The Horizon of Rights: Lessons from South Africa for the Post-Goodridge Analysis of Same-Sex Marriage

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Lisa Newstrom†

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"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."
—Warren, C. J., Loving v. Virginia1

"Our obligation is to define the liberty of all, not to mandate our own moral code."
—Kennedy, J., Lawrence v. Texas2

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1. 388 U.S. 1, 12 (1967).

"The horizon of rights is as limitless as the hopes and expectations of humanity."

— Sachs, J., Minister of Home Affairs v. Fourie

Introduction

Over the last two decades, the civil rights of lesbian, gay, bisexual, and transgender (LGBT) individuals have skyrocketed to prominence within "mainstream" legal and political discourse in the United States. Although social and religious conservatives have used these rights as a call-to-arms in the country's "culture wars," various levels of government continue to incrementally establish rights that were inconceivable fifty to sixty years ago. Two U.S. Supreme Court decisions stand as legal milestones for these rights. In 1996, in Romer v. Evers, the Court established that a desire to disadvantage gays and lesbians cannot constitute a legitimate rational basis for state action. Seven years later, in Lawrence v. Texas, the Court held that criminalizing consensual sexual conduct in the home between adults of the same sex violates due process and the right to privacy. These key victories coalesced in Goodridge v. Department of Public Health, in which the Supreme Judicial Court of Massachusetts held that the state's exclusion of same-sex couples from the institution of marriage violated the liberty and equality safeguards of the state constitution and lacked a legitimate legislative interest. As the focus in LGBT rights has shifted to the issue of same-sex marriage after Goodridge, many states have faced litigation either challenging the exclusion of same-sex couples from existing

3. 2006 (1) SA 524 (CC) at 564 (S. Afr.).
4. Throughout this paper, the terms "LGBT," "lesbian and gay," and simply "gay" (in the modern, non-gender-restrictive meaning) may be used to describe individuals who have significant relationships with members of the same sex that affect that individual's legal position in society. Although the use of these terms is under-inclusive, given the variety of terms used by such individuals to identify themselves, this paper will use them for the sake of simplicity. In keeping with common parlance, same-sex couples may likewise be referred to as "gay couples," though one or both partners may identify as having a different sexual orientation. This paper avoids the term "homosexual," given the term's historical link to the treatment of same-sex attraction as a psychiatric disorder. For a more generalized discussion of these and other labels relating to sexual orientation, see generally Don Kulick, Gay and Lesbian Language, 29 ANN. REV. ANTHROPOLOGY 243 (2000).
7. See 517 U.S. 620 (1996) (state constitutional amendment barring judicial and political remedies to claims of discrimination based on sexual orientation fails equal protection standards).
marriage statutes or challenging newly-passed state constitutional amendments relating to same-sex marriage.\textsuperscript{10} In these post-Goodridge marriage battles, same-sex couples have largely lost, although they have achieved some qualified victories.\textsuperscript{11}

As U.S. courts have confronted same-sex marriage issues, several countries around the world have also examined the issue of legal recognition for same-sex couples and have decided to either include same-sex couples in existing marriage schemes or to create alternative schemes, such as civil partnerships in the United Kingdom\textsuperscript{12} or the \textit{pacte civil de solidarité} (civil solidarity pact) in France.\textsuperscript{13} In South Africa, the issue arose in the context of \textit{Minister of Home Affairs v. Fourie}.\textsuperscript{14} Although South African society is, in many ways, as traditional and conservative regarding sexuality as American society,\textsuperscript{15} the South African Constitution of 1996 prohibited discrimination based on sexual orientation, which, at that time, was unique to South Africa.\textsuperscript{16} In \textit{Fourie}, the South African Constitutional Court held that the constitution therefore required the government to extend marriage rights to same-sex couples and granted Parliament one year to formulate a remedy.\textsuperscript{17}

American courts have struggled to frame the issues involved in same-sex marriage clearly because of the heated U.S. political debate and because the U.S. Constitution does not address discrimination based upon sexual orientation in the way it addresses discrimination based on factors such as race and religion. The South African decision in \textit{Fourie} provides a unique opportunity to study how another court has framed and addressed the legal issues involved in same-sex marriage. By comparing \textit{Fourie} with several recent American decisions, including the Court of Appeals of New York's decision in \textit{Hernandez v. Robles},\textsuperscript{18} the Eighth Circuit's decision in \textit{Citizens for Equal Protection v. Bruning},\textsuperscript{19} and the Supreme Court of New Jersey's decision in \textit{Lewis v. Harris},\textsuperscript{20} future courts can improve their own

\begin{thebibliography}{99}
\bibitem{10}E.g., California (City & County of San Francisco v. State, 27 Cal. Rptr. 3d 722 (Cal. Ct. App. 2005)); Washington (Andersen v. King County, 138 P.3d 963 (Wash. 2006)).
\bibitem{11}Compare Andersen, 138 P.3d 963 (same-sex couples have no right to marry under state constitution), with Lewis v. Harris, 908 A.2d 196, 220-21 (N.J. 2006) (same-sex couples entitled to protections the state affords married opposite-sex couples).
\bibitem{12}Civil Partnerships Act, 2004, ch. 33 (U.K.).
\bibitem{14}2006 (1) SA 524 (CC) (S. Afr.).
\bibitem{17}Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 585–86 (S. Afr.).
\bibitem{18}7 N.Y.3d 338 (N.Y. 2006).
\bibitem{19}455 F.3d 859 (8th Cir. 2006).
\bibitem{20}908 A.2d 196 (N.J. 2006).
\end{thebibliography}
analyses.

Part I of this Note briefly establishes the relevant legal background of gay rights and same-sex marriage in the United States and South Africa. In Part II, the Note begins its analysis by comparing the way Fourie and the American decisions address: (1) the balancing of the state's interest in legislating the social institution of marriage with its interest in individual rights and (2) the importance of examining context in order to evaluate discrimination. The former, discussed in Part II.A, constitutes the crux of discrimination jurisprudence in both countries and is at the legal heart of the highlighted cases. The latter, discussed in Part II.B, is an issue largely ignored by the American marriage decisions, yet Fourie demonstrates how the context of discrimination is crucial to an accurate balancing result. Part II.C analyzes the role that international and foreign law might play in same-sex marriage decisions and what these bodies of law actually state. This is an important analysis because South African courts regularly refer to international jurisprudence and some American courts seem to be cautiously exploring foreign law as a source of additional insight on the new and often murky issues involved in same-sex marriages. Finally, Part II.D addresses the significance of what states choose to call the structures that they create to protect and recognize relationships, an issue upon which Fourie touches cautiously. As decisions like Fourie and Lewis assign the forming and naming of remedies to legislative bodies, parties are likely to litigate the significance of the name "marriage" in many future cases.

