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## Sweet Land of Liberty: The Case against the Federal Marriage Amendment

Sarah C. Courtman

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# Comment

## Sweet Land of Liberty: The Case Against the Federal Marriage Amendment

Sarah C. Courtman\*

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## I. Introduction

"In order to form a more perfect union."<sup>1</sup>

The struggle for equality and freedom is a thread running through all of American history. Since the 1970s, gay civil rights and, more specifically, same sex marriage, have been hotly contested legal and social issues.<sup>2</sup> In 1996, Congress spoke directly to those issues in a vote that cut across party lines; an overwhelming majority of the House and Senate agreed to pass the Defense of Marriage Act (DOMA), which has the stated purpose of "defin[ing] and protect[ing] the institution of marriage."<sup>3</sup> The Act defines "marriage" as the union between a man and a woman for the purposes of interpreting federal laws and provides that no state, territory or possession of the United States can be compelled to recognize any law of another state that treats same sex relationships as "marriages."<sup>4</sup> This Act effectively changed the character of the Full Faith and Credit Clause of the Constitution without a corresponding amendment. President Clinton signed it into law without delay.<sup>5</sup> Several states followed suit by amending their family relations laws or adding new statutory provisions to prevent homosexuals from marrying.<sup>6</sup>

Vermont was the first state in the union to provide for legal recognition of same sex unions.<sup>7</sup> In 1999, Vermont's legislature enacted the civil unions statute<sup>8</sup> in response to a Vermont Supreme Court decision holding that the state's constitution required an extension of marital benefits to same sex unions.<sup>9</sup>

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1. U.S. CONST. pmbl.

2. Robin Cheryl Miller, Annotation, *Marriage Between Persons of the Same Sex*, 81 A.L.R. 5th 1, 2 (2002).

3. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

4. *Id.* § 7.

5. Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996, at A21.

6. Alaska, Arkansas, and Georgia are just a few of the states with laws explicitly preventing same sex marriage. ALASKA STAT. § 25.05.013 (Michie 2003); ARK. CODE ANN. § 9-11-109 (Michie 2003); GA. CODE ANN. § 190303.1 (2002).

7. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

8. VT. STAT. ANN. tit. 15, §§ 1201-07 (2003).

9. *Baker*, 744 A.2d 864.

Many states have since refused to honor the civil unions certified in Vermont, citing DOMA as an exception to the Full Faith and Credit Clause, which might otherwise require them to recognize such unions.<sup>10</sup> State courts have also used cases presenting the question of the legal effect of same sex unions and their dissolution outside Vermont to expound on the immorality of those unions, or on their state's legislative policy against such unions, or both.<sup>11</sup> On the other hand, a few states began to debate whether to enact civil unions laws of their own.<sup>12</sup> In the face of what they perceived as the growing push for the recognition of same sex marriage, special interest groups rallied to prevent the states from enacting more civil unions laws.

In 2001, the Alliance for Marriage Organization drafted an amendment to the Constitution in response to attempts by litigants to use Full Faith and Credit in order to force sister states to recognize Vermont civil unions.<sup>13</sup> Representative Ronnie Shows, a Mississippi Democrat, sponsored this proposed amendment and brought it to the House, where it was promptly co-sponsored by twenty-one more Representatives.<sup>14</sup> The proposed amendment, entitled the "Federal Marriage Amendment,"<sup>15</sup> is the latest in a long line of unconstitutional legislation perpetuating civil rights abuse and discrimination in America.

Courts addressing the issue of same sex marriage have almost overwhelmingly agreed that it is not a violation of the Constitution or American tradition to forbid same sex marriages.<sup>16</sup> This article will demonstrate how American history, the Constitution, its underpinnings and legislative history, together with long standing legal precedent require state and federal recognition of gay marriages. The history of the United States as included here is not, nor is it intended to be, exhaus-

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10. *See, e.g.*, *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002); U.S. CONST. art. IV, § 1.

11. *See infra* note 133.

12. This year Massachusetts became the first state to recognize gay marriage. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (2003).

13. Federal Marriage Amendment, H.R.J. Res. 93, 107th Cong. (2002), *available at* <http://www.allianceformarriage.org/reports/fma/amendment.htm> (July 12, 2001) (on file with author).

14. *Id.*

15. *Id.*

16. *See infra* note 136.

tive. Rather, I will use parts of American history to illustrate the general principle that the American ideal is freedom; that the American dream is liberty and justice for all.

## II. Foreshadowing

"Man is born free, and everywhere he is in chains."<sup>17</sup>

"Give me liberty or give me death."<sup>18</sup>

The American dream has always been a dream of freedom. Since the beginning, this New World has drawn to itself those who would live free.<sup>19</sup> In 1776, after massive civil unrest, Thomas Jefferson's Declaration of Independence was signed, thereby separating the colonies from the rule of the British. It began, "WE hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."<sup>20</sup> The new American government would, Thomas Jefferson explained, secure those unalienable rights.<sup>21</sup> According to Jefferson, securing those rights was the purpose of all government and any government of a free people derived its "just powers [only] from the consent of the governed."<sup>22</sup>

In 1787, delegates from twelve of the thirteen states finally met in Philadelphia to create a union out of thirteen sovereigns by creating a central government strong enough to govern and yet unable to impinge on the freedoms that the colonists had just fought to protect.<sup>23</sup> In 1788, a majority of the states ratified the new Constitution and it became the supreme law of the

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17. Jean-Jacques Rousseau, *On the Social Contract, or Principles of Political Right*, in CLASSICS OF MORAL AND POLITICAL THEORY 909 (Michael L. Morgan ed., 2d ed. 1996) (1992).

18. Patrick Henry, Speech delivered to the Virginia House of Delegates, Richmond, Va., (Mar. 23, 1775), in 2 ANNALS OF AMERICA 321 (1968).

19. "Bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression." PETER MCWILLIAMS, *AIN'T NOBODY'S BUSINESS IF YOU DO* 269 (Jean Sedillos ed., 1993) (quoting Thomas Jefferson, 1801).

20. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

21. *Id.*

22. *Id.*

23. RALPH MITCHELL, *CQ'S GUIDE TO THE CONSTITUTION* 25 (2d ed. 1986).

land.<sup>24</sup> In 1791, the first ten amendments, which were crucial to the states' acceptance of the Constitution, were ratified. They secured from tyranny the most basic and most fundamental rights of a free people such as freedom of religion, a free press, freedom of speech, freedom to be secure in one's person and possessions, and the right to due process.<sup>25</sup>

From its ratification, the Bill of Rights has been treated with utmost reverence. The courts carefully scrutinize statutes that touch it, or are perceived as doing so.<sup>26</sup> No amendment has yet been passed that abridges the "unalienable rights" contained in the Bill of Rights. The Federal Marriage Amendment would be the first to contract these natural, fundamental rights, which are not created by law but are, according to the Founders, inherent in all people. It is to secure such rights that "Governments are instituted among Men . . . ."<sup>27</sup>

### III. Philosophical Underpinnings

"Liberty is the only thing you cannot have unless you are willing to give it to others."<sup>28</sup>

In 1969, in New York City, decades of state sponsored oppression of homosexuals exploded in the Stonewall Riot, where "gays fought back during a police raid of the [Stonewall] bar" in Greenwich Village.<sup>29</sup> Since this time, the gay rights movement has fought openly for the equal rights of gay Americans. This movement was not the first of its kind to sweep America, nor was it the first of its kind to confront the discrimination and hatred entrenched in American society. Long before Stonewall, both the women's and black civil rights movements battled for equal rights and a return to the traditional American values of liberty and justice for all.

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24. *Id.* at 28.

25. U.S. CONST. amend. I, amend. IV, amend. V.

26. *See, e.g.*, *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (discussing an Alabama law that infringed upon the First Amendment).

27. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

28. McWilliams, *supra* note 19, at 32 (quoting Williams Allen White).

29. LESBIANS, GAY MEN, AND THE LAW 202 (William B. Rubenstein ed., 1993).

### A. *The Black Civil Rights Movement*

The Declaration of Independence, precursor to these united states and the heart of American political philosophy, states that "all men are created equal,"<sup>30</sup> yet America is no stranger to hatred or discrimination. After a war based, ostensibly, on liberty, the revolutionaries created a government whose purpose was to "form a more perfect Union"<sup>31</sup> and secure for the people their "unalienable Rights."<sup>32</sup> Despite the espoused values of this new government, an entire group of Americans remained in chains.

Formal slavery tarnished two hundred years of American history and its effects linger on to this day. Slaves were stripped of every natural right. They had no liberty and no property. Rather, they *were* property.<sup>33</sup> The law failed to protect their very lives. Families were split and sold apart.<sup>34</sup> Rape, assault, and murder were commonplace.<sup>35</sup> For example, in Virginia in 1748 a statute provided "[a]n accidental homicide during correction of a slave does not make one liable for prosecution or punishment . . . ."<sup>36</sup> Laws that protected whites did not apply to blacks.<sup>37</sup> Criminal laws treated them much more harshly than they treated whites.<sup>38</sup> "In fact, any education of Negroes was forbidden by law in some states."<sup>39</sup> Many people believed that slaves were less than human.<sup>40</sup> Those who believed in the equality of the races were few.

The revolutionaries had the chance to abolish slavery and ground the new nation firmly on espoused egalitarian principles while drafting the Constitution. They failed to do so. During the convention in 1787, the delegates agreed on an infamous

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30. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

31. U.S. CONST. pmbl.

32. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

33. See, e.g., U.S. CONST. art. IV, § 2, cl. 3; *Le Grand v. Darnall*, 27 U.S. 664 (1829); *Johnson v. Tompkins*, 13 F. Cas. 840 (C.C.E.D. Pa. 1833) (No. 7,416).

34. See JON-CHRISTIAN SUGGS, *WHISPERED CONSOLATIONS: LAW AND NARRATIVE IN AFRICAN AMERICAN LIFE* 21 (2000).

35. See *id.* at 25-26.

36. *Id.* at 25.

37. ROBERT B. SHAW, *A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES* 174 (1991).

38. *Id.* at 175-83.

39. *Brown v. Bd. of Educ.*, 347 U.S. 483, 490 (1954).

40. See, e.g., *Scott v. Sanford*, 60 U.S. 393 (1856).

solution to the dispute over slavery, the three-fifths compromise.<sup>41</sup> The compromise between slave states and “free” states provided each slave would count as three-fifths of a person for purposes of representation and taxation.<sup>42</sup> Otherwise, slaves counted for nothing. The drafters codified the idea that slaves were property instead of people in Article IV, Section 2, Clause 3 of the Constitution.<sup>43</sup> The Thirteenth Amendment eventually preempted this section.<sup>44</sup>

Prior to the beginning of the Civil War, the federal government passed the Fugitive Slave Act, which made certain that slaves who escaped to “free” states would never really be free.<sup>45</sup> This Act allowed their former masters to claim them whenever they pleased and made resisting the return to captivity a crime.<sup>46</sup> In 1857, the Supreme Court articulated the hatred and prejudice of the day with its decision in the notorious *Dred Scott* case.<sup>47</sup> In his analysis of whether Scott was a citizen with standing to sue his “owner” for assault, Chief Justice Taney wrote that the prevailing societal view when the Constitution was written was that the black race was “so far inferior, that they had no rights which the white man was bound to respect . . . .”<sup>48</sup> Despite the rampant bigotry explained in Justice Taney’s opinion, slavery was eventually abolished. It took a civil war, massive casualties and an amendment to the Constitution to accomplish it.<sup>49</sup>

Despite the abolition of slavery with the passage of the Thirteenth Amendment, the Southern states tried to preserve slavery in the “Black Codes,” legislation designed to keep newly freed blacks in the same position they were before the Civil War.<sup>50</sup> “[A]n increasingly conservative Supreme Court”<sup>51</sup>

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41. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

42. *Id.*

43. U.S. CONST. art. IV, § 2, cl. 3, *amended by* U.S. CONST. amend. XIII § 1.

44. U.S. CONST. amend. XIII, § 1.

45. SUGGS, *supra* note 34, at 26.

46. *Id.*

47. *Scott v. Sanford*, 60 U.S. 393 (1856).

48. *Id.* at 407.

49. U.S. CONST. amend. XIII, § 1.

50. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 48 (1988).

51. W. Haywood Burns, *Law and Race in Early America*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 283 (David Kairys ed., 3d ed. 1998).



helped perpetuate the “badges & incidents of slavery”<sup>52</sup> by taking a narrow view of the reconstruction amendments. In 1866, in response to this crisis, Senator Trumbull, an abolitionist and member of the House Judiciary Committee, proposed a bill to protect civil rights.<sup>53</sup> His bill became the Civil Rights Act of 1866.<sup>54</sup> Trumbull’s Act was an attempt to re-establish the American ideal of equality for all. In part, it read,

That all persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other . . .<sup>55</sup>

This Act evolved into 42 U.S.C. §§ 1981 and 1982.<sup>56</sup>

The passage of the Civil Rights Act was insufficient to ensure nationalization of equality, and continuing doubts about the security of civil rights led Congress to propose the Fourteenth Amendment. The Fourteenth Amendment was ratified in 1868 and it provides:

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>57</sup>

Despite the concerted effort of the federal government to restore some semblance of liberty to all Americans, segregation and prejudice persisted.

