BALANCING STRUCTURAL AND SUBSTANTIVE CONSIDERATIONS IN SAME-SEX MARRIAGE LITIGATION
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I. Introduction
In Ivan Turgenev’s Fathers and Sons, the nihilist Yevgeny Vassilyev Bazarov argues with the aging Pavel Petrovitch Kirsanov who accuses him of wanting to “destroy everything”—a charge which Basarov accepts. Pavel Petrovitch objects: “But one must construct too, you know.” Basarov responds: “That’s not our business now. . . . The ground wants clearing first.”² How like the mindset described by Richard Weaver: “striking at restraints without considering what they preserve.”³

The urge to destroy political systems to make room for new ones is hardly novel. Emblematic is the French Revolutionaries’ conceit of “throw[ing] over 1,792 years of the Christian calendar and [i]nagurat[ing] a new age of reason in the year 1 of the new age.”⁴ Although less ambitious, strains of this thinking have a place in American legal history and current practice. For instance, some types of “public interest litigation” have focused on “restructur[ing] public institutions in accordance with what are asserted to be the commands of the federal Constitution.”⁵

Basarov, however, was not content to destroy only government structures. Indeed, he challenged Pavel Petrovitch to “bring forward a single institution in our present mode of life, in family or in social life, which does not call for complete and unqualified destruction.”⁶ In a similar way, recent lawsuits have gone beyond seeking structural reforms of public institutions to attempts to restructure social institutions such as marriage and the family. This is no surprise. From a certain perspective, “the formal family unit is suspect for all the same reasons that the

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²IVAN TURGENEV, FATHERS AND SONS 56 (Barnes & Noble edition 2000).

³RICHARD M. WEAVER, VISIONS OF ORDER 50 (ISI edition 1995).


⁶TURGENEV, supra note *** at 61.
governmentally sponsored megastructures are suspect.”  

The family comes under pressure from government partially because the government “is responding to continuing pressure from the advocates of egalitarian value positions who want the megastructure to absorb mediating institutions in order to control them.”  

This pressure comes from those who believe “the liberal state also has an obligation to remove all barriers to fulfillment, which requires using its power to weaken the authority of ‘oppressive’ institutions like the family.”  As Robert Nisbet has noted, “For the radical mentality it is not a matter of ignoring social groups and associations and the right of individual choices; it is a matter of exterminating them all, in the name of socialism, communism, equality, or whatever.”

The scope of these changes is debatable. Their proponents would characterize the aims of this litigation as relatively minor. Opponents characterize the changes as radical and far-reaching. That the duel between these two views is important is manifest by the great effort that litigants and sympathetic courts go to in order to portray the plaintiffs in the same-sex marriage cases (for instance) as “just like their neighbors” and to downplay differences (such as the impossibility of conception in same-sex sexual relations).

This disagreement about the novelty of the change may be attributable to the different reference points of the competing sides. The argument of those who want to see the family restructured seems to focus on the “individual interests” in marriage and family relationships, while their opponents seem to stress the “social interests.”

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8 Id. at 163.


11 See, for instance, the complaint in a pending Maryland case which points out such things as the religion of the couples and provides narratives of their relationships, notwithstanding the irrelevance of both things to a court’s determination of whether their claim has any legal merit. *Deane v. Conway*, No. 24-C-04-005390, Complaint (Md. Cir. Ct.).

12 See, for instance, the decisions of the Vermont Supreme Court and the Massachusetts Supreme Judicial Court which both try to avoid this issue by pointing out that same-sex couples sometimes raise children. *Baker v. Vermont*, 744 A.2d 864, 882 (Vt. 1999); *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 961-962 (Mass. 2003).

interests in the family in exploring the effort to restructure the family (particularly its foundation in marriage) through public interest litigation.

II. Mediating Institutions and Family Autonomy
Professor F.C. DeCoste notes that the state cannot “claim ownership” over marriage although court have recently sought to create that impression:

[T]he facts are these: (a) prior to the thirteenth century, when the Church finally managed to take control of it, marriage was an entirely social practice; (b) marriage only became a sacrament in 1439; and c) the Catholic Church only began requiring the attendanc eof a priest for a valid marriage in 1563, after the Reformation. The state came to marriage even later than did the Church. Indeed, it was not until 1753, with the passage of Lord Hardwicke’s Marriage Act, that the British state became a significant player in the joining together of men and women as husbands and wives.¹⁴

b) family autonomy doctrine

c) how family autonomy protects freedom

III. Restructuring the Family Through Litigation
a) the restructuring effort proposes an entirely new understanding of family

b) this understanding of the family is a government creation which requires state support for its sustenance

c) it magnifies trends (like adult-centeredness) that have weakened family in the past

d) this threatens to prevent marriage from fulfilling its valuable social role

IV. Conclusion