I. Background

In order to provide valid insight, a comparison of same-sex marriage in South Africa and the United States requires an understanding of the relevant legal context in each of these countries and the ways in which the American and South African systems coincide or differ. This section first provides the background required for a basic understanding of each country's constitution, focusing on provisions for minority protection. Next, because the United States operates under a common law system and South Africa operates on a civil/common law hybrid, the section explores the relevant case law and judicial tests applicable to same-sex marriage in these different contexts.\(^ {21}\) The marked similarities in constitutional requirements and the comparable use of judicial balancing tests illustrate the potential for simple migration of ideas: American judges may, without undue hardship, look to South African decisions for alternative approaches to the issues at stake in same-sex marriage.

A. Constitutions in Context

Like American law, South African law originated in a colonial past. The Dutch and British influences in South Africa created a hybrid legal system with aspects derived from both the common law and civil law sys-

tems, allowing for significant judicial power to interpret statutes and apply constitutional principles. Thus, although the labels of the American and South African legal systems differ, their judges share similar power. Additionally, both nations' constitutions protect individual liberty with a Bill of Rights. The constitutions of the two states are nevertheless separated by two hundred years of human experience, and this experience led South Africans to incorporate into the text of their constitution some of the balancing tests that American courts have struggled to establish throughout this time. The result in cases analyzing government authority to limit individual rights, however, is sufficiently alike to yield workable comparisons.

1. Origins of Minority Protections

The establishment of minority protections in the U.S. Constitution has been an arduous uphill climb with a few grand leaps. The original drafters failed to provide for any substantial individual rights. Although the Bill of Rights created protections for religious and political opinion, it was silent on matters of race and gender. With the Thirteenth and Fourteenth Amendments adding hard-won protections for racial minorities, race became the main focus of minority rights under U.S. constitutional law. Until after World War II, both legal and public discussions of minority rights largely were silent on the issue of sexual orientation.

From the 1960s onward, the Gay Rights Movement developed rapidly; it is often categorized with other identity-based rights movements, such as the Civil Rights Movement and Women's Liberation. The Gay Rights Movement, to some extent, has benefited from this association by building on judicially recognized arguments supporting the constitutional rights of religious and racial minorities as well as women. Unlike racial, religious, or gender discrimination, however, U.S. federal law has never held that discrimination based on sexual orientation is per se unconstitutional nor has it deemed gays and lesbians a suspect class when statutes targeted or excluded them.

24. S. AFR. CONST. 1996 art. 36.
26. See U.S. CONST. amends. XIII, XIV.
28. See id. at 32-37.
29. Id. at xi.
30. Compare Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) (upholding Solomon Amendment, which requires law schools, in order to receive federal funding, to offer military recruiters the same access that they provide to nonmilitary recruiters with the most favorable access), and Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that Boy Scouts of America could prohibit gay man from being scout master), with U.S. v. Virginia, 518 U.S. 515 (requiring heightened scrutiny for sex-based discrimination).
The history of LGBT rights in South Africa stands in stark contrast to the U.S. movement. For years, legal protections for minorities in South Africa were unthinkable under the specter of another remnant of the country's colonial past, the legal entrenchment of racial discrimination known as apartheid. When South Africa opened its doors to human rights at the end of apartheid in 1996, it created a new and powerful constitution that provided protections for individual rights and remedies for their violation. The 1996 Constitution empowered citizens, particularly minority citizens, to create legal demands for their rights and the judiciary to ensure that government actions support those rights.

The 1996 Constitution was, in many ways, intended to be a complete break from all that apartheid had embodied and, thus, involved high levels of popular participation in its formation. Given that South Africa had—and continues to have—high levels of homophobia, this process could have been disastrous for lesbians and gay men, except that LGBT leaders had formed coalitions with the African National Congress (ANC) and United Democratic Front (UDF) before apartheid ended, when those groups were relatively powerless and more willing to make unlikely alliances to gather political support. When these groups gained power post-apartheid, LGBT rights workers successfully ensured that the new constitution was the first in the world to include prohibitions on discrimination based on sexual orientation.

2. Constitutional Language

Despite the divides of time and culture separating the U.S. Constitution from its South African counterpart, both documents are largely similar in their treatment of minority rights. Both constitutions include provisions for equal protection of individuals under the law and allow the judiciary to grant remedies for equal protection violations, such as striking down legislation found to be discriminatory. Additionally, neither constitution includes an express right to marry. The South African constitution is unique because it directly addresses sexual orientation in its Equality Clause, but a brief examination of the constitutional language shows that

33. See id. at 147.
36. Cock, supra note 34, at 36.
37. See S. AFR. CONST. 1996 art. 14(3).
38. U.S. CONST. amend. XIV, § 1; S. AFR. CONST. 1996 art. 9.
Most U.S. arguments for same-sex marriage focus on the Fourteenth Amendment's Equal Protection Clause and similar clauses under state constitutions, along with an implied right to privacy, sometimes framed as "a right to intimate life." The Fourteenth Amendment instructs that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ... nor deny to any person within its jurisdiction the equal protection of the laws." Through ever-evolving case law, the U.S. Supreme Court has interpreted the Equal Protection Clause to require a balancing test that, broadly put, considers: (1) the nature of the right restricted or the disability imposed, including such concerns as the basis for the restriction and how well the restriction serves that goal, and (2) the nature of the classification of those affected, including whether the classification is over- or under-inclusive. The Supreme Court thus far has avoided the question of whether sexual orientation is at least a semi-suspect classification, but the Court has used the Due Process Clause of the Fifth and Fourteenth Amendments to review legislation when a constitutional liberty is at stake. Though not enumerated in the Constitution, the Court has held marriage to be a fundamental right. State constitutions, such as those in New York and New Jersey, largely echo this Equal Protection language, and state courts have interpreted the clauses using similar tests.

