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Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?

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ADAM AND STEVE VS. ADAM AND EVE: WILL THE NEW SUPREME COURT GRANT GAYS THE RIGHT TO MARRY?

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INTRODUCTION

In 2003, the U.S. Supreme Court declared, in *Lawrence v. Texas*, that state laws criminalizing gay sex were unconstitutional.¹ The decision is ground-breaking because, for the first time in U.S. history, the highest court in the land determined that gays could not be fined or imprisoned for private, adult consensual sex, something the Court only seventeen years earlier did not consider a fundamental right.² The ruling is also controversial because Americans seem to be deeply divided when it comes to issues regarding gay rights. While studies indicate that most Americans support the adoption of laws that grant gays the most basic of civil rights, like the right to the kind of privacy in the bedroom that *Lawrence* envisioned, many also believe that homosexuality is immoral.³

With respect to the issue of whether or not gays should be able to marry, a 2005 nationwide poll conducted for the Boston Globe indicated that forty-six percent of the respondents said they were against gay marriage and thirty-seven percent said that they supported it.⁴ Forty-six percent of those that the Globe surveyed, however, also indicated that they supported civil unions between gays in which gays could enjoy “some, but not all, of the legal rights of married couples while forty-one percent said that they were opposed” to such unions.⁵ This split in American perspectives is tied to age, with Americans thirty-five years old and younger decidedly more pro-gay in their attitudes than their plus sixty-five year old counterparts.⁶ It is

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1. See 539 U.S. 558, 578 (2003) (holding that gay individuals have the right to engage in private and consensual sexual conduct free from government intervention).

2. See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (concluding that there is no fundamental right to engage in “homosexual sodomy”).

3. See Jennifer Loftus, *American Liberalization in Attitudes Toward Homosexuality: 1973-1998*, 66 AM. SOC. REV. 762, 778 (2001) (suggesting that the question of the morality of homosexuality turns not on the minority status of gays and lesbians but rather on gay sexuality, thus implicating Americans’ adverse and puritanical ideas about sexual behavior).

4. See Scott S. Greenberger, *One Year Later, Nation Divided on Gay Marriage*, BOSTON GLOBE, May 15, 2005, at A1 (describing how public attitudes towards gay marriage vary according to region and age).

5. See *id.*

6. See *id.* (reporting that only thirty-nine percent of respondents between the ages of eighteen and twenty-four disapprove of gay marriage, as compared to sixty-four percent of respondents over the age of sixty-five that do not support gay

therefore possible that many of these issues will become moot, as younger American voters and policy makers replace their older counterparts over the next few decades. The inevitability of this dynamic is reflected in the Globe study results, which revealed that “[w]hatever their views on gay marriage, most respondents predicted that some or all states would end up legalizing it.”⁷

Shortly after deciding *Lawrence*, the Massachusetts Supreme Court ruled, in *Goodridge v. Department of Public Health*, that Massachusetts state law prohibiting gay marriage was unconstitutional under Massachusetts law.⁸ Noting that marriage is “an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition,”⁹ the court concluded that state law preventing gays from marrying “is incompatible with the [state’s] constitutional principles of respect for individual autonomy and equality under law.”¹⁰ “This is a momentous legal and cultural milestone,”¹¹ said the plaintiff’s lawyer, Mary L. Bonauto of the Gay and Lesbian Advocates and Defenders (“GLAD”), the public interest law group that represented the plaintiffs in the case. “The law caught up with the reality that gay people and their families are part of the fabric of our communities. At long last, gay and lesbian families and their children will finally be equal families in the Commonwealth. This will make a huge difference in people’s lives.”¹²

Soon after the *Goodridge* ruling, New Jersey passed a same sex domestic partnership law in 2004,¹³ and Connecticut passed a law in 2005 favoring same sex civil unions.¹⁴ Several other states now have domestic partnership laws that give limited rights to gay couples.¹⁵

marriage).

7. See *id.* (stating that ninety-one percent of those who support gay marriage believe that the impetus to allow homosexuals to marry will spread to other states, while sixty-three percent of opponents agree that this impetus will spread).

8. 798 N.E.2d 941, 958 (2003) (relying on *Lawrence* to support the conclusion that denying civil marriage violates basic principles of equality and autonomy).

9. *Id.* at 322.

10. *Id.* at 313.

11. Glad.org, Gay and Lesbian Families Win Marriage Case Before Massachusetts Supreme Judicial Court, Nov. 18, 2004, http://www.glad.org/News_Room/press63-11-18-03.shtml.

12. *Id.*

13. See N.J. STAT. ANN. § 26:8A-2 (West 2004) (stating that all persons in domestic partnerships, regardless of their sex, should have access to the same rights and benefits under New Jersey law).

14. See S. 963, 2005 Leg. §§ 1-3 (Ct. 2005) (stating that persons of the same sex are eligible to enter into a civil union).

15. See HRC.org, Marriage/Relationship Laws: State by State, <http://hrc.org/Template.cfm?Section=Center&CONTENTID=20716&TEMPLATE=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66> (last visited Mar. 22, 2006) [hereinafter Marriage/Relationship Laws: State by State] (listing state provisions regarding

A large number of people who label themselves as religious and politically conservative are not happy with the above developments.¹⁶ For these individuals, gay marriage represents the ever increasing demise of traditional family and religious values.¹⁷ Supreme Court Justice Antonin Scalia sympathizes with this view in his dissenting opinion in *Lawrence*.¹⁸ He said that

[m]any 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.¹⁹

Justice Scalia also warned that the decision could ultimately lead to the Supreme Court's endorsement of gay marriage nationwide, and he observed that "[t]oday's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."²⁰

Embracing Scalia's warning, conservative activists and politicians continue their efforts to pass laws that enable states opposed to gay marriage to refuse to recognize those marriages when they are officiated in other states, and to prevent gays from marrying within their own borders.²¹ There are forty states that have passed such laws, by adopting statutory (usually referred to as of Defense of Marriage Acts or "DOMAs") or constitutional provisions to this effect.²² As of this writing, eighteen states passed constitutional amendments banning same sex marriage, and several others hope to have similar provisions under consideration in the upcoming election year.²³ A

relationship recognition for same sex couples).

16. See Greenberger, *supra* note 4, at A1 (discussing the Boston Globe's survey results, which showed that "Americans older than [sixty-five], Republicans, Protestants, regular churchgoers, and Southerners" tend to oppose gay marriage).

17. See *id.* at A1 (quoting a survey participant stating that gay marriage confuses children and "lowers our moral values because it's against the Bible").

18. See *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (comparing homosexuality to other illegal and immoral practices such as bigamy, incest and prostitution).

19. *Id.* at 602.

20. *Id.* at 604.

21. See Steve LeBlanc, *One Year on, Massachusetts' Gay Marriage Ruling Fuels Passions*, ASSOCIATED PRESS, May 14, 2005 (explaining that many states do not want to permit same sex marriage).

22. See *Marriage/Relationship Laws: State by State*, *supra* note 15 (describing various state bans on the recognition of marriages between same sex couples).

23. See LeBlanc, *supra* note 21 (summarizing that, while in the past year only one state, Connecticut, enacted a law legalizing same sex civil unions, Alabama, South Dakota, and Tennessee are to enact bans on same sex unions next year and almost a

federal DOMA was passed in 1996, and bills calling for a U.S. constitutional amendment banning same sex marriage were introduced in the U.S. Senate and House of Representatives in 2003 and again in 2005.²⁴

Despite the legislative backlash against gay marriage and Justice Scalia's misgivings about the *Lawrence* decision, the Supreme Court's rulings in *Lawrence* and in earlier cases concerning due process and equal protection under the law make it clear that the right to same sex marriage is clearly protected by the U.S. Constitution. Whether or not the Court will adhere to this view, however, is directly related to two momentous changes that took place on the Court in 2005 and early 2006. First, Supreme Court Justice Sandra Day O'Connor announced in the Summer of 2005 that she would be retiring from the bench after twenty-four years of service.²⁵ Second, before the U.S. Senate approved Justice O'Connor's replacement, Chief Justice William Rehnquist succumbed to a protracted battle with thyroid cancer, ending a thirty-three year term on the Court.²⁶ The Senate voted to replace Rehnquist with Bush nominee and federal appeals court judge John Roberts in the fall of 2005. It then approved Bush nominee and federal appeals court judge Samuel Alito to replace Justice O'Connor in January of 2006.²⁷

Chief Justice Rehnquist was no friend to gay rights advocates. He voted on countless occasions to ignore the rights of gays to enjoy equal protection under the law.²⁸ Justice O'Connor's stance on gay rights issues is a bit more complex. Although she concurred with the majority opinion's decision to strike down state anti-sodomy laws in *Lawrence*, a close reading of her reasoning in *Lawrence* leads me to believe that it is not clear that she would have endorsed a pro-gay

dozen other states are considering following suit).

24. See HRC.org, Marriage Protection Amendment, http://www.hrc.org/Template.cfm?Section=Federal_Constitutional_Marriage_Amendment (last visited Mar. 22, 2006) [hereinafter Marriage Protection Amendment] (discussing the failure of the proposed federal marriage amendment in both the House and the Senate).

25. See Evan Thomas & Stuart Taylor Jr., *Queen of the Center*, NEWSWEEK, July 11, 2005, at 24-25 (assessing Justice O'Connor's legacy on the Supreme Court and examining the importance of her influence as the 'swing vote' in many close decisions).

26. See Charles Lane, *Chief Justice Dies at Age 80*, WASH. POST, Sept. 4, 2005, at A1 (noting that the Senate was preparing for hearings on John Roberts, who, at the time of the Chief Justice's death, was President Bush's nominee to replace Sandra Day O'Connor as an associate justice on the U.S. Supreme Court).

27. Charles Babington, *Alito Is Sworn in on High Court; Senators Confirm Conservative Judge Largely on Party Lines*, WASH. POST, Feb. 1, 2006, at A1.

28. See *infra* notes 312-319 and accompanying text (discussing former Chief Justice Rehnquist's conservative leanings on such issues as affirmative action, abortion, and anti-sodomy laws).

marriage decision had she decided to stay on the Court.²⁹ Will Rehnquist and O'Connor's replacements follow in their footsteps? While Justice Roberts' and Justice Alito's views on gay marriage have been the subject of much speculation,³⁰ it is my hope that the new justices will, along with their other colleagues on the Court, keep an open mind and follow the lead of Canada and the European Community, where attitudes about gay life and gay marriage are much more inclusive and open-minded, and where sweeping legislative and judicial reforms favoring gay rights have been underway for the past several years.³¹ Gay marriage is legal in the Netherlands, Belgium, seven of the ten Canadian provinces, and most recently in Spain.³² In addition, same sex civil unions have recently become legal in the United Kingdom.³³ Dismantling laws and policies in the U.S. that hinder movement in a similar direction is long overdue.

Part I of this Article will explore why gay marriage has become such a contentious issue in the United States, by first examining why some people in the gay rights movement believe that full equality cannot be achieved unless gay couples have the right to marry.³⁴ Part I will also explore debates taking place within the gay community itself about the merits of making marriage the prime focus of political activism, when it could be argued that there are other, more pressing social justice issues that deserve attention, like the fight for economic equality for all people, regardless of their marital status. Finally, Part I will look at the views of conservative activists and politicians who hope to successfully pass DOMAs in all fifty states and the District of Columbia, as well as a federal constitutional amendment banning gay marriage.

Part II will cover the three court cases upon which the current

29. See *infra* notes 320-326 and accompanying text (asserting that Justice O'Connor has not taken a consistent position on gay rights and adding that it is impossible to predict how she would rule in a gay marriage case).

30. See *infra* notes 327-332 and accompanying text (theorizing that while Chief Justice John Roberts may have a more open attitude towards gay rights than former Chief Justice Rehnquist, Roberts' opposition to decisions such as *Roe v. Wade* could undermine fundamental rights important to the gay and lesbian community).

31. See Michael Foust, *On Views on Homosexuality, U.S. Differs From Canada, Britain*, BAPTIST PRESS, May 27, 2005, <http://www.bpnews.net/bpnews.asp?ID=20871> (citing a poll showing that the majority of citizens in Canada and Great Britain say that homosexuality is "morally acceptable" and favor gay marriage while a majority of Americans believe that homosexuality is "morally wrong" and oppose gay marriage).

32. See *id.* (stating that the governing party in Canada is pushing a bill that would legalize same sex marriages across the country).

33. See *id.* (explaining that Great Britain's law granting gay and lesbian couples all the benefits of marriage take effect in late 2005).

34. See *infra* Part I.A (including a discussion of historical and contemporary definitions of marriage and an examination of why some heterosexual and gay people choose to marry).

Supreme Court will most probably rely when it next considers a gay marriage claim. Those cases are the 1967 decision, *Loving v. Virginia*,³⁵ in which the Court struck down laws criminalizing interracial marriage, the 1996 case, *Romer v. Evans*,³⁶ where the Court ruled that states could not enact laws that attempt to permanently exclude gays from being able to participate in the political process, and the *Lawrence* case mentioned above.³⁷ In each of these decisions, the justices relied on the Fourteenth Amendment of the U.S. Constitution to support their rulings.³⁸

Part III will examine how courts have interpreted the Full Faith and Credit Clause of the Constitution,³⁹ which, along with the Fourteenth Amendment, is the other part of the Constitution most relevant to the gay marriage debate. The Full Faith and Credit Clause requires each state to honor the public acts and records of other states.⁴⁰ Gay rights advocates believe that gay couples who marry in places like Massachusetts should be able to get full recognition for their marriages if they end up moving to other states, even if those states have passed DOMAs.⁴¹ Those who support DOMAs think the contrary, and hope that courts will apply jurisprudence that allows states to ignore the public acts of other states in certain limited instances.⁴²

The last section will consist of my conclusions. I will look at the legacies of Justice Rehnquist and Justice O'Connor with respect to gay

35. 388 U.S. 1, 11-12 (1967) (holding that a Virginia law prohibiting interracial couples from marrying was unconstitutional because it denied individuals the fundamental right to marry and violated the Equal Protection Clause of the Fourteenth Amendment).

36. 517 U.S. 620, 636 (1996) (striking down a state constitutional amendment that prohibited any pro-gay anti-discrimination legislation).

37. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that personal decisions made about sexual relationships are a liberty interest protected under the Due Process Clause).

38. See *infra* Part II.B-C (explaining how the Supreme Court's application of the Fourteenth Amendment in cases not related to race has laid the ground for constitutional challenges to anti-gay legislation).

39. See U.S. CONST. art. IV, § 1 (stating that each state must give 'full faith and credit' to the laws of other states).

40. See *id.* ("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.")

41. See, e.g., Steve Sanders, Op-Ed., *Full Faith for Judgments*, NAT'L L. J., Feb. 21, 2005, at A27 (arguing that a state's refusal to recognize same sex marriages from another state will have the consequence of arbitrarily depriving gays and lesbians of property merely on account of their sexuality).

42. See *id.* (describing how the federal DOMA permits states to refuse to honor other state statutes and judgments regarding same sex marriage that are contrary to their policies).

rights issues, discuss how Chief Justice Roberts and Justice Samuel Alito might rule on these topics, and also predict that, barring the virtually impossible chance that legislators will amend the U.S. Constitution, there is a strong chance that the new Supreme Court will rule that gay marriage is worthy of constitutional protection.⁴³

I. *Gay Marriage and the Current Political Climate*

A. *What Is Marriage?*

1. *Civil v. Religious Marriage*

Before launching into a discussion of gay marriage and the current political climate surrounding it, the terms “marriage,” “gay marriage,” “civil unions,” and “domestic partnerships” should be defined. The 2005 online version of the *American Heritage College Dictionary* defines marriage as “[t]he legal union of a man and woman as husband and wife A union between two persons having the customary but usually not the legal force of marriage: a *same sex marriage* A close union.”⁴⁴ A 1993 hard copy edition of the same dictionary only refers to opposite sex couples, and sidesteps the question of same sex marriage altogether.⁴⁵ It defines marriage as “the legal union of a man and a woman as husband and wife.”⁴⁶ While the newer, more inclusive definition of marriage is devoid of the kind of politically polarizing commentary that can be found in the press and on most talk radio today, it reflects a monumental cultural shift in both language use and attitudes over the last two decades. Gay marriage, at least according to this leading chronicler of cultural phenomenon, now stands right next to heterosexual marriage as an alternative form of matrimony. Those religious and political conservatives who are opposed to gay marriage would probably beg to differ.

Indeed, it is important to note that neither of the above two definitions refers to the kind of marriage or union that would be performed as part of a religious ceremony. Both refer to *legal* unions with the implication being that marriage is grounded in civil, not natural law. Support for this perspective can be found in the

43. See *infra* Conclusion.

44. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), available at <http://education.yahoo.com/reference/dictionary/entry/marriage>.

45. See AMERICAN HERITAGE COLLEGE DICTIONARY 832 (3d ed. 1993) (omitting same sex marriage from the definition of marriage but including a definition of marriage as “a close union”).