In 1896, in *Plessy v. Ferguson*, the Supreme Court officially approved segregation as consonant with the supreme law of the

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52. Civil Rights Cases, 109 U.S. 3, 20 (1883).

53. THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION: CASE AND MATERIALS 12 (4th ed. 1996).

54. *Id.*

55. *Id.* at 13.

56. *Id.* at 789.

57. U.S. CONST. amend. XIV, § 1.

land.<sup>58</sup> Despite the fact that such segregation violated every principle the country had fought for when it declared its freedom in 1776, "separate but equal" endured for fifty-eight years. The Supreme Court finally overruled *Plessy* and its "separate but equal" compromise in 1954 in *Brown v. Board of Education*.<sup>59</sup> In *Brown I*, the Court held that separate educational facilities were inherently unequal and violated the Fourteenth Amendment's guarantee of equal protection under the law.<sup>60</sup> The Court's decision, although an unprecedented break from the recent past, was only the first of many steps that would be necessary to undo the terrible damage that slavery had done to the essential American dream of freedom.

Throughout the 1950's and 1960's, the black civil rights movement struggled for freedom while the Supreme Court and the federal government tried to dismantle the culture of slavery entrenched in the United States. By 1870, the states had ratified the Fifteenth Amendment, which read, "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude,"<sup>61</sup> but it took federal intervention with the Voting Rights Act of 1965 to make the revolutionary goal of sweeping participation in government a reality for black men.<sup>62</sup> It took the Supreme Court's holding in *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>63</sup> to start making *Brown's* vision of integrated schooling a reality.<sup>64</sup>

It has been a long road to freedom and the journey towards equality continues. Still, many of the evils of slavery and its aftermath have been remedied. For example, marriage between the races cannot be outlawed;<sup>65</sup> a willing seller and a willing buyer may contract to exchange land regardless of their races;<sup>66</sup> blacks cannot be subjected to harsher criminal laws than

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58. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

59. 347 U.S. 483 (1954).

60. *Id.* at 495.

61. U.S. CONST. amend. XV, § 1.

62. Alan Freeman, *Anti-discrimination from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 294 (David Kairys ed., 3d ed. 1998).

63. 402 U.S. 1 (1971).

64. Freeman, *supra* note 62, at 295.

65. *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

66. *See Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948).

whites;<sup>67</sup> and a public inn may not exclude a paying guest solely on the basis of color.<sup>68</sup> Slowly, the American people have been reclaiming their original dream of liberty and justice for all.

### B. *The Women's Civil Rights Movement*

Women's co-extensive fight for the right to participate in their government culminated in the Nineteenth Amendment, which finally granted them the right to vote in 1920.<sup>69</sup> Their fight for equality in all other areas of life continues today.

In the early 1800s, women, like slaves, were considered property.<sup>70</sup> They could not own property, had no right to "an independent name, earnings [they could] call [their] own, control of [their] children, independent legal existence, and locomotion and bodily security . . . ."<sup>71</sup> Women could not serve on Grand Juries;<sup>72</sup> form partnerships on their own;<sup>73</sup> hold office;<sup>74</sup> participate in government;<sup>75</sup> or practice law.<sup>76</sup> Upon divorce,

67. Civil Rights Act of May 31, 1870, 42 U.S.C. § 1981(a) (2003).

68. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

69. U.S. CONST. amend. XIX.

70. DAVID A.J. RICHARDS, *WOMEN, GAYS, AND THE CONSTITUTION* 138 (1998) (citing Representative Farnsworth, CONG. GLOBE, 38th Cong., 2d Sess. (1865)).

71. *Id.* at 114.

72. *Harland v. Territory*, 3 Wash. Terr. 131, 140 (1887) (holding that women cannot serve on grand juries because "the labor and responsibility which it imposes [is] so onerous and burdensome, and . . . utterly unsuited to the physical constitution of females . . .").

73. *Bradstreet v. Baer*, 41 Md. 19 (1874).

Married women have no power, under our laws, to enter into contracts of co-partnership, nor as members thereof would their contracts be binding upon them, and, consequently, would not bind the other parties to them. Co-partnerships, consisting in whole or in part of married women, are inconsistent with the policy of the legislation of this State, and it is manifest that their existence would materially interfere with the marital rights of the husband.  
*Id.* at 23-24.

74. *Robinson's Case*, 131 Mass. 376 (1881).

The word "citizen," when used in its most common and most comprehensive sense, doubtless includes women; but a woman is not, by virtue of her citizenship, vested by the Constitution of the United States, or by the Constitution of the Commonwealth, with any absolute right, independent of legislation, to take part in the government, either as a voter or as an officer, or to be admitted to practice as an attorney.

*Id.* at 376-77.

75. *Id.* at 377.

76. *Id.*

women "automatically lost custody of their children."<sup>77</sup> Women were so subordinate to men that a man who forced his wife to have sex with him could not be guilty of rape. The common law and States' statutes provided for a marital exemption to rape charges.<sup>78</sup> Women who committed crimes were subject, like blacks, to longer sentences.<sup>79</sup>

Women's fight for equal rights began early in American history with the feminist abolitionist movement, designed to eradicate slavery. Scholars and thinkers in the movement found, in their own lives, echoes of the slavery they fought to abolish.<sup>80</sup> Mary Wollstonecraft, writing in 1792, believed that women were dehumanized in society. She asked, "[i]s one half of the human species, like the poor African slaves, to be subject to prejudices that brutalize them . . . ?"<sup>81</sup> In her Seneca Falls address in 1854, Elizabeth Cady Stanton pointed out that women lacked the rights of male citizens in that they could not vote or hold office and were not entitled to a trial by their peers or equal treatment under criminal law.<sup>82</sup> Stanton made her argument for the equal treatment of women by saying that the "rights of every human being are the same and identical."<sup>83</sup> In 1851, at the Akron Women's Rights Convention, white ministers disrupted the speakers by shouting out biblical strictures against female equality.<sup>84</sup> In response, Sojourner Truth, an ex-slave, got up to counter them. In doing so, she brought the women's and black civil rights movements together saying,

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77. LORRAINE DUSKY, *STILL UNEQUAL* 135 (1996)

78. A husband who forced his wife to have sex with him was not guilty of rape under the common law or some rape statutes, which provided for a marital exemption. *See, e.g.*, *State v. Paolella*, 554 A.2d 702, 708 (Conn. 1989); *People v. Peraza*, 733 N.Y.S.2d 510, 514 (App. Div. 2001) (explaining the common law and statutory schemes of marital exemption); A husband was found not guilty of aggravated sodomy because divorce action was not final at the time he attacked his wife. Because they were still married, the husband was entitled to the marital rape exemption. *State v. Dubish*, 675 P.2d 877 (Kan. 1984).

79. J.R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 318-19 (1978).

80. RICHARDS, *supra* note 70, at 63-124.

81. *Id.* at 70.

82. Elizabeth Cady Stanton, *Address to the Joint Judiciary Committee, New York Legislature, 1854*, in *THE SEARCH FOR SELF-SOVEREIGNTY* 97-109 (Beth M. Waggenpack ed., 1989).

83. *Id.* at 107.

84. RICHARDS, *supra* note 70, at 116.

I tink dat 'twixt de neggers of de Souf and de womin at de Norf, all talk 'bout rights, de white men will be in a fix pretty soon . . . Look at me! Look at my arm! . . . I have ploughed, and planted, and gathered in barns, and no man could head me! And a'n't I a woman? I could work as much and eat as much as a man - when I could get it - and bear de lash as well! And a'n't I a woman? I have born thirteen chilern and seen 'em mos' all sold off to slavery, and when I cried out with my mother's grief, none but Jesus heard me. And a'n't I a woman?<sup>85</sup>

The women's movement slowly gained political strength. For example, in 1909, female garment workers in New York City undertook a great strike under the authority of the New York Women's Trade Union League.<sup>86</sup> The politically powerful Women's Christian Temperance Union was instrumental in its support of the Eighteenth Amendment, which, after its ratification in 1918, led immediately to Prohibition.<sup>87</sup> Yet it was not until 1920 that women finally gained the right to participate fully in their own government.<sup>88</sup>

During the Second World War, women were asked to work outside the home for the good of the country and they came out in record numbers.<sup>89</sup> In 1943, a women's baseball league was organized and the players were eventually inducted into the Baseball Hall of Fame.<sup>90</sup> One woman, Frances Perkins, served as Secretary of Labor in President Roosevelt's administration during the New Deal.<sup>91</sup> After the War, however, women's positions did not improve much despite their war effort and the work they had done in formerly male dominated industries. In the 1960's, women remained vastly underrepresented in the professional world. A bare seven percent of doctors, three percent of lawyers, and one percent of engineers were women.<sup>92</sup> At that time, married women were still restrained by legal disabil-

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85. *Id.* (citation omitted).

86. POLE, *supra* note 79, at 307.

87. *Id.* at 309.

88. U.S. CONST. amend. XIX.

89. Eleanor Roosevelt, *American Women in the War*, READER'S DIGEST, Jan. 1944, at 42-44, available at <http://newdeal.feri.org/er/er14.htm> (Sept. 9, 2003).

90. TRUDY J. HAMMER, *THE ALL-AMERICAN GIRLS PROFESSIONAL BASEBALL LEAGUE* (1994).

91. POLE, *supra* note 79, at 310.

92. *Id.* at 311 (citing Martha Weinman Lear, *The Second Feminist Wave*, in *THE NEW FEMINISM OF THE TWENTIETH CENTURY* 163-64 (June Sochen ed., 1971)).

ity and were often unable to contract or transfer property independent of their husbands.<sup>93</sup>

Women consistently petitioned the court system to overturn oppressive laws and the legislatures to create new ones. They fought within the system, using the Constitution, to gain a measure of equality. As time passed, the courts of the fifty states overturned the marital rape exemption laws (as challenged in criminal cases) and made it a crime for a man to rape any woman regardless of whether he was married to her.

Great strides were made in legislation with the passage of Title VII, Title IX and the Equal Pay Act of 1963. The Equal Pay Act, passed by President John F. Kennedy, was proposed to ensure women and men received equal wages for equal work.<sup>94</sup> At the time, women were paid between three and ten percent less than men were for the same jobs.<sup>95</sup> Though the Equal Pay Act was a step forward, there were so many exceptions to it "as to render it ineffective in many of the cases where women's contributions were . . . most distinctive."<sup>96</sup> Title VII, dealing with equal employment, promised to put women on equal footing in employment cases.<sup>97</sup> Although there is still work to be done, women have improved their lot in America and gained the right to equal treatment before the law and to freedom from discrimination based on sex.<sup>98</sup>

### C. *The Gay Civil Rights Movement*

"With liberty and justice for all."<sup>99</sup>

America started with a dream of equality that is still in the process of being realized. The movement for gay and lesbian equality does not mirror any one previous civil rights movement, but rather, runs parallel to them all and has, at its core,

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93. *Id.* at 312.

94. Equal Pay Act § 6, 29 U.S.C. § 206(d) (1963); POLE, *supra* note 79, at 316.

95. POLE, *supra* note 79, at 316.

96. *Id.*

97. Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) (1964).

98. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (discussing how women can serve on juries and holding that the use of preemptory challenges based solely on the sex of the juror violates equal protection); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that women in the military cannot be treated differently for the purpose of determining dependent benefits).

99. PLEDGE OF ALLEGIANCE.

the same goal, equal treatment before the law. Homosexuals' fight for equality, like that of women and minorities, is a strenuous one, an ongoing uphill battle.

Currently, homosexuals can be discharged from the military solely because they are gay.<sup>100</sup> They can be fired for their sexual orientation.<sup>101</sup> They can be discriminated against in employment and housing.<sup>102</sup> Common laws of intestacy do not apply to same sex couples.<sup>103</sup> Partners in a same sex union are not considered as each other's next of kin for the purpose of making medical care decisions.<sup>104</sup> In some states, same sex partners may not adopt each other's children while retaining original parental rights, as heterosexual stepparents can.<sup>105</sup> One partner in a same sex relationship may be denied a legal relationship to the children born into that relationship, as well as visitation and custody.<sup>106</sup> Until this year, sex between homosexuals was still a crime in thirteen states.<sup>107</sup>

Currently, only one state, Massachusetts, recognizes the right of two people of the same sex to marry.<sup>108</sup> A few state and local governments provide for registration of domestic partnerships or for civil unions.<sup>109</sup> The federal government does not recognize any same sex union, solemnized in any state, as a

100. *E.g.*, *Able v. United States*, 155 F.3d 628, 630 (2d Cir. 1998).

101. *See* *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 450 (6th Cir. 1984).

102. *See, e.g.*, *Equality Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997).

103. *See, e.g.*, *In re Estate of Hall*, 707 N.E.2d 201 (Ill. App. Ct. 1998).

104. *See* *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999).

105. *See, e.g.*, *Adoption of T.K.J. v. State*, 931 P.2d 488, (Colo. Ct. App. 1996).

106. *See, e.g.*, *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Ct. App. 1991); *West v. Superior Court*, 69 Cal. Rptr. 2d 160 (Ct. App. 1997); *S v. S*, 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (lesbianism of the custodial parent may, by itself, constitute sufficient reason to revoke the mother's custody); *Scott v. Scott*, 665 So. 2d 760, 766 (La. Ct. App. 1995) ("It is the opinion of this court that under such facts, primary custody with the homosexual parent would rarely be held to be in the best interests of the child.").