The Equality Clause and the Limitation of Rights Clause of the South African constitution provided the heart of the Constitutional Court's analysis in Fourie, as in other gay rights cases. The Equality Clause includes the following provisions:

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40. See S. Afr. Const. 1996 art. 9(3).
41. See Richards, supra note 27, at 128-29.
42. U.S. Const. amend. XIV, § 1.
43. See Plyler v. Doe, 457 U.S. 202, 216-18 (1982) ("In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose. ... We have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. ... [(I)n these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.").
45. U.S. Const. amend. V ("No person shall ... be deprived of life, liberty, or property without due process of law"); U.S. Const. amend. XIV, § 1 (making the same prohibition on actions by the states); see Lawrence, 539 U.S. at 578.
48. Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 555, 567 (S. Afr.).
(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms...

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status... or sexual orientation... 49

The constitution sets clear boundaries for any limitation of the rights set out in its Bill of Rights. These boundaries create a balancing test similar in essence to the one used in American law, allowing a limitation only so long as it is "reasonable and justifiable in... a society based on human dignity, equality and freedom" and balancing "(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and the purpose; and (e) less restrictive means to achieve the purpose." 50 Certain rights are non-derogable and may not be limited by the South African government under any circumstances. Sex is included among these non-derogable rights but sexual orientation is not. 51

B. Gay Rights, Marriage Rights, and the Judiciary

In both the United States and South Africa, the case history working up to same-sex marriage has tumbled onto the legal stage relatively quickly over the last decade. Critics use this recent awareness as proof that gay rights are a fabrication of modern Western liberalism, disconnected from the long tradition of history. 52 Perhaps more probable is the argument that the struggle for gay marriage is the inevitable progression of a rights movement whose members are just now emerging from centuries of forced silence. 53 Though that silence has erased much of the historical record, judges are beginning to recognize that the relative novelty of gay rights claims cannot render neither the rights of individuals any less potent nor the discrimination any less harmful. 54

49. S. AFR. CONST. 1996 art. 9.
50. Id. at art. 36.
51. Id. at art. 37(5)(c).
54. See, e.g., Lawrence, 539 U.S. at 571-72 (subordinating arguments about the long historical disapproval of same-sex relations to more recent analysis of individual rights to privacy); Goodridge v. Dept’ of Pub. Health, 798 N.E.2d 941, 958 (Mass. 2003) ("[I]tory must yield to a more fully developed understanding of the invidious quality of the discrimination"); Lewis v. Harris, 908 A.2d 196, 229 (N.J. 2006) (Poritz, C.J., concurring and dissenting) ("Without analysis, our Court turns to history and tradition and finds that marriage has never been available to same-sex couples. That may be so—but the Court has not asked whether the limitation in our marriage laws, ‘once thought
1. A Brief History: The United States

Although most same-sex marriage cases have been brought in state courts under state constitutions, these state cases have heavily relied on the underpinnings of a triumvirate of landmark civil rights cases from the U.S. Supreme Court: *Loving v. Virginia*, *Romer v. Evans*, and *Lawrence v. Texas*. In striking down a Virginia statute that criminalized interracial marriage, the Court in *Loving* described marriage as both a "basic civil right[ ]" and a "fundamental freedom" that is "essential to the orderly pursuit of happiness." The Supreme Judicial Court of Massachusetts was the first to logically extend this reasoning to same-sex couples and find that "the right to marry means little if it does not include the right to marry the person of one's choice..." Despite the presence of a fundamental right, the New York Court of Appeals and other courts have applied only a rational basis test to marriage statutes that exclude same-sex couples. In *Romer*, the Court reiterated an earlier ruling that "a... bare desire to harm a politically unpopular group cannot constitute a legitimate government interest[,]" and in *Lawrence*, the Court struck down a state sodomy law, condemning such laws as "an invitation" to discriminate against and "demean[ ] the lives" of gays and lesbians. After *Romer* and *Lawrence*, many states attempted to prevent any effort by gays and lesbians to achieve marriage equality by passing statutes or state constitutional amendments specifically restricting marriage rights to opposite-sex couples.

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55. 388 U.S. 1 (1967).
58. *Loving*, 388 U.S. at 12. Although *Loving* addressed a state statute applying a criminal penalty for interracial marriages, there can be little doubt that a statute "defining away" the issue, by defining valid marriage as the union of two persons of the same race, would have suffered the same fate. Thus, a lack of criminal penalty associated with gay marriage in a state where marriage is defined as the union of a man and a woman is unpersuasive in distinguishing the result that the Court reached in *Loving*. For more on *Loving* and comparisons between same-sex and interracial marriage, see infra Part II.B.1.
59. Goodridge, 798 N.E.2d at 958.
60. See Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006).
61. *Romer*, 517 U.S. at 634 (emphasis in original) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
64. Alaska (ALA. CONST. art. 1, § 25); Arkansas (ARK. CONST. amend. 83); Georgia (GA. CONST. art. 1, § 4, ¶ 1); Hawaii (HAW. CONST. art. 1, § 23); Kentucky (KY. CONST.
2. A Brief History: South Africa

For many around the world, the Fourie decision may have been shocking, because few persons think of sub-Saharan Africa as a hotbed of gay rights. 

Nevertheless, Fourie was not an isolated decision about impermissible discrimination in a single statute. Rather, it was the crystallization of nearly a decade of minority rights jurisprudence, building up to a fuller achievement of the Equality Clause’s promise to gays and lesbians in South Africa. The new constitution took effect in 1996, but the old sodomy law was not eliminated until two years later. After the elimination of the sodomy law, suits in 2000 and 2002 successfully established the right of gays and lesbians to have a same-sex partner immigrate or receive the portion of certain government pensions due to legal spouses. Following these decisions, in 2003, the Constitutional Court upheld a same-sex couple’s right to adopt and raise children as co-parents. The Fourie decision recognized the fundamental injustice of the current marriage statute and set a time limit for Parliament to remedy the inequality by amending the law, warning that if Parliament failed to pass legislation assuring same-sex couples the same legal rights as heterosexual couples, inclusive language would automatically be read into the existing statute. After debating various forms of a Civil Union Act, some of which would have restricted same-sex couples’ options for relationship recognition, Parliament managed to beat the court-appointed deadline and passed a version of the Act that allows both same-sex and opposite-sex couples the ability to choose either civil marriage or a civil union. Supporters of same-sex marriage continue to debate the adequacy of the Act as a remedy, while homophobia and bureaucracy remain barriers to marriage for many couples.

