." But, once again, the fit between the restriction and the objective is not necessarily closely tailored.³²⁷ An individual, for example the law student referred to above, may be domiciled in one state while a long-term resident of another state. The student may retain the domicile merely because there exists no present intent to remain anywhere indefinitely. During the three years of law school, the student is not domiciled in the state where the school is located so the student may not secure a divorce there, but may have little real connection with the domiciliary state. The domiciliary state, however, is the one empowered to enter the divorce decree. Such problems are of increasing concern in

323. *Sherrer v. Sherrer*, 334 U.S. 343, 351-52, 355-56 (1948).

324. Although the state could challenge a divorce decree through a bigamy prosecution against a person who obtains such a divorce and then remarries, *see, e.g., Williams v. North Carolina*, 325 U.S. 226 (1945); *Williams v. North Carolina*, 317 U.S. 287 (1942), state prosecutors' offices are overwhelmed with investigating and prosecuting crimes of a more serious nature than bigamy and are unlikely to pursue such a matter.

325. 419 U.S. at 424 (Marshall, J., dissenting).

326. *See* BLACK'S LAW DICTIONARY 572 (Rev. 5th ed. 1979).

327. *See* Garfield, *supra* note 65.

our highly mobile society in which, for example, students attend educational institutions in jurisdictions other than their domicile, or business executives shuttle from jurisdiction to jurisdiction to work for short periods of time in their transcontinental corporations' offices.

Any time restraint will cause hardship in some cases,³²⁸ but because a state has a sufficiently important interest in protecting all parties subject to a marital dissolution, in protecting its own decrees from collateral attack, in not interfering with affairs that rightly concern another jurisdiction, and in not becoming a divorce mill, a regulation closely tailored to serving a state's objectives will withstand strict scrutiny. The key to the regulation is to determine when a divorce litigant has the sufficient "modicum of attachment" to a state to permit the state to entertain an action in divorce. As illustrated above, neither a precise residency period nor a domicile requirement will serve that purpose. Rather, the courts should adopt a "minimum contacts" approach similar to that in jurisdiction cases.³²⁹ A divorce litigant would bear the burden of proving contacts with the state that would justify its courts' exercising jurisdiction over the matter and deciding the divorce case on the merits consistent with "traditional notions of fair play and substantial justice."³³⁰ The standard is a flexible one with which the courts are already experienced and it serves the states' interests with minimum hardship to the individual litigants.

b. No-Fault Periods of Separation

State divorce laws may require periods of separation ranging from six months to five years before a court will entertain an action for divorce on no-fault grounds.³³¹ In addition, a state may have two standards, one for couples with minor children and one for couples without minor children.³³² The state's interest in such time periods is to provide a cooling

328. See *supra* notes 315-18 and accompanying text.

329. *Kulko v. California Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

330. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); see also *International Shoe Co.*, 326 U.S. at 320.

331. E.g., IDAHO CODE § 32-610 (1983) (living "separate and apart for a period of five (5) years or more without cohabitation"); VT. STAT. ANN. tit. 15 § 551(7) (1974) ("[w]hen a married person has lived apart from his or her spouse for six consecutive months and the court finds that the resumption of marital relations is not reasonably probable").

332. E.g., FLA. STAT. ANN. § 1.611(c) (West 1985) (simplified procedure); VA. CODE § 20-91(9)(a) (1950) (separate and apart without cohabitation for one year; if no minor children and parties have entered into separation agreement, separate and apart without cohabitation for six

off period during which divorce litigants can live apart³³³ and perhaps reconcile. Reconciliation of broken marriages, especially when those marriages involve minor children, is clearly an important state interest, but is the length of time mandated for separation closely tailored to effectuating only that interest or does it amount to an unwarranted infringement upon the right to divorce?

No magic number in terms of days, weeks, months, or years exists for separation period requirements. Some marriages are so hopelessly broken that a separation period of a lifetime would not induce the individuals involved to reconcile, while others may be reconciled within a matter of days. The question that remains is whether the state should mandate a waiting period of a particular length or whether it should trust the courts to determine whether the marriages are broken with no hope for reconciliation.