46. *Id.*

Goodridge v. Department of Public Health decision rendered in Massachusetts two years ago:

Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution. No religious ceremony has ever been required to validate a Massachusetts marriage. In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State.⁴⁷

The view that the rules for marriage should be based solely on civil law, however, is the subject of much legal, political, and social debate. For many Americans, for instance, the views of the Vatican have much greater currency than the views of the Massachusetts Supreme Court. In a set of guidelines issued the same year that the *Goodridge* case was decided, the Vatican said that “[m]arriage exists solely between a man and woman Marriage is holy, while homosexual acts go against the natural moral law.”⁴⁸ The Vatican also urged Roman Catholic legislators “to vote against bills legalizing gay marriage, and where they already exist, work towards repealing them.”⁴⁹

2. *The Legal and Financial Benefits of Marriage*

There are numerous benefits that married couples, as opposed to non-married people, enjoy. For instance, in Massachusetts, which is currently the only state in the country that allows gays to marry,⁵⁰ each member of a married couple enjoys such benefits as the following: ability to file jointly on their state tax returns; participate in a tenancy by the entirety, in which the surviving spouse automatically inherits the deceased spouse’s property unless the deceased spouse had a will that said otherwise; and take advantage of the homestead protection, in which the couple’s home is protected from creditors in the event that one spouse dies.⁵¹

47. See 798 N.E.2d 941, 954 (2003) (citing *Commonwealth v. Munson*, 127 Mass. 459, 460-466 (1879)) (noting that “in Massachusetts, from very early times, the requisites of a valid marriage have been regulated by statutes of the Colony, Province, and Commonwealth,” and surveying marriage statutes from 1639 through 1834).

48. *Vatican Fights Gay Marriage*, CNN.COM, July 31, 2003, <http://www.cnn.com/2003/WORLD/Europe/07/31/Vatican.gay.marriages/index.html>.

49. *Id.*

50. See *Marriage/Relationship Laws: State by State*, *supra* note 15 (noting that Massachusetts began issuing marriage licenses to same sex couples on May 17, 2004).

51. See *Goodridge*, 798 N.E.2d at 955-57 (indicating that other benefits accruing to married couples include the following: the ability to acquire wages owed to a deceased spouse by the deceased spouse’s employer, continue operating the businesses of a deceased spouse; participate in the medical plan of a spouse who is a state employee; receive monetary compensation for the loss of a spouse who worked as a fire fighter or police officer killed in the line of duty; have an equitable division of marital property pursuant to a divorce; sue for a spouse’s wrongful death or loss of consortium in a tort action; receive compensation for funeral expenses and punitive

Although the demarcation between domestic partnerships and civil unions is sometimes unclear, domestic partnerships tend to fall into two categories: 1) same sex couples whose relationship is acknowledged by the state or municipality in which they live, or 2) same sex couples who assert that they are in a committed relationship in order to get the same work-related benefits that are available to heterosexual married employees or to apply for the equivalent of common law marital rights in certain kinds of legal disputes.⁵² With respect to the former, gay couples have to register with the state or municipality in which they live.⁵³ Registration usually does not give couples additional rights or benefits, but it does amount to a public recognition of their relationship.⁵⁴ With respect to the latter, the assertion can take the form of an affidavit or other writing in which the couple in question state that they share living expenses and intend to be in a committed, long term relationship.⁵⁵

Furthermore, substantive proof supporting the aforementioned assertions should also be supplied in legal disputes. For instance, in the 1989 New York case, *Braschi v. Stahl Associates Co.*,⁵⁶ the court determined that the plaintiff was entitled to stay in the apartment of his deceased same sex partner because the governing New York Rent and Eviction Regulation allows members of a tenant's "family" to do so.⁵⁷ The court came to this conclusion after reviewing evidence that the couple had a been in a long term committed relationship in which they shared a household budget, a joint checking account and

damages arising from tort actions; know that any children born to the couple will be entitled to a presumption of legitimacy and parentage under state law; and make health care decisions on behalf of the other spouse in the event that that spouse becomes physically or mentally incapacitated).

52. See David L. Chambers, *Couples: Marriage, Civil Union, and Domestic Partnership*, in JOHN D. D'EMILIO ET AL., *CREATING CHANGE: SEXUALITY, PUBLIC POLICY AND CIVIL RIGHTS* 281, 299 (2000) (observing that while public registration for same sex couples is merely symbolic, and at its purest form does not convey any benefits onto couples, public and private employers can independently choose to provide the same benefits for married couples and domestic partners).

53. See *id.* at 299 (relating that in 1982, San Francisco became the first city to permit unmarried same sex couples to register as domestic partners).

54. See *id.* (suggesting that public registration conveys the message that same sex or unmarried-couple relationships are as worthy of public recognition as are traditional marriage partnerships).

55. See, e.g., N.J. STAT. ANN., § 26:8A-2 (West 2004) (stating that, in order to establish a domestic partnership, two non-related persons must demonstrate that they have entered into a relationship of mutual caring and are jointly responsible for each other's common welfare).

56. 543 N.E.2d 49 (N.Y. 1989).

57. See *id.* at 55 (concluding that, when the legislature used the term "family" in a rent regulation, it intended to protect all tenants residing in households with the characteristics of a normal family).

three safe deposit boxes, among other things.⁵⁸

As of this writing, California, the District of Columbia, Hawaii, Maine and New Jersey all have some form of domestic partnership laws.⁵⁹ New Jersey's 2004 domestic partnership law allows the state's gay couples to file jointly on their state tax returns and have hospital visitation rights, and the law requires insurance companies to make domestic partner benefits available to state government workers.⁶⁰ Some municipalities, like San Francisco, also provide some combination of registration and domestic partner benefits to gay government workers.⁶¹

Vermont (in 2000) and Connecticut (in 2005) are the only two states to allow civil unions.⁶² Civil unions are state sanctioned relationships that usually grant all the benefits of marriage, without calling it marriage.⁶³ For instance, the new Connecticut law gives same sex couples "all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage,"⁶⁴ but defines marriage as "applying only to one man and one woman."⁶⁵

58. *See id.* (applying an objective test and concluding that the same sex partner of a deceased tenant fell under a regulation's definition of family member and therefore was entitled to protection from eviction).

59. *See* Marriage/Relationship Laws: State by State, *supra* note 15 (explaining that these states allow limited rights to same sex couples but do not necessarily provide the same federal protections extended to heterosexual married couples).

60. *See* § 26:8A-2 (describing the receipt of these rights and benefits as integral to the success and enjoyment of a domestic partnership); HRC.org, New Jersey Marriage/Relationship Recognition Law, http://www.hrc.org/Template.cfm?Section=Federal_Marriage_Amendment1&CONTENTID=21663&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Mar. 22, 2006) [hereinafter New Jersey Marriage/Relationship Recognition Law] (explaining that New Jersey requires insurance companies to provide coverage for a domestic partner, and while domestic partners of state employees are entitled to insurance benefits, private employers can decide whether or not to offer benefits to employees' same sex partners).

61. *See* Chambers, *supra* note 52, at 301 (remarking that San Francisco provides greater registration and partner benefits than most other cities, requiring employers who contract with the city to provide benefits to their employees' partners).

62. *See* VT. STAT. ANN. tit. 15, § 1201 *et seq.* (West 2003) (indicating that any two eligible persons may establish a civil union while marriage is reserved for eligible heterosexual couples); S. 963, 2005 Leg. (Ct. 2005) (stating that two persons entering into a civil union may be of the same sex); *see also* Paul Carrier, *House Soundly Rejects Amendment*, PORTLAND PRESS HERALD, June 8, 2005, at A1 (relating that Maine's House of Representatives rejected a proposed amendment to the state constitution that would prohibit same sex marriages and civil unions).

63. Brad Knickerbocker, *Tug of War Intensifies on Gay-Marriage Issue*, CHRISTIAN SCI. MONITOR, May 5, 2005, at 2 (noting that many elected officials, conscious of a growing "pro-marriage" movement, are careful to define marriage as limited to a man and a woman when enacting statutes approving civil unions between same sex couples in an effort to distinguish the two).

64. S. 963 § 14.

65. *Id.*

It is important to note that no gay couple married in Massachusetts or in a civil union or a domestic partnership authorized in the above listed states is able to enjoy certain federal protections that are available to all American married heterosexual couples.⁶⁶ Such protections include the right to take advantage of federal family leave laws when one partner is ill, the right to receive the federal social security benefits of a deceased partner, and the right to take advantage of federal income tax benefits for married couples filing jointly on their tax returns.⁶⁷ With respect to the latter, “federal tax laws require unmarried employees to report as taxable income the value of health coverage provided to their partners but permit married employees to exclude it.”⁶⁸

B. Debates in the Gay Community About the Pros and Cons of Gay Marriage

It is possible for unmarried gay couples to secure some of the concrete marital benefits discussed in the *Goodridge* decision, like hospital visitation and inheritance rights, as well as the equitable distribution of post-divorce property, without getting married. They would need to hire an attorney to do so, however, and this can be a financially costly process.⁶⁹ It is therefore easy to understand why many gay couples would opt to marry when given the chance,⁷⁰ and

66. See Marriage/Relationship Laws: State by State, *supra* note 15 (noting that under Vermont law, couples in civil unions have the same rights and responsibilities as married couples on the State level, but have no such rights on the Federal level).

67. See HRC.org, Top [Ten] Reasons for Marriage Equality, <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=14392&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Mar. 22, 2006) [hereinafter Top Ten Reasons for Marriage Equality] (commenting that the children of same sex parents are also precluded from establishing a legal relationship to both parents under federal law and are unable to receive important federal protections, such as Social Security survivor benefits).

68. See Chambers, *supra* note 52, at 302 (exploring the fact that benefits for same sex couples under the federal tax statutes may not be as extensive as commentators think and adding that few gay or lesbian employees avail themselves of partner benefits when they are offered by employers); see also, Kay Lazar, *Double Trouble on Taxes for Gays Newly Married Facing Two Sets of Filing Rules*, BOSTON GLOBE, Dec. 30, 2004, at 1 (describing how same sex married couples in Massachusetts, unlike heterosexual couples, must file their yearly income tax forms twice: they must file as single on their federal tax forms because the federal government does not recognize same sex marriage, and they must file as couple on their state tax forms because Massachusetts requires married couples to file jointly).

69. See Top Ten Reasons for Marriage Equality, *supra* note 67 (explaining that while some rights are available through costly legal proceedings, same sex couples have no way to access some benefits accorded to heterosexual couples).

70. See Karen Lee Ziner, *Same-Sex Marriage: One Year Later—Nothing Less Than Love*, PROVIDENCE J. BULL., May 15, 2005, at B-01 (relating the story of two women and their daughter who were able to become a legally recognized family after Massachusetts legalized gay marriage, and they were thus able to obtain basic state legal protections for their daughter).

see domestic partnerships and civil unions as “separate but equal” half measures on the way to fully legalizing same-sex marriage.”⁷¹ But perhaps the most important reason that gay couples prefer same sex marriage is the symbolic societal recognition that married couples enjoy as they embark on what they hope will be a journey of mutual emotional and financial interdependence.

Explaining why he sued the state of Minnesota in 1970 for refusing to grant him and his partner a marriage license, gay rights pioneer Michael McConnell said, “I sincerely believe that my love for Jack is as valid and deep as any heterosexual love, and I think it should be recognized—I demand that it be recognized!—by the state and society.”⁷² McConnell and his partner, Jack Baker, were the first openly gay couple to bring a lawsuit against their state when the city clerk in their Minnesota town rejected their request for a marriage license in 1970.⁷³ The Minnesota Supreme Court rejected their claims, however, on the grounds that “marriage uniquely involves procreation and the rearing of children.”⁷⁴ In addition to losing the suit, McConnell lost a job that the University of Minnesota had promised him because of the heightened public attention he received as a result of the lawsuit.⁷⁵ He also lost the lawsuit he brought against the university for refusing to hire him.⁷⁶ The court ruled that McConnell had no legally protected right to “foist tacit approval of this socially repugnant concept upon his employer.”⁷⁷

Similar legal challenges to state marriage laws were made in the 1970s by several other gay men and lesbians hoping to get their

71. Knickerbocker, *supra* note 63.

72. Chambers, *supra* note 52, at 283-284 (citing KAY TOBIN & RANDY WICKER, *THE GAY CRUSADERS* 144 (1975)).

73. *See id.* at 283-285 (recounting how McConnell, a young gay rights activist, invited the press to come with him and his partner when they went to apply for a marriage license and, as a result, garnered national attention and likely brought the concept of legal same sex marriage to the attention of many members of the gay community for the first time).

74. *Id.* at 284 (stating that Minnesota’s marriage statute did not permit same sex marriages and finding that a prohibition on same sex marriage did not violate McConnell’s Due Process or Equal Protection rights); *see also* Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (holding that limiting marriage to heterosexual couples is not irrational or discriminatory because of the deeply founded concept of marriage as a union between a man and a woman involving the bearing and rearing of children).

75. *See* Chambers, *supra* note 52, at 286 (stating that McConnell filed a suit to get his job as a librarian back but lost in federal court after a judge found that McConnell had publicly flaunted his homosexuality and his employer was not required to tolerate such behavior).

76. *See id.* (concluding that seeking a marriage license is not constitutionally protected behavior).

77. *Id.* (citing McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972)).

respective states to let them marry.⁷⁸ All of them were unsuccessful.⁷⁹ While the 1980s and 1990s produced some temporary successes in court, they too ultimately failed.⁸⁰ For instance, several years after the Hawaii Supreme Court ruled in 1993 that Hawaii's attempts to prevent gays from marrying violated the state constitution's equal protection clause,⁸¹ the Hawaii legislature passed a state constitutional amendment banning same sex marriage in 1998.⁸² In that same year, the Alaskan state legislature amended its constitution to limit marriage to heterosexual couples in response to a judicial ruling that such limitations were an illegal form of sex discrimination.⁸³ The legal and constitutional issues to which suits like this gave rise will be discussed in greater depth in Parts III and IV.

Despite the setbacks of the 1970s, '80s and '90s, the desire on the part of certain members of the gay community to marry has not diminished.⁸⁴ If anything, that desire has become even stronger.⁸⁵ Witness the fact that over 6000 gay couples registered to marry in Massachusetts in the months immediately following the *Goodridge* decision,⁸⁶ and 3,200 couples applied for marriage licenses in the city

78. See *id.* at 288 (discussing similar suits brought by Tracy Knight and Margery Jones).

79. See *id.* (noting that courts still cite these early decisions as legal precedent and concluding that the only benefit from these early challenges came from news articles that depicted gays in a positive manner and increased public awareness of gay couples' demands for recognition).

80. See *id.* (observing that while greater numbers of gays and lesbians were demanding state recognition of their relationship, many groups were reluctant to pursue legal challenges after the Supreme Court's decision in *Bowers v. Hardwick* in 1986, which many felt was dismissive of gay and lesbian rights).

81. See *Baehr v. Levin*, 852 P.2d 44, 67-68 (Haw. 1993) (holding that, while there is no fundamental right to same sex marriage under the Hawaii Constitution, Hawaii's marriage laws violate the constitutional right to equal protection by discriminating against citizens who wish to marry on the basis of sex).

82. See HRC.org, History of Legal Challenges, <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=15328&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Mar. 22, 2006) [hereinafter History of Legal Challenges] (recounting that in December 1998, after considerable lobbying by conservative political groups that opposed gay marriage, Hawaiian citizens voted to amend the state constitution to restrict marriage to heterosexual couples).

83. See *id.* (noting that a court decision finding that denial of same sex marriage was sex discrimination provided the impetus for gay marriage opponents who placed intense political pressure on the legislators to propose the amendment).

84. See Gay and Lesbian Families Win Marriage Case Before Massachusetts Supreme Judicial Court, *supra* note 11 (stating that granting gay couples the right to marry shows that the law is beginning to catch up with the fact that gay people and families are becoming a "part of the fabric of our communities").

85. Cf. Greenberger, *supra* note 4 (suggesting that the gay rights movement is gaining support as the older generations, who are more likely to oppose gay marriage, pass away).

86. See LeBlanc, *supra* note 21 (positing that Massachusetts could remain the only state allowing gay marriage for many years because of the intense debate it spurred in the rest of the country).

of San Francisco just after the mayor, in an act of social protest, announced that he would begin issuing marriage licenses to gay couples in contravention of California state law in February of 2004.⁸⁷ Commenting on why so many people believe that gay marriage is a goal worth fighting for, Thomas Stoddard says:

Marriage is much more than a relationship sanctioned by law. It is the centerpiece of our entire social structure, the core of the traditional notion of “family.” Even in its present tarnished state, the marital relationship inspires sentiments suggesting that it is something almost superhuman

. . . Lesbian and gay men are now denied entry to this “noble” and “sacred” institution. The implicit message is. . . [that] [g]ay relationships are somehow less significant, less valuable.⁸⁸

The Human Rights Campaign (“HRC”), one of the largest gay rights advocacy groups in the country, echoes Stoddard’s views.⁸⁹ In a page on their website called “Top 10 Reasons for Marriage Equality,” the campaign says:

Gay, lesbian, bisexual and transgender people grow up dreaming of falling in love, getting married and growing old together. Just as much as the next person, same-sex couples should be able to fulfill that dream. We know from anecdotal evidence that after same-sex couples have a commitment ceremony, their friends and family treat them differently—as a married couple. Shouldn’t they, too, have the legal security that goes along with that?⁹⁰

While the HRC and other pro-marriage advocacy groups like the Gay and Lesbian Advocates and Defenders (“GLAD”) have been very successful making their case in the media and in the courts in recent years, other competing voices in the gay community have not been as successful.⁹¹ For instance, there are many gay rights advocates who believe that the push for same sex marriage is a misguided attempt by certain members of the gay community to assimilate into mainstream

87. See Mary Leonard-Ramshaw, *Mayor Vows to Continue Same-sex Marriage Licenses Assails Bush, Sees ‘Shameful’ Political Bid*, BOSTON GLOBE, Feb. 25, 2004, at B7 (recognizing that Mayor Gavin Newsom faced criticism for issuing the marriage licenses from those opposed to gay marriage and those who supported it and felt that Newsom’s action undermined legal efforts to promote gay marriage).