§ 233A); Louisiana (LA. CONST. art. 12, 15); Michigan (Mich. Const. art. 1, § 25); Mississippi (Miss. Const. art. 14, § 263A); Missouri (Mo. Const. art. 1, § 33); Montana (MONT. Const. art. 13, § 7); Nebraska (NEB. Const. art. 1, § 29); Nevada (NEV. Const. art. 1, § 21); North Dakota (N.D. Const. art. 11, § 28); Ohio (OHIO Const. art. 15, § 11); Oklahoma (OKLA. Const. art. 2, § 35); Oregon (OR. Const. art. 15, § 5a); and Utah (UTAH Const. art. 1, § 29).

65. Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) (S. Afr.).
70. See Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 585-86 (S. Afr.).
II. Analysis

A. Balancing Rights

In order to balance the interests involved in pursuing same-sex marriage rights, the courts must first recognize and analyze the importance of civil marriage as a government institution. Two types of interests are legitimately involved in such an analysis: state welfare interests and individual liberty interests. In addition, a third interest is often urged into consideration: the interest of third party institutions, whether acknowledged as religious interests or cloaked in the vague language of "the traditional institution of (opposite-sex) marriage." As Fourie shows, there is no legitimate legal basis for third-party claims that allowing same-sex couples to marry would harm their own interests.

1. State Interests

When analyzing the state interests in same-sex marriage cases, most American courts run into difficulties by casting their net too broadly and, at the same time, too narrowly. By focusing so much effort on justifying the very existence of civil marriage, they fail to adequately examine what, if any, interest the state has in excluding same-sex couples from that institution. For example, in Hernandez v. Robles and Citizens for Equal Protection v. Bruning, the court spends a great deal of time painting marriage as an institution built around procreation. This distinction might explain why states choose to offer marriage to those heterosexual couples capable of reproducing, but it fails to address what interest the state might have in excluding same-sex couples, particularly same-sex couples with children. At the same time, it focuses too narrowly on the single thing that some opposite-sex couples can do that same-sex couples cannot: produce biological children who are the genetic result of a reproductive cell from each partner. To say that this is the sine qua non of civil marriage is willfully


73. See generally Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (discussing both the individual liberty interest and the state's interest in crafting marriage to promote the welfare of society).

74. See, e.g., Citizens for Equal Protection v. Bruning, 455 F.3d 859, 867 (8th Cir. 2006).

75. See Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 558-63 (S. Afr.).

76. See, e.g., Bruning, 455 F.3d at 868 (purporting that the legitimate purpose of "traditional marriage laws" is "to encourage heterosexual couples to bear and raise children in committed marriage relationships"); Hernandez v. Robles, 855 N.E.2d 1, 11 (N.Y. 2006) (defining the relevant state interest as "the protection of children").

77. See Goodridge, 798 N.E.2d at 963 ("The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children.").
under-reaching.\textsuperscript{78}

Fourie’s analysis is superior in that it considers a much broader range of state interests in modern civil marriage and examines whether opening marriage to same-sex couples would harm these interests. Among several interests Fourie identifies are: (1) establishing a reciprocal duty of support between partners, (2) regulating property interests, (3) establishing parentage and the duty to support children, and (4) providing public documentation of key relationships.\textsuperscript{79} Fourie views the first interest as particularly important to both the state and the married parties during the marriage or at the unfortunate event of its dissolution.\textsuperscript{80} If a state wishes to promote stable relationships and prevent individuals from unnecessary dispute or destitution should those relationships fail, the American cases fail to indicate why same-sex marriage would harm these state interests rather than support them. Moreover, Fourie correctly points out that limiting the state interest in marriage to its “procreative potential” confuses a religious value judgment with the true breadth of legitimate state interests and is “deeply demeaning” to married couples who cannot or choose not to have children.\textsuperscript{81}

2. Liberty Interests

Another common error that American courts make is underestimating the individual liberty interests at stake for same-sex couples seeking marriage. A good example of this is how the courts try to circumvent the heightened scrutiny necessary once marriage is acknowledged as a fundamental right. The Hernandez court relies on a convoluted analysis whereby it argues that same-sex marriage cannot be a fundamental right because the cases establishing marriage as a fundamental right dealt with opposite-sex couples. Therefore, the statute in question does not restrict a fundamental right because it only prohibits gays and lesbians from enjoying same-sex marriage.\textsuperscript{82} Likewise, the Supreme Court of New Jersey, in Lewis, found that there was no fundamental right at stake because same-sex marriage is not “deeply rooted in [the] State’s history.”\textsuperscript{83} In concluding that Nebraska’s state constitutional ban on same-sex marriage is acceptable under the U.S. Constitution, the Eighth Circuit points out that no Supreme Court Justice has ever found the “traditional definition of marriage” to violate Equal Protection.\textsuperscript{84} None of these decisions acknowledges what Justice Kennedy emphasized in Lawrence, that “history and tradition are the starting point but not in all cases the ending point” of a rights analysis.\textsuperscript{85}

\textsuperscript{78} Cf. id. at 962 (announcing that “such a narrow focus is inappropriate”).
\textsuperscript{79} Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 551–52 (S. Afr.).
\textsuperscript{80} Id. at 554.
\textsuperscript{81} Id. at 558.
\textsuperscript{82} Hernandez v. Robles, 855 N.E.2d 1, 14–15 (N.Y. 2006).
\textsuperscript{83} Lewis v. Harris, 908 A.2d 196, 208 (N.J. 2006).
\textsuperscript{84} Citizens for Equal Protection v. Bruning, 455 F.3d 859, 870 (8th Cir. 2006).
Besides placing undue emphasis on the supposed distinction between the fundamental right to “traditional marriage” and the supposed modern heresy of same-sex marriage, the post-Goodridge cases inadequately weigh the harm to individuals when states deny them their right to form a basic contract and have that contract publicly recognized. For example, the concurring opinion in Hernandez posits that the current marriage statute does not actually restrict the rights of gays and lesbians because they are free to marry members of the opposite sex.86 Although this conclusion might seem absurd to many onlookers, it is not surprising considering the insistence with which the majority opinion refers to sexual orientation as merely a “preference” and not a fundamental trait.87 None of the cases address same-sex couples’ inability to obtain many of the concrete benefits of marriage, such as next-of-kin status, automatic inheritance, joint tax status, and joint-parenting protections, through other “non-marriage” means.88 By failing to acknowledge the importance of marrying a partner of one’s choosing, these decisions demean the importance of the human bond at the heart of marriage and avoid an accurate inquiry into the individual liberty interest involved.89