107. *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003).

108. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (2003) (holding the "Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens." The Commonwealth "has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples").

109. Vermont provides for a civil union and California provides for registration of a domestic partnership. VT. STAT. ANN. tit. 15, § 1202 (2003); CAL. FAM. CODE § 297 (Deering 2003).

marriage. DOMA was the first federal Act denying homosexual couples the same rights as all other Americans and a new barrier to the realization of the American dream.<sup>110</sup>

D. *Show and Tell: Familiar Arguments Against Equal Rights*

"All animals are equal but some animals are more equal than others."<sup>111</sup>

Argument 1: Because God said so. "Natural law" and "natural order" dictate that marriage is between a man and a woman only.<sup>112</sup> Reverend Lou Sheldon, founder of The Traditional Family Values Coalition, calls the Federal Marriage Amendment a "defining moment for American Christianity." Declaring, "[w]hat is at stake is no less than the doctrine of creation."<sup>113</sup> Preventing gay marriage is "not discrimination. It's common sense."<sup>114</sup> The gay rights movement is a "well-planned and well-financed attack on our civilization" that "supporters of the Judeo-Christian ethic" must answer lest "militant homosexuality . . . defeat us."<sup>115</sup>

Compare Argument 1 with the following. "Nothing could be more anti-Biblical than letting women vote."<sup>116</sup> "The relative positions to be assumed by man and woman in the working out of our civilization were assigned long ago by a higher intelligence than ours."<sup>117</sup> The concurrence in *Bower v. Hardwick* and Justice Scalia (dissenting) in *Lawrence v. Texas* both relied on the Blackstone's Commentaries description of homosexual sodomy as a crime with deeper malignity than rape to support the

110. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

111. GEORGE ORWELL, *ANIMAL FARM* 133 (Signet Classics 1945).

112. William J. Bennett, Editorial, *What Natures Joins Let No Gays Put Asunder; Marriage is Meant to be Between One Man and One Woman*, *Period.*, L.A. TIMES, Oct. 17, 2003, at 15.

113. Evelyn Nieves, *Family Values Groups Gear Up For Battle Over Gay Marriage*, WASH. POST, Aug. 17, 2003, at A6.

114. Gary Bauer, *Let's Pass a Marriage Amendment*, NEWSDAY, Oct. 6, 2003, at A27.

115. Nancy J. Knauer, *Homosexuality as Contagion: From the Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 494 (2000) (quoting Rep. William Dannemyer, 1989).

116. McWILLIAMS, *supra* note 19, at 336 (quoting Harper's Magazine editorial, Nov. 1853).

117. *Id.* (quoting President Grover Cleveland discussing suffrage, 1905).



holding that states could, without running afoul of the Constitution, fine or jail, or both, adult homosexuals for engaging in consensual intimate acts in their own homes. William Blackstone, who codified English law in *Commentaries on the Laws of England*, the “backbone of American common law,”<sup>118</sup> also had something to say about women. Blackstone wrote, “the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything . . . .”<sup>119</sup> “[T]his doctrine [called coverture] would later be compared to slavery.”<sup>120</sup> The Illinois Supreme Court, in denying Myra Bradwell admission to the bar in 1870, argued “[t]hat God designed the sexes to occupy the different spheres of action, and that it belonged to men to make, apply and execute the laws, [is] regarded as an almost axiomatic truth.”<sup>121</sup> “The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.”<sup>122</sup>

Compare also with: “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents.”<sup>123</sup> “The fact that he separated the races shows that he did not intend for the races to mix.”<sup>124</sup> The black race is “so far inferior, that they had no rights which the white man was bound to respect . . . .”<sup>125</sup> Defenders of slavery argued, “[n]o human institution . . . [was] more manifestly consistent with the will of God, than human slavery.”<sup>126</sup> They also stated, “slavery had been ‘intended by our creator for some useful purposes.’”<sup>127</sup> The duty of anti-abolitionists then was to “prevent blacks from acquiring power in any form,” which duty was “paramount

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118. DUSKY, *supra* note 77, 251.

119. WILLIAM BLACKSTONE, COMMENTARIES at <http://www.lonang.com/exlibris/blackstone/bla-115.htm> (Feb. 24, 2004).

120. DUSKY, *supra* note 77, at 251.

121. *In re Application of Bradwell*, 55 Ill. 535, 539 (1876).

122. *Bradwell v. State*, 83 U.S. 130, 141 (1872).

123. *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting the trial judge).

124. *Id.*

125. *Scott v. Sandford*, 60 U.S. 393, 407 (1856).

126. NELSON, *supra* note 50, 23 (internal quotations and citation omitted).

127. *Id.* (citation omitted).

to all laws, all treaties, all constitutions" arising "from supreme and permanent law of nature, the law of self-preservation."<sup>128</sup>

Argument 2: Homosexuals are inferior and same sex couples are therefore unfit for marriage and child raising. Same sex unions are "widely known to be promiscuous and unstable, no matter how much they say they are not."<sup>129</sup>

I write specially to state that the homosexual conduct of a parent—conduct involving a sexual relationship between two persons of the same gender—creates a strong presumption of unfitness that alone is sufficient justification for denying that parent custody of his or her own children or prohibiting the adoption of the children of others.<sup>130</sup>

Compare Argument 2 with the following "[T]he real evil of the negro race [was] that they are so fit for slavery as they are."<sup>131</sup> "No negro, or descendant of negroes, is a citizen of the Union, or of any of the States."<sup>132</sup> They are mere "sojourners in the land," inmates, allowed usually by tacit consent, sometimes by legislative enactment, certain specific rights.<sup>133</sup> "Their status and that of the citizen is not the same."<sup>134</sup>

Upon the whole, by whatever appellation we may designate free negroes, whether as perpetual inhabitants, or citizens of an inferior grade, we feel satisfied, that they are not citizens in the sense of the Constitution; and, therefore, when coming among us, are not entitled to all the "privileges and immunities" of citizens of this State.<sup>135</sup>

Compare also with:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The

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128. NELSON, *supra* note 50, 23 (internal quotations and citation omitted).

129. BBC News, *America's Marital Rows*, at <http://news.bbc.co.uk/2/hi/americas/3195336.stm> (Oct. 26, 2003) (quoting "Janice Shaw Crouse, a senior fellow at a think-tank within Concerned Women For America").

130. *Ex parte* H.H., 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring specially).

131. NELSON, *supra* note 50, at 19 (quoting *Negro Intellect—Ellis and Douglass, and Uncle Tom*, NAT'L ERA, June 2, 1853, at 2) (internal quotations omitted).

132. *State v. Claiborne*, 19 Tenn. 331 (1838) (argument of attorney general).

133. *Id.*

134. *Id.*

135. *Id.* at 341.

constitution of the family organization, which is founded on the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.<sup>136</sup>

Argument 3: There is a long standing tradition of discrimination against homosexuals. Sodomy was, before 1961, a criminal offense in all fifty states and the District of Columbia.<sup>137</sup> “[H]omosexual conduct has historically been repudiated by many religious faiths.”<sup>138</sup> “Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.”<sup>139</sup> “Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature’s God upon which this Nation and our laws are predicated.”<sup>140</sup> Homosexuality has been subject to “constant quadrimillennial revulsion of moralistic civilizations from the vice that evoked the total and everlasting destruction of Sodom and Gomorrah . . . .”<sup>141</sup> Prohibiting same sex marriage is “not discrimination. It’s common sense.”<sup>142</sup>

Compare Argument 3 with the following: “Free negroes have always been a degraded race in the United States . . . with whom public opinion has never permitted the population to associate with on terms of equality and in relation to whom, the laws have never allowed . . . the immunities of the free white

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136. *DUSKY*, *supra* note 77, at 139-40 (citations omitted).

137. *Lawrence v. Texas*, 41 S.W.3d 349, 361 (Tx. App. 2001), *rev’d*, 123 S. Ct. 2472 (2003) (citing *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986)).

138. *Id.* (justifying the anti-sodomy penal law).

139. *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring specially). Amicus briefs filed in *Lawrence* show scholarly disagreement with Burger’s assertion of continuing religious and societal condemnation. *Lawrence*, 123 S. Ct. 2472.

140. *Ex parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring specially).

141. *Id.* at 31. The crimes Sodom committed to deserve destruction appear to be inhospitality (a heinous crime in the ancient world, particularly in desert communities). See *Genesis* 19:1-5, 19:6-9.

142. Bauer, *supra* note 114, at 128.

citizen.”<sup>143</sup> “[T]he immutable laws of God have fixed upon the brows of the white races the ineffaceable stamp of superiority, and all attempts to elevate the Negro to a social or political equality with the white man are futile.”<sup>144</sup> “Nature’s God intended the African for the *status* of slavery.”<sup>145</sup>

Truly then, as Reverend Pat Robertson himself once said, “[t]he American public has a very short memory.”<sup>146</sup>

#### IV. Defense of Marriage Act

“The government of the United States is not, in any sense, founded on the Christian religion.”<sup>147</sup>

“[F]or why is my liberty judged of another man’s conscience?”<sup>148</sup>

The Defense of Marriage Act, sponsored by the thrice married, twice divorced Robert Barr, a Republican Representative from Georgia, was intended to “define and protect the institution of marriage”<sup>149</sup> by amending a section of the United States Code dealing with “Powers Reserved to the States.” The amendment read

No State, territory or possession of the United States or Indian tribe, shall be required to give effect to any public act, record or judicial proceeding of any other State, territory, possession, or tribe, respecting the relationship between persons of the same sex that is treated as a marriage under the law of such other State, territory, possession or tribe, or a right or claim arising from such relationship.<sup>150</sup>

It amended the United States Code at Chapter 1, Title 1 by adding a definition of “marriage” and “spouse” for the purposes of “determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States.”<sup>151</sup> “Marriage” is now defined as “only a legal union between one man and one

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143. *State v. Claiborne*, 19 Tenn. 331, 339 (1838).

144. NELSON, *supra* note 50, at 98.

145. THEODORE LESKES, *A CENTURY OF CIVIL RIGHTS* 17 (1961).

146. MCWILLIAMS, *supra* note 19, at 609.

147. *Id.* at 6 (quoting George Washington, 1796).

148. 1 *Corinthians* 10:29 (King James).

149. H.R. Con. Res. 3396, 104th Cong. (1996) (enacted).

150. *Id.*

151. *Id.*

woman as husband and wife.”<sup>152</sup> “Spouse” is defined exclusively as “a person of the opposite sex who is a husband or a wife.”<sup>153</sup>

In 1996, an overwhelming majority of the House and Senate passed this Defense of Marriage Act, with 342 Representatives voting in favor and only sixty-seven voting against it.<sup>154</sup> In the Senate, eighty-five senators voted in favor of the Act and only fourteen voted against it.<sup>155</sup> President Clinton, approved this likely unconstitutional legislation by signing it into law, without fanfare, and in the middle of the night.<sup>156</sup>

During debates of this Act, the Representatives of our secular nation made it clear that the Act had a theocratic, Judeo-Christian base. The purpose of the legislation was to preserve “one of the essential foundations on which our civilization is based” according to Representative Canady, a Republican from Florida.<sup>157</sup> Canady stated that the family structure is based on “our Judeo-Christian moral tradition.”<sup>158</sup> In debate, he declared, “[o]ur law should not treat homosexual relationships as the moral equivalent of the heterosexual relationships on which the family is based. That is why we are here today.”<sup>159</sup> With its passage, DOMA codified the legal separation between heterosexuals and homosexuals and created a second class citizenry by denying one discrete and insular group of Americans the fundamental rights belonging to all other Americans; the rights to equal protection, to due process, to contract, and to marry.

## V. DOMA and Full Faith and Credit

The Full Faith and Credit Clause reads, “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by General Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”<sup>160</sup> DOMA created an exception to this clause.<sup>161</sup>

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152. *Id.*

153. *Id.*

154. H.R. Con. Res. 3396, 104th Cong. (1996) (enacted).

155. *Id.*

156. Baker, *supra* note 5.

157. 142 CONG. REC. H7441 (July 11, 1996) (statement of Rep. Canady).

158. *Id.*

159. *Id.*

160. U.S. CONST. art. IV, § 1.

Before the Constitution was written, the Articles of Confederation governed this country. The new Americans, having just finished a war with Britain, and being recently freed from the supervision of the Crown created a government with an extremely weak central authority, incapable of tyranny. Unfortunately for the citizens, the weak central government was also incapable of pulling the states together to make a unified nation. Each state could have its own money, could tax goods coming into and leaving the state and each state could ignore the laws of the several states.<sup>162</sup> This model was ultimately unsuccessful. The drafters of the Constitution, in an attempt to avoid some of the problems that occurred under the Articles of Confederation, drafted the Full Faith and Credit Clause, so that no state could ignore the laws or judgments of another and particularly so that a judgment debtor in one state could not flee to another state and thereby avoid payment.<sup>163</sup>

Under the Full Faith and Credit Clause, as traditionally interpreted, all states must honor the judgments of the courts of other states.<sup>164</sup> All states must at least acknowledge the "public acts" or laws of other states.<sup>165</sup> DOMA changes this model.<sup>166</sup> DOMA states that if Vermont considers a same sex couple married and issues a marriage license, and that couple moves to Georgia, Georgia does not have to treat that couple as legally married.<sup>167</sup> Any benefits that would otherwise accrue to that couple in Georgia as a result of being married would not accrue if Georgia simply chose not to recognize the marriage.<sup>168</sup>

The federal government is not immune from the effects of Full Faith and Credit.<sup>169</sup> Federal courts must honor the judg-

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161. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

162. MITCHELL, *supra* note 23, at 6.

163. *Id.*

164. *See, e.g.*, Fauntleroy v. Lum, 210 U.S. 230, 237 (1908).