88. Thomas B. Stoddard, *Why Gay People Should Seek The Right To Marry*, OUT/LOOK 8-12 (1989), reprinted in WILLIAM N. ESKRIDGE & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW 819 (1997).

89. See Top Ten Reasons for Marriage Equality, *supra* note 67 (noting that allowing same sex marriage would both move civil rights forward and help to remedy the inequities of the past).

90. *Id.*

91. See, e.g., Leonard-Ramshaw, *supra* note 87, at B7 (discussing the backlash from the San Francisco mayor’s decision to issue marriage licenses to same sex couples without legislative approval, which some gay activists felt bolstered efforts to pass anti-gay marriage amendments in other states).

heterosexual culture at a time when what is really needed is a challenge to that culture.⁹² People in this camp often come from the civil, women's and gay rights movements of the 1960s and '70s, a time notorious for the oppressive way in which mainstream America resisted the inclusion of African-Americans, women and gays into all walks of American life.⁹³ Those who hold this view might point to the fact that historically, traditional marriage and the laws that supported it were "exceptionally harsh toward women who became wives: a woman's legal identity all but evaporated into that of her husband."⁹⁴ As the court in *Goodridge* observed, before slavery ended in Massachusetts, "the condition of a slave resembled the connection of a wife with her husband, and of infant children with their father. He [was] obliged to maintain them, and they [could not] be separated from him."⁹⁵

Understandably suspicious of anything that was connected to government, patriarchy, racism or capitalism, these activists advocated for "sexual liberation and radical social change."⁹⁶ As Paula L. Ettelbrick says:

[M]aking legal marriage for lesbian and gay couples a priority would set an agenda of gaining rights for a few, but would do nothing to correct power imbalances between those who are married . . . and those who are not. Thus, justice would not be gained.

. . . Those who are more acceptable to the mainstream because of race, gender, and economic status are more likely to want the right to marry.

. . . [W]hat good is the affirmation of our [marital] relationships. . . if we are rejected as women, people of color,

92. See Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK 8-12 (1989), reprinted in WILLIAM N. ESKRIDGE & NAN D. HUNTER, *SEXUALITY, GENDER AND THE LAW* 817-18 (1997) (arguing that the campaign to legalize gay marriage undermines the purpose of the gay rights movements by forcing the assimilation of gays into heterosexual society while justice for gay men and lesbians can only be achieved by forcing society to accept them despite their differences).

93. See CHRIS BULL & JOHN GALLAGHER, *PERFECT ENEMIES: THE BATTLE BETWEEN THE RELIGIOUS RIGHT AND THE GAY MOVEMENT* 9 (Madison Books 2001) (1996) (noting that the early gay rights activists were strongly encouraged by the increased awareness produced by the actions of other minorities, and saw an opportunity to change class awareness for all disenfranchised groups).

94. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003) (citing C.P. KINDREGAN, JR., & M.L. INKER, *FAMILY LAW AND PRACTICE* §§ 1.9-1.10 (3d ed. 2002)).

95. *Id.* at 967 (quoting *Winchendon v. Hatfield*, 4 Mass. 123, 129 (1808)).

96. See BULL & GALLAGHER, *supra* note 93, at 201 (noting that during the early decades the gay rights movement was dominated by a few left-wing activists, but grew to include more diverse viewpoints as the movement mirrored AIDS consciousness and the conservative atmosphere of the 1980s and 1990s).

or working class?⁹⁷

Or as Laura Kiritsy puts it, “[t]he unfortunate reality is that many GLBT ethnic and racial minorities, like their heterosexual peers, are more consumed with finding decent jobs, adequate housing, meeting basic healthcare needs and dealing with immigration issues than with planning a wedding reception.”⁹⁸

For people like Ettelbrick and Kiritsy, radical social change needs to involve not simply dispensing marital benefits to yet another small and privileged segment of society—same sex couples in long term, monogamous relationships—but also recognizing “the relationships that citizens view as significant to themselves, relationships that might include more than two intimately involved persons and relationships that have no sexual component.”⁹⁹ If this model were followed, for example, an eighty year old heterosexual man living with his ninety year old heterosexual male friend might be able to get access to the equivalent of the friend’s health insurance and social security spousal death benefits if the friend had listed him as a designated beneficiary.¹⁰⁰ Married people would therefore no longer be singled out for special treatment, and the economic playing ground for people in all kinds of significant relationships who are economically needy, as well as single people, would be drastically leveled.¹⁰¹

I tend to agree that the institution of marriage draws an arbitrary circle around people who are deemed more deserving than others of certain kinds of rights and privileges that should really be available to everyone, not just married people. Marriage is a package deal, a cluster of rights and responsibilities that immediately come into existence the moment wedlock occurs.¹⁰² It would be far more equitable to allow any two or more people who choose to disassemble that package and negotiate a contract that distributes these rights and

97. Ettelbrick, *supra* note 92, at 817-18.

98. Laura Kiritsy, *Rainbow Coalition: GLBT Leaders Try to Get People of All Races to Talk Amongst Themselves*, BAY WINDOWS, July 21, 2005, available at <http://www.baywindows.com/media/paper328/news/2005/07/21/News/Rainbow.Coalition-963685.shtml>.

99. Chambers, *supra* note 52, at 300.

100. See, e.g., New Jersey Marriage/Relationship Recognition Law, *supra* note 60 (noting that New Jersey’s domestic partnership law does not require proof of a sexual or romantic relationship and both parties must not be related by blood, so two non-related elderly men of the type just described might be able to become domestic partners in New Jersey).

101. See Top Ten Reasons for Marriage Equality, *supra* note 67 (asserting that only gay marriage will level the playing field for gays as to married heterosexual couples because marriage confers over 1,000 benefits on heterosexual couples).

102. See Stoddard, *supra* note 88, at 819 (surveying both the legal advantages granted to married couples as well as those that arise by custom, such as health benefits from employers, which often extend to spouses).

responsibilities among themselves as they see fit. Many of the package's individual attributes—increased financial security, protection during times of illness, inheritance rights, and even the rights and responsibilities of parents with respect to any children that might be involved—can easily be accommodated contractually.¹⁰³ In fact, traditionally gay couples have had no other choice, and have taken this approach in order to resolve these issues.

The type of thinking just outlined, however, is probably too radical to be popular in today's market driven America. It is also not sufficiently assimilationist in tone or in content for those moderate and liberal heterosexual Americans who might be sympathetic to the argument that gay people are just like everybody else to embrace. Such individuals, as the HRC website quoted above implies, simply wish for the ability to go to work, marry the person they love, and raise a family and worship at the church, temple or the mosque of their choice.¹⁰⁴ The fact that Chief Justice Marshall embraced the assimilationist rhetoric in the *Goodridge* case demonstrates the extent to which it has gained currency in a movement that was once, at least in part, associated with much more radically progressive politics.¹⁰⁵ Marshall noted that the claimants in *Goodridge* included:

business executives, lawyers, an investment banker, educators, therapists, and a computer engineer. Many are active in church, community, and school groups . . . Each plaintiff attests a desire to marry his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children.¹⁰⁶

She continues, "Civil marriage anchors an ordered society by encouraging stable relationships over transient ones,"¹⁰⁷ and by trying to prohibit same sex marriage, the state wrongly "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect."¹⁰⁸

103. *But see id.* (noting the problems with trying to gain these rights through contract, including the expense incurred, the need for competent legal counsel, and the inherent incompleteness of the rights acquired as compared to those gained through marriage).

104. *See Top Ten Reasons for Marriage Equality, supra* note 67 (surveying the myriad of advantages to couples who are married as opposed to unmarried couples, including over 1,049 benefits given to married heterosexual couples by federal law).

105. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003) (holding that granting same sex marriages supports "the modern family in its many variations").

106. *Id.* at 949.

107. *Id.* at 954.

108. *Id.* at 962.

As the above demonstrates, the assimilationist argument appears to be the “cost” of equal protection, or at least some abbreviated form of equal protection. As Nancy Polikoff says, “[d]emands for social change often have begun with a movement at first articulating the rhetoric of radical transformation and then later discarding that rhetoric to make the demands more socially acceptable . . . [by issuing] reassurances promising that such transformation is not what the movement is about at all.”¹⁰⁹ So it is with current demands for gay marriage. Even though I am concerned about the privileging dimensions of marriage, I still think that gay marriage should be legalized, because failure to do so infringes on certain basic individual privacy rights and liberties that the Constitution guarantees.¹¹⁰ Furthermore, perhaps the legal sanctioning of gay marriage will contribute to increased tolerance and approval of other kinds of people who are society disenfranchised, even when those people are not as educated or as well off as the corporate executives, attorneys, and bankers hailed in *Goodridge*.¹¹¹

With respect to the gay rights community, as Chris Bull and John Gallagher observe in their book on the religious right and the gay rights movements, *Perfect Enemies*, the need for increased respect and approval has been steadily building for decades.¹¹² The authors note that “[b]y the . . . 1990s . . . [t]he fierce, long-simmering debate among the community’s intellectual leaders over assimilation—whether gays were just another ethnic group to be absorbed by America’s melting pot or a distinct subculture. . . that desires no part of the larger, corrupt society—sounded increasingly outdated”¹¹³ to those gays who simply wanted acceptance from their families and their communities. Gays therefore want to marry, says David Chambers, “less, it seems, for the legal benefits that might flow from it than for the symbolism of formal equality. The tenacity of the conservatives’ resistance is the measure of [this] need.”¹¹⁴

109. Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535, 1541 (1993).

110. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding a right to marital privacy in the Fourteenth Amendment); *Romer v. Evans*, 517 U.S. 620 (1996) (interpreting the Equal Protection Clause of the Fourteenth Amendment).

111. See 798 N.E.2d at 949 (implying the validity of the plaintiffs’ request for the right to marry by referencing their professional jobs).

112. See BULL & GALLAGHER, *supra* note 93 (tracing the evolution of the battle between the gay rights movement and the religious right from the 1960s through the 1990s).

113. *Id.* at 201.

114. Chambers, *supra* note 52, at 303.

C. THE DEFENSE OF MARRIAGE MOVEMENT

1. Conservative Religious and Secular Objections to Gay Marriage.

As mentioned previously, the 2005 Boston Globe survey indicates that most people who are against gay marriage describe themselves as religious conservatives.¹¹⁵ The objections to gay marriage that are raised by people who self-identify in this manner are very different from the kinds of objections to it made by progressive gay rights activists.¹¹⁶ For instance, Gary Bauer, president of the religious conservative group, American Values, believes that marriage should be limited to unions between men and women.¹¹⁷ According to one journalist, Bauer refers to gay marriage as “‘the new abortion’ . . . a culture-altering change being implemented by judicial fiat.”¹¹⁸ Furthermore, the Southern Baptist Convention, one of the largest conservative Christian denominations in the United States, asserts in its official position statement on sexuality:

We affirm God’s plan for marriage and sexual intimacy—one man, and one woman, for life. Homosexuality is not a “valid alternative lifestyle.” The Bible condemns it as sin. It is not, however, unforgivable sin. The same redemption available to all sinners is available to homosexuals. They, too, may become new creations in Christ.¹¹⁹

In a 2004 speech, President Bush, himself a self-identified Christian conservative, also used religion to justify his opposition to gay marriage by stating that “[t]he union of a man and woman is the most enduring human institution . . . honored and encouraged in all cultures and by every religious faith Marriage cannot be severed from its cultural, religious and natural roots without weakening the

115. See Greenberger, *supra* note 4 (describing those most likely to oppose gay marriage as “older than [sixty-five], Republicans, Protestants, regular churchgoers, and Southerners”).

116. Compare Russell Shorto, *What’s Their Real Problem with Gay Marriage? It’s the Gay Part*, N.Y. TIMES, June 19, 2005, at 34 (asserting that religious conservatives oppose gay marriage because they believe it is against their religion and because they believe marriage is limited to a man and a woman in the Bible), with Polikoff, *supra* note 109, at 1536 (stating that she believes that the gay and lesbian rights movement should not focus on marriage because “the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society”).

117. See Shorto, *supra* note 116, at 34 (noting that Bauer’s views and the views of others opposed to gay marriage “are based on their readings of the Bible, their views about both homosexuality and . . . marriage and the political force behind the issue”).

118. *Id.*

119. Southern Baptist Convention, <http://www.sbc.net/aboutus/pssexuality.asp> (last visited Mar. 22, 2006).

good influence of society.”¹²⁰

Other anti-gay marriage advocates stress the importance of heterosexuality to the rearing of children and the protection of families.¹²¹ As writer Jeff Jacoby argues, “[t]he core of marriage has always and everywhere been the pairing of a man and a woman because no other arrangement can do what marriage does: produce the next generation, bind men to the women who bear their children, and give boys and girls the mothers and fathers they need.”¹²²

What none of the above objections to gay marriage acknowledge, however, is that marriage has long since become unmoored from its heterosexual, pro-procreative origins, origins which for centuries facilitated the subjugation of women to men.¹²³ For instance, in early American history, a “woman’s legal identity all but evaporated into that of her husband.”¹²⁴ As the Court in *Goodridge* observed, “the condition of a slave resembled the connection of a wife with her husband, and of infant children with their father. He [was] . . . obliged to maintain them, and they [could not] . . . be separated from him.”¹²⁵ Since the earlier times noted in *Goodridge*, “[m]arriage has undergone many changes, from Old Testament times when King David had multiple wives and concubines to today’s monogamy, from arranged marriages to romance-based marriages, and from banning to accepting interracial marriages.”¹²⁶ Somewhere along the way, “love conquered marriage . . . [in order to] make marriage more secure by getting rid of the cynicism that accompanied mercenary marriage and encouraging couples to place each other first in their affections and loyalties.”¹²⁷ In addition, it is not unusual to find young heterosexual couples who use birth control because they have

120. *Same-sex Marriage: Bush’s Remarks on Marriage Amendment*, N.Y. TIMES, Feb. 25, 2005, at A18.

121. See Jeff Jacoby, *My Best Wishes*, TOWNHALL.COM, May 23, 2005, <http://www.townhall.com/opinions/columns/jeffjacoby/2005/05/23/15499.html> (stating that even though he opposes gay marriage because it does not conform to the traditional goal of marriage, he still understands the emotional impact of the same sex marriage issue for the gay movement).

122. *Id.*

123. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003) (indicating that civil marriage has evolved as a public institution through the courts and legislature “ameliorat[ing] the harshness of the common-law regime”).

124. *Id.* (citing C.P. KINDREGAN, JR., & M.L. INKER, FAMILY LAW AND PRACTICE §§ 1.9-1.10 (3d ed. 2002)).

125. *Id.* (quoting *Winchendon v. Hatfield*, 4 Mass. 123, 129 (1808)).

126. Joshua Glenn, *Sins of Sodom?*, BOSTON GLOBE, June 5, 2005, available at http://www.boston.com/news/globe/ideas/articles/2005/06/05/sins_of_sodom/ (quoting author David Myers).

127. Ellen Goodman, *Score One for Cupid*, BOSTON GLOBE, May 19, 2005, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2005/05/19/score_one_for_cupid/ (quoting Stephanie Coontz).

decided not to have children, and elderly heterosexual couples, long past their child bearing years, who have decided to marry. Ironically, the defense of marriage movement's growing political influence seems to be in direct proportion to the radical transformation that the institution of marriage has undergone in recent times.

2. *The Rise of DOMAs and the Proposed Constitutional Amendment Banning Gay Marriage*

The first state DOMAs were passed by Alaska and Hawaii, both in 1998.¹²⁸ Today, there are forty states that have state statutes or constitutional amendments banning gay marriage.¹²⁹ In November of 2004 alone, there were eleven states that passed constitutional amendments banning gay marriage.¹³⁰ Eight of those states banned gay civil unions as well.¹³¹ Concerned that they might be required to recognize civil unions or same sex marriages authorized and performed in other states, legislators instituted preventative measures like the one in Nebraska, which says: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same sex relationship shall not be valid or recognized in Nebraska."¹³² The Nebraska law was overturned by a federal district court judge in May of 2005 in *Citizens for Equal Protection v. Bruning*.¹³³ *Bruning* will be discussed in greater depth in the conclusion section of this Article.¹³⁴

In addition to anti-gay marriage initiatives, other anti-gay rights initiatives are also underway in several states. For example, the House of Representatives in Texas voted in 2005 to prohibit gays from becoming foster parents, and gave the state permission to inquire into

128. See History of Legal Challenges, *supra* note 82 (discussing the fight for gay marriage, which began in 1971, but did not gain any success until the 1990s when the Alaska and Hawaii courts ruled that banning gay marriage was unconstitutional, which led the legislatures in those state to pass anti-gay marriage legislative measures).

129. See Marriage/Relationship Laws: State by State, *supra* note 15 (noting that lawsuits challenging the denial of same sex marriage have been initiated in California, Florida, Maryland, New Jersey, New York, Connecticut and Oregon).

130. See Knickerbocker, *supra* note 63 (noting that these amendments passed despite polls which showed that Americans, particularly young Americans, are increasingly likely to favor civil unions to gay marriage).

131. See *id.* (noting that conservatives oppose civil unions because gay activists consider civil unions a step towards acceptance of gay marriage).

132. NEB. CONST. art. I, § 29, *held unconstitutional* by *Citizens for Equal Protection v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005).

133. 368 F. Supp. 2d at 1009 (noting that marriage is among the intimate relationships granted protection as an element of personal liberty under the Due Process Clause).