In contrast, the Fourie decision deals with the question of individual rights more holistically. The South African constitution does not include an express right to marry, but South African jurisprudence has established that the state may not oppressively restrict the right to marry or choose a spouse.90 When tackling the historical absence of marriage rights for same-sex couples, the Fourie court simply acknowledges that family formations “evolve” and “develop,” and that any state restrictions on the right of individuals to marry and form families may not be “arbitrary.”91 That is to say, what constitutes a “traditional” marriage or a “traditional” family is constantly evolving, and it is not the state’s right to entrench one form of marriage or family and burden all others, particularly when that burden is imposed based on historical discrimination that has forced one form of family to render itself invisible.92 Finally, Fourie truthfully acknowledges not only that the duties of marriage are more diverse than procreation but also that the rights associated with marriage are “vast.”93 Therefore, to fence those rights off from a certain portion of the population is much more than just a “small and tangential inconvenience.”94

86. Hernandez, 855 N.E.2d at 14-18 (Graffeo, J., concurring).
87. See, e.g., id. at 17-19.
89. Cf. Perez v. Sharp, 198 P.2d 17, 25 (Cal. 1948) (striking down the state’s miscegenation laws and noting that “[a] member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains.”).
90. See Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 543 (S. Afr.).
91. See id. at 543, 548.
92. See id. at 548.
93. See id. at 552-53.
94. See id.
3. The "Threat" to Third Party Institutions

In the United States, popular discourse on same-sex marriage often focuses on the vague notion of the "threat" same-sex marriage would pose. Precisely who same-sex marriage threatens and who or what should be "defended" from it is confusing in the social and political discourse and is even more confusing in the courtroom. Religious groups opposed to gay rights often promulgate these "threat" arguments, but courts attempt to appear neutral by deferring to a vague legislative prerogative to protect the "institution of marriage" from same-sex incursions and avoiding any discussion of the religious and gender norms the institution implicitly imposes. At the same time, these arguments draw support with the assertion that history and religion bolster the institution of marriage. The legitimacy of these historical-religious arguments is further undermined by their failure to engage in meaningful discussion of whether or not history and religion are legitimate reasons for state discrimination. Ignoring Justice Kennedy's advice in Lawrence, the majority of American courts have determined that a history of legitimizing discrimination is the ending point of their analysis.

The South African Constitutional Court in Fourie directly confronts the notion that same-sex marriage is a threat to religion and the institution of marriage. Addressing religious concerns, the court points out that although religious ministers often perform civil marriages (like in the United States but unlike some countries that have completely divorced civil from religious marriage), legalizing same-sex marriage would in no way compel ministers to perform ceremonies that go against their religious beliefs. Furthermore, the court says, "It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution." This is advice that American courts ruling on same-sex marriage would do well to remember.

95. See Richards, supra note 27, at 139-40.
98. Lawrence, 539 U.S. at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833 (1998)).
100. See Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 562 (S. Afr.).
101. See id. at 560.
As for the need to protect and preserve the "institution of marriage," the Fourie court addresses this argument quite honestly. It breaks down such rhetoric into two principles: (1) that "same-sex couples would undermine the institution of marriage" and (2) that they would "intrude upon and offend against strong religious susceptibilities of certain sections of the public." The court then analyzes each argument's merits. Regarding the former principle, the court simply acknowledges that granting rights to same-sex couples in no way legally limits or affects the rights of opposite-sex couples. What opponents of same-sex marriage usually mean when they talk about "demeaning the institution," however, is a conflation of the former with the latter—the notion that because of social disapproval of gays and lesbians, straight couples will think less of marriage if gay couples are permitted to marry. Rather than ignoring this prejudice at the heart of the "institution" argument, as the American cases do, the Constitutional Court in Fourie speaks directly to this concern:

However strongly and sincerely-held the beliefs underlying the second proposition might be, these beliefs cannot through the medium of state-law be imposed upon the whole of society and in a way that denies the fundamental rights of those negatively affected. . . . It might well be that negative presuppositions about homosexuality are still widely entertained in certain sectors of our society. The ubiquity of a prejudice cannot support its legitimacy.

If American courts want to be honest about the interests that they are balancing in same-sex marriage cases, they need to stop hiding behind the "institutional preservation" arguments. Like Fourie, they must analyze exactly what and whom proponents of that rationale actually believe the threat to be.

B. The Context of Discrimination

One continuing flaw with American same-sex marriage decisions post-Goodridge is their persistent failure to examine the context of discrimination against gays and lesbians in the United States. This failure is dangerous because it ignores two important factors in the discriminatory nature of current marriage statutes: (1) the historical reasons for why drafters of older state marriage statutes did not consider same-sex couples, and (2) the prejudice and animosity against gays and lesbians that has gone into drafting and passing newer "one man, one woman" marriage statutes and amendments. The need to examine the context of discrimination is not new in American jurisprudence, and it is something the Supreme Court showed itself willing to do in both Romer and Lawrence. The South African Constitutional Court in Fourie provides a possible

102. See id. at 568.
103. See id.
104. Id.
model for incorporating the examination of context into same-sex marriage analysis.

1. Why History Matters

Hernandez and Lewis demonstrate the way courts interpret older marriage laws as prohibiting same-sex marriage partly because the original legislative authors—drafting laws decades or centuries in the past—never would have considered same-sex marriage. This enables the courts to define the right at issue not as marriage generally, but rather as same-sex marriage. By defining the right narrowly, the courts easily conclude that same-sex marriage must not be a fundamental right because it was not discussed at the time these statutes were passed. The problem with such reasoning is not just that it defines the right at stake too narrowly but that it turns one of the great historical harms suffered by gays and lesbians—the denial of their existence and the accompanying secrecy forced on their very identities—into a continuing rationale for discrimination against them. Even so, Judge Smith, writing for the plurality of the Court of Appeals of New York in Hernandez, seems particularly offended at any implication that legislators were historically ignorant of, or prejudiced against, same-sex couples. He broadly claims:

Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted.