165. *See, e.g.*, Pac. Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939); Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 546 (1935).

166. For discussion of this principle see Mark Strasser, *Baker and Some Recipes For Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307 (1998).

167. *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

168. *See id.*

169. *See, e.g.*, Kremer v. Chem. Cont. Corp., 456 U.S. 461, 462 (1982).

ments of state courts.<sup>170</sup> The federal government is bound to respect state laws in areas where the states are competent to legislate and it is not.<sup>171</sup> DOMA states that the federal government *will not* recognize such same sex unions as legal marriages.<sup>172</sup> Any benefits provided to married couples by the federal government, such as transfer tax benefits, do not apply to same sex couples even if they were married in and live in a state that recognizes their union as a legal marriage.<sup>173</sup>

The power of Congress is an awesome power. The Constitution and federal law made "in Pursuance thereof" constitutes the "supreme Law of the Land," which supercedes "any Thing in the Constitution or Laws of any State to the Contrary . . ."<sup>174</sup> The Constitution provides for Full Faith and Credit.<sup>175</sup> DOMA provides an exception to this Constitutional mandate.<sup>176</sup> The ability of Congress to create such exception is not explicitly provided for in the Full Faith and Credit Clause.<sup>177</sup> Furthermore, the Act runs counter to the character of the Constitution and the personal freedoms enshrined within it.

Article V of the Constitution provides that two-thirds of both houses may propose amendments to the Constitution, which amendments are not valid or considered part of the Constitution until ratified by three-fourths of the states.<sup>178</sup> DOMA was not proposed as an amendment to the Constitution. It was not ratified by three-fourths of the states. Yet, it precipitated an equally significant change in the Constitutional requirement that states take notice of each other's laws, judgments and judicial proceedings.<sup>179</sup>

## VI. Challenge: Vermont Decides

In 1999, the Supreme Court of Vermont held that under the Common Benefits clause of its state constitution, same sex

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170. *Id.*

171. See U.S. CONST. art. I, § 8; U.S. CONST. amend. X.

172. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

173. See *id.*

174. U.S. CONST. art. VI, § 1, cl. 2.

175. U.S. CONST. art. IV, § 1.

176. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

177. U.S. CONST. art. IV, § 1.

178. U.S. CONST. art. V.

179. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

couples could not be “deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry.”<sup>180</sup> The court held that it was up to the Legislature of Vermont to construct a system that would give homosexual couples those benefits and protections.<sup>181</sup> Vermont’s legislature came up with the “civil union” in response to the court’s directive.<sup>182</sup> Feeling ultimately uncomfortable with extending the term “marriage” to a same sex union, the Vermont Legislature enacted the civil union law, a separate but equal compromise.<sup>183</sup>

After the decision in *Baker v. State*,<sup>184</sup> and the enactment of a civil unions law without a residency requirement, several courts had reason to address the question of the extraterritorial effect of a Vermont civil union in light of DOMA and Full Faith and Credit. For example, in *Rosengarten v. Downes*,<sup>185</sup> a same sex couple married in Vermont asked the court to grant them the equivalent of a divorce. The Connecticut Court of Appeals refused to do so, holding that it lacked the jurisdiction to dissolve a civil union made in Vermont.<sup>186</sup> The court also took this opportunity to discuss, in lengthy dicta, why same sex unions violate the mores of the state of Connecticut.<sup>187</sup>

## VII. Same Sex Unions In Other States

In a case determining the claims of seven same sex couples who applied for marriage licenses and were denied, the Superior Court of Massachusetts held that since “procreation is marriage’s central purpose, it is rational for the Legislature to limit marriage to opposite-sex couples who, theoretically, are capable of procreation.”<sup>188</sup> One assumes the court means with each other as, presumably, the majority of individuals involved in same sex relationships are also capable of procreation. The City

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180. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

181. *Id.*

182. VT. STAT. ANN. tit. 18, § 5160 (2003).

183. *Id.*

184. 744 A.2d 864.

185. 802 A.2d 170 (Conn. App. Ct. 2002).

186. *Id.* at 184.

187. *Id.* at 177-78.

188. *Goodridge v. Dep’t of Pub. Health*, No. 2001-1647-A, 2002 Mass. Super. LEXIS 153, \*48, 2002 WL 1299135, \*13, *vacated and remanded by*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (2003).



of Philadelphia enacted local legislation creating the “status of ‘life partnership’ between members of the same sex”<sup>189</sup> and forbade “discrimination in employment and places of public accommodations based on ‘marital status.’ ”<sup>190</sup> It also excluded a transfer tax on the “transfer of real estate between [l]ife [p]artners” granting those couples the same property rights as heterosexual couples.<sup>191</sup> In *Devlin v. City of Philadelphia*, the Pennsylvania court overruled this legislation as “ultra vires.”<sup>192</sup> In *Littleton v. Prange*, the Texas appellate court held that a woman who had male to female sex reassignment surgery before getting married could not sue for the wrongful death of her spouse because she was technically a man and therefore could never have been legally married and therefore did not have standing to bring a wrongful death action as surviving spouse.<sup>193</sup>

The courts are being used in an all too familiar fashion to strip United States citizens of their natural rights. Opponents of same sex marriage fear that same sex couples will be able to influence enough state legislatures to make same sex marriage a reality in this country.<sup>194</sup> The Alliance for Marriage would like to stop this from happening and maintain the oppressed position of homosexuals in American society. To this end, they proposed an amendment to the Constitution that would institutionalize this oppression.

### VIII. Federal Marriage Amendment

“It would be against the spirit of our free institutions, by which equal rights are intended to be secured to all, to grant peculiar franchises and privileges to a body of individuals merely for the purpose of enabling them more conveniently and effectually to advance their own private interests.”<sup>195</sup>

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189. *Devlin v. City of Philadelphia*, 809 A.2d 980, 981 (Pa. Commw. Ct. 2002).

190. *Id.* at 982.

191. *Id.*

192. *Id.* at 993.

193. *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

194. Federal Marriage Amendment, H.R.J. Res. 93, 107th Cong. (2002), available at <http://www.allianceformarriage.org/reports/fma/amendment.htm> (July 12, 2001) (on file with author).

195. NELSON, *supra* note 50, at 16 (citation omitted).

On July 12, 2001, the Alliance for Marriage held a press conference to explain their proposed amendment to the Constitution: the Federal Marriage Amendment. The proposed amendment reads:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this constitution nor the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents there of be conferred upon unmarried couples or groups.<sup>196</sup>

The avowed purpose of the Alliance for Marriage is to promote marriage, address “the crisis of fatherless families in the United States, . . . restore a culture of married fatherhood in American society,”<sup>197</sup> and solve the problem of the “tragedy of family disintegration in America” by proffering an amendment that would *prevent* an entire segment of Americans from marrying and raising children.<sup>198</sup> The group believes that same sex marriage would “erase the legal roadmap to marriage and the family,”<sup>199</sup> presumably making it even more difficult for married people to stay married and for absent fathers to embrace their responsibilities.<sup>200</sup> No further rationale is offered.

Representative Ronnie Shows, a Democrat from Mississippi, introduced the amendment to the House of Representatives on May 15, 2002.<sup>201</sup> It was referred to the House Committee on the Judiciary the same day.<sup>202</sup> The bill was described as a “joint resolution” and it was co-sponsored by twenty-one Republicans and three Democrats.<sup>203</sup> The sponsors included representatives from Utah, Virginia, Texas, North Carolina, South Carolina, Illinois, Pennsylvania, Louisiana, Missouri, Florida, Colorado, Kentucky, and Maryland.<sup>204</sup> As of the date of this article, this amendment has not been submitted

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196. Federal Marriage Amendment, H.R.J. Res. 93, 107th Cong. (2002), *available at* <http://www.allianceformarriage.org/reports/fma/amendment.htm> (July 12, 2001) (on file with author).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. H.R.J. Res. 93, 107th Cong. (2002).

202. *Id.*

203. *Id.*

204. *Id.*

to the House and Senate for a vote but it has been already implicitly approved by President George W. Bush.<sup>205</sup>

If this amendment passes two-thirds of the House and Senate, at least three-fourths of the legislatures of the fifty states will have to ratify it before it becomes a part of the Constitution.<sup>206</sup> In the entire history of the United States, there have been just twenty-seven amendments made to the Constitution.<sup>207</sup> The first ten Amendments, known as the Bill of Rights, were ratified in 1791.<sup>208</sup> Only one Amendment, the Eighteenth, instituting Prohibition, has been repealed.<sup>209</sup> If the Federal Marriage Amendment becomes part of the Constitution, it will be the first to violate the text and spirit of the Constitution and the first to seriously contract the fundamental rights of American citizens.

#### A. *Two Steps Forward, Two Steps Back*

The Constitution begins:

We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>210</sup>

The purpose of the Constitution, set out in the preamble, is to draw the states together and provide *all* "the people of the United States" with *all* the benefits of the Union and the "Blessings of Liberty."<sup>211</sup> There is no mention in the preamble that the benefits being secured thereby would only apply to certain favored groups and not to others. Yet, the United States has repeatedly deprived one or more groups of its citizen of the rights enjoyed by the rest.<sup>212</sup> The Federal Marriage Amend-

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205. Martha Brant, *Bush and the Gay Debate*, at <http://stacks.msnbc.com/news/949175.asp> (Aug. 6, 2003).

206. U.S. CONST. art. V.

207. MITCHELL, *supra* note 23, at 30.

208. *Id.* at 27.

209. *Id.* at 32.

210. U.S. CONST. pmbl.

211. *Id.*

212. See, e.g., RICHARDS, *supra* note 70, at 114 (discussing rights that were available to men but not to women).

ment, in the guise of providing a "legal roadmap to marriage and family,"<sup>213</sup> would remove from homosexual citizens the fundamental rights enjoyed by all other Americans under the Constitution.

Fundamental rights are those "basic right[s],"<sup>214</sup> firmly established and "repeatedly recognized,"<sup>215</sup> "implicit in the concept of ordered liberty,"<sup>216</sup> and "preservative of all rights."<sup>217</sup> They include the rights explicit in the Constitution and more. They include access to courts regardless of financial means,<sup>218</sup> voting,<sup>219</sup> interstate travel,<sup>220</sup> privacy,<sup>221</sup> and marriage.<sup>222</sup> So precious are these liberties, that when a law implicates a fundamental right, the courts must apply heightened judicial scrutiny when determining its legitimacy.<sup>223</sup> The revolutionaries had as their goal the security of such basic and fundamental rights. To this end, they enshrined these basic rights in the Constitution. Proponents of same sex unions have argued that their right to marry lies within the reach of the First Amendment, Eighth Amendment,<sup>224</sup> Fourteenth Amendment (Equal Protection and Due Process Clauses), and the Ninth Amendment,<sup>225</sup> but so far, most courts have not agreed.<sup>226</sup>

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213. Federal Marriage Amendment, H.R.J. Res. 93, 107th Cong. (2002), *available at* <http://www.allianceformarriage.org/reports/fma/amendment.htm> (July 12, 2001) (on file with author).

214. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969).

215. *Id.* at 642.

216. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

217. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

218. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

219. *Reynold v. Sims*, 377 U.S. 533 (1964).

220. *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969).

221. *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (discussing contraception as being protected under the right to privacy); *Roe*, 410 U.S. at 153 (discussing abortion as being protected under the right to privacy).

222. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

223. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *Dandridge v. Williams*, 397 U.S. 471, 520 (1970).

224. *See Burns v. Burns*, 560 S.E.2d 47, 48-49 (Ga. Ct. App. 2002).

225. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

226. *See id.; Burns*, 560 S.E.2d at 48-49.

## B. *Badges and Incidents*

Marriage is both a contract matter and a domestic relations matter. Most states, and the federal government, do not allow homosexuals to form marriage contracts. The inability to contract was considered a characteristic of slavery and, after the Civil War, remained a "badge and incident of slavery."<sup>227</sup> The Thirteenth Amendment destroyed slavery, and the Civil Rights Acts were designed to destroy its badges and incidents.<sup>228</sup> The current federal and state laws and the proposed Federal Marriage Amendment put homosexuals, in some sense, in the same position as freed slaves after the civil war: free in name only and shackled in the eyes of the state. It puts them in the same position as women under the slavery-like "coverture," legally incompetent. In this way, the Federal Marriage Amendment also violates the spirit of the Thirteenth Amendment's proscription of slavery and the Civil Rights Act's attempt to abolish the badges and incidents thereof. Enshrining discrimination in the Constitution sets America back in its historical search for liberty and justice for all and tells its lesbian, gay, bisexual, and transgendered citizens that they are a second class within their own country and that their government approves of their subjugation and moral slavery.<sup>229</sup>

## IX. A Mandate from the People

"[Y]ou must first enable the government to control the governed; and in the next place oblige it to control itself."<sup>230</sup>

The federal government is without the authority to define marriage for the states.<sup>231</sup> The states and not the federal government have traditionally had the power to regulate marriage and other domestic relations matters, subject to the strictures of the Fourteenth Amendment.<sup>232</sup> Nowhere in the Constitution is the federal government given the power to restrict marriage to a select group of people. The Tenth Amendment provides that "power[] not delegated to the United States by the Constitu-

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227. See generally EISENBERG, *supra* note 53, at 3-63.