134. See *infra* notes 350-68 and accompanying text.

the sexual orientation of people who are currently foster parents.¹³⁵ In Alabama, one legislator has introduced a bill that would prevent public funds from being used to “recognize or promote homosexuality as an acceptable lifestyle,” including portraying same sex parents in a positive light.¹³⁶ When asked what would be done with existing library books and textbooks depicting same sex parents positively, a Georgia representative said: “I guess we dig a big hole and dump them in and bury them.”¹³⁷

Congress passed the federal DOMA, with the approval of Democratic President Bill Clinton, in 1996, which provides:

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 a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.¹³⁸

Whether or not federal or state DOMAs or state constitutional bans on gay marriage can survive legal challenges brought against them under the U.S. Constitution, however, is questionable because the Supreme Court will have to apply the Fourteenth Amendment’s guarantees of due process and equal protection to the case under review.¹³⁹ All of these issues will be discussed in greater depth in the following sections.¹⁴⁰

135. See Knickerbocker, *supra* note 63 (suggesting that if an investigation reveals that those acting as foster parents are gay, the state will remove foster children from the home).

136. *Id.* (noting that the proposed legislation would specifically prohibit the use of state funds to purchase textbooks and library materials that “promote” homosexuality).

137. *Id.* (quoting Rep. Gerald Allen (R)).

138. 28 U.S.C.A. § 1738C (West 2005).

139. See U.S. CONST. amend. XIV (guaranteeing due process and equal protection to “[a]ll persons born or naturalized in the United States”); see also *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (rejecting the argument that because a statute barring interracial marriage resulted in equal penalties to all offenders it did not violate the Equal Protection Clause, and finding that depriving interracial couples of the fundamental right to marry violated the Due Process Clause because it was a choice that must be left to individuals).

140. See *infra* Part II.B-C (discussing the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment and how they relate to gay marriage).

In light of the above, President Bush has argued:

Those who want to change the meaning of marriage claim that [the Full Faith and Credit Clause of the Constitution] requires all states and cities to recognize same-sex marriage performed anywhere in America.

. . . [E]ven if the Defense of Marriage Act is upheld, the law does not protect marriage within any state or city. For all these reasons, the defense of marriage requires a constitutional amendment.¹⁴¹

Early in 2005, just after Bush's second presidential campaign victory, Republican Senator Majority Leader Bill Frist (R-TN) "promised that Republicans will again seek to approve a constitutional amendment to ban gay marriage."¹⁴² With his confidence bolstered by President Bush's reelection in 2004, Senator Frist declared that "his party's members are coming into the [2005] session with the American people on their side."¹⁴³

Republican Congresswoman Marilyn Musgrave of Colorado and five co-sponsors introduced the first anti-gay marriage Congressional resolution in May of 2003.¹⁴⁴ In that same year, Republican Wayne Allard of Colorado introduced a companion resolution in the Senate.¹⁴⁵ Both resolutions provided that: "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 thereof be conferred upon unmarried couples or groups."¹⁴⁶

However, because the requirements for passing a U.S. Constitutional Amendment are extremely rigorous, the chance for passage of the resolutions is slim.¹⁴⁷ First, such an amendment

141. *Same-sex Marriage: Bush's Remarks on Marriage Amendment*, *supra* note 120.

142. See Rick Klein, *Senate Democrats Coordinate Message, Attack on Bush*, BOSTON GLOBE, Jan. 25, 2005, available at http://www.boston.com/news/nation/washington/articles/2005/01/25/senate_democrats_coordinate_message_attack_on_bush/ (highlighting the priorities of both Democratic and Republican leaders of the Senate for the year, and noting that in 2004 supporters of a constitutional amendment came up nineteen votes short of moving forward in the Senate).

143. See *id.* (noting that Senator Frist also appealed to Democratic Senators to acknowledge the support Republicans received when seeking compromises).

144. See H.R.J. Res. 56, 108th Cong. (2003) (using the increasing power of the Republican Party to introduce the constitutional amendment defining marriage as between a man and a woman).

145. See S.J. Res. 26, 108th Cong. (2003) (echoing the House Resolution calling for an anti-gay marriage constitutional amendment).

146. S.J. Res. 26.; H.R.J. Res. 56.

147. See Sheldon Alberts, *Bush Bid to Ban Gay Marriage is Just Talk*, NATIONAL POST, Feb. 27, 2004, at A10 (pointing out that since the adoption of the U.S. Constitution in 1787, legislators have amended it twenty-seven times but have failed

requires support from two-thirds of both the House of Representatives and the Senate, as well as three-fourths of the States.¹⁴⁸ Second, it is not clear that either President Bush or Senator Frist will be able to get the level of support needed from their own party members to pass an amendment. Republican party members' stance cannot easily be identified. For instance, Montana Senator Conrad Burns has said that "he is 'very cool to the idea of an amendment' because he opposes government intervention in family matters."¹⁴⁹ Other Republicans, including California Governor Arnold Schwarzenegger, also have refused to support the proposed amendment, because they are "loath to support a federal initiative that treads on their jurisdiction to legislate family relationships."¹⁵⁰

In the absence of a constitutional amendment, the future of gay marriage rests in the hands of the courts. In 2005 alone there were a series of conflicting rulings addressing this issue in different state courts around the country.¹⁵¹ On one coast a New York state court judge decided that the New York Constitution's Equal Protection and Due Process Clauses were not violated when a same sex couple was prevented from marrying,¹⁵² while on the other coast the Oregon Supreme Court ruled that a gay marriage was not valid because it violated Oregon's DOMA¹⁵³ and a California court decided that the State's new law limiting marriage to heterosexuals was valid under California law.¹⁵⁴

Any state law or court decision that gives rise to issues covered by the U.S. Constitution, however, is subject to review in the federal court system and can ultimately lead to a case being heard by the U.S.

on more than eleven thousand occasions).

148. See U.S. CONST. art. V (requiring that "whenever two thirds of both Houses deem it necessary . . . when ratified by the Legislatures of three fourths of the several States," the Constitution may be amended); see also *Marriage/Relationship Laws: State by State*, *supra* note 15 (noting that forty states currently ban gay marriage).

149. Alberts, *supra* note 147 (quoting Senator Conrad Burns).

150. *Id.*

151. Compare *Seymour v. Holcomb*, 790 N.Y.S.2d 858, 861 (2005) (finding no constitutional right to gay marriage under the New York Constitution), and *Li v. State*, 110 P.3d 91, 102 (Or. 2005) (finding Oregon can properly limit marriage to only between a man and woman), with *Knight v. Super. Ct. of Sacramento County*, 26 Cal.Rptr.3d 687, 687 (Ct. App. 2005) (finding that a domestic partnership provision did not violate the California Constitution).

152. See *Seymour*, 790 N.Y.S.2d at 866 (noting that the decision to extend marriage to gay couples must be made by the legislature, not the courts).

153. See *Li*, 110 P.3d at 102 (finding that a county lacked the authority to issue marriage licenses to same sex couples, rendering all such marriage licenses void).

154. See *Knight*, 26 Cal.Rptr.3d at 699 (describing the differences between the rights enjoyed by married couples and the rights granted to couples in domestic partnerships, including the inability of domestic partners to file joint tax returns or to receive many government benefits).

Supreme Court.¹⁵⁵ There are a host of constitutional provisions that are triggered by these decisions, all of which will be examined in the next section.¹⁵⁶

II. THE TENTH AMENDMENT AND STATES' RIGHT TO REGULATE MARRIAGE VS. THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

A. *The Tenth Amendment and State Police Powers*

It is not possible to talk about how the federal courts will resolve the gay marriage debate without first examining the Tenth Amendment to the Constitution, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁵⁷ The powers referred to in the Tenth Amendment are commonly referred to as the state's "police powers," which include "[t]he power to make any and all laws deemed necessary for the protection of the public health, safety, welfare, and morals."¹⁵⁸ Generally, courts have ruled that the Tenth Amendment grants states the right to regulate marriages that take place within their borders.¹⁵⁹

As mentioned previously, pro-DOMA advocates believe that state enacted DOMAs can be justified on Tenth Amendment grounds because, in their view, homosexuality in general, and gay marriage in particular, are immoral.¹⁶⁰ They believe states should therefore have the right to regulate this kind of conduct vis-a-vis states' police powers. State laws restricting marriage, however, must also not be in conflict with the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution.¹⁶¹ The extent to which the courts have used the Fourteenth Amendment to place boundaries around

155. See SUP. CT. R. 10 (providing that the United States Supreme Court has jurisdiction over controversies that have resulted in conflicting decisions from federal courts of appeals, conflicting decisions from state courts of last resort, or that involve an important question of federal law that remains unsettled).

156. See *infra* Part II.A-C (discussing the Tenth Amendment, Due Process Clause and Equal Protection Clause as they relate to gay marriage).

157. U.S. CONST. amend. X.

158. OTIS H. STEPHENS, JR. & JOHN M. SCHEB II, *AMERICAN CONSTITUTIONAL LAW* 94 (2d ed. 1999).

159. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (stating that "civil marriage is created and regulated through exercise of the police power").

160. See, e.g., *Southern Baptist Convention*, *supra* note 119 (declaring that gay marriage goes against God's laws).

161. See, e.g., *Goodridge*, 798 N.E.2d at 968 (finding that a prohibition on gay marriage violated the Fourteenth Amendment and produced "a deep and scarring hardship on a very real segment of the community for no rational reason").

states' police powers with respect to marriage will be discussed next.

B. The Fourteenth Amendment Due Process and Equal Protection Clauses

Passed by Congress during the racially and politically tumultuous years following the end of the Civil War in 1868, the Fourteenth Amendment provides that “[n]o State shall make or enforce any law which shall . . . deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹⁶² Although the Amendment is written in broad, racially neutral terms, it was initially intended to protect the rights of newly freed slaves, most of whom were prevented from participating fully as citizens by whites who found the prospect of black liberty and equality threatening to their way of life.¹⁶³ There is therefore a long tradition of legal jurisprudence in which the courts have used the Fourteenth Amendment to strike down laws and policies that attempted to promote racial discrimination.¹⁶⁴ Over the last 140 years, however, there has also been a steady and continuous trend in the courts to allow the Fourteenth Amendment to be used to overturn laws and policies that have nothing to do with race or the rights of the descendants of slaves.¹⁶⁵ This in turn has allowed gay rights advocates to lay claim to the Fourteenth Amendment's promises, especially in the area of marriage rights.

In the 1967 case *Loving v. Virginia*, the Supreme Court used the Fourteenth Amendment to overturn a Virginia state anti-miscegenation law that made it a crime for African-Americans and whites to marry.¹⁶⁶

I. Loving v. Virginia

The plaintiffs in *Loving* were a black woman and her white husband.¹⁶⁷ Originally residents of Virginia, they left the State in

162. U.S. CONST. amend. XIV.

163. See Toni Lester, *Context, Contention and the Constitution: Riding the Waves of the Affirmative Action Debate*, 39 SUFFOLK U. L. REV. 67 (2005) (discussing the original intent of the Fourteenth Amendment, and the challenges to black equality in the years following the Civil War).

164. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down Virginia's anti-miscegenation statute as “directly subversive to the principle of equality at the heart of the Fourteenth Amendment”).

165. See Lester, *supra* note 163.

166. See 388 U.S. at 2 (distinguishing between statutes based on racial classifications and those based on other distinctions, and holding that the statutes based on racial classifications were subject to much more rigorous scrutiny because they had no rational basis).

167. See *id.* (noting that the plaintiffs that sought to get married were Mildred

1958 to marry in the District of Columbia, where it was legal for them to do so.¹⁶⁸ They then returned to Virginia, whereupon they were tried and convicted under Section 20-58 of the state criminal code, which stated:

If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished . . . and the marriage shall be governed by the same law as if it had been solemnized in this State.¹⁶⁹

At the time of the ruling, there were sixteen states in the U.S. that outlawed interracial marriage, including Delaware, Tennessee and Alabama, and fourteen states that had repealed such laws.¹⁷⁰ The California Supreme Court was the first court to declare such laws illegal under the Equal Protection clause in the 1948 case, *Perez v. Sharp*.¹⁷¹

The Supreme Court of Virginia upheld the Lovings' convictions, finding that the State had a legitimate interest in preserving "the racial integrity of its citizens, . . . [preventing] the corruption of blood . . . and the obliteration of racial pride."¹⁷² The Virginia Court also ruled that the states have an exclusive right under the Tenth Amendment to regulate marriage within their boundaries.¹⁷³ The U.S. Supreme Court granted certiorari to determine if these assertions were correct.¹⁷⁴

Delivering the opinion for the U.S. Supreme Court, Chief Justice Warren said that the Virginia law violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution, notwithstanding the fact that it penalized whites and blacks equally.¹⁷⁵ Because the

Jeter, a black woman, and Richard Loving, a white man).

168. *See id.* at 2-3 (stating that after their convictions in Virginia, the Lovings returned to the District of Columbia because the laws in the District allowed them to live together as man and wife, while in Virginia living together was a legal basis for a presumption that they were married, and therefore in violation of Virginia's laws).

169. *Id.* at 4 (quoting VA. CODE ANN. § 20-58 (Michie 1960) (repealed 1967)).

170. *See id.* at 6 (noting that the initiation of litigation in this case compelled Maryland to repeal its statute barring interracial marriages).

171. *See* 198 P.2d 17, 29 (Cal. 1948) (holding that the California statutes arbitrarily and unreasonably discriminated against certain racial groups).

172. *Loving*, 388 U.S. at 7 (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)).

173. *See id.* (noting that although the State claimed the power to regulate marriage, it did not argue that the power to regulate marriage was unlimited in light of the Fourteenth Amendment).

174. *See id.* at 2 (noting that the case presented a constitutional question never addressed by the Court of whether a state statute barring interracial marriage violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

175. *See id.* at 12 (holding that depriving citizens of the fundamental right to

state statute involved racial classifications, Warren observed that it was not exempt “from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”¹⁷⁶ Countering arguments made by the State that the Framers of the Fourteenth Amendment never intended for it to eliminate anti-miscegenation laws, Warren declared that “[w]hile these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they . . . [do not pertain] to the broader, *organic purpose* of a constitutional amendment.”¹⁷⁷ Warren also noted that racial discrimination of the type covered in the Virginia statute had to be subjected to the “most rigid scrutiny,”¹⁷⁸ and unless there was a separate and distinct, permissible, objective reason for the discrimination, laws furthering it could not stand.¹⁷⁹ He declared that “[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification [Its sole purpose is] to maintain White Supremacy.”¹⁸⁰

Justice Warren also decided that the Virginia law was unconstitutional because it violated the Due Process Clause of the Fourteenth Amendment: “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”¹⁸¹ As such, he argued that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”¹⁸² “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes,” he said, “is surely to deprive all the State’s citizens of liberty without due process of law.”¹⁸³ Thus, he concluded, it is the individual, not the state, that has the right to decide if they are going to marry a person of another race.¹⁸⁴

marry based on racial distinctions was “directly subversive of the principle of equality at the heart of the Fourteenth Amendment”).

176. *Id.* at 9.

177. *Id.* (emphasis added).

178. *Id.* at 11 (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

179. *See id.* (noting that the Supreme Court had already declared that there is no valid legislative purpose for using the color of a person’s skin as the test for criminality).

180. *Id.*

181. *Id.* at 12.

182. *Id.* (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

183. *Id.*

184. *See id.* (invalidating the state’s statutory scheme restricting interracial marriage and mandating that white persons only marry other white persons on the basis that such restrictions violate the Fourteenth Amendment of the United States

The *Loving* decision is extremely important to the gay marriage issue for the following reasons. First, the Court ruled that the right to marry is a fundamental right guaranteed by the U.S. Constitution.¹⁸⁵ Second, Justice Warren made it clear that religion should not play a role in the development of laws designed to discriminate based on race.¹⁸⁶ Also, while he recognized that states do have the right to manage the morality and welfare of their residents in such areas as marriage, he said that this is not an exclusive right.¹⁸⁷ Finally, Warren outlined the standard of review that should be used in Fourteenth amendment cases where racial discrimination is the chief motivating force behind a government law or policy.¹⁸⁸ That standard, which Warren refers to as the “rigid scrutiny” standard, is today called the “strict scrutiny test.”¹⁸⁹

C. Standards of Review in Fourteenth Amendment Cases and Disputes About Which Standard to Apply to Sexual Orientation Claims

Generally, there are three levels of review that courts use to determine equal protection issues.¹⁹⁰ The strict scrutiny test is considered the most rigorous test of the three.¹⁹¹ The test relates to the proposition that some kinds of discrimination are inherently suspect, such as discrimination based on religion, race, ethnicity or fundamental rights like the right the right to privacy.¹⁹² It requires

Constitution).

185. See *id.* (holding that “[m]arriage is one of the basic civil rights of man, fundamental to our very existence”).

186. See *id.*

187. See *id.* at 7 (stating that the state’s power in the Tenth Amendment to regulate marriage is limited by the proscriptions of Fourteenth Amendment).

188. See *id.* at 11 (holding that rigid scrutiny must be used when racial classifications are made in criminal statutes).

189. See *id.* (finding that rigid scrutiny demands that the statute “must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate”).

190. See STEPHENS & SCHEB, *supra* note 158, at 739-41 (explaining that the three tests courts use in equal protection cases, rational basis, strict scrutiny, and heightened scrutiny, to determine a statute or action’s constitutional validity vary in terms of scrutiny levels and shifting burdens of proof, with the rational basis test providing the easiest test for a statute or state action to pass, and strict scrutiny providing a more difficult test).