Needless to say, the court cited no evidence supporting the implication that early lawmakers had impartially considered the possibility of stable same-sex relationships and had rationally rejected their inclusion in marriage statutes.

106. See Lewis v. Harris, 908 A.2d 196, 208-11 (N.J. 2006) (concluding that "we are concerned only with the question of whether the right to same-sex marriage is deeply rooted in this State's history and its people's collective conscience" and then finding that it is not); Hernandez v. Robles, 855 N.E.2d 1, 2-3 (N.Y. 2006) ("Articles 2 and 3 of the Domestic Relations Law, which govern marriage, nowhere say in so many words that only people of different sexes may marry each other, but that was the universal understanding when Articles 2 and 3 were adopted in 1909.").
110. Hernandez, 855 N.E.2d at 8.
111. Id. at 8. But see Cabaj, supra note 53, at 2-6 (discussing early precedence of same-sex marriage in various forms and in a variety of cultures throughout history).
112. At least one critic of Smith's plurality opinion points out that the marriage statute, which was passed in 1909, likely was conceived without any particular slant for or against gay rights at all, let alone same-sex marriage, making this line of reasoning absurd at best. See Arthur S. Leonard, New York Court of Appeals Rejects Marriage Claim, 4-2, 2006 Lesbian/Gay L. Notes 123, 124 (2006) (arguing instead that "[j]udicial review of an ancient statute under the rational basis test requires the court to imagine a contemporary legislature faced with the policy question and how it might justify adopting the present-day statute").
It is especially perverse that the Hernandez court attempted to preempt the obvious counter-argument to the historical limitation of marriage, the overturning of the historically supported ban on interracial marriage in Loving, and asserted that, unlike sexual orientation discrimination, "for centuries [racism was recognized] . . . as a revolting moral evil." Although this is a dubious claim, at least in the United States, the court did not hesitate to compare the long horror of racism with the relative novelty of disapproval of discrimination against gays and lesbians. Comparing racial discrimination with sexual orientation discrimination creates inherent problems and complexities, but Loving shows the importance of historical context by rejecting Virginia’s argument that the law criminalizing interracial marriage was acceptable because penalties applied “equally” for whites and non-whites and concluding that, taken in context, the law was part of historic efforts “to maintain White Supremacy.” Discrimination based on race and sexual orientation need not be qualitatively similar in order for courts to take a cue from Loving and consider how history, shaped by a heterosexual majority, has created a “traditional definition” of marriage that perpetuates the exclusion of gays and lesbians.

What Hernandez and Lewis deliberately ignore and what the Fourie court points out is that many practices unquestioned in the past are now regarded as patently unjust. Discrimination against gays and lesbians is a historical practice that, although still prevalent, must be firmly acknowledged as an impermissible basis for law. Fourie brings this historical context into the equal protection analysis by discussing the harm that the existing marriage statute causes to same-sex couples and by asking

113. Hernandez, 855 N.E.2d at 8.
114. See id.
115. See, e.g., Henry Louis Gates, Jr., Blacklash?, NEW YORKER, May 17, 1993, at 42 (analyzing some African Americans’ resistance to comparisons of gay rights with African-American rights). But cf. Siobhan B. Somerville, Queer Loving, 11 GLQ: J. LESBIAN & GAY STUD. 335 (2005) (extensively critiquing simplistic comparisons of Loving and interracial marriage to the light for same-sex marriage). Somerville discusses the interconnectivity of race and sexual orientation need not be qualitatively similar in order for courts to take a cue from Loving and consider how history, shaped by a heterosexual majority, has created a “traditional definition” of marriage that perpetuates the exclusion of gays and lesbians.

118. Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 554–55 (S. Afr.) (“[T]he antiquity of a prejudice is no reason for its survival. Slavery lasted for a century and a half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law; the first two are today regarded with total disdain, and the third with varying degrees of denial, shame or embarrassment. Similarly, the fact that the law today embodies conventional majoritarian views in no way mitigates its discriminatory impact.”).
119. See Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O’Connor, J., dissenting) (“Moral disapproval of [gays and lesbians] is an interest that is insufficient to satisfy rational basis review.”).
whether there is a permissible rational basis for this harm. Through this analysis, *Fourie* points out that the absence of gays and lesbians from marriage statutes does not justify their exclusion but rather becomes part of the harm itself. *Fourie* notes that the old law, however innocently, inflicts discrimination on same-sex couples, explaining, “It is as if they did not exist as far as the law is concerned. They are implicitly defined out of contemplation as subjects of the law.” Later, the court acknowledges that “the default position of gays and lesbians is still one of exclusion and marginalisation.” Without following *Fourie*’s lead and examining the context of historical discrimination against gays and lesbians and the influence of such discrimination on contemporary laws and justifications, American courts will continue to miss the mark in their analysis.

2. Insiders and Outsiders

The post-**Goodridge** decisions do not consider another crucial ingredient in the balancing test: the extent to which existing marriage schemes create and enforce the notions of heterosexual “insiders,” who are privileged, and homosexual “outsiders,” who are not. This divergence was evident in the **Bruning** court’s assertion that the Nebraska legislature is justified in “choos[ing] not to expand in wholesale fashion” the groups allowed the benefits of marriage; in other words, Nebraska acted reasonably in choosing to privilege heterosexual couples over gay couples. In striking down the offending constitutional amendment in **Romer**, Justice Kennedy points out that “laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.” The **Bruning** court, however, ignores the animosity and prevalence of anti-gay rhetoric involved in the push to pass not only the Nebraska ban but also similar measures in other states. The Court of Appeals of New York announces that the legislature rationally could have decided that opposite-sex families are better at raising children than same-sex families, despite contrary and abundant social-science evi-