228. See generally *id.*

229. See generally RICHARDS, *supra* note 70.

230. THE FEDERALIST NO. 51 (James Madison).

231. See, e.g., *Dodson v. State*, 31 S.W. 977 (Ark. 1895).

232. *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

tion, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>233</sup>

The proposed Federal Marriage Amendment purports to define marriage for the states and forbid the state courts from construing their own laws and constitutions as permitting or requiring recognition of same sex marriages. The amendment reads, “[m]arriage in the United States shall consist only of the union of a man and a woman.”<sup>234</sup> It also provides that no state constitution or law “shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.”<sup>235</sup> In passing this amendment, the federal government could not only define marriage for every state, but could also tell each state what its laws and Constitution mean. This it may not do. The Supreme Court may tell a state that its laws or constitution violate the United States Constitution by interfering with basic rights;<sup>236</sup> the legislature may preempt state law *where it is competent to legislate*,<sup>237</sup> but it cannot tell the states what their laws do and do not require. For example, if a federal court decides a question of federal law that also contains a state law component, the state in which the court sits is not bound by the federal court’s interpretation of state law.<sup>238</sup> If the states ratify the amendment, they allow the federal government to invade their sovereignty.<sup>239</sup>

For Congress to propose such an amendment is akin to stating that the federal government can, by amendment, take any power for itself that it wishes even if that power were reserved to the states or the people or forbidden to Congress. This

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233. U.S. CONST. amend. X.

234. Federal Marriage Amendment, H.R.J. Res. 93, 107th Cong. (2002), *available at* <http://www.allianceformarriage.org/reports/fma/amendment.htm> (July 12, 2001) (on file with author).

235. *Id.*

236. *See, e.g.,* Cooper v. Aaron, 358 U.S. 1, 17-18 (1958).

237. *See, e.g.,* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n, 461 U.S. 190, 204 (1983).

238. *See, e.g.,* Murdock v. City of Memphis, 87 U.S. 590, 626 (1875); U.S. Term Limits, Inc. v. Thornton, 524 U.S. 779, 812 (1995); Mason v. American Emery Wheel Works, 241 F.2d 906 (1st Cir. 1957).

239. This truth has created a rather awkward situation as those who traditionally oppose gay marriage are also those who traditionally support states’ rights. *See* HUMAN RIGHTS CAMPAIGN, *at* <http://www.hrc.org/marriage> (Oct. 31, 2003).

is not what the founders of this country intended. In fact, they specifically guarded against it in the Ninth and Tenth Amendments.<sup>240</sup> When the Constitution was drafted, its purpose was to create a union out of thirteen feuding sovereigns and secure the natural rights of all citizens from invasion by either the states or the federal government.<sup>241</sup> The founders also intended to protect the populace from tyranny in the new government by creating a system of checks and balances.<sup>242</sup> The Federal Marriage Amendment blurs the line between the separate branches of government, which are currently duty bound to respect each other's provinces.<sup>243</sup>

The amendment would also restrict the Judiciary's ability to interpret the constitution and federal law. The Federal Marriage Amendment reads, in part, "[n]either this constitution . . . nor . . . federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."<sup>244</sup> The government of the United States is comprised of three co-equal branches, the legislature, executive, and judiciary and their powers "are defined and limited."<sup>245</sup> In order that the limits of the legislature were not "mistaken, or forgotten, the constitution [was] written."<sup>246</sup> The Supreme Court is in charge of interpreting the Constitution and it is "emphatically the province and duty of the judicial department to say what the law is."<sup>247</sup> The principle of judicial review laid out by *Marbury v. Madison*,<sup>248</sup> "has ever since been respected by [the] Court and the Country as a permanent and indispensable feature of our constitutional system."<sup>249</sup> The judiciary has the ability and the duty to look into the whole of the Constitution when determining a question of law.<sup>250</sup> This function of the ju-

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240. U.S. CONST. amend. IX; U.S. CONST. amend. X.

241. See U.S. CONST. pmbl.

242. See, e.g., *Nixon v. United States*, 506 U.S. 224, 234-35 (1993).

243. *Id.*

244. Federal Marriage Amendment, H.R.J. Res. 93, 107th Cong. (2002), available at <http://www.allianceformarriage.org/reports/fma/amendment.htm> (July 12, 2001) (on file with author).

245. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

246. *Id.*

247. *Id.* at 177.

248. *Id.* at 178.

249. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

250. *Id.*

diciary was explained by Alexander Hamilton when he wrote, “[t]he interpretation of the laws is the proper and peculiar province of the courts”<sup>251</sup> and it belongs to the judges to ascertain the meaning of the Constitution and “any particular act proceeding from the legislature.”<sup>252</sup> For the federal government to pass and the states to ratify an amendment removing the power of the Supreme Court to interpret the Constitution would be to invade the sovereign province of the judiciary. To remove the power of the federal courts to interpret federal law would also invade the province of the judiciary. This is what the Federal Marriage Amendment will do. It will upset the carefully balanced spheres of government and it will be unsupported by wisdom, reason, or precedent.

This is not to say that such an amendment *could* not be passed, but that it *should* not. Never in our history has there been an amendment to the Constitution that has abridged natural rights in the way that the Federal Marriage Amendment would. Yet Congress and the President, without advancing a legitimate explanation are willing to do this:<sup>253</sup> ignore 200 plus years of history and the purpose of the Constitution and upset the careful balance of government and the principles of federalism and state’s rights, simply to ensure that one small segment of society may not marry.

## X. Equal Protection

“The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free.”<sup>254</sup>

“The universal application of law to all citizens has been a tenet of English common law since at least the Magna Carta, and our

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251. THE FEDERALIST NO. 78 (Alexander Hamilton).

252. *Id.*

253. President Bush says he approves of the Federal Marriage Amendment and that, although “we are all sinners,” he would not allow gay marriage to be legitimized. Martha Brant, *Bush and the Gay Debate*, at <http://stacks.msnbc.com/news/949175.asp> (Aug. 6, 2003).

254. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 115 (1949) (Jackson, J., concurring).



whole system of law is predicated on this fundamental principle."<sup>255</sup>

### A. *Suspect Classes*

The Equal Protection Clause was designed to "hold over every American citizen . . . the protecting shield of law,"<sup>256</sup> to ensure the right of individuals to be free from legislation that singled them out because of their membership in a particular class of people such as former slaves, women, blacks, Jews, Irish, etc.<sup>257</sup> It embodied the ideal that laws be applied equally to all.<sup>258</sup> In *Railway Express*, the Court held, "[t]he framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."<sup>259</sup> It continued, "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation . . . ."<sup>260</sup>

Legislation that targets a suspect class is reviewed under strict scrutiny. In order to survive this inquiry, the legislation that applies only to a suspect class must further a compelling state interest and be necessary and narrowly tailored to meet that compelling interest.<sup>261</sup> Race and ethnicity are "inherently suspect" classes because of our unfortunate American history.<sup>262</sup> Gender or sex is also considered "suspect"<sup>263</sup> but legislation that is imposed on only one gender or sex is generally reviewed by

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255. *Lawrence v. Texas*, 41 S.W.3d 349 (Tx. App. 2001), *rev'd*, 123 S. Ct. 2472 (2003) (citing *Truax v. Corrigan*, 257 U.S. 312, 332 (1921)) (internal quotations omitted).

256. HOWARD N. MEYER, *THE AMENDMENT THAT REFUSED TO DIE* 78 (1973).

257. *See, e.g., Saint Francis College v. Al-Khazraj*, 481 U.S. 604 (1987) (discussing the Civil Rights Act, which arose out of the same concerns addressed by the Fourteenth Amendment).

258. *Ry. Express Agency, Inc.*, 336 U.S. at 112 (Jackson, J., concurring) ("Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.").

259. *Id.*

260. *Id.*

261. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

262. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 291 (1978).

263. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

the court under the lower standard of intermediate scrutiny.<sup>264</sup> To survive a review under intermediate scrutiny, the challenged legislation "must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>265</sup> The means must "fit" the ends.<sup>266</sup>

When deciding whether to add a classification to the list of suspect classes, the Court will consider whether the group is a "discrete and insular minority" requiring extraordinary protection from the majoritarian political processes;<sup>267</sup> whether the characteristic being used "frequently bears no relation to [the] ability to perform or contribute to society;"<sup>268</sup> whether the classification is based on "an immutable characteristic determined solely by the accident of birth,"<sup>269</sup> or whether the class was subjected to "a history of purposeful unequal treatment . . ."<sup>270</sup>

Sexual orientation should be considered either a suspect or quasi-suspect class because homosexuals, as a group, have historically been the subject of discrimination and hatred<sup>271</sup> and because they are a discreet and insular minority.<sup>272</sup> Sexual orientation is also unrelated to the ability to perform or contribute to society and it is particularly unrelated to the statutory requirements of marriage.<sup>273</sup>

As of the date of this article, sexual orientation is not considered a suspect or quasi-suspect class and legislation that targets homosexuals, as a class, must only survive the so-called rational basis test or conventional equal protection analysis.<sup>274</sup> Under conventional or traditional equal protection analysis, when legislation does not target a suspect class, or does not implicate a fundamental constitutional right, that legislation need

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264. See, e.g., *Adarand Constructors, Inc.*, 515 U.S. at 247.

265. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

266. *Id.* at 211.

267. *Bakke*, 438 U.S. at 290.

268. *Frontiero*, 411 U.S. at 686.

269. *Id.*

270. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

271. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Burger, C.J., concurring) (historical legal commentators condemned homosexual sodomy as "an offense of 'deeper malignity' than rape . . ."); McWILLIAMS, *supra* note 19, at 603-19.

272. See *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

273. See, e.g., CAL. FAM. CODE § 300 (Deering 2003).

274. *Romer v. Evans*, 517 U.S. 620, 632-36 (1996); *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

only be "rationally related to a legitimate [government] interest."<sup>275</sup>

For example, New York City enacted a law that prohibited vehicles used "merely or mainly" for advertising purposes, to be operated on city streets.<sup>276</sup> Those who wished to advertise their own businesses on their vehicles could continue to operate those vehicles on the city streets.<sup>277</sup> New York argued that trucks with big advertisements on the sides that were unrelated to products sold by the trucks' owners were distracting to drivers and were therefore properly banned.<sup>278</sup> The Supreme Court upheld this legislation despite an equal protection challenge by a nation wide express mail business that carried the advertising of others on its trucks for a fee.<sup>279</sup> The Court held that the regulation, although discriminatory, did not pose a problem because the classification was legitimate, related "to the purpose for which it [was] made," and did not touch a suspect class or fundamental right.<sup>280</sup>

Even under rational basis, if the challenged legislation does not further a legitimate interest or the means of achieving that interest are not rationally related to the ends, it will be overturned. In *Romer v. Evans*, the Court held that an amendment to the Constitution of the state of Colorado removing all legal protections from homosexuals as a group failed to meet even the rational basis test because the state interest served by the legislation was illegitimate and the means were not rationally related to the illegitimate ends.<sup>281</sup> The amendment provided:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person

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275. *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976).

276. *New York City, N.Y. TRAF. REG. § 124, repealed by ch. 48, § 1 (Mar. 14, 1972)*.

277. *Id.*

278. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 109 (1949).

279. *Id.* at 110.

280. *Id.*

281. 517 U.S. 620, 635 (1996).

or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.<sup>282</sup>

In effect, the amendment repealed all current legal protections for homosexuals against discrimination of any kind.<sup>283</sup> It “nullifie[d] specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.”<sup>284</sup> First, said the Court, the legislation challenged in *Romer* imposed “a broad and undifferentiated disability on a single named group” and was “an exceptional . . . invalid form of legislation.”<sup>285</sup> Second, the Court held the “sheer breadth [of the legislation] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”<sup>286</sup> To sum up then, the Court held that a lack of rational basis as evidenced by a malicious purpose behind the legislation, such as discrimination for discrimination’s sake, would make a law unconstitutional even where the class targeted by that law is considered neither suspect nor quasi-suspect.<sup>287</sup>

Even if sexual orientation is neither suspect nor quasi-suspect, as the Court held in *Romer*, laws denying them the right to marry still violate the Equal Protection Clause because the means are not rationally related to any legitimate end and the proposed amendment is “inexplicable by anything but animus toward the class it effects.”<sup>288</sup> The avowed ends are maintenance of Judeo-Christian morals,<sup>289</sup> family values,<sup>290</sup> and encouragement of procreation.<sup>291</sup> Yet, religious morality is not

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282. *Id.* at 624.