191. See *id.* at 739-40 (describing the strict scrutiny test as difficult, if not impossible, for the government to satisfy because it removes the statute’s presumption of constitutionality, shifts the burden of proof to the government, and requires the government to show that it has a compelling interest for ethnic discrimination).

192. See *id.* (outlining the historical development of the strict scrutiny test and explaining that the test shifts the burden of proof to the government or state to show that the statute or policy in question serves some sort of compelling interest); see also

courts to overturn government laws or policies that discriminate on these grounds unless it can be shown that there is a sufficiently compelling government interest in furthering those laws or policies, and that the means used to advance that interest are narrowly tailored.¹⁹³ In addition to *Loving*, a long line of cases have reinforced the notion that the strict scrutiny test should be applied to state and federal laws and policies that discriminate against people on racial grounds.¹⁹⁴

In addition to the strict scrutiny test, courts employ two other tests in Fourteenth Amendment cases. The second most rigorous test, called the intermediate or heightened scrutiny test, requires that the government show “that a challenged policy bears a ‘substantial’ relationship to an ‘important’ government interest.”¹⁹⁵ Courts have ruled that the heightened scrutiny analysis is the test that should be applied to sex discrimination cases.¹⁹⁶ The least rigorous test, called the “rational basis test,”¹⁹⁷ allows courts to uphold laws if those laws are supported by a legitimate government purpose and the means used to accomplish that purpose are rationally related to it.¹⁹⁸ The

Romer v. Evans, 517 U.S. 620, 631 (1996) (stating that “if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end) (citing *Heller v. Doe*, 509 U.S. 312, 319-320 (1993)).

193. See STEPHENS & SCHEB, *supra* note 158, at 739-40 (describing the courts’ duty to subject any statute or state action that discriminates on the basis of race to the most rigid scrutiny, as set forth in *Korematsu v. United States*, and explaining that courts must hold the government to a very high burden of proof to show that its statute or action is valid).

194. See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (striking down a city ordinance that awarded a certain percentage of public contracts to minority contractors only because it excluded other non-minority business owners from consideration for some public contracts on the basis of race); *Adarand Construction v. Peña*, 515 U.S. 200, 237-239 (1995) (maintaining that government statutes and actions involving racial classification are still subject to strict scrutiny analysis, stressing the importance of narrowly tailoring any such statutes that serve a compelling government interest, and remanding the case to lower court so that the court could apply the strict scrutiny test to a federal program that awarded contracts to disadvantaged businesses).

195. STEPHENS & SCHEB, *supra* note 158, at 741.

196. See Sidney Buchanan, *Affirmative Action: The Many Shades of Justice*, 39 HOUS. L. REV. 149, 157-58 (2002) (comparing the tests that courts use to assess the constitutionality of racially and gender based affirmative action programs and laws, and noting that courts have normally considered gender inequality to be an “important” interest justifying legislation that distinguishes between men and women, whereas they have been less willing to classify the government’s use of racial classifications in the same way) (citing *Califano v. Webster*, 430 U.S. 313, 317 (1977)).

197. STEPHENS & SCHEB, *supra* note 158, at 739.

198. See *id.* (explaining that the rationale basis reflected a more conservative activism in the Supreme Court in the first half of the twentieth century, and thus, the test is usually a lesser standard for the government to satisfy when parties challenge its legislation or action’s constitutionality, but its application is limited to certain types of constitutional challenges, usually not involving racial classification).

rational basis test is the primary standard of review in cases involving business regulation.¹⁹⁹ Cases “under rational basis review normally pass constitutional muster, since ‘the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.’”²⁰⁰

The above three tiers of review largely exist to accommodate competing claims that have emerged since the passage of the Fourteenth Amendment in 1868. Because the amendment was initially enacted to level the playing field for freed African-American slaves and their descendants denied basic civil rights and liberties after the end of the Civil War, “[t]he first step in . . . [any Fourteenth Amendment] analysis is to categorize the class affected as more or less similar to race based on certain judicially-developed criteria.”²⁰¹ Claimants hoping to get suspect class protection are thus evaluated in order to see if they were subjected to “historical discrimination, political powerlessness . . . [or if they have] immutable characteristics [akin to race] In addition to race (the original suspect class), alienage and national origin have also been recognized as suspect.”²⁰² As mentioned above, the mid-tier standard of review is reserved for classifications based on gender. The balance is usually left for almost all business regulation, which, as also stated previously, “[is] presumptively constitutional and will be upheld if rationally related to any conceivable, legitimate government interest.”²⁰³

The question of what test should be applied to sexual orientation discrimination claims, however, has been the subject of much dispute in the courts. Is sexual orientation discrimination similar to race and thus deserving of strict scrutiny treatment? Or should it be subject to

199. *See id.* (citing the example of a state regulation requiring medical licenses for psychiatrists to serve the legitimate state interest of protecting public health and safety as illustrative of the way in which a court might apply the rational basis test to legislation aimed at a certain class of persons).

200. *Lawrence v. Texas*, 539 U.S. 558, 579-80 (2003) (O'Connor, J., concurring) (citing *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985)).

201. *Baker v. State*, 744 A.2d 864, 871 (Vt. 1999) (citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979)); *see also* JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 253-64 (1983) (concluding that the question of whether a classification is similar to race is the wrong kind of analysis to be undertaken when doing an Equal Protection Clause test); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2441-44 (1994) (comparing suspect classifications to the anti-caste principle, which aims to prevent second-class status for various groups in society, and noting that under both principles, courts consider such factors as political power, immutable characteristics, and discrimination history to determine if a class is entitled to protection from suspect legislation, but recognizing the definitional problems that courts have when they try to define and analyze these factors, and that the analysis under the anti-caste principle may yield different results from the suspect classification analysis).

202. *Baker*, 744 A.2d at 871 (citing *Cleburne*, 473 U.S. at 440-41).

203. *Id.* (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)).

the less taxing standards associated with sex discrimination or economic discrimination, respectively? In the 1997 case, *Equality Foundation v. City of Cincinnati*,²⁰⁴ a federal appeals court ruled that since homosexual conduct was legally criminal at the time, gays could not claim suspect class status.²⁰⁵ But in the 1998 case, *Tanner v. Oregon Health Sciences University*,²⁰⁶ the Oregon Court of Appeals declared that gays were a suspect class because they were a socially recognized group that was the target of negative political and social stereotyping and prejudice.²⁰⁷ Thus, the Oregon court concluded that a government employer's practice of denying health insurance benefits to heterosexual married couples, but not gay couples, was unconstitutional under Oregon state law.²⁰⁸

I have argued elsewhere that that sexual orientation discrimination is much like sex discrimination because homophobia is largely motivated by a desire to punish gay people for failing to conform to traditional stereotypes about how men and women are supposed to behave.²⁰⁹ As my analysis in Part I showed, outdated, religiously inspired notions about the proper roles that men and women should play in and outside of marriage all surface in arguments made by pro-DOMA advocates.²¹⁰ The natural state for men and women is heterosexuality, the argument goes. Marriage, procreation and

204. 128 F.3d 289 (6th Cir. 1997).

205. See *id.* at 292-93 (rejecting the heightened scrutiny and intermediate scrutiny tests for constitutional validity of legislation in analyzing a city ordinance that removed sexual orientation from a statute defining protected classes, because the court did not believe that homosexuality was a suspect or quasi-suspect class).

206. 971 P.2d 435 (Or. Ct. App. 1998).

207. See *id.* at 447 (denying that the University's policy that homosexual employees could not receive health benefits for their domestic partners violated a state statute, but holding that the policy violated the Oregon Constitution because homosexuals were a "suspect class," and therefore, policies aimed at or affecting this class differently must be subject to strict scrutiny).

208. See *id.* (reasoning that the University's policy violated constitutional principles because homosexuals were a distinct social class which had been discriminated against socially and politically, and because Oregon did not have a valid reason to justify providing benefits for heterosexual married couples, but not domestic partners).

209. See generally Toni Lester, *Protecting the Gender Nonconformist from the Gender Police: Why the Harassment of Gays and Other Gender Nonconformists Is a Form of Sex Discrimination in Light of the Supreme Court's Decision in Oncale v. Sundowner*, 29 N.M. L. REV. 89 (1999) (explaining the connection between stereotypes about gender and identity and discrimination against homosexuals in society and advocating that those in the legal profession use this connection to better argue for increased protection for homosexual rights in harassment and discrimination cases).

210. See *infra* Part I (defining the varying definitions and conceptions of marriage, such as the difference between legal and religious definitions of marriage, and the difference between older concepts of marriage as more of a "mercenary" relationship and more modern concepts that see marriage as more of a romantic union).

raising children should be the ultimate desire of all heterosexuals. Under this line of reasoning, gay people are traitors to their biological sex, a perversion in the eyes of God. Because homophobia has its roots in this kind of sexist thinking and reasoning, right to marry claims should be subjected to the heightened scrutiny test normally used in sex discrimination cases. Under the heightened scrutiny test, it would be very hard for a state DOMA to withstand constitutional attack, since, as the discussion below will show, none of the typical reasons offered by states to justify the passage of DOMAs (i.e., preservation of the tradition, safeguarding morality, and protecting children from gay parents) sufficiently articulates an important or provable government interest worth preserving. The U.S. Supreme Court took up this issue in the 1996 case, *Romer v. Evans*.²¹¹

1. Romer v. Evans and the Court's Use of the Rational Basis Test for Sexual Orientation

The Supreme Court had to decide in *Romer* which of the above tests to apply in a case involving government based sexual orientation discrimination.²¹² In the early 1990s, certain Colorado cities like Boulder and Denver enacted laws that prohibited various forms of discrimination against gays, lesbians, and bisexuals.²¹³ For example, the City of Boulder passed a law that prevented such discrimination in “any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public or that receives financial support through solicitation of the general public or through governmental subsidy of any kind.”²¹⁴ In response to these developments, the citizens of Colorado passed a statewide referendum in 1992 amending the state constitution.²¹⁵ The amendment prevented any kind of “legislative, executive or judicial action at any level of state or local government designed to protect” gays, bisexuals and lesbians from ever being

211. See 517 U.S. 620, 631 (1996) (evaluating a Colorado constitutional amendment that would prohibit the state executive, legislator, or courts from enacting laws or taking action that aimed to protect homosexuals from discrimination, and concluding after applying a rational basis test, that the state did not have a legitimate interest that was rationally related to this legislation).

212. See *id.* at 634-35 (deciding that the standard to be used is that a law must have a rational basis to the legitimate government interest that it looks to further).

213. See *id.* at 623 (stating that these statutes looked to end “discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services”).

214. *Id.* at 628 (citing BOULDER REV. CODE § 12-1-1(j) (1987)).

215. See *id.* at 623 (stating that the citizens of Colorado voted to adopt Amendment 2 in response to the municipal ordinances).

passed.²¹⁶ It made illegal any law or policy “whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.”²¹⁷

Several gay claimants challenged the amendment in court on the grounds that it would subject them to the risk of discrimination and leave them without any recourse.²¹⁸ Laws in place at the time that the amendment would negate included the governor’s executive order prohibiting sexual orientation discrimination against state government workers,²¹⁹ and government policies outlawing sexual orientation discrimination on state college campuses.²²⁰ The state argued that the new constitutional amendment was legal because it simply put gays on the same level playing ground as everyone else, by not granting them special rights.²²¹

Writing for the majority of the Court, Justice Kennedy disagreed:

The amendment imposes a special disability upon . . . [gays] alone Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint This is so no matter how local or discrete the harm, no matter how public and widespread the injury . . . these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.²²²

Furthermore, he noted, the amendment’s “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it

216. *See id.* at 624 (citing the text of the amendment, and noting that its intended and practical effect would be to not only repeal the existing ordinances that define homosexuals and bisexuals as a protected class, but also to prevent future legislation or judicial decisions that would do the same).

217. *See id.* (citing COLO. CONST. art. II, § 30b).

218. *See id.* at 625 (outlining the plaintiffs’ argument that the amendment would put them at a “substantial risk “for discrimination and that the amendment would repeal additional laws not mentioned in the amendment).

219. *See id.* at 629 (citing Colo. Exec. Order No. D0035 (Dec. 10, 1990)) (explaining that the state executive order prohibited “employment discrimination for ‘all state employees, classified and exempt’ on the basis of sexual orientation”).

220. *See id.* (highlighting the fact that the amendment would affect not only legislation protecting gay, lesbian, and bisexual people, but also, would prohibit such protection through policies, as the amendment also repealed state college policies that protected homosexuals as a class from discrimination).

221. *See id.* at 626 (contrasting the state’s argument that the amendment only denies special treatment for gays, lesbians, and bisexuals, rather than denying specific rights, with the state court’s interpretation of the amendment as aimed at legislation involving homosexual rights only).

222. *Id.* at 631.

lacks a *rational relationship to legitimate state interests*.”²²³ With respect to this last point, Kennedy observed that he could see no legitimate reason for such a law to be passed except for homosexual animus.²²⁴ As such, he concluded, “a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”²²⁵

Aside from two earlier cases in which the Court struck down laws making gay magazines per se obscene and therefore not shippable by U.S. mail,²²⁶ the *Romer* case marks the first time the U.S. Supreme Court outlawed the practice of targeting gays for discrimination just because they are gay. As the language used by Justice Kennedy also suggests, the Court applied the rational basis test to determine that the Colorado amendment was unconstitutional.²²⁷ Laws making it harder for one group of citizens to seek help from the government, as opposed to others, are contrary to the Fourteenth amendment’s equal protection clause,²²⁸ Kennedy explains, because “central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”²²⁹

Kennedy’s decision in *Romer* should be applauded for its pro-gay stance. However, because he used the rational basis test to overturn the Colorado law, as opposed to the heightened scrutiny test, it was also possible at the time to think that states still had some leeway to enact other kinds of laws that discriminated against gays, as long as those laws were designed to support newly articulated interests that made sense to the Court. As it turned out, Kennedy was not willing to

223. *Id.* at 632 (emphasis added).

224. *See id.* (reasoning that an amendment that is so broad and imposes burdens on one group, homosexuals, “defies,” rather than fails, the requirements of Constitutional analysis).

225. *Id.* at 634-35 (quoting *Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

226. *See One, Inc. v. Olesen*, 241 F.2d 772 (9th Cir. 1957) (holding that a magazine that promoted homosexuality and lesbianism was notailable), *rev’d*, 355 U.S. 371 (1958); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962) (reversing the lower court decision that determined certain magazines with semi-nude male models and possibly advertising obscene material were a violation of a federal statute prohibiting people from mailing such materials because the magazines did not fall under the Court’s definition of obscenity).

227. *See Romer*, 517 U.S. at 631-32 (applying the rational basis test to the amendment in question and concluding that there is no way in which a statute that is so broad in scope and targets a particular group could rationally serve a legitimate state purpose).

228. *See id.* at 633 (explaining that such laws violate the group members’ equal protection rights, as did the Colorado amendment in this case when it precluded gays specifically from government protections).

229. *Id.*

entertain such interests in the next gay rights case to come before the Court, *Lawrence v. Texas*, and he essentially took up where he left off in *Romer*, continuing his use of the rational basis test to overturn Texas' anti-sodomy laws.²³⁰

2. Lawrence v. Texas

In *Lawrence*, the Houston police arrested two adult men, John Geddes Lawrence and Tyron Garner, when the police entered Lawrence's home and found the two men having consensual sex.²³¹ The state convicted the two men under a Texas state statute, making it a crime for two people of the same sex to engage in "deviate sexual intercourse."²³² Deviate sexual intercourse was defined as "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object."²³³

Justice Kennedy, delivering the opinion for the majority, said that there were three issues in dispute: 1) whether the statute violated the plaintiffs' rights under the Fourteenth Amendment's guarantees of equal protection; 2) whether the statute violated the plaintiffs' rights under the Fourteenth Amendment's guarantees of due process; and 3) whether or not *Bowers v. Harwick*,²³⁴ the 1986 Supreme Court case upholding Georgia's anti-sodomy law, should be overturned.²³⁵ In *Bowers*, the Court let stand a Georgia statute that made it a crime for both heterosexuals and gay people to engage in sodomy.²³⁶

230. See 539 U.S. 558, 574 (2003) (acknowledging that the Equal Protection Clause analysis could be relevant to determining if a Texas criminal statute prohibiting homosexual sodomy was constitutionally invalid, but ultimately declining to expand *Romer*, and requiring that the government show a substantial interest in prohibiting sodomy).

231. See *id.* at 562 (stating that the police were called to the home in response to a purported claim of weapons being fired).

232. See TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2005), declared unconstitutional by *Lawrence*, 539 U.S. at 579 (prohibiting deviate sexual intercourse between members of the same sex and noting that violators are subject to a Class C misdemeanor).

233. TEX. PENAL CODE ANN. § 21.01(1).

234. See 48 U.S. 186 (1986) (rejecting plaintiff's claim that a state statute prohibiting sodomy was unconstitutional and denying that the Due Process Clause provided a right to engage in homosexual sodomy).

235. See *Lawrence*, 539 U.S. at 564 (outlining the possible questions the court could answer in the case, including whether or not the statute violates Due Process or Equal Protection Clauses, and whether the Court should overturn the *Bowers* decision, and ultimately concluding that the Court could decide the case on due process grounds).

236. See *Bowers*, 48 U.S. at 189 (reversing the lower court's decision that the plaintiff's due process rights were violated when he was not allowed to engage in sodomy because it interfered with his privacy and association rights, and holding that the Georgia statute was valid).