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120. Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 554-55 (S. Afr.).
121. *Id.* at 555.
122. *Id.* at 556.
125. See **Richards**, supra note 27, at 140-41; Pam Belluck, **Nebraskans to Vote on Sweeping Ban on Gay Unions**, N.Y. TIMES, Oct. 21, 2000, at A9 (quoting State Attorney General and amendment supporter Don Stenberg, who compared a union between two men to a union between a man and a dog); Nancy Hicks, **Initiative’s Backers, Foes Speak at Public Hearing**, LINCOLN J. STAR, Oct. 12, 2000, at B2 (quoting supporter Rev. Al Riskowski, who categorizes same-sex marriage as akin to stealing and murder); Leslie Reed, **Emotion Fills Debate over Gay Marriage**, OMAHA WORLD-HERALD, Sept. 29, 2000, at 19 (quoting law professor Richard Duncan, who supported the amendment, describing public opinion of same-sex unions as a split between “good” and “deep evil”); see also **WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS** 204-05 (2002). Eskridge discusses Romer’s impact on rhetoric used by opponents of same-sex marriage, forcing “traditionalist allies . . . [to] shy away from status denigration or Biblical authority,” and exchange “abomination” rhetoric for what he sees as weaker arguments about issues like child rearing. *Id.*
The ease with which the court dismisses those studies as "limited" and fails to remark on the absence of any studies showing that children fare worse in same-sex households sends a clear message to gays and lesbians: the court is paying strong deference to the presumption of heterosexual superiority. Most telling, however, is the unwillingness of the court to discuss the symbolic impact that exclusion from marriage has on same-sex couples.

The *Fourie* court describes this symbolic effect by criticizing the existing marriage scheme for excluding same-sex couples not only from the legal benefits and duties of marriage but also from the status and dignity that marriage provides through official recognition of intimate relationships. At every analytical step, the court incorporates considerations of several factors, including dignity, rights, and duties. Rather than dismiss the less-tangible effects of the law, the court addresses their importance, explaining:

> It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

This creation of insiders and outsiders is precisely what the American courts ignore in their analysis of same-sex marriage, although Justice O'Connor admitted to its ubiquity in the sodomy statutes that *Lawrence* struck down. The sodomy law in *Lawrence* created an "underclass" of legal outsiders by associating gays and lesbians with criminality. The exclusion of same-sex couples from marriage statutes—whether deliberately through recent actions or through the oversights of history, now enforced by present interpretations—creates the same underclass of citizens deemed officially unworthy of an important societal institution. The *Fourie* analysis shows how sensitivity to this effect is vital when the courts

127. See id.
128. See Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 556 (S. Afr.).
129. See, e.g., id. at 543, 556, 558, 561, 567.
130. See *Lawrence* v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("[B]ecause Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. . . . [T]he State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to 'a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with the Equal Protection Clause" (quoting Plyler v. Doe, 457 U.S. 202, 239 (1982)).
must weigh admission into an institution that sends as strong a message of governmental approval as marriage does.

C. The International Question

Although the U.S. Supreme Court has traditionally shied away from international legal analysis, the Lawrence decision showed that such analysis might provide valuable insight, particularly in the area of gay rights. Gay rights analysis is particularly amenable to international input because, due to the historical absence of gay rights from the general rights discourse, it is a relatively new area of rights analysis. Thus, the key American legal documents are frequently unhelpful, as they were not expressly designed to address the gay rights issue. South Africa is a logical place to look for useful analysis, because its legal system grants credibility and weight to sources of international and foreign law. Therefore, an examination of the international and regional bases for the rights at issue here should prove particularly fruitful.

1. What International Law Really States

Unfortunately, international analysis is one aspect of the Fourie decision that the Constitutional Court does not fully develop. The Court rightly interprets provisions of the 1948 Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) to enshrine the fundamental right of men and women of appropriate age to marry and form families. It also notes that, in 2002, the United Nations Human Rights Committee ruled in Joslin v. New Zealand that the ICCPR does not require states to recognize same-sex marriages. The Fourie decision interprets Joslin as signifying that although opposite-sex marriage is an internationally protected right, same-sex marriage is both unprotected and un-prohibited, but the true current situation is more complex.

Until recently, it was unthinkable to believe that principles of equal protection and non-discrimination could prevent state discrimination on the basis of sexual orientation; however, this notion has won increasing international acceptance over the last few decades, not just in South Africa. Nations are not only recognizing equality for people of all sex-

132. *Lawrence*, 539 U.S. at 573 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981) for support of the premise that the right to engage in private sexual activity with a same-sex partner is acknowledged in other Western countries).
133. See supra Part II.B.1.
137. See Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 565 (S. Afr.).
ual orientations, but they are beginning to naturally extend this idea to encompass relationship recognition and the right to family life. Along with France and the United Kingdom, Spain, Canada, Denmark, Norway, Sweden, Iceland, Finland, Germany, Luxembourg, Slovenia, Switzerland, Hungary, Portugal, Croatia, and New Zealand have granted same-sex couples some form of relationship recognition under national law, and sub-national jurisdictions in several other countries have done the same.\textsuperscript{139} Even the \textit{Joslin} decision provided evidence that states may be under an obligation to provide some form of relationship recognition to same-sex couples, with two dissenting justices pointing out that unless such state recognition involves "consequences similar to or identical with those of marriage[,] . . . denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26 [(a non-discrimination provision)]."\textsuperscript{140} Clearly, the legal obligation of states to recognize and protect same-sex families on an equal basis with opposite-sex families is far from settled under international opinion. Nevertheless, American courts should start to take notice of the sufficient evidence that significant numbers of international actors believe states have some obligation to these families.

2. \textbf{The Weight of International Opinion}

Once courts recognize the diversity of international legal opinion on same-sex families, they need to determine how to use this information. Because of the different treatment of international law in the U.S. and South African constitutions,\textsuperscript{141} the Fourie model is less helpful here. Justice Kennedy's majority opinion in \textit{Lawrence} provides one possible model for incorporating and weighing international opinion in gay rights analysis.\textsuperscript{142} His model is perhaps best adapted for use by American courts. Justice Kennedy cites the \textit{Dudgeon v. United Kingdom}\textsuperscript{143} decision, in which the European Court of Human Rights held that Ireland's laws criminalizing consensual same-sex activity violated individual rights, but rather than citing the case for its substantive law, Kennedy uses the decision to provide evidence of developing international trends and human rights norms.\textsuperscript{144} More particularly, he uses the case, which is binding in forty-six nations (forty-five at the time Kennedy cited it), to counter the idea that the right to engage in private, consensual sexual conduct is anomalous or "insubstantial" in prevailing Western society.\textsuperscript{145} This use of international opinion is

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\textsuperscript{139} Kukura, \textit{supra} note 138, at 18.
\textsuperscript{141} Compare U.S. \textit{CONST.} art. VI, § 2, with S. \textit{AFR. CONST.} 1996 art. 39(1)(b)-(c).
\textsuperscript{142} See \textit{Lawrence} v. Texas, 539 U.S. 558, 573 (2003).
\textsuperscript{144} See \textit{Lawrence}, 539 U.S. at 573.
\textsuperscript{145} See id. at 573.
particularly salient to the issue of same-sex marriage, especially when opponents argue that there is no room in the traditional institution of marriage for same-sex couples or that the right to non-discrimination that gays and lesbians assert is mere confabulation. In such cases, international opinion can provide helpful input on trends and targets for non-discrimination and equal protection of same-sex couples.