The arguments that no guarantee exists that courts would be able to make such determinations and that forcing them to do so will tax already overcrowded court dockets is tempting. Although courts may sometimes err and grant a divorce to a couple who could reconcile, or deny a divorce and force an additional period of separation upon a couple who will never reconcile, these are the types of decisions that society regularly entrusts to our courts. In any event, even after the mandatory waiting period, statutes may direct the courts to determine that irreconcilable differences exist before entering a divorce decree.³³⁴

Requiring courts to make such determinations may further expand the courts' workload. Legislatures might, then, statistically determine an optimum period of time to facilitate reconciliation and a time period be-

months). For a proposed restriction on divorce relating to couples with minor children, see *infra* notes 336-40 and accompanying text.

333. State statutes may have or may be interpreted as having more than one definition of the phrase "living separate and apart." See *supra* note 306 and cases cited therein.

334. In reality, even when courts are required by statute to determine whether irreconcilable differences exist between partners to a marriage or whether a marriage is irretrievably broken, many courts do little more than rubber stamp litigants' petitions for divorce once the mandatory separation period is met. See, e.g., Note, *Irreconcilable Differences: California Courts Respond to No-Fault Dissolutions*, 7 LOY. L.A.L. REV. 453, 466 (1974) (reporting that even if one spouse denies that irreconcilable differences exist between the parties, judges are likely to enter a decree of divorce on that ground). Replacing uniform waiting periods with individual determinations may, in fact, improve the chances of serving the states' reconciliation interests. Without a presumption of irreconcilability provided by statute, courts may examine more closely the issue of whether the differences really are irreconcilable. The danger, of course, always exists that removing the mandatory separation period and replacing it with an individual determination of irreconcilability will only speed the process of the rubber stamp.

yond which reconciliation is unlikely to occur. Procedure by presumption and administrative convenience, however, are not valid reasons for infringing upon fundamental rights.³³⁵ Therefore, as with requirements of residency and domicile, individual determinations of an irretrievable breakdown of a marriage and the impossibility of reconciliation will serve the states' interests in preserving marriage when possible without placing overly broad restrictions upon the fundamental right to divorce.

c. Restrictions Concerning Minor Children

Some states impose longer periods of separation upon no-fault divorce litigants when those litigants are parents of minor children.³³⁶ Such statutes are directed at preserving families and protecting children, surely sufficiently important state interests. This additional form of procedure by presumption, however, is not closely tailored to effectuate only those interests. The restriction may prove to be both over and underinclusive. A longer waiting period could harm children. During the waiting period, rather than reconciling, parents may continue to argue over money, property, and the children, only increasing the hostilities between them. Although parents will, in most cases, continue to deal with each other after the divorce has been granted, a process may begin after divorce whereby they are no longer adversaries and can communicate civilly. A long waiting period may also prevent one or both spouses from remarrying or forming other partnerships, perhaps to the children's detriment. For example, the parents living apart may experience severe financial difficulties, but one or both parents may be waiting to marry another who will love and care for the parent and for the children. The requirement is also underinclusive because if a child's parents do not happen to be married to each other, they can dissolve their relationship at any time without any state attention being paid to the preservation of the family or protection of the children.³³⁷

Professor Younger offers an alternative to state mandated separation periods for parents with minor children.³³⁸ She proposes that, in addition

335. *Carey*, 431 U.S. 678, 691 (1977); *Craig v. Boren*, 429 U.S. 190, 198 (1976); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

336. *See supra* note 332.

337. The state would become involved through the courts, of course, if both parents were to seek custody of the children, but that involvement would be at the instigation of the parents, not the state, as is the case with the mandatory waiting period.