Justice Kennedy, who was joined in his opinion by Justices Stevens, Souter, Ginsburg, and Breyer, ruled that the plaintiffs' Fourteenth Amendment due process liberty rights were infringed upon when they were arrested.²³⁷ Justice Kennedy states:

[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the [Due Process Clause of the] Constitution allows homosexual persons the right to make this choice.²³⁸

Justice Kennedy also said that *Bowers* should be overturned because it is not good law now nor was it good law at the time it was decided.²³⁹ Our *stare decisis* system requires judges to grant great deference to precedent because society has a right to rely on the stability that judicial decisions produce, he noted.²⁴⁰ Furthermore, of the nine states that had anti-sodomy laws on the books before *Bowers* was decided, many failed to enforce those laws and many abolished them altogether after the decision was rendered, and, thus, he said, the stability argument had no weight.²⁴¹ Furthermore, although the majority court in *Bowers* said that there was ample evidence to support the proposition that homosexuality has always been a crime in America, Justice Kennedy noted that more recent historical scholarship in this area contradicts that assertion.²⁴² Finally, and most

237. See *Lawrence*, 539 U.S. at 578 (contrasting the consensual conduct between two adults that the petitioners engaged in, with the type of conduct that might justify government interference, such as prostitution or child abuse, and holding that the statute in question violated the petitioner's due process liberty rights to privacy).

238. *Id.* at 567.

239. See *id.* at 577-78 (stating that "there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradicts its central holding."). It is also important to note that *Bowers* involved a law that made same sex and opposite sex sodomy a crime, although the law tended to be targeted only against gays, whereas the law under review in *Lawrence* only targeted same sex behavior. *Id.* at 566.

240. See *id.* at 577 (acknowledging that *stare decisis* requires the Court's respect, but noting that it is not an unlimited principle, and therefore, if there is compelling interest for overturning a decision or if a decision infringes on constitutional liberties, the Court may overturn it).

241. See *id.* at 570-71 (comparing states' approaches to sodomy laws, including Oklahoma and Texas, that criminalize sodomy and enforce anti-sodomy statutes, with other states such as Tennessee and Montana that have moved to abolish their sodomy laws, and with Georgia, which has a sodomy law but chooses not to enforce it).

242. See *id.* at 576 (reasoning that the fact that many scholars and others have criticized the decision in *Bowers*, combined with the fact that many states have chosen not to follow it as precedent because they believe it violates homosexuals' constitutional rights, demonstrates that it is not a given consensus that homosexuality has always been a crime in the United States) (citing C. FRIED, ORDER AND LAW:

importantly, Justice Kennedy said that *Bowers* needed to be overturned because he did not want to leave people with the impression that an anti-sodomy statute that targeted both gays and heterosexuals was constitutional under the equal protection clause because it treated similarly situated people the same.²⁴³

Justice Kennedy eloquently articulated a host of reasons for his ruling in *Lawrence*.²⁴⁴ His rationale reads like a history lesson in the jurisprudence of privacy rights, equal protection and due process law, especially as these three areas of constitutional law relate to a person's right to autonomy over their own body and sexuality.²⁴⁵ Four particular cases that Kennedy used to bolster his conclusions were *Griswold v. Connecticut*,²⁴⁶ *Eisenstadt v. Baird*,²⁴⁷ *Carey v. Population Services International*,²⁴⁸ and *Roe v. Wade*.²⁴⁹

Griswold involved a challenge to a Connecticut state statute that made it a crime punishable by sixty days in jail for anyone who used

ARGUING THE REAGAN REVOLUTION: A FIRSTHAND ACCOUNT 81-84 (1991); R. POSER, SEX AND REASON 341-50 (1992)).

243. See *id.* at 574-75 (explaining that if the Court were to use the Equal Protection Clause to invalidate the decision in *Bowers* or the Texas statute, states might be able to circumvent the protection by including more classes of people under an anti-sodomy statute, and that this risk was not worth taking when the Court could invalidate both the case and the statute using the Due Process Clause, which furthers many of the same equal protection interests).

244. See *id.* at 564-67 (elaborating on several bases for the Court's decision to overturn *Bowers* and invalidate the Texas statute, including several substantive rights arising from due process rights, equal protection interests, and historical evidence that runs contrary to the idea that sodomy is a crime in the United States).

245. See *id.* (discussing the various rights that the Court has used over the past half century to invalidate state actions or legislation that violates due process rights, including substantive individual rights to privacy, spatial integrity and control over one's own body, and privacy and freedom within marital and other intimate relationships, and noting that these interests are similar to those involved in homosexual relationships including the rights to privacy and control over one's own body, and privacy in a consensual adult relationship).

246. See *id.* at 564-65 (noting that the Court in *Griswold* invalidated a state statute prohibiting the use of birth control, as well as aiding and abetting others using birth control, because it violated due process rights by infringing on privacy rights, and explaining that the decision was relevant to the analysis in *Lawrence* because it involved privacy in intimate relationships) (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)).

247. See 405 U.S. 438 (1972) (invalidating a state statute that prohibited the sale and distribution of contraceptives to non-married people without authorization because the Court could not find a reasonable purpose for distinguishing non-married from married people in the statute, and thus, that the statute violated the equal protection clause).

248. See 431 U.S. 678 (1977) (holding that a state statute restricting birth control sales to people over sixteen and only by licensed pharmacists or physicians was unconstitutional because it burdened an individual's right to make a decision about his or her own reproduction without serving a compelling government interest).

249. See 410 U.S. 113 (1973) (striking down a state statute prohibiting abortion on the grounds that it interfered with a woman's personal liberty as guaranteed by the Fourteenth Amendment without serving a compelling interest).

contraceptives or for doctors who proscribed contraceptives or counseled people on their use.²⁵⁰ One of the plaintiffs was a doctor who had given medical advice to married women on how to protect against getting pregnant, and was convicted under the statute.²⁵¹ Justice Douglas wrote the opinion for the Court.²⁵² Key to the question of whether or not the law was unconstitutional, he observed, was how it should interpret the meaning of the Fourth Amendment's mandate that people have a right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures conducted by the government, as well as the First Amendment's free association guarantees and the Third Amendment's prohibitions against the housing of soldiers in private homes during peacetime.²⁵³ All of these amendments, said Douglas, create a series of "penumbral rights of privacy and repose,"²⁵⁴ which in turn produce a "zone of privacy,"²⁵⁵ on which married couples should be able to rely. He asked, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."²⁵⁶

Justice Goldberg, in his concurrence, used the strict scrutiny test to determine the constitutionality of the Connecticut law.²⁵⁷ He said that the state's excuse that the law was designed to regulate extra-marital relations was not compelling enough to justify its enforcement.²⁵⁸ The case also made some pronouncements about

250. See CONN. GEN. STAT. ANN. § 53-32 (West 1958) (repealed 1971) (prohibiting the use of contraceptives and providing for penalties for violations of this rule).

251. See *Grissold*, 381 U.S. at 480 (asserting that the appellant was a "licensed physician and a professor at the Yale Medical School who served as Medical Director for the [Planned Parenthood League of Connecticut]").

252. See *id.* at 480-86 (stating that three other Justices concurred with Justice Douglas, two other Justices concurred in judgment, and two Justices dissented).

253. See *id.* at 484-85 (defining the various rights that derive from Constitutional Amendments and explaining that the right claimed in this case, the right to use birth control without interference from the state, derives from the concept of privacy, which is implied in the guarantees of the First, Third, Fourth, and Fifth Amendments).

254. *Id.* at 485 (dictating that the existence of these penumbras is made evident by the many controversies in which the Court has adjudicated the right to privacy).

255. *Id.* at 484.

256. *Id.* at 485-86.

257. See *id.* at 497 (Goldberg, J., concurring) (finding the right to privacy in the Constitution to be a fundamental right and asserting that when a fundamental right has been abridged by a state, strict scrutiny must apply).

258. See *id.* at 497-98 (Goldberg, J., concurring) (declaring that Connecticut merely asserted a rational relation between the statute and its legitimate state goal when it stated that "preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations").

the special nature of marriage that have particular significance to the gay marriage issue:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. 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. Yet it is an association for as noble a purpose as any involved in our prior decisions.²⁵⁹

Justice Goldberg was not willing to cast his protective net around gay Americans, however. He distinguished heterosexual marital rights from the rights of adulteresses and homosexuals to engage in sexual practices prohibited by the state:

Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.²⁶⁰

Thus, after Court determined its decision in *Griswold*, the government could no longer enter the bedrooms of married heterosexuals, but single heterosexuals and all homosexuals were still fair game.

Later decisions rendered in the next decade, however, expanded on the principles outlined in *Griswold*, and announced that even unmarried heterosexuals had a right to the zone of privacy that Douglas articulated.²⁶¹ For instance, in the 1972 case, *Eisenstadt v. Baird*, the Court ruled on equal protection grounds that state laws making it illegal for unmarried people to use contraceptives were also illegal.²⁶² It said, "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²⁶³ And in

259. *Id.* at 486.

260. *Id.* at 499 (Goldberg, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)).

261. See *Eisenstadt v. Baird*, 405 U.S. 438, 447-49 (1972) (rejecting the statute's distinction between married and unmarried people, and holding that both categories enjoyed certain privacy rights free from government interference).

262. See *id.* at 438 (reasoning that the state's given purposes for drawing a distinction between married and unmarried people in the statute, to discourage the evils of premarital intercourse and preserve the sanctity of the home through self-restraint, did not meet the lesser, rational basis standard for legislation that interferes with equal protection claims, let alone a more stringent compelling interest test because the law was unlikely to achieve its intended deterrent purpose in reality, and married people could engage in the illicit and immoral behavior the state feared as well).

263. *Id.* at 453 (emphasis added).

the 1977 decision, *Carey v. Population Services International*, the Court upheld a New York law that prohibited the sale of contraceptives to children sixteen years old or younger.²⁶⁴

The decision in the 1973 case *Roe v. Wade* also demonstrates the Court's clear movement towards favoring liberty rights connected to a person's sexuality or autonomy over his or her own body.²⁶⁵ In *Roe*, the Court declared that a state law making abortion illegal was unconstitutional because it interfered with a woman's right "to make certain fundamental decisions . . . [relating to her liberty interests] . . . under the Due Process Clause."²⁶⁶ *Roe* also made it clear that laws restricting a woman's right to have an abortion potentially violate her constitutional right to privacy.²⁶⁷ The Court then implied that, when privacy rights such as this were at stake, the strict scrutiny test needs to be applied to determine if those laws are constitutional or not.²⁶⁸ The Court used strict scrutiny language and said, "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,'"²⁶⁹ and the "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."²⁷⁰

Even though he relied on *Griswold*, *Casey*, and *Roe*, Justice Kennedy implicitly stated that the proper standard of review in *Lawrence* was the rational basis test, not the strict scrutiny test used in these other cases.²⁷¹ This is evidenced by the fact that he said that there was no *legitimate state interest* that the Texas statute served that could possibly *justify* the invasion of privacy envisioned by the law.²⁷² This language is usually associated with the rational basis test.²⁷³

264. See 431 U.S. 678, 678-79 (1977) (finding that the New York law had to be examined under strict scrutiny because it involved the constraining of a fundamental right of whether to bear children or not).

265. See 410 U.S. 113, 114 (1973) (holding that a Texas statute that made abortion illegal except to save the mother's life was unconstitutional because it violated the right to privacy found in the Due Process Clause of the Fourteenth Amendment).

266. *Lawrence v. Texas*, 539 U.S. 558, 565 (2003).

267. See 410 U.S. at 153 (suggesting that a state's denial of such a right would detrimentally affect pregnant women by forcing them to give birth and raise a child).

268. See *id.* at 155 (stating that most courts have held that "the right to privacy . . . is broad enough to cover the abortion decision," but the right has limitations).

269. *Id.* (citing *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969)).

270. *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)).

271. See *Lawrence*, 539 U.S. at 578 (searching for but failing to find a legitimate state interest that justifies the Texas anti-sodomy law).

272. See *id.* (finding that Texas cannot demean homosexuals' existence by entering into and regulating their private sexual conduct).

273. See *id.* at 579 (O'Connor, J., concurring) (defining the rational basis test as searching for a legitimate state interest and seeing if the government's regulation is rationally related to the furthering of that interest).

Justice Kennedy could have used one of the other two more demanding tests (i.e., strict scrutiny or heightened scrutiny) to come to his conclusions, but he did not.²⁷⁴ If indeed, as Justice Kennedy indicated, fundamental rights were violated in *Lawrence*, his failure to apply a more taxing standard in *Lawrence* is both confusing and potentially troubling. Confusing because he offers no explanation for why he uses a different standard or how the situation in *Lawrence* differs from the privacy rights addressed in *Griswold* or *Roe*. Troubling because the lesser standard leaves the door open for states to successfully offer only a nominal justification for other kinds of anti-gay legislation in the future. As I said previously, the heightened scrutiny test is the most appropriate test to use in sexual orientation discrimination cases because this is the test used in sex discrimination cases, cases with which sexual orientation discrimination claims have the most in common.²⁷⁵ Justice Kennedy's decision, at least theoretically, relegates gay claimants to a kind of secondary status when compared to women, since discrimination against women is subjected to much more rigorous standards of review.²⁷⁶

Despite his application of the less onerous rational basis test in *Lawrence*, however, Justice Kennedy still determined that government-based infringements on certain fundamental rights like the right to privacy, even when those rights are the rights of gay Americans of any race or gender, will rarely pass even that test's hurdles.²⁷⁷ Whether or not this refusal to approve anti-gay legislation will apply to all future gay marriage claims, however, remains unclear.

In her concurring opinion in *Lawrence*, Justice O'Connor also endorsed the use of the rational basis test, albeit in more nuanced attire.²⁷⁸ She noted that, in cases such as this, where the law is designed to hurt a politically marginalized group, "a more searching form of rational basis review" is required.²⁷⁹ This more searching test appears to be slightly more rigorous than the traditional rational basis

274. See *id.* at 565 (comparing *Lawrence* to cases that found the right of privacy in the Fourteenth Amendment to be a fundamental liberty interest, and, thus, mandated strict scrutiny review).

275. See STEPHENS & SCHEB, *supra* note 158, at 741 (stating that heightened scrutiny, where you must show a "substantial relationship to an important government interest," is the standard most often used for sex discrimination cases).

276. See *Lawrence*, 539 U.S. at 578 (applying rational basis review to sexual orientation discrimination).

277. See *id.* (finding the Texas statute which made homosexual sodomy a crime to not pass rational basis review because Texas could not proffer a legitimate state interest in regulating private conduct between consenting adults).

278. See *id.* at 579 (O'Connor, J., concurring) (stating that a heightened form of rational basis review is to be applied when a law seeks to inhibit personal relationships in violation of the Equal Protection Clause).

279. *Id.* at 580 (O'Connor, J., concurring).

test, which is usually used to uphold laws that hinder economic or tax regulation.²⁸⁰ Justice O'Connor focused on the inconsistent treatment that the Texas law took to the sexual acts in question when she complained that "[s]odomy between opposite-sex partners . . . is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants."²⁸¹ She also said that moral animosity towards a particular group can never be a legitimate reason for the enactment of a law that is subject to rational basis review.²⁸² Justice O'Connor also explained that since Texas rarely enforced its sodomy law against gay defendants, "the law serve[d] more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior."²⁸³ This, combined with the fact that being called a homosexual in Texas is slander *per se* because of the associations with criminality that the word evokes, places an untenable burden on Texas' gay citizens.²⁸⁴

Justice O'Connor argued that the Equal Protection Clause makes it clear that people in similar situations must be treated similarly under the law.²⁸⁵ She therefore concluded:

[T]he State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to 'a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with' the Equal Protection Clause.²⁸⁶

280. See *id.* at 579-80 (O'Connor, J., concurring) (asserting that laws that regulate tax or economic legislation will likely be upheld under rational basis review because the presumption in the Constitution is that the democratic process will fix imprudent decisions).

281. *Id.* at 581 (O'Connor, J., concurring) (noting that her opinion in *Bowers* upholding Georgia's anti-sodomy statute is not inconsistent with her opinion in *Lawrence*, since Georgia made it a crime if both opposite sex and same sex sodomy were involved, whereas Texas only made it a crime if same sex sodomy was involved).

282. See *id.* at 582 (O'Connor, J., concurring) (explaining that the Supreme Court has "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons").

283. *Id.* at 583 (O'Connor, J., concurring).

284. See *id.* at 581-84 (O'Connor, J., concurring) (stating that the Texas law labels all gays as criminals, which makes it harder for them to be treated equal to heterosexuals) (citing *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 310 (5th Cir. 1997)).

285. See *id.* at 579 (O'Connor, J., concurring) (relying on the Equal Protection Clause to invalidate the Texas statute because it states that "all persons similarly situated should be treated alike," and the Texas law treats homosexuals different from its other citizens) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

286. *Id.* at 585 (O'Connor, J., concurring) (citing *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring)).

Justice O'Connor was not willing, however, to make a sweeping statement in *Lawrence* about the extent to which her opinion could be relied upon to justify overturning laws that prohibit gays from being in the military or from being able to marry.²⁸⁷ Handing DOMA supporters an olive branch in the form of dicta, she said:

Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.²⁸⁸

Thus, when DOMA supporters are next called upon to defend their legislation in federal court, they will have Justice O'Connor to thank when the judge allows them to submit testimony about the negative impact gay marriages have on children with same sex parents, for instance. However, since Justice O'Connor did not render an opinion on the merits of these kinds of arguments, gay rights advocates will also have her to thank when the judge allows them to submit evidence that refutes this kind of testimony. Indeed, there is much evidence to support the latter.²⁸⁹

Justice Scalia was very angry about the decision that his more tolerant colleagues rendered in *Lawrence*.²⁹⁰ He blamed them for being unduly influenced by “a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”²⁹¹ Criticizing the majority for engaging in the worst kind of judicial activism, Justice Scalia said that a Court “impatient of democratic change” had tried to unreasonably interfere with the state of Texas’ legitimate right to further the wishes of its

287. See *id.* (distinguishing this case in which no legitimate state interest could be proffered, from the case where law discriminates against homosexuals to further a state interest that is rooted in tradition).