D. What's in a Name

There is one aspect of the same-sex marriage analysis that courts largely have ignored since Goodridge but that undoubtedly will grow in importance as non-marriage relationship schemes are established in more state and local jurisdictions: the relative importance of the title that the law gives to same-sex relationships. Bruning and Hernandez never even reach the naming issue, instead implying that, without the right to marry, same-sex couples have no claim to the accompanying bundle of legal privileges attached to marriage.146 Lewis separates the name “marriage” from the bundle of privileges associated with it and finds that although same-sex couples currently have no right to the former, they have a right to the latter.147 Deferring to the legislature’s latitude to classify and define marriage, the court announces that it “will not presume that a difference in name alone is of constitutional magnitude.”148 Surely it is odd that after finding that the state cannot withhold the rights and benefits associated with marriage from same-sex couples, the court allows the state to withhold the name “marriage” itself, even as it cites the “evocative and important meaning” of the word.149 Because the court offers no valid basis for this distinction under equal protection reasoning other than deference to the legislative branch,150 which it already held is insufficient to deny same-sex couples the rights and benefits in the first place, there is ample room to speculate that political factors, such as fear of public reaction, influenced the court. By its reluctance to perform more than a cursory inquiry, the court throws away any chance it might have had to examine the importance of the name “marriage” and any opportunity to convince the plaintiffs that the name is not of constitutional significance.

Perhaps the Supreme Court of New Jersey was reluctant to perform a more thorough inquiry into the significance of naming because it was afraid to reach the same result as the Fourie court. As this Note discussed in Part II.B.2,151 the Fourie decision emphasizes that although the legal benefits and consequences are a significant part of what is at stake in this rights analysis, they are not the only considerations. The desire of same-sex couples to marry also implicates these individuals’ wish “to live openly

147. See Lewis v. Harris, 908 A.2d 196, 225 (N.J. 2006).
148. Id. at 222.
149. Id. at 221.
150. See id. at 222–23.
151. See supra Part II.B.2.
and freely” and to achieve an important symbolic measure of equality and
dignity. As American courts should recognize, the South African decision points out
that “[h]istorically the concept of ‘separate but equal’ served as a thread-
bare cloak for covering distaste for or repudiation by those in power of the
group subjected to segregation.” In addition to the message of repudia-
tion implicit in creating separate non-marriage classifications for same-sex
couples, the Supreme Court of New Jersey admits that one such classifica-
tion, the state’s domestic partnership registry, has failed to provide
couples with the security and full scope of rights attached to the name “marriage.” Unfortunately, the Lewis decision concludes that the solu-
tion lies in simply tacking on more of the missing rights for same-sex
couples, rather than admitting that without the recognition the name “mar-
rriage” affords, society as a whole is unlikely to treat these parallel institu-
tions as equally valid. Withholding the name “marriage” from same-sex
relationships does nothing to fight the isolation of gays and lesbians from
existing legal structures and does not acknowledge, as Fourie does, “the
profound role [marriage plays] in terms of the way our society regards
itself.” Although the Fourie decision, like Lewis, leaves the ultimate task
of remedying inequality in the hands of the legislative branch, it provides a
much stronger impetus for the legislature to genuinely consider the mes-

sage that the name they choose will send.

Conclusion

The legal analysis of same-sex marriage, like the analysis of gay rights
more generally, is still relatively young. Perhaps it is to be expected that
courts will finesse and improve the application of judicial methods as time
passes. Nevertheless, if American courts wish to retain their reputation not
only for fairness but for a reluctance to twist the rights of the minority to
fit the political will of the majority, then they must stop hiding behind a
legislative history that fails to acknowledge the existence of gays and lesbi-
ans. By looking to the South African Constitutional Court’s decision in

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152. See Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 576 (S. Afr.).
153. Id. at 580.
154. Id.
157. See id. at 221–22. But see id. at 229–30 (Poritz, C.J., dissenting and concurring)
(“[A]s the majority painstakingly demonstrates, the Domestic Partnership Act does not
provide many of the tangible benefits that accrue automatically when heterosexual
couples marry. New Jersey’s statutes reflect both abhorrence of sexual orientation dis-

crimination and a desire to prevent same-sex couples from having access to one of soci-
ety’s most cherished institutions, the institution of marriage.” (citing N.J. STAT. ANN.
§§ 26:8A-1 to -13 (West 2006); Lewis, 908 A.2d at 215-17)).
158. See Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 583 (S. Afr.).
Fourie, this Note shows several crucial ways in which the post-Goodridge cases in the United States fail to adequately consider what is really at stake in the fight for state recognition of same-sex marriage.

Perhaps the American courts have been reluctant, thus far, because of an unfortunate national tendency to think of discrimination as a historical ill that is no longer widely present in the United States. Certainly, cases like Bruning, Lewis, and Hernandez evince a judicial blindness to the very real discrimination that same-sex marriage bans propagate and ignore the multitude of harms that they cause in the lives of same-sex families. With apartheid still in the living memory of its people, the South African judiciary does not have the luxury of forgetting the harms of discrimination or pretending that a long history of exclusion is justification enough for a static law. Until American judges and lawmakers are willing to learn from Fourie's analysis by adapting and improving upon it—acknowledging all of the factors at stake in balancing rights, including the less tangible ones, and considering their own domestic analysis in light of foreign and international developments—the balance will remain skewed against same-sex families before the doors to the courtroom even open. The horizon of rights may indeed be limitless, but courts must open their eyes fully in order to appreciate it.