338. *See Younger, supra* note 304, at 90-95.

to the usual grounds for divorce, parents with minor children must prove to the court that continuing the marriage would result in exceptional hardship to either or both of them and would harm the minor children more than would the divorce.³³⁹ Such an individualized approach would serve the state's important interests in protecting the family and yet would not be overly broad. Pursuant to this approach, parents would not be prevented from divorcing for any fixed period of time so long as they met the hardship requirements. Parents would be forced to try to resolve their difficulties, if they did not do so voluntarily. If they could not resolve their difficulties, however, their marriages would not be perpetuated to the continuing detriment of their children.³⁴⁰

Although Professor Younger's hardship requirement suggestion narrows the fit between the restriction and the state's objectives, it raises other concerns. The suggestion does not address the need for family stability and care for the children of unmarried couples who terminate their relationship. The proposal may also discourage either marriage or procreation once a couple has married, both of which society views as public goods. When balanced, however, against the fact that the restriction will serve the interests of many families, yet not infringe unnecessarily upon the fundamental right to divorce, the marriage for minor children restriction represents a reasonable compromise.

V. EPILOGUE: A NEW LOOK AT THE NEW LOOK

The Supreme Court in *Zablocki* held the right to marry to be a fundamental right. The Court has traditionally evaluated restrictions upon fundamental rights using strict scrutiny. Although room for argument exists concerning the standard of review the Court intended to apply to state restrictions on marriage, the authorities cited in *Zablocki* support review of state restrictions that significantly interfere with the right to marry with traditional strict scrutiny.

Zablocki, when read in conjunction with *Boddie* and *Kras*, also leads to the conclusion that divorce, too, should be treated as a fundamental right. State restrictions that significantly interfere with one's attempt to dissolve the marital relationship, therefore, should be evaluated pursuant to *Zablocki*'s strict scrutiny standard.

A fundamental right/strict scrutiny approach to the rights to marriage

339. *Id.* at 90.

340. *Id.*

and divorce is the logical result of *Zablocki*. Reality, however, necessitates a new look at the new look. Most, if not all, state restrictions on marriage will fail strict scrutiny analysis. In several instances the restrictions serve sufficiently important interests, but generally they are not closely tailored to effectuate only the states' interests. The restrictions tend to be overinclusive, underinclusive, or both. While restrictions do prevent individuals from marrying, they do not make families economically or socially stable, they do not improve the physical health of our population, and they do not make the operation of our prisons more efficient. In general, the restrictions do not necessarily accomplish any of the objectives at which they are aimed or, at most, they accomplish objectives that could be met in less intrusive ways. The same is true of restrictions on divorce. Although the restrictions serve sufficiently important state interests, the fit between the restriction and the objective is not closely tailored to effectuate only those interests.

In reality, the courts probably will not invalidate many of the restrictions discussed in this Article. The expense associated with alternative means of achieving the objectives the state seeks through the restrictions is prohibitive. State-sponsored genetic and contraceptive counseling, child care assistance, job training and placement, while all worthy projects and while all directed at meeting the same goals as a complete restriction on marriage for those deemed too young or mentally incompetent to marry, would place a substantial burden on already overburdened state budgets. Also, equally important to the objectives of promoting stable, healthy families may be society's desire to withhold recognition and benefits from individuals engaged in relationships of which it does not approve, whether those individuals desire to marry a close relative, one of the same gender, or another already married.

How may the Supreme Court's opinion in *Zablocki*, carried to its logical conclusions, be reconciled with the reality that legislatures and courts are not going to lift most restrictions on marriage and divorce, are not going to provide alternative means of meeting their sufficiently important interests, and are not going to provide benefits and protections to everyone who enters into or exits from a marriage? In truth, reconciliation will be difficult. Therefore, alternatives should be considered to enable the Court to avoid the results that a logical interpretation of *Zablocki* mandates.

First, courts could reinterpret *Zablocki* to conclude that strict scrutiny should not be applied to restrictions affecting one's decision to enter into

or exit from the marital relationship. Rather, courts could adopt the sliding-scale approach that Justice Marshall advocates and look to “‘the nature of the classification and the individual interests affected’”³⁴¹ in determining whether a restriction on marriage or divorce is valid. The sliding-scale approach would provide courts with the flexibility to determine that in some instances the rights that individuals claim, when balanced against state concerns with financial expenditures or morality, do not warrant strict, or even heightened, scrutiny. The courts could then apply the standard of scrutiny deemed applicable to the individual case and determine that although a restriction on the right to marry or divorce exists, the restriction serves an important (or legitimate) state interest and is sufficiently tailored to serve (or rationally related to) the interest without unduly restricting the individual’s right. Such an approach, of course, eliminates any element of certainty in deciding marriage and divorce cases. Decisions would be reached on a case-by-case basis and would rest on the courts’ opinion as to the relative weight of individual interests and state interests.