288. *Id.* (O'Connor, J., concurring).

289. See Ethan Jacobs, *Damned Lies and Statistics—Pediatricians Debunk Right-Wing Rhetoric About LGBT Parents*, BAY WINDOWS, Oct. 27, 2005, at 11 (discussing peer-reviewed study of 450 children raised by a lesbian parents or couple, which showed that “those children were identical to their peers from heterosexual families in terms of self-esteem, peer relationships, gender-typical behaviors, and prevalence of psychiatric disorders.”) Children in the study also seemed to be more open-minded about diversity issues. *Id.*

290. See *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (refocusing the issue of the liberty interest involved to the right to engage in homosexual sodomy rather than the right of privacy of two consenting adults at home).

291. *Id.* at 602 (Scalia, J., dissenting).

citizens.²⁹² “[I]t is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best[.]”²⁹³ he complained.

In a short opinion that consists of only a few paragraphs, Justice Thomas called the Texas law “silly,” saying that if he had been a Texas legislator he would have voted against it, since the law, to his mind, required an unnecessary use of government resources to enforce it.²⁹⁴ He said he ultimately would affirm the Texas law, however, because it is not the role of the Court to find that a general right of privacy exists.²⁹⁵

Based on the majority opinion written by Justice Kennedy in *Lawrence*, however, it is clear that there is a strong constitutional basis for the position that state and federal DOMAs are unconstitutional because they violate the Fourteenth Amendment of the U.S. Constitution.²⁹⁶ The only other possible issue that could be raised to challenge this analysis relates to how the courts would apply the Full Faith and Credit Clause of the Constitution to the question at hand.²⁹⁷

III. THE FULL, FAITH AND CREDIT CLAUSE OF THE U.S. CONSTITUTION

The following two scenarios illustrate how full faith and credit issues would play out in a gay marriage case:

Scenario #1: Imagine that a gay male couple—Adam and Steve—marry in Massachusetts, and decide to move to Georgia one year later. Just like their heterosexual counterparts, they expect that Georgia will recognize their marriage, complete with its accompanying rights and responsibilities. For instance, if Steve becomes ill and needs to be hospitalized, Adam should have the right to visit Steve in the hospital, and make decisions about Steve’s medical treatment in the event that

292. See *id.* at 603 (Scalia, J., dissenting) (arguing that the decision of whether to criminalize homosexual acts or forbid prohibition of homosexual acts is best left to the legislature and the democratic process).

293. *Id.* at 603-04 (Scalia, J., dissenting).

294. See *id.* at 605 (Thomas, J., dissenting) (implying that even though he may disagree with the law, it is up to the legislature and the democratic process to correct imprudent decisions) (citing *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)).

295. See *id.* at 605-06 (Thomas, J., dissenting) (asserting that his duty is to “decide cases agreeably to the Constitution and laws of the United States”) (citing *Griswold*, 381 U.S. at 530 (Stewart, J., dissenting)).

296. See *id.* at 578 (finding a liberty interest under the Due Process Clause for homosexuals to engage in private behavior without government intervention).

297. See U.S. CONST. art. IV, § 1 (mandating that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State”).

Steve becomes incapacitated. Adam should also be able to inherit all of Steve's assets should Steve die.

Scenario #2: In the alternative, if Adam and Steve end up getting a divorce while still living in Massachusetts, and then move to Georgia separately, both should be able to expect that the terms of their divorce will be honored in Georgia. Even if the two men were to move to Georgia and then get divorced there, they should still be entitled to the same rights, since:

A married person has: the ability to get divorced in her state of residence, regardless of where the marriage was celebrated, and the right to seek property distribution under that state's laws; the right to inherit even if their spouse dies intestate (without a will) or tries to disinherit them (in which case they still get the "spousal share"); and the right to sue for wrongful death if their spouses [sic] dies as a result of medical malpractice or other negligence.²⁹⁸

Georgia, however, passed a DOMA in 2004, and most Georgia courts would no doubt refuse to recognize either the marital rights or the divorce arrangements just described. Indeed, the federal DOMA supports Georgia's right to do just that because it attempts "to ensure that no state would be forced under the Full Faith and Credit Clause against its will to recognize a same sex marriage legally contracted in a sister state."²⁹⁹ In response, Adam (in the first scenario) or Steve (in the second scenario) might decide to challenge the Georgia courts in federal court by claiming that the Georgia courts, as well as the federal DOMA, violate their Full Faith and Credit rights under the U.S. Constitution.

As mentioned earlier, the Full Faith and Credit Clause provides that each state must give full recognition to the public acts and records of each other state.³⁰⁰ The Framers of the U.S. Constitution hoped that the clause would be used to combat "the disintegrating influence of provincialism."³⁰¹ Thus, since marriage is a matter of public record, Georgia should have to honor the rights of both men outlined in both scenarios.³⁰² However, even though courts usually honor out of

298. Joanna Grossman, *Will Other States Recognize Vermont's Civil Unions?*, CNN.Com, May 20, 2003, <http://www.cnn.com/2003/LAW/05/20/findlaw.analysis.grossman.civilunions.txt/index.html>.

299. Ronald J. Krotoszynski, Jr. & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. 599, 606 (2005) (citing 28 U.S.C.A. § 1738C (West 2005)).

300. See U.S. CONST. art. IV, § 1.

301. Steve Sanders, Op-Ed., 'Full Faith' for Judgments, NAT'L L.J., Feb. 21, 2005, at A27.

302. See, e.g., 52 AM. JUR. 2D *Marriage* § 63 (2005) (stating that "a marriage which is valid under the law of the state or country in which it is contracted will generally be recognized as valid").

state marriages, it is a generally accepted principle of law that they are not required to do so in cases where the marriage in question would be in conflict with the state's public policy.³⁰³ As the U.S. Supreme Court ruled as recently as 1998, a state does not have to replace its statutes with the statutes of other states "dealing with a subject matter concerning which it is competent to legislate A court may [instead] be guided by the forum State's 'public policy' in determining the law applicable to a controversy."³⁰⁴

Sometimes state courts exercise the public policy exception and rule against out of state marriages that were not formed in compliance with their home state's licensing criteria.³⁰⁵ For example, courts in New York and Connecticut refused to recognize out of state marriages in which the parties were engaging in bigamy or incest.³⁰⁶ Other courts, however, decline to exercise the public policy exception, giving deference to the fact that applying the new home state's rules to the couple in question could wreak havoc on their lives. For instance, some courts in Arkansas and Indiana have recognized out of state marriages that did not comply with home state minimum age or blood relation restrictions.³⁰⁷ In light of the above, a Georgia state court could refuse to recognize Adam and Steve's marriage in Scenario 1 or their subsequent divorce in Scenario 2 on the grounds that Georgia public policy, as articulated in Georgia's DOMA, allows it to do so.

303. See Joshua K. Baker, *Status, Benefits, and Recognition: Current Controversies in the Marriage Debate*, 18 B.Y.U.J. PUB. L. 569, 609-10 (2004) (noting that other states have typically rejected recognizing out of state marriages when there was bigamy or incest involved because these things were against the state's public policy) (citing 52 AM. JUR. 2D *Marriage* § 63 (2005)).

304. *Baker v. Gen. Motors Corp.*, 552 U.S. 222, 232 (1998) (quoting *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935)); see also RESTATEMENT (SECOND) CONFLICTS OF LAW § 6 (1971) (stating that "a marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.").

305. See Baker, *supra* note 303, at 610 (delineating cases where the state will accept out of state marriages when the marriage involves a difference in the age of the parties, first cousin relationships and common law marriages from cases where a state will not recognize out of state marriages if the marriage involves bigamy or incest).

306. See, e.g., *People v. Ezeonu*, 588 N.Y.S.2d 116, 118 (N.Y. Sup. Ct. 1992) (stating that "[w]hile Nigerian law and custom may permit a 'junior wife,' New York does not recognize such status); *Catalano v. Catalano*, 170 A.2d 726, 728 (Conn. 1961) (barring recognition of marriage in Connecticut of a uncle and niece who were legally married in Italy)).

307. See, e.g., *State v. Graves*, 307 S.W.2d 545, 553 (Ark. 1957) (recognizing out of state marriage of thirteen-year-old girl that would not be allowed under local law); *Mason v. Mason*, 775 N.E.2d 706, 711 (Ind. Ct. App. 2002) (recognizing out of state marriage between first cousins not otherwise legal under local law).

When one looks at how the Supreme Court has addressed the issue of marriage, however, any attempt by a Georgia court to invoke the public policy exception can not stand. The *Loving v. Virginia* case is illustrative of this point.³⁰⁸ In *Loving*, the two plaintiffs married in the District of Columbia, where interracial marriage was legal, and moved back to Virginia, where it was not.³⁰⁹ The Supreme Court sidestepped the issue of whether or not Virginia should grant full faith and credit recognition to the D.C. marriage altogether, and decided the case on Fourteenth Amendment equal protection and due process grounds.³¹⁰ It ruled that “[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.”³¹¹ In a similar vein, it can be argued that invidious discrimination against gay people is at the heart of the defense of the marriage movement. *Romer v. Evans* and *Lawrence v. Texas* show that such discrimination is not a sufficiently legitimate reason to justify laws targeted to exclude gays from the Fourteenth Amendment’s protections.³¹² Therefore, absent a constitutional amendment to the contrary, even generally recognized exceptions to the Full Faith and Credit Clause can not be used to justify state or federal DOMAs that attempt to ban gay marriage.

CONCLUSION: GAY MARRIAGE AND THE NEW SUPREME COURT

In the fall of 2005, Chief Justice Rehnquist died at the age of eighty, ending his longstanding campaign to undo most of the legal gains made by civil rights advocates over the past fifty years, starting with the Court’s 1954 decision in *Brown v. Board of Education*, which made government sanctioned racial segregation illegal.³¹³ While working as a clerk to Supreme Court Justice Robert H. Jackson in the 1950s,

308. See 388 U.S. 1, 7 (1967) (finding that preservation of racial homogeneity is not a valid public policy).

309. See *id.* at 2-3 (stating that the couple left their residence in Virginia to be married in the District of Columbia, which allowed interracial marriage, and then returned to Virginia, hoping that the state would recognize their marriage under the Full Faith and Credit Clause).

310. See *id.* at 12 (finding the Virginia statute criminalizing interracial marriage to be unconstitutional and, thus, not reaching the issue whether Virginia would have to recognize an interracial marriage in the District of Columbia).

311. *Id.*

312. See 517 U.S. 620, 635 (1996) (holding that a Colorado Amendment is unconstitutional where its only legislative goal is to make homosexuals unequal to the rest of its citizens); 539 U.S. 558, 578 (2003) (decrying Texas’s purported goal of demeaning gays and making them unequal to other citizens as not a legitimate interest).

313. See Lane, *supra* note 26, at A1 (stating that Chief Justice Rehnquist waged “his own war of ideas against liberalism,” starting with a scathing memo about the decision in *Brown*).

Chief Justice Rehnquist wrote a memo characterizing as “pathological” claims made by civil rights groups about the prevalence of racism in America.³¹⁴ He also wrote another memo praising the famous 1896 decision, *Plessy v. Ferguson*, in which the Court ruled that states should be allowed to adopt laws that sanction racial segregation, a decision later overturned by the Court in *Brown*.³¹⁵ While on the Court, Chief Justice Rehnquist sided against the majority in *Grutter v. Bollinger*, which upheld the right of state educational institutions to use race-based affirmative action programs,³¹⁶ and in *Bob Jones University*, which declared that private universities discriminating against blacks could not obtain tax exempt status.³¹⁷ He also disagreed with the majority’s rulings in *Roe v. Wade*,³¹⁸ which upheld a woman’s right to choose, *Romer v. Evans*,³¹⁹ which overturned state laws excluding gays from participating in the political process, and *Lawrence v. Texas*,³²⁰ which declared state anti-sodomy laws unconstitutional. It is therefore fairly clear that, had Chief Justice Rehnquist survived to see a gay marriage claim come before the Court, he would have voted against it.

In the Summer of 2005, just a few months prior to Chief Justice Rehnquist’s passing, Justice Sandra Day O’Connor announced that she would retire from the Supreme Court after twenty-four years of service.³²¹ Justice O’Connor, who once supported the Georgia anti-sodomy law upheld in the *Bowers* decision,³²² voted seventeen years

314. See *id.* (asserting that he “take[s] a dim view of this pathological search for discrimination against blacks”).

315. See *id.* (noting that historians have been skeptical of Chief Justice Rehnquist’s explanation that he wrote the memo reflecting Justice Jackson’s opinion and not his own opinion).

316. See 539 U.S. 306, 307 (2003) (holding that consideration of race in determining college admissions is constitutional as long as it is narrowly tailored and furthers the compelling state interest of diversity in the classroom).

317. See *Bob Jones University v. United States*, 461 U.S. 574, 575 (1983) (holding that an educational institution with discriminatory admissions policies is contrary to public policy and therefore cannot qualify for charitable federal tax exemptions).

318. See 410 U.S. 113, 176 (1973) (Rehnquist, J., dissenting) (arguing that the plaintiff did not have standing in the case and even if there was a valid plaintiff there is no such privacy right that the Fourteenth Amendment guarantees).

319. See 517 U.S. 620, 640 (1996) (Rehnquist, C.J., dissenting) (joining the dissenters who argued that Coloradans wanted to preserve traditional morals against a minority when they passed the state’s amendment and that this was the legitimate rational basis required to uphold the state’s amendment under Constitutional attack).

320. See 539 U.S. 558, 599 (2003) (Rehnquist, C.J., dissenting) (arguing that the Court should have followed past precedent and that there was a rational basis for the Texas statute).

321. See Thomas & Taylor, *supra* note 25, at 25-6 (discussing how O’Connor’s retirement will result in the loss of a crucial swing vote on the Supreme Court).

322. See 478 U.S. 186, 187 (1986) (noting that Justice O’Connor joined Justice White’s majority opinion that the Constitution does not give homosexuals the

later in *Lawrence* to overturn Texas' anti-sodomy statute because she said it unfairly targeted gay people for conduct that heterosexuals engaged in as well.³²³ Even though she reached this conclusion, and sometimes constituted the swing vote in other so-called liberal court rulings,³²⁴ the prospects for a pro-gay marriage decision endorsed by Justice O'Connor could hardly have been described as certain. Indeed, as was the case with her position on anti-sodomy laws, many of her decisions on other important civil rights issues like affirmative action have not been consistent.³²⁵ Also, as I mentioned previously, Justice O'Connor made it clear in her concurring opinion in *Lawrence* that she was not giving a carte blanche to each and every gay rights claim that might make its way to the Court.³²⁶ Claims brought by gays barred from serving in the military or from marrying each other in states that have enacted DOMAs are the two examples she said were not necessarily protected under the rational basis test.³²⁷ Thus, it is not clear that Justice O'Connor would have voted in favor of gay marriage had she not decided to retire.

How Rehnquist successor, Chief Justice Roberts, and O'Connor successor, Justice Alito, will deal with the issue of gay marriage is the subject of much debate. Although Roberts was a law clerk for Rehnquist, it is not so easy to determine whether Roberts is cut from the same anti-gay cloth as his former mentor.³²⁸ On one hand, the new Chief Justice wrote briefs opposing abortion and advocating for the reversal of *Roe v. Wade* in his role as deputy solicitor general

fundamental right to engage in sodomy).

323. See 539 U.S. at 582 (O'Connor, J., concurring) (distinguishing this case from *Bowers* by holding that the Texas statute violated the Equal Protection Clause while *Bowers* only involved analysis under substantive due process).

324. See Thomas & Taylor, *supra* note 25, at 29-30 (documenting how Justice O'Connor "gradually inched to the left on the great, and divisive, social issues, taking the court with her").

325. Compare *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (endorsing the use of race-based affirmative action plans in educational settings), with *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995) (refusing to approve a federal government sponsored affirmative action plan that sought to level the playing field for minority businesses that racism harmed).

326. See *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring) (stating that the Texas law is unconstitutional as applied to private conducts of adults, but "that does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review").

327. See *id.* (O'Connor, J., concurring) (finding that the preservation of national security and marriage were legitimate state interests, and that statutes regulating them would pass rational basis review if the language was rationally related to these interests).

328. See Jeffrey Rosen, Op-Ed., *In Search of John Roberts*, N.Y. TIMES, July 21, 2005, at A29 (asserting that John Roberts' stance on stare decisis has been indecisive and is vague).

during the 1990s.³²⁹ During this time, he also advocated for restrictions on school busing and other policies geared at promoting minority civil rights.³³⁰ On the other hand, Roberts helped gay rights groups prepare their arguments before the Court in the *Romer* case, when his law firm agreed to handle the case on a pro bono basis.³³¹ Nevertheless, Human Rights Campaign President Joe Solmonese warns that “Roberts has . . . urged that [*Roe*] . . . be overruled. Reversing *Roe* could undermine fundamental rights to privacy and liberty that are the legal underpinning for the freedom of gay, lesbian, bisexual and transgender Americans.”³³² Kevin Cathcart, Executive Director of the gay public interest law firm, Lambda Legal Defense and Education Fund, says that he is still concerned about Roberts’ much more extensive advocacy of positions that the organization opposes.³³³

Gay marriage proponents are also concerned about Justice Samuel Alito. Like Roberts, Alito has a track record of attacking the constitutionality of a woman’s right to choose. For instance, on a 1985 application for a political appointment within the Reagan administration, Alito said that he was “‘particularly proud’ of his work on cases in which the Reagan White House had argued ‘that the Constitution does not protect a right to abortion.’”³³⁴ He also wrote a dissenting opinion in the 1991 appeals court case, *Planned Parenthood v. Casey*, in which he said that “Pennsylvania has a legitimate interest in furthering the husband’s interest in the fate of the fetus.”³³⁵ The Supreme Court rejected this view, which would have required a woman seeking an abortion to first notify her husband, thus reaffirming the basic guarantees promised in *Roe v.*

329. See *id.* at A29 (opining that even though Roberts signed government briefs advocating the overturning of *Roe*, he was only advocating for the position of the federal government, his employer).