283. *Id.* at 629.

284. *Id.* at 629.

285. *Id.* at 632.

286. *Romer*, 517 U.S. at 632.

287. *See generally Romer*, 517 U.S. 620.

288. *Id.* at 632.

289. *See* 142 CONG. REC. H7270 (daily ed. July 11, 1996).

290. *See, e.g.*, HR. REP. No. 104-664 (1996) (recommending passage of DOMA).

291. *See, e.g.*, *Goodridge v. Dep’t of Pub. Health*, No. 2001-1647-A, 2002 Mass. Super. LEXIS 153, at \*12, \*46-47, 2002 WL 1299135, \*4-5, \*13 (holding that a prohibition against same sex marriage did not violate a fundamental liberty nor deprive any person of substantive due process, liberty, or freedom of speech or association, that the law was rationally related to legitimate ends. The Court also

now, and never has been, a legitimate state end.<sup>292</sup> Rather, the “legitimacy of secular legislation depends . . . on whether the State can advance some justification for its law beyond its conformity to religious doctrine.”<sup>293</sup> Encouragement of procreation may be a state interest but it is not rationally related to the prohibition of same sex marriage because heterosexuals need not procreate, desire to procreate, or indeed *be able* to procreate to get married.<sup>294</sup> In fact, there is a constitutional right to prevent procreation.<sup>295</sup> The reason the state has an interest in “family values” in the first place is “not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life.”<sup>296</sup> The state has an interest in protecting marriage because it “is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.”<sup>297</sup> The state protects procreation not out of some “demographic” or Biblical consideration but “because parenthood alters so dramatically an individual’s self-definition.”<sup>298</sup> Therefore, the central theme of all these state interests is not the benefit that accrues to the state but the benefits and rights of the individual members of the state. Only *granting* marriage rights to everyone furthers this state interest; withholding them from an insular minority does not.

The Federal Marriage Amendment would impose on homosexuals alone a “special disability.”<sup>299</sup> State and federal statutes, including DOMA, that deny the right to marry based on

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indicated that it was not troubled that Massachusetts allowed same sex couples to establish legal relationships with their children but not with each other), *vacated and remanded by*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (2003).

292. See U.S. CONST. amend. I; *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting).

293. *Bowers*, 478 U.S. at 211 (Blackmun, J., dissenting); see also *McGowan v. Maryland*, 366 U.S. 420, 429-53 (1961); *Stone v. Graham*, 449 U.S. 39 (1980); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (explaining that where the sole purpose of the legislation is to “endorse a particular religious doctrine” it furthers religion in violation of the Establishment Clause).

294. See, e.g., CAL. FAM. CODE § 300 (Deering 2003).

295. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

296. *Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting).

297. *Griswold*, 381 U.S. at 486.

298. *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting).

299. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

sex and sexual orientation already impose this “special disability” on people that otherwise meet all established criteria to obtain a marriage license. The Federal Marriage Amendment will go even further. The Federal Marriage Amendment, like existing state and federal laws prohibiting same sex marriages, is a “status based enactment divorced from any factual context” in which courts “could discern a relationship to legitimate state interests.”<sup>300</sup> All laws prohibiting same sex marriage are based on “classification[s] of persons undertaken for [their] own sake, something the Equal Protection Clause does not permit.”<sup>301</sup> As all such legislation is “class legislation,” it is “obnoxious to the prohibitions of the Fourteenth Amendment.”<sup>302</sup>

### B. *Fundamental Rights*

The Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>303</sup> The law defines discrimination as different treatment of similarly situated individuals.<sup>304</sup> Equal protection means, “all persons . . . shall stand equal before the laws of the States.”<sup>305</sup> The Fourteenth Amendment incorporates most of the first ten amendments and applies them to the states, meaning that if the federal government cannot abridge those rights, neither can the states.<sup>306</sup> The Supreme Court has held that marriage is a fundamental right of the kind protected by the Constitution from interference by the state and federal government.<sup>307</sup> All states recognize the civil contract between a man and a woman arising out of a personal relationship, solemnized as the states see fit, as a marriage.<sup>308</sup> States that prohibit same sex marriages<sup>309</sup> prohibit same sex couples from making such

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300. *Id.* at 635.

301. *Id.* (quoting Civil Rights Cases, 109 U.S. 3, 24 (1883)).

302. *Id.* at 635.

303. U.S. CONST. amend. XIV, §1.

304. *See, e.g.,* Willingham v. Macon Tel. Publ'g, 507 F.2d 1084 (5th Cir. 1975) (en banc).

305. *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879).

306. *See, e.g.,* *Malloy v. Hogan*, 378 U.S. 1 (1964).

307. *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

308. *See, e.g.,* ALASKA STAT. § 25.05.011 (Michie 2003); ARK. CODE ANN. § 9-11-101 (Michie 2003); CAL. FAM. CODE § 300 (Deering 2003).

309. Among those states that prohibit same sex marriage are Alabama, Alaska, Arizona, Arkansas, Connecticut, and Hawaii.

civil contracts. In effect, same sex couples are incompetent to make such contracts in the same way that underage persons and the mentally ill are incompetent to make marriage contracts.<sup>310</sup> Most states consider same sex marriages to be void and prohibited. Arizona, for example, considers such marriages void in the same way that marriages between parents and children, grandparents and grandchildren, brothers and sisters of half and whole blood, uncles and nieces, aunts and nephews, and between first cousins are void.<sup>311</sup>

The state of being married carries with it certain obligations and rights under state law. Spouses qualify as next of kin and immediate family. This is important for rules of intestacy, succession, probate, wrongful death actions, and health care.<sup>312</sup>

Intensive Care Units often limit the people who can visit a critically ill person to immediate family. If one member of a heterosexual marriage is ill, the other spouse can always visit that person in the hospital, because he or she is considered immediate family. A same sex partner of a critically ill person may be barred from visiting her partner in an Intensive Care Unit because they are not married.<sup>313</sup> If one member of an opposite sex marriage falls ill and becomes unable to direct her own medical care, the spouse may direct such medical care where there is no living will or health care directive to the contrary. The partners in a same sex couple cannot make such decisions for each other in the absence of a living will or health care directive.<sup>314</sup>

Married couples also enjoy certain tax benefits and spousal immunity that same sex partners do not. For example when a married couple gets divorced they may split an IRA into two accounts when distributing marital property, essentially cashing out the IRA. There are no tax penalties for this early payout. When a same sex couple splits up, however, the same IRA

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310. See ALA. CODE § 30-1-19 (2003); ALASKA STAT. §§ 25-05-.011, 013 (Michie 2003); ARIZ. REV. STAT. § 25-101 (2003); ARK. CODE ANN. §§ 9-11-101, 109, 208 (Michie 2003); CAL. FAM. CODE § 300 (Deering 2003).

311. ARIZ. REV. STAT. § 25-101 (2003).

312. See, e.g., *Leszinske v. Poole*, 798 P.2d 1049 (N.M. Ct. App. 1990); *Litleton v. Prange*, 9 S.W.3d 223, 230-31 (Tex. App. 1999).

313. See LESBIANS, GAY MEN, AND THE LAW, *supra* note 29, at xv-xx.

314. Robin Toppings, *Gay Couples are Missing Out on Many Legal Milestones*, *NEWSDAY*, Mar. 16, 2004, at A64.

split in the division of joint property carries an enormous tax penalty that may cost the couple hundreds of dollars of their own money.<sup>315</sup> Same sex couples, because they cannot marry, cannot freely confide in each other without the fear that each can be forced to testify adversely against the other in open court.<sup>316</sup> Because they cannot marry in any state or form a legal union in the majority of the states, and because the federal government recognizes no same sex marriages wherever solemnized, same sex couples that would otherwise qualify for the numerous state and federal benefits of marriage are left without the protection of the laws.

Most states include the following qualifications as pre-requisites to marriage: age of majority, mental competence, no consanguinity, not currently married.<sup>317</sup> Same sex couples that have all of the qualifications to be married cannot be married in any state. Two states, California and Vermont, provide a separate but equal compromise.<sup>318</sup> Vermont provides for a civil union and California provides for registration of a domestic partnership.<sup>319</sup>

Marriage is a fundamental right.<sup>320</sup> Prohibiting homosexuals from enjoying this right does not serve a compelling state interest. A statute that infringes on a fundamental right must be narrowly tailored to achieve a compelling state interest. Statutes infringing on fundamental rights are subject to strict

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315. Videotape: James T. Sexton, *Knowing Your Rights: Making and Breaking Domestic Partnerships in the Tri-State Area*, Address Before the Pace University School of Law LAMBDA Chapter (Oct. 28, 2003) (on file with Pace Law School Library).

316. *See, e.g.*, *Trammel v. United States*, 445 U.S. 40 (1980) (discussing the evolution and current shape of spousal immunity).

317. *See, e.g.*, CAL. FAM. CODE. § 297 (Deering 2003).

318. Westchester County, New York, also provides for registration of domestic partnerships. *See* Domestic Partner Registry, at <http://www.westchestergov.com/lgbtc/> (last visited Feb. 6, 2004).

319. VT. STAT. ANN. tit. 15, § 1202 (2003); CAL. FAM. CODE. § 297 (Deering 2003). California's domestic partnership registration also applies to opposite sex couples over sixty-five years of age that are not married but otherwise maintain a household. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (2003) (holding the "Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. The Commonwealth 'has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples'").

320. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967).



judicial scrutiny. Although it did not directly implicate marriage, *Bowers* does discuss fundamental rights and homosexuals. The Court held that there is no fundamental right to engage in homosexual sodomy.<sup>321</sup> In framing the issue thus, the Court mischaracterized the rights the Georgia statute was actually infringing.<sup>322</sup> The rights implicated by the Georgia statute were the fundamental rights to privacy and personal autonomy. Though the Georgia statute prohibited any person, man or women, from engaging in sodomy with any other person, regardless of sex, the Court discussed the law solely in terms of homosexuality, betraying an overwhelming personal bias unusual in a neutral arbiter.<sup>323</sup> The deliberate mischaracterization of the issue presented allowed the divided *Bowers* Court to remove the right to privacy and physical intimacy from one specific group, homosexuals. The Court specifically expressed no opinion on heterosexual sodomy and after *Bowers*, the rights of heterosexuals to intimate relations remained protected.<sup>324</sup> Therefore, the only interest served by the Georgia statute and approved by the Supreme Court was the desire to oppress one group based solely on the gender and orientation of the couples involved on the ground that homosexuality offended the Judeo-Christian morals of the state legislators.<sup>325</sup> This interest is not only not compelling, it is not even legitimate in a staunchly secular government.<sup>326</sup>

Civil marriage is not like a Ferrari or a diamond; it does not follow the laws of economics, gaining value as a result of rarity. Allowing everyone who is otherwise qualified and wants to get married to do so will not devalue the marriages currently existing.<sup>327</sup> It has been acknowledged that divorce rates in American are quite high. If the country really wanted to preserve and

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321. *Bowers v. Hardwick*, 478 U.S. 186, 194-96 (1986).

322. *See id.* at 188.

323. *Id.*

324. *Id.*; *see also* GA. CODE ANN. § 16-6-2 (1984).

325. *Bowers*, 478 U.S. at 196-97 (Burger, C.J., concurring); *id.* at 211 (Blackmun, J., dissenting).

326. *See, e.g.*, U.S. CONST. amend. I; *Stone v. Graham*, 449 U.S. 39, 40-41 (1980); *McGowan v. Maryland*, 336 U.S. 420, 429-53 (1961); *McWilliams*, *supra* note 19, at 6 (quoting George Washington, 1796).

327. This does not speak to religious marriages as no one has, or likely ever will, advance the illegitimate notion that religious institutions could or should be forced by the state to acknowledge any marriage they did not perform.

encourage “traditional” marriages, as Alliance for Marriage proposes, would legislatures not make it harder to both marry and divorce? Yet, it is quite easy to get married and easy to get divorced. In most states, couples wishing to get married must meet only three simple criteria; they must be of the opposite sex, of the age of majority, and unrelated to one another within a certain degree of consanguinity.<sup>328</sup> Until the very recent backlash, the prevailing legislative trend with regard to divorce was towards easier, no-fault, laws.<sup>329</sup> The federal government’s purpose in pursuing the Federal Marriage Amendment, which would foreclose the rights of same sex couples to marry, is based on illegitimate, invidiously discriminatory grounds that are repugnant to the United States Constitution.

#### XI. Due Process: Classes, Fundamental Rights and Liberty Interests

“Congress has no substantive power over sexual morality.”<sup>330</sup>

Legislation that targets a class of people and that is not “reasonably related to any proper governmental objective” imposes on that class “a burden that constitutes an arbitrary deprivation of . . . liberty in violation of the Due Process Clause [of the Fifth Amendment].”<sup>331</sup> The Federal Marriage Amendment would affect a class of people based solely on gender and sexual orientation. It is unrelated to a “proper governmental objective” because the only true interest served by the legislation is the oppression of that discrete class. Oppression of a class of people for oppression’s sake is not a proper basis for legislation<sup>332</sup> and offends the very ideals on which this nation was founded. Even conservatives adamantly opposed to same sex marriage agree that marriage is a fundamental right.<sup>333</sup> Fundamental rights

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328. See, e.g., ARIZ. REV. STAT. § 25-101 (2002); CAL. FAM. CODE. § 300 (Deering 2003).