Courts could also apply *Zablocki* without invalidating most restrictions upon marriage and divorce by defining marriage to match society’s idea of marriage. Marriage would not be defined as a relationship entered into by two persons to be accorded protection and benefits by the state, but rather as a relationship entered into between two legally competent adults of different gender not closely related to each other and not already married to another. Once these criteria are met, then those entering into the relationship are entitled to state protection and benefits. Similarly, courts could define any restriction that impacts on this standard definition of marriage, for example, a law prohibiting marriage between two persons of kinship closer than first cousins, as not significantly interfering with marriage. The person is free to marry anyone other than close kin (assuming that the desired partner is a legally competent adult

341. *Zablocki*, 434 U.S. 374, 383 (1978) (quoting *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 253 (1974)). Such an approach would also be consistent with Justice Stewart’s concurring opinion in *Zablocki* in which he advocated looking to

“the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen.”

434 U.S. at 396 (Stewart, J., concurring) (quoting *Williams v. Illinois*, 399 U.S. 235, 260 (1970) (Harlan, J., concurring)).

of a different gender and not already married to another) so strict scrutiny should not be applicable to the restriction.

Such an approach is flawed, however, because it essentially forecloses review of the central issue raised. For example, if legislatures were to define marriage as a relationship between two legally competent adults of different gender and *of the same race* not closely related to each other and not already married to another, the miscegenation issue addressed in *Loving* never could have been raised. The question should not be whether the relationship at issue meets the standard definition of marriage and therefore is entitled to state benefits and protections, but rather whether the relationship at issue *should be* recognized as a valid marriage and afforded such protection.

Finally, the courts could apply *Zablocki* without upsetting economic or moral reality evidenced in state restrictions on marriage and divorce by redefining the state interests that the restrictions promote. Instead of defining the interests to include promoting stable families, protecting innocent spouses from venereal disease, encouraging childbirth, or safeguarding the health of individuals and society, courts could redefine the state's objective as one of withholding governmental benefits and society's approval from relationships that do not conform to the will of the majority.

The Supreme Court has never decided whether a state's concern with the morality of its citizenry is an interest sufficiently important or compelling to justify infringing upon an individual's fundamental rights in the family context.³⁴² If, however, the state withheld benefits and approval from nonsanctioned marriages as opposed to prohibiting the marriages, the state could argue that it is not using its powers to enforce its ideas of morality, but rather is providing benefits to encourage a more attractive alternative.³⁴³

Withholding approval and benefits would not eliminate the relationships. Individuals could enter personal relationships resembling that which society traditionally defines as a "marriage," regardless of their alleged legal incompetence, gender, kinship, or current marital status.

342. *Developments, supra* note 36, at 1209. See *id.* at 1202-13 for an informative discussion of state regulation of morality. See also Bratt, *supra* note 36, at 285-89.

343. *Cf. Maher v. Roe*, 432 U.S. 464, 473-75 (1977) (denial of state funds for abortion but provision of state funds to cover cost of childbirth does not violate woman's right to choose whether or not to carry a fetus to term; state may encourage "a more attractive alternative" without infringing on constitutionally protected right).

The state in this situation would not be infringing upon a couple's right of association.³⁴⁴ But, their relationship would not carry with it the burdens and benefits attaching to those society now defines as married.

To adopt such an approach will probably achieve the same results that current state restrictions on marriage reach: families will not be healthier or wealthier, sexual relations between those closely related or of the same gender will not stop, venereal disease will not be eradicated, prisons will not become safer, and judicial resources will not be used more constructively. States, however, will not be sanctioning, economically or morally, relationships that society deems objectionable.

344. States could, of course, make such relationships criminal through means such as deviate sexual intercourse statutes. *See supra* notes 223 & 231. That action will raise other questions related to the right of association separate from the rights to marry and divorce.