330. See Maura Reynolds, *Roberts Gay Rights Case Surprises Friends and Foes: Supreme Court Nominee Helped as Part of His Pro Bono Work*, S.F. CHRON., Aug. 5, 2005, at A6 (asserting that some liberals consider Roberts to be much more conservative than he admits).

331. See *id.* (mentioning that Roberts did not bring up his participation in the *Romer* case while responding to the Senate’s inquiries).

332. *Supreme Court Nominee*, BAY WINDOWS, July 21, 2005, available at <http://www.baywindows.com/media/paper328/news/2005/07/21/News/Supreme.Court.Nominee-963683.shtml>.

333. See *id.* (“There are a number of issues that are important in determining whether a nominee will respect the rights of all Americans. Judge Roberts’ track record on reproductive freedom, privacy and federalism . . . merits particular scrutiny.”)

334. Sheryl Gay Stolberg & David D. Kirkpatrick, *Nominee Plays Down Remarks on Quotas and Abortion*, N.Y. TIMES, Nov. 16, 2005, at A16.

335. *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 726 (3d Cir. 1991).

Wade.³³⁶

Alito's record on gay rights issues during his time serving on the U.S. Court of Appeals for the Third Circuit during the past fifteen years is a bit more mixed. In a recent case most closely related to the gay marriage issue, he gave a very traditional reading of the meaning of marriage. He ruled that the boyfriends of women forced to have abortions in China did not have the same right to seek asylum as did the husbands of women who had undergone the same hardship, reasoning that "marriage was a central organizing principle in the law," and that to grant asylum protection "to nonspouses would create numerous practical difficulties."³³⁷ In another case, Alito sided with the majority of the court when it concluded that a university anti-harassment policy, which included prohibitions on the harassment of gays and other minorities, was an unconstitutional infringement of first amendment rights.³³⁸ But in another decision, he ruled that a New Jersey school district was obligated to fund a male student's transfer to a new school because the student was being called "faggot," "homo" and "gay" and harassed because he was perceived to be effeminate by his classmates.³³⁹ Finally, in a case that addressed the right of a municipality to block HIV-positive adults from taking in non-HIV-positive foster children, he said that the municipality's "blanket policy discriminates against the Does because of (their son's) HIV-positive status even though the probability of HIV transmission, and consequently the risk, is next to zero."³⁴⁰

Taking Alito's record as a whole, however, Joe Solmonese said in a press release issued during the former circuit judge's nomination hearings: "A glance at . . . [Alito's] resume reads like an anti-gay textbook. From striking down a policy that protected gay students from harassment to his view that would threaten Congress' power to enact non-discrimination laws, he's the wrong choice for the court."³⁴¹ Solmonese's instincts about Alito may yet turn out to be true, since soon after Alito was sworn in for his new position on the

336. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

337. Adam Liptak, *In Abortion Rulings, Idea of Marriage is Pivotal*, N.Y. TIMES, Nov. 2, 2005, at A1.

338. Lou Chibbaro, Jr., *Gay Groups Oppose Alito Nomination*, Dec. 12, 2005, http://www.washblade.com/thelatest/thelatest.cfm?blog_id=4008; Kathi Wolfe, *Alito's Record on Gay Rights a Mixed Bag*, Jan. 9, 2006, http://www.progressive.org/media_mpwolfe010906.

339. See Wolfe, *supra* note 338.

340. See *id.* (quoting *Doe v. County of Centre*, 242 F.3d 437, 451 (2001)).

341. Press Release, Human Rights Campaign, *Full Senate Can Protect Fairness with Vote Against Alito*, Jan. 4, 2006, http://www.hrc.org/Content/ContentGroups/News_Releases/2006/Full_Senate_Can_Protect_Fairness_with_Vote_Against_Alito.htm.

Court, he sent a thank you letter to James Dobson, head of the conservative anti-gay marriage, anti-abortion rights group, Focus on the Family, saying “the prayers of so many people from around the country were a palpable and powerful force. As long as I serve on the Supreme Court, I will keep in mind the trust that has been placed in me.”³⁴² That trust will be put to the test in an abortion case the Supreme Court is scheduled to decide on in the Fall of 2006. The case, brought by the Bush administration, challenges a lower court decision declaring the Partial-Birth Abortion Ban Act of 2003 illegal, which makes it a crime when a doctor performs an abortion on a fetus that is partially outside the uterus at the time of the abortion.³⁴³ The Act allows such abortions to take place if the pregnant woman’s life, but not her health, is threatened. Since the Court found that a similar restriction on a woman’s health needs rendered a Nebraska state law unconstitutional several years ago,³⁴⁴ it would appear that the whole question of a woman’s right to choose and the accompanying privacy rights previously championed by the Court will be called into question. A decision that weakens these rights could have serious consequences for gay marriage advocates.

Any judge on the new Supreme Court who is inclined to overturn *Roe* or rely on such a decision to deny gays the right to marry, however, will have to do a great deal of intellectual maneuvering to justify such a position. As Justice Kennedy said in his majority opinion in *Lawrence*, the right of gays to marry derives directly from the Fourteenth Amendment and the judicial interpretations thereof.³⁴⁵ Furthermore, given the fact that Justice O’Connor relied on *Roe* and its many equal protection and due process precursors in her concurring opinion in *Lawrence*,³⁴⁶ and the fact that our common law system expects judges to give great deference to legal precedent, Chief Justice Roberts and Justice Alito would be hard pressed to ignore decades of legal jurisprudence pointing in the opposite

342. Colleen Slevin, *Dobson Says Alito Sent Thank-You Note for Backing His Nomination*, ASSOC. PRESS, Mar. 2, 2006, available at http://web.lexis-nexis.com/universe/document?_m=fbf0c2150b91476f9fafdc8433358218

&wchp=dGLbVlb-zSkVA&_md5=bbd89d162a9ebf7d4a1a6af108e3d422.

343. Linda Greenhouse, *Justices to Review Ban on Disputed Abortion Method*, N.Y. TIMES, Feb. 22, 2006, at A1.

344. *Id.*

345. See 539 U.S. 558, 573-74 (2003) (arguing that the Fourteenth Amendment provides protection for personal decisions about marriage, and that homosexuals in relationships have autonomy to make decisions about marriage just as heterosexuals can).

346. See *id.* at 582 (O’Connor, J., concurring) (contrasting *Lawrence* from *Bowers*, which rested upon substantive due process and analogizing *Lawrence* to other cases in which the Court has held that statutes legislating moral animus towards a group are to be analyzed under the Equal Protection Clause).

direction. Chief Justice Roberts himself said during his federal judgeship confirmation hearings that he would honor precedent.³⁴⁷ And asked about his views on the subject, Alito told one Senator during a closed door interview that “he has tremendous respect for precedent . . . and that his approach is not to overturn cases due to a disagreement with how they were originally decided.”³⁴⁸ Both nominees’ remarks are in stark contrast to the views of Justice Clarence Thomas. Known for his ultra conservative stances on issues pertaining to civil rights, Thomas has said that he would overturn any case that is inconsistent with the framers’s original intent in writing the Constitution.³⁴⁹

Although it is difficult to predict with certainty what the ultimate decision will be when the Supreme Court next meets to consider a gay marriage claim, I believe that if each member of the Court renders a decision that is in line with his or her views in the *Lawrence* decision, or in views expressed elsewhere as just discussed, the final decision will be that gay marriage is a fundamental right guaranteed under the Constitution. That is because even if Justices Scalia, Roberts, Alito and Thomas all vote against such a position, there is a strong chance that Justices Kennedy, Ginsburg, Souter, Stevens and Breyer will do just the opposite. In rendering such a decision, the justices who are hoping to champion gay marriage might want to take their counsel from the federal district court judge in the May 2005 Nebraska case, *Citizens for Equal Protection, Inc. v. Bruning*.³⁵⁰ The *Bruning* court appreciated the gravity of passing laws that attempt to deny equal rights to an entire segment of the population. In the first ruling of its

347. See Rosen, *supra* note 328, at A29 (commenting during his confirmation hearings for his appellate position that he was bound by *stare decisis*). But see *Lawrence*, 539 U.S. at 577 (noting that Justice Kennedy may have unwittingly opened the door for Justice Roberts and his more conservative colleagues to break with precedent and overrule *Lawrence* and *Romer*). Justice Kennedy states:

The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. In *Casey* we noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course.

Id. (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 855-56 (1992)).

348. Sheryl Gay Stolberg & David D. Kirkpatrick, *Judge Woos Both Sides on Abortion*, N.Y. TIMES, Nov. 9, 2005, at A20.

349. See Rosen, *supra* note 328, at A29 (stating that both Justice Thomas and Justice Scalia are Constitutional originalists and would overturn any precedent that strayed from the intent of the Framers of the Constitution).

350. See 368 F. Supp. 2d 980, 1008 (D. Neb. 2005) (holding that Section 29 of the Nebraska Constitution, which limited marriage to a man and woman and prohibited recognition of same sex marriage from other states, was unconstitutional as it was a “denial of equal protection”).

kind, Judge Batallion overturned a state of Nebraska constitutional amendment that limited marriage to opposite sex couples and prevented the state from recognizing gay marriages officiated outside Nebraska.³⁵¹

Judge Bataillon classified Nebraska's law as "indistinguishable" from the anti-gay amendment that Colorado passed and that was overturned in *Romer v. Evans*.³⁵² Bataillon recognized that the Full Faith and Credit Clause did little to protect the rights of married gay couples who had recently moved to Nebraska.³⁵³ Despite this finding, the Judge decided that the amendment was illegal because there was a strong link between the denial of the plaintiff's fundamental First Amendment rights to participate in the political process, and the plaintiff's right to equal protection and to due process under the law.³⁵⁴ The Judge concluded that, "[b]ecause intrusions on First Amendment rights are often accompanied by invidious or irrational animus against a certain group, a First Amendment infringement can also be analyzed as the deprivation of a fundamental interest under the Equal Protection Clause when accompanied by proof of such discriminatory animus."³⁵⁵ The Judge also drew the connection between the First Amendment right to free association and the right to marry.³⁵⁶ He reasoned that "[t]he First Amendment's ban on government abridgment of speech and peaceable assembly 'anchors all [of the decisions relating to a due process liberty interest] most firmly in the Constitution's explicit text.'"³⁵⁷

It is important to note that Judge Batallion didn't reach his

351. See *id.* at 987 (stating that Nebraska citizens voted for the amendment because of their concerns that Nebraska would have to recognize a lawful marriage between same sex couples from another state).

352. See *id.* at 1002 (finding the Nebraska statute indistinguishable from the Colorado amendment because they both try to "impose a broad disability on a single group," homosexuals).

353. See *id.* at 987 n.5 (stating that according to the Full Faith and Credit Clause, states do not have to automatically recognize marriages that happened in other states if the marriage from the other state is against public policy) (citing Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-sex Marriage Debate*, 38 CREIGHTON L. REV. 233, 353-64 (2005)).

354. See *id.* at 990-91 (asserting that the constitutional protections that the First Amendment and the Fourth Amendment envision intersect "when the state interferes with an individual's selection of those whom they wish to join in a common endeavor").

355. *Id.* at 989 n.8.

356. See *id.* at 990 (finding similarities between the right to free association and the right to marry because the right to marry involves the personal choice of an individual desiring personal association).

357. *Id.* at 989 n.9 (citing Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1939-40 (2004)).

conclusions by applying either the strict scrutiny test or the rational basis test. Instead, he reasoned that when the first ten amendments or laws that try to restrict access to the political process are involved, heightened scrutiny should be applied to determine their constitutionality.³⁵⁸ He explained that “[t]he court need not determine whether, once a law is found to be directed at a ‘politically unpopular group,’ more searching scrutiny is required.”³⁵⁹ The Judge therefore seems to have appropriately departed from the rational basis test standard of review implicitly used in *Romer* and overtly used in *Lawrence*, and raised the bar for those who hope to justify DOMAs by simply stating that there is a *good reason* for those laws, as opposed to a *reason that is substantially related* to an important government interest.³⁶⁰ It could be argued that Justice O’Connor’s call for the use of a “more searching rational basis test” in *Lawrence* laid the groundwork for Judge Bataillon to do what he did, since the line between heightened scrutiny and a more searching rational basis standard can hardly be described as clear.³⁶¹

The Supreme Court has still not clarified whether or not the rational basis test should be used in all gay rights cases.³⁶² If the Court were to affirm Judge Bataillon’s use of the heightened scrutiny test, it would be harder for states to successfully defend their DOMAs before it.³⁶³ Judge Bataillon therefore seems to be trying to force the Court’s hand and make it decide once and for all that gays deserve to be protected at least to the same extent as women in sex discrimination cases, where the heightened scrutiny test is normally used.³⁶⁴

358. *Id.* at 1001 n.19 (requiring heightened scrutiny when legislation affects “a specific prohibition of the Constitution”) (citing *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938)).

359. *Id.* at 1002 n.20 (citing *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring)).

360. See STEPHENS & SCHEB, *supra* note 158, at 741 (asserting that heightened scrutiny falls between rational basis review and strict scrutiny and demands that the state show that a statute “bears a substantial relationship to an important government interest”).

361. See *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring) (prescribing that a higher standard of rational basis review should be used when a law is designed to detriment a politically unpopular segment of the population, but failing to exhibit what this heightened review would look like).

362. See Kristina Brittenham, *Equal Protection Theory and the Harvey Milk High School: Why Anti-Subordination Alone Is Not Enough*, 45 B.C.L. REV. 869, 890 (2004) (noting that the Supreme Court has strayed from the traditional rational basis test but has failed to commit to an elevated standard of review).

363. See STEPHENS & SCHEB, *supra* note 158, at 741 (implying that the rational basis test is a “less stringent” test, thus making it easier for the government to abridge certain rights that others would consider fundamental).

364. See *id.* (conveying that the heightened scrutiny test is most often applied to claims of sex discrimination).

Judge Bataillon said that the government's stated reason for the law—the wish to protect the traditional institution of marriage—is not credible, especially since the new law affects all kinds of transactions that have nothing to do with marriage.³⁶⁵ Private parties wishing to enter into real estate or prenuptial contracts, or business agreements could also be restricted from doing so by the law,³⁶⁶ since it bars “any recognition of a ‘domestic partnership,’ ‘civil union,’ or ‘same sex relationship.’”³⁶⁷ Even two people of the same sex who sign a lease in order to rent an apartment together might not be able to do so if the letter of the law was strictly enforced.³⁶⁸

Judge Bataillon had it right. State and federal DOMAs are unconstitutional because they infringe upon fundamental rights and attempt to deny equal protection and due process rights to gay citizens.³⁶⁹ DOMAs, the way they are currently written, are either so arbitrary in their reach or so motivated by the desire to disenfranchise gays that they will always fall short of the heightened scrutiny test, or either of the other two standards of legal review for that matter. One can only hope that when the new Supreme Court eventually chooses to review Bataillon's decision, or one just like it, the Court will see the wisdom in his analysis and follow suit.

I am cautiously enthusiastic about a pro-gay marriage victory in the Supreme Court, however, for the following reasons. By focusing almost exclusively on marriage—an institution that, given its associations with family life, and the presumed stability of certain kinds of mainstream monogamous relationships, is inherently conservative and assimilationist in nature—same sex marriage advocates may be unwittingly participating in a strategy that shifts the focus off of other, equally important social justice causes like the fight for economic and distributive justice, the fight to end sexism and racism, and the fight to protect the rights of other more politically expendable sexual minorities, like single and non-monogamous people of all sexual persuasions. As I discussed in Part II, proposed legal protections favoring gay marriage therefore run the risk of serving to produce yet another class of economically and socially

365. See *Citizens for Equal Protection v. Bruning*, 368 F. Supp. 2d 980, 1005 (D. Neb. 2005) (finding that the amendment invalidates different activities that are unrelated to marriage such as “a lease agreement involving two same-sex persons who share an apartment”).

366. See *id.* (asserting that “[s]ection 29 prohibits contracts, benefits and arrangements that already receive recognition in various forms in Nebraska”).

367. *Id.* at 1004 (citing NEB. CONST. art. I, § 29, *held unconstitutional by Bruning*, 368 F. Supp. 2d 980).

368. See *id.* at 1005.

369. See *id.* (holding that Section 29 violates the Equal Protection Clause of the Fourteenth Amendment).

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privileged Americans who are distanced from those who are subjected to these other forms of inequality. Therefore, to paraphrase a traditional African-American saying, I would hope that people in the gay marriage movement remember to “lift up others as they climb,” by refusing to rest on their laurels once a positive decision is forthcoming, and continuing to work for a wider vision of social justice than the marriage movement currently embraces. Otherwise, victory in the marriage wars will be bittersweet.