329. Peter Nash Swisher, *The ALI Principles: A Farewell to Fault - But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?*, 8 DUKE J. GENDER L. & POL’Y 213, 213-14 (2001).

330. *Roth v. United States*, 354 U.S. 476, 504 (1957) (Harlan, J., concurring in part and dissenting in part).

331. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

332. See *Romer v. Evans*, 517 U.S. 620, 635 (1996).

333. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). “Marriage is a fundamental institution of our society and it should be defended against all the people who are

confer a liberty interest and citizens cannot be deprived of them without due process of law.<sup>334</sup> The Federal Marriage Amendment is both class-based legislation and legislation infringing on a fundamental right. On either count, or both, the amendment would deprive American citizens of their liberty and their freedom.

The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law . . . ."<sup>335</sup> It applies to actions taken by the federal government. The Federal Marriage Amendment would invade the purpose of this amendment by depriving same sex couples of liberty without due process. The Fourteenth Amendment guarantees equal protection to all people under state law.<sup>336</sup> The Fifth Amendment doesn't contain this provision. The Fourteenth Amendment "is a more explicit safeguard of prohibited unfairness" than the Fifth Amendment. The concepts of equal protection and due process both stem from the "American ideal of fairness" and though the two concepts are not interchangeable, they "are not mutually exclusive" either.<sup>337</sup> The Court in *Bolling v. Sharpe*, acknowledged that, "discrimination may be so unjustifiable as to be violative of due process" under the Fifth Amendment.<sup>338</sup> The *Bolling* Court gave Fifth Amendment due process that substantive equal protection flavor.

The liberty interest that is protected from government interference in the absence of due process has never been absolutely defined by the Supreme Court. Citizens have the right to be free from physical restraint where they have not been afforded due process of law but the liberty interest protected by the Fifth Amendment goes further than this.<sup>339</sup> Liberty includes "the full range of conduct which the individual is free to pursue"<sup>340</sup> and this liberty "cannot be restricted except for a

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attacking it. The gays have moved in to deliver the knockout punch." Nieves, *supra* note 113.

334. *Id.*

335. U.S. CONST. amend. V.

336. U.S. CONST. amend. XIV, § 1.

337. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

338. *Id.*

339. *Id.*

340. *Id.*

proper governmental objective.”<sup>341</sup> The Court held that the federal government could not be held to a lesser standard of due process concerning segregation where the states were forbidden to make laws segregating public schools.<sup>342</sup> If the states cannot infringe on these rights, the Court said, neither can the federal government.<sup>343</sup>

Marriage is a fundamental right of free men.<sup>344</sup> The ability to marry “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness.”<sup>345</sup> It is “one of the ‘basic civil rights of man.’”<sup>346</sup> Denying “this fundamental freedom” on an “unsupportable . . . basis,” such as racial classification, violates the Fourteenth Amendment and is “subversive of the principle of equality.”<sup>347</sup> In *Loving v. Virginia*, the court held that “the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”<sup>348</sup> The Court further held that the Virginia law prohibiting and criminalizing interracial marriages deprived citizens of due process of law and equal protection under the Fourteenth Amendment.<sup>349</sup> If the Fourteenth Amendment’s due process and equal protection clauses prohibit the states from interfering with the freedom to marry, then the Fifth Amendment’s due process clause surely prevents the federal government from doing the same thing.<sup>350</sup> As such, the federal government cannot interfere with the “fundamental freedom” to marry where the interference is based on invidious discrimination against a class of people.<sup>351</sup>

There is no difference between laws that prohibit marriage based on the race of the parties and laws that prohibit marriage based on the sex of the parties. One discriminates based on race and the other discriminates based on sex and sexual orientation. During the shameful years of American history when

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341. *Id.* at 499-500.

342. *Bolling*, 347 U.S. at 500.

343. *Id.*

344. *Perez v. Sharp*, 198 P.2d 17, 19 (Cal. 1948).

345. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *See Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

351. *Loving*, 388 U.S. at 12.

black people first had no rights and then had far fewer rights than whites, many vehement arguments were made in favor of perpetuating the culture of slavery.<sup>352</sup> Not surprisingly, many of these arguments were based on a perceived Judeo-Christian "tradition."<sup>353</sup> The arguments against interracial marriage include the argument that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents."<sup>354</sup> "The fact that he separated the races shows that he did not intend for the races to mix."<sup>355</sup> The arguments against same sex marriage include the following: that Judeo-Christian morality condemns such practices;<sup>356</sup> that such conduct has been condemned for hundreds of years;<sup>357</sup> and that same sex marriage would threaten "*the very basis of the whole fabric of civilized society*."<sup>358</sup> The arguments against same sex marriages echo those made against interracial marriages. Marriage is marriage regardless of the race or gender of the parties. In 1967, the Supreme Court decided that the states could not

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352. *Scott v. Sandford*, 60 U.S. 393 (1856).

The province of Maryland, in 1717, (ch. 13, s. 5,) passed a law declaring 'that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a slave during life, excepting mulattoes born of white women, who, for such intermarriage, shall only become servants for seven years, to be disposed of as the justices of the county court, where such marriage so happens, shall think fit; to be applied by them towards the support of a public school within the said county. And any white man or white woman who shall intermarry as aforesaid, with any negro or mulatto, such white man or white woman shall become servants during the term of seven years, and shall be disposed of by the justices as aforesaid, and be applied to the uses aforesaid.' The other colonial law to which we refer was passed by Massachusetts in 1705, (chap. 6.) It is entitled "An act for the better preventing of a spurious and mixed issue," &c.; and it provides, that "if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped, at the discretion of the justices before whom the offender shall be convicted."

*Id.* at 408-09.

353. See discussion *supra* Part III.D.

354. *Loving*, 388 U.S. at 3.

355. *Id.* (quoting the trial judge who sentenced the Lovings, an interracial couple, to jail for marrying in violation of Virginia's anti-miscegenation laws).

356. *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, J., concurring).

357. *Id.* at 198 n.2 (Powell, J., concurring).

358. *Goodridge v. Dep't of Pub. Health*, No. 2001-1647-A, 2002 Mass. Super. LEXIS 153, at \*11, 2002 WL 1299135, \*4 (emphasis added) (citation omitted), *vacated and remanded by*, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (2003).

constitutionally prohibit marriage based on the race of the parties.<sup>359</sup> But, in 1996, the federal government decided that it could refuse to recognize marriage based on the sex of the parties.<sup>360</sup> It also decided that the states could refuse to recognize marriages solemnized in other sovereign states based on the sex of the parties.<sup>361</sup> If marriage is truly a fundamental right then neither the states nor the federal government can abridge it on the grounds of sex, race, sexual orientation, or any other invidious classification.<sup>362</sup> To do so violates the due process clause of the Fifth Amendment.<sup>363</sup>

If Congress were to pass the Federal Marriage Amendment, it would also violate the Fifth Amendment by qualifying the constitutional protections open to a select class of people. It would be the kind of discrimination that is “so unjustifiable as to be violative of due process.”<sup>364</sup>

Married couples that are members of the opposite sex are accorded certain privileges and benefits under federal law. In fact, marriage is often a “pre-condition to the receipt of government benefits . . . .”<sup>365</sup> For example, spouses may transfer property to each other without federal income tax consequences.<sup>366</sup> A sale or transfer of property between unmarried persons will have transfer and income tax consequences.<sup>367</sup> Members of the House of Representatives pay a portion of their salary towards their pensions. Members of the House are entitled to health insurance. The spouses of those members get that insurance and that pension on the death of the member. The same sex partner of a representative, like Representative Studds, would receive neither the pension, nor the health care, regardless of the fact that the member had paid into the system the same amount as his heterosexual colleagues, who are capable of getting married and having such security.<sup>368</sup> The group of people who wish to

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359. *Loving*, 388 U.S. at 12.

360. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

361. *Id.* § 2(a).

362. *See, e.g., Loving*, 388 U.S. at 11-12; *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

363. *Bolling*, 347 U.S. at 499.

364. *Id.*

365. *Turner v. Safley*, 482 U.S. 78, 96 (1987).

366. I.R.C. § 1041(a) (2003).

367. *See id.*

368. 142 CONG. REC. H7270, 7277-78 (1996).

marry and who do marry, receive these benefits and this security. The group that wishes to marry and is barred from marrying does not.

The ability of citizens of the United States to freely "enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights."<sup>369</sup> Marriage is one such "intimate or private" relationship that is protected by the Constitution.<sup>370</sup> In *Turner v. Safley*, the Court held that, although all constitutional rights are subject to "restrictions as a result of incarceration," prisoners nevertheless have the fundamental right to get married even though they are in prison and subject to such decreased constitutional protection.<sup>371</sup> The court explained that prisoners have the fundamental right to get married because marriage is an "expression . . . of emotional support and public commitment"<sup>372</sup> and part of an "exercise of religious faith" or an "expression of personal dedication."<sup>373</sup> There is no argument that can be advanced that a marriage between two people of the same sex is not a fundamental right as a same sex union would also presumably be an "expression of emotional support and public commitment," and "exercise of religious faith" or an "expression of personal dedication." If an incarcerated prisoner still has the freedom to marry despite the fact that his conviction has seriously curtailed his other constitutional rights, including his right to liberty itself,<sup>374</sup> then there is no reason that two people of the same sex are not entitled to that same freedom.

The federal government, bound by the Constitution, cannot regulate marriage on the basis of sex or sexual orientation because marriage is a fundamental right of all citizens of the United States.<sup>375</sup> It cannot pass the Federal Marriage Amendment without violating due process and equal protection. It cannot pass the Federal Marriage Amendment without setting

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369. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987).

370. *Id.*

371. *Turner v. Safley*, 482 U.S. 78, 96 (1987).

372. *Id.* at 95.

373. *Id.* at 96.

374. *See Sandin v. Conner*, 515 U.S. 472 (1995).

375. *See Turner*, 482 U.S. at 94; *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

America back in its long search for "liberty and justice for all."<sup>376</sup>

## XII. *Lawrence v. Texas*

"The arc of history is long, but it bends toward justice."<sup>377</sup>

*Lawrence v. Texas*,<sup>378</sup> decided by the Supreme Court on June 26, 2003, was the Court's latest opportunity to speak to the issue of gay civil rights. The case came up through the Texas criminal and trial courts before it landed in the Texas Court of Appeals. The appellants, Messrs. Lawrence and Garner, were arrested for violating section 21.06 of the Texas Penal Code by having consensual sex with each other and they were fined two hundred dollars each.<sup>379</sup> They pled *nolo contendere* to the criminal charges and then argued that section 21.06 of the Texas Penal Code was unconstitutional because it violated equal protection and a fundamental right to privacy under the state and federal constitutions.<sup>380</sup> The Court of Appeals, asked to answer the narrow question of whether the law making it a criminal offense to engage in consensual homosexual sex was facially unconstitutional, held that it was not.<sup>381</sup> After analyzing the text of the statute, the history of equal protection, due process, and the realities of governance, and after rejecting appellants' arguments regarding facial invalidity, discriminatory animus, and class based discrimination, the court finally held "[b]ecause (1) there is no fundamental right to engage in sodomy, (2) homosexuals do not constitute a 'suspect class,' and (3) the prohibition of homosexual conduct advances a legitimate state interest and is rationally related thereto, namely, preserving public morals, appellant's first contention [that the statute violated equal protection] is overruled."<sup>382</sup>

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376. THE PLEDGE OF ALLEGIANCE.

377. Jennie R. Shuki-Kunze, *The "Defenseless" Marriage Act: The Constitutionality of the Defense of Marriage Act as an Extension of Congressional Power Under the Full Faith and Credit Clause*, 48 CASE W. RES. 351, 351 (1998) (quoting Dr. Martin Luther King, Jr.).

378. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

379. *Lawrence v. Texas*, 41 S.W.3d 349, 350 (Tx. App. 2001), *rev'd*, 123 S. Ct. 2472 (2003).

380. *Id.*

381. *Id.*

382. *Id.* at 357.



Appellants then made an argument that the statute impermissibly discriminated on the basis of gender, which the court discounted, finding the statute to be gender neutral and to apply to two men the same as two women. The court admitted, however, that the statute did not apply to one man and one woman but did not address the anomalous result proceeding from that admission. Regarding the appellants' right to privacy argument, the court held that there was no federal or state constitutional zone of privacy that protected homosexual sex. The Court of Appeals cited extensively to *Bowers v. Hardwick* throughout the majority opinion.

The dissent agreed that there was no fundamental right to engage in homosexual sodomy and agreed that no zone of privacy protected homosexual sex. Where the dissent disagreed was on the equal protection claim. The dissent argued that the statute clearly violated equal protection and that the majority had engaged in a

Herculean effort to justify the discriminatory classification of section 21.06 of the Penal Code despite the clear prohibitions on such discrimination contained in the Equal Protection Clause of the United States Constitution and the Texas Equal Rights Amendment in the Bill of Rights of the Texas Constitution.<sup>383</sup>

The Supreme Court granted certiorari and reversed.<sup>384</sup>

The Supreme Court overruled *Bowers* and held that the statute violated the Due Process Clause.<sup>385</sup> After discussing the questionable historical and legal evidence relied on in *Bowers*, the constant criticism of the decision in the United States and abroad, the erosion of the case's precedential value after the Court's decisions in *Casey* and *Romer*, the rejection of the case's reasoning by at least five states asked to answer the same question under their state constitutions, and the lack of legal or legislative reliance on the case, the Court then articulated why, exactly, the law violated the Due Process Clause of the Fourteenth Amendment.<sup>386</sup> The Court held:

[t]he petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by

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383. *Id.* at 366.

384. *Lawrence v. Texas*, 123 S. Ct. 2472, 2476 (2003).

385. *Id.*

386. *Id.* at 2484.

making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.<sup>387</sup>

The Court carefully avoided basing its decision on the Equal Protection Clause and explicitly stated that it did not “involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>388</sup> But it did hold that, under Due Process, the right to engage in private consensual sexual activity was a fundamental right and that the protection of “public morals,” was not a legitimate state interest when it came to this right.<sup>389</sup> The law did not survive even rational basis review.

Justice O'Connor concurs in the judgment because she does not agree with overruling *Bowers* and thought that the question of whether the statute was constitutional ought to be answered, in the negative, with reference to Equal Protection only.<sup>390</sup> Justice O'Connor did not subscribe to the majority's view that there is a fundamental right to privacy in consensual, intimate matters protected by Due Process. Instead she argues, not that homosexuals were a suspect class and therefore the statute failed under strict scrutiny, but that they were *not* a suspect class and that the statute failed *even* under rational basis review.<sup>391</sup> Augmenting the majority's argument, Justice O'Connor argues the only state interest offered by Texas for its statute was moral disapproval of a group, which the court has never held to be a legitimate state interest without more.<sup>392</sup> O'Connor dismisses Texas's arguments that the law applies only to homosexual *conduct*, as opposed to homosexual *persons*, to be specious and ultimately unpersuasive evidence of a non discriminatory purpose.<sup>393</sup>

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387. *Id.* (internal quotations and citations omitted).

388. *Id.*

389. *Lawrence*, 123 S. Ct. at 2483-84.

390. *Id.* at 2484 (O'Connor, J., concurring in the judgment).

391. *Id.* at 2484-85.

392. *Id.* at 2486.

393. *Id.* at 2486-87.

In response to a five justice due process/fundamental rights argument and a one justice equal protection argument, Justice Scalia offers a scathing dissent accusing his brethren of capitulating to the "homosexual agenda."<sup>394</sup> In a moment of breathtaking audacity, Justice Scalia writes that racially discriminatory laws, which were based on nothing more than religion and morality, are wrong, and invalid under the Constitution because they intentionally discriminate on the basis of race but laws that intentionally discriminate against homosexuals on the basis of orientation are valid under the Constitution precisely *because* they are based on religion and morality.<sup>395</sup> "Even if the Texas law *does* deny equal protection to 'homosexuals as a class,'" he argued, "that denial *still* does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality."<sup>396</sup> If morality is not a legitimate basis for legislation, he argues, then laws against prostitution, child pornography, "fornication, bigamy, adultery, adult incest, bestiality, and obscenity" would not survive rational basis review either.<sup>397</sup> This argument, aside from insulting petitioners, also misses a rather large point. The above laws are justified not by reference solely to traditional morality but to the actual harm done either to the victims or to society. Further, they do not single out a class of persons in the same way that the Texas code does. Justice Scalia addresses this argument when he says that the law at issue impacts conduct only, in the way that laws against public nudity impact conduct only and not nudists as a group. This of course ignores the fact that laws against homosexual sex are laws against homosexuals themselves in the most basic sense.<sup>398</sup>

To understand why the argument that the disputed law affects conduct and not classes is illogical, it might be helpful to

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394. *Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting).

395. *Id.* at 2495-96.

396. *Id.* at 2496.

397. *Id.* at 2494-95.

398. The Texas law denied a normal life to the petitioners, (and others like them), made them into convicted criminals and left them with a record that would affect the rest of their lives, bar them from participation in certain aspects of civil life, expose them to ridicule and require them, in at least four states, to register as sex offenders. *Id.* at 2485-86 (O'Connor, J., concurring in the judgment).

look at a hypothetical. Suppose the petitioners were heterosexuals instead of homosexuals. Suppose the Texas legislature had decided to forbid heterosexual adults from having consensual sex on pain of imprisonment because the state was offended by it. Would this hypothetical law really just affect conduct, like public nudity, that is not inherent in the identity of heterosexuals or would it instead criminalize one of the most basic aspects and identifiers of heterosexual life? Would it target conduct or the members of an identifiable class? Would it protect society in the way that laws against conduct such as incest do?

Suppose sex wasn't involved at all. Suppose instead the proposed law made it a crime to worship a particular god or vote for particular political party. Would those laws be valid? They affect conduct. But they also affect the essence of identity, of autonomy as the citizens of a free nation, in the way all the other laws Justice Scalia uses as examples do not.

Justice Scalia argues that the majority's holding that sexual morality alone cannot be a legitimate state interest when dealing with a law implicating a fundamental right is "so out of accord with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion."<sup>399</sup> Yet, as discussed in the body of this paper, that is not true. Not only has the Supreme Court never explicitly declared that religious morality may form the base of legislation affecting a fundamental right, it has explicitly held that it may not.<sup>400</sup>

Justice Scalia insists it is not the Court's decision to decide questions better left to the legislature and the normal democratic process. But, in pointing to examples of how society currently discriminates against homosexuals to support his argument in favor of waiting for Congress and the States to work it out, he undermines it.

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399. *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting). The following countries recognize same sex marriage: Belgium, Denmark, Greenland, Germany, Netherlands, Norway, and Portugal (common law). The following countries recognize same sex civil unions or the like: Iceland, Finland, Columbia, France, Sweden, and Canada. The following states or cities recognize civil unions: Vermont, USA and Buenos Aires, Argentina Marriage Laws, at [http://usmarriagelaws.com/search/alternative\\_lifestyles/same\\_sex\\_marriage/gay\\_laws\\_around\\_the\\_world/index.shtml](http://usmarriagelaws.com/search/alternative_lifestyles/same_sex_marriage/gay_laws_around_the_world/index.shtml) (Dec. 31, 2002). Massachusetts is the only American state to recognize same sex marriage to date.

400. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967).

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress.<sup>401</sup>

This argument has two main problems. First, the question presented was not whether the Constitution permits private citizens to discriminate against homosexuals and incarcerate them but whether the *state* can do so. Second, the judicial restraint he advocates is improper where the government has created laws that violate the Constitution. If the Court had waited for Congress and the States to dismantle American apartheid after the civil war, perhaps it would never have ended.<sup>402</sup> Yet, Justice Scalia openly agrees that the Court's decisions were necessary to end that unconstitutional oppression. He cites *Loving*, for example, with approval, arguing that it was well decided and necessary because laws created solely to maintain race supremacy are so clearly inapposite to American jurisprudence.<sup>403</sup>

Though Justice Thomas joins Justice Scalia's dissent in name, he writes separately to say he finds the law at issue "uncommonly silly."<sup>404</sup> He opines that "punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources."<sup>405</sup> He goes on to state that he is not, however, in a position to help the petitioners as he is bound to decide the question with refer-

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401. *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting).

402. See generally EISENBERG, *supra* note 53, at 13.

403. *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting).

404. *Id.* at 2498 (Thomas, J., dissenting).

405. *Id.*

ence to the Constitution, which he finds does not contain any such right to personal intimacy.<sup>406</sup>

Justice Scalia is right about one thing; the majority and concurring opinions in this case will support the argument in favor of same sex marriage. The majority opinion makes it clear that moral disapproval alone is not a legitimate state interest supporting even rational basis review of any law touching a recognized liberty interest. It also reaffirms the notion that there is a fundamental right to privacy in intimate relations and decisions. Justice O'Connor's concurrence, relying primarily on the majority decision in *Romer*, argues that statutes that treat homosexuals differently solely on the basis of their homosexuality are unconstitutional. And those are really the two easy pieces of the argument in favor of same sex marriage and against the Federal Marriage Amendment; 1) moral disapproval is an illegitimate state interest and cannot support legislation targeting homosexuals; and 2) laws that treat homosexuals differently for the bare sake of treating them differently are unconstitutional. As discussed above, the Federal Marriage Amendment is based on illegitimate interests: the protection and propagation of a single view of Judeo-Christian religious morality and discrimination for the sake of discrimination. It impacts a fundamental right. It targets a class of people and treats them differently than identically situated heterosexual people. As Justice Scalia so presciently asked, in light of the case's rationale, "what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the Constitution?'"<sup>407</sup>

### XIII. Conclusion

"Finally, be ye all of one mind, having compassion one of another . . . ." <sup>408</sup>

Marriage is currently available to all heterosexual Americans regardless of race, religion, national origin, or status of imprisonment.<sup>409</sup> Yet, it is denied to homosexuals solely on the

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406. *Id.*

407. *Id.* at 2498 (Scalia, J., dissenting).

408. 1 *Peter* 3:8 (King James).

409. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Turner v. Safley*, 482 U.S. 78, 96 (1987).

basis of their sex and sexual orientation. Marriage "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>410</sup> It should therefore be available to *all* Americans regardless of sex, sexual orientation, or other invidious classification. To confine basic rights to favored groups is anathema to the history of the United States and to Supreme Court precedent holding consistently that this right cannot be abridged.<sup>411</sup> Because it is a "fundamental right of free men," there can be "no prohibition of marriage except for an important social objective."<sup>412</sup> Prohibiting an entire segment of American society from getting married solely based on the sex of the parties does not further any objective other than discrimination. As such, marriage cannot be prohibited to homosexuals and the Federal Marriage Amendment is therefore illegitimate.

After *Lawrence* was decided, all hell broke loose in the media as pundits and commentators around the world weighed in. Even the Vatican issued a statement calling on democratically elected Catholic lawmakers to vote against any extension of the rights of marriage to homosexuals on the basis of faith and Vatican commands.<sup>413</sup> Since *Lawrence*, many Americans have argued that homosexuals do not deserve the same rights or the same treatment as their heterosexual counterparts and that the extension of marriage rights to them must be prevented at all costs.<sup>414</sup> Some commentators think those arguments sound familiar and note,

"how closely the resistance to same-sex marriage resembles white people's fears about interracial marriage, which were at the emotional core of their fears about integration in general." Now, as in the 1950's and 60's, much of the objection to legally extending marital rights takes the form of religious warnings about a declining 'moral order,' even though the rights being debated are those

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410. *Loving*, 388 U.S. at 12.

411. *See id.*

412. *Perez v. Sharp*, 198 P.2d 17, 19 (Cal. 1948) (overturning anti-miscegenation law as violating equal protection).

413. Alan Cooperman & David Von Drehle, *Vatican Instructs Legislators On Gays; Backing Marriages Called Immoral*, WASH. POST, Aug. 1, 2003, at A1.

414. Evelyn Nieves, *Family Values Groups Gear Up For Battle Over Gay Marriage*, WASH. POST, Aug. 17, 2003, at A6; Alison Gendar, *52% Want A Ban On Gay Marriage*, DAILY NEWS, Aug. 9, 2003, at 6; Bauer, *supra* note 114; Bennett, *supra* note 112.

granted by the government, not those bestowed (or withheld) by religious denominations.<sup>415</sup>

This country must not continue as a “house divided against itself”<sup>416</sup> reserving fundamental rights to favored groups and perpetually creating second-class citizens. Those who oppose gay civil rights have the right to their beliefs, but they have no right to impose religious domestic policy on a secular nation. They have no right to use the might of the many to remove the humanity of the few. Granting same sex couples equal rights harms no one but failing to grant those rights harms everyone.

In America, all people “are created equal.”<sup>417</sup> Among such equals, no person, or group of people, should be more equal than another, enjoying rights, like marriage, not available to all. Our society espouses the belief that America truly is the “land of the free.”<sup>418</sup> To live up to that image we must extend basic and fundamental rights to all people regardless of sex, race, color, creed, national origin, and sexual orientation.<sup>419</sup> Otherwise, we turn our back on the American dream of a free land.

Said Supreme Court Justice Matthews in 1886, “[t]he very idea that one man may be compelled to hold . . . any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.”<sup>420</sup> Oppression of homosexuals by singling them out for unfavorable treatment is as much “moral slavery” as oppression of blacks and women and must be as roundly condemned. Only by refusing the temptation presented by the Federal Marriage Amendment, to make new outsiders, do we truly preserve traditional American values.

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415. Frank Rich, *And Now the Queer Eye for Straight Marriage*, N.Y. TIMES, Aug. 10, 2003, at B1.

416. President Abraham Lincoln, Address to the Illinois Republican State Convention (June 16, 1858).

417. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

418. Francis Scott Key, *The Star-Spangled Banner* (1814). America is referred to as this “sweet land of liberty.” Patriots are exhorted to “let freedom ring.” In our Pledge of Allegiance it is said that American is “one Nation . . . with liberty and justice for all.” THE PLEDGE OF ALLEGIANCE.

419. RICHARDS, *supra* note 70, at 3-4.

420. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).