ABSTRACT

Legislating Marriage: A Constitutional Examination of Same-Sex Marriage

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One of the most pressing legal issues facing the American legal system is the question of homosexual marriage. Following the legalization of homosexuality following *Lawrence v. Texas* in 2003, and the Supreme Court's subsequent 2013 decision to recognize same-sex marriages on the federal level in *U.S. v. Windsor*, few issues can match the fervor with which same-sex marriage is discussed. This thesis examines the Court's jurisprudence concerning marriage, sexual autonomy, privacy, and discrimination in order to determine the appropriate level of scrutiny for the Court to use when examining this issue, and then proceeds to apply that level of scrutiny in order to demonstrate that state bans on same-sex marriage are unconstitutional infringements on the liberty of homosexual persons. Finally, I demonstrate that the legalization of same-sex marriage will not have the effect of moral degradation feared by some opponents of legalization, namely those expounded upon by Justice Scalia in his famous dissent in *Lawrence*.

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LEGISLATING MARRIAGE: A CONSTITUTIONAL EXAMINATION OF SAME-SEX MARRIAGE

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DEDICATION

In loving memory of Mom
To Dad, for supporting me despite our differences
To Aunt Dianne and Aunt Elaine, for handling the things I couldn't
To Victoria, for always being there for me

CHAPTER ONE

Introduction to the Gay Marriage Debate

The History of Homosexuality in the English-Speaking World

The History of Homosexuality Prior to 2003

Views of homosexuality in historical English law. Laws against sodomy, homosexuality in general, and specifically gay marriage are pieces of the legislative and judicial history that have led up to recent developments such as the Defense of Marriage Act and *US v. Windsor*. Emboldened by recent Supreme Court victories such as *Lawrence v. Texas* and *US v. Windsor*, this movement has grown drastically in size and momentum over the last decade, and the Court currently has a case on its docket that may end the debate once and for all.[1] Given the recent legal precedent, state bans on same-sex marriage are demonstrably unconstitutional. However, this argument is not easily understood without a firm grasp on the history of homosexuality in English and American law. As such, I will begin my discussion in English law, which much of American law is derived from.

Though the Christian church has condemned homosexuality in varying degrees since the apostle Paul wrote the epistles that would form the bulk of the New Testament, homosexuality was not codified as a crime in English law until

[1] Denniston, Lyle. "Court Will Rule on Same-sex Marriage (UPDATED)." SCOTUSblog. January 16, 2015. Accessed April 14, 2015. http://www.scotusblog.com/2015/01/court-will-rule-on-same-sex-marriage/.

1533. The law outlawed "buggery," which referred broadly to homosexual intercourse, heterosexual anal intercourse, and any penetrative intercourse with an animal. This law forms part of the foundation that English and American treatises on the issue are built on.[2]

Referring to homosexuality, sodomy, and bestiality under the same term might seem outlandish to a modern reader – while homosexuality is a hotly contested issue, it is widely accepted that bestiality is wrong. At the time, however, all of these sexual acts had one thing in common: they were all "against the ordinance of the Creator and order of nature."[3] This reveals an underlying truth of historical legislation concerning homosexuality – frequently, though they were secular in origin, the laws had a religious backbone to their purpose. While this religious undercurrent may seem odd to a modern reader, in reality it is unsurprising; the nature of law is to reflect the values of the society they originate from, and in 1533, England was an explicitly Christian nation; as such, many laws had religious origins.

Views of homosexuality in post-Independence America. However, the law carried on in America post-Independence, despite a policy of separating church and state. In the newly formed country, homosexuality began slowly to be singled out in

[2] Goldstein, Anne B. "History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick." *The Yale Law Journal* 97, no. 6, 1082-1083.

[3] Ibid.,

comparison to heterosexual anal intercourse. "In 1791," Goldstein writes, "three states' criminal statutes singled out sexual acts between men for special condemnation." The text of the laws that Goldstein references makes the aforementioned religious background clear: "That if any man shall lay with mankind as he layeth with a woman," taken from the Massachusetts law[4], for instance, mirrors almost exactly the wording of the infamous proscription in Leviticus 18:22 – "Thou shalt not lie with mankind, as with womankind: it is abomination."[5] As can be seen in Goldstein's summary, the texts of the remaining two laws were very similar in form and word choice.[6]

Eight of the remaining states of the new Union (specifically, Delaware, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, New Jersey, and Virginia) had criminal laws against buggery in the old sense, indicating perhaps a respect for tradition of law. Maryland had no such proscription against sodomy or buggery, while historical evidence is unclear on the fact in Georgia.[7]

In the time between American Independence and the ratification of the Fourteenth Amendment, "no additional states had singled out sexual acts between men for special prohibition," writes Goldstein. However, in many of the states, anti-

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[4] Ibid., 1073

[5] Harmon, Frank. *King James Version Personal Reference Bible, Navy Bonded Leather*. S.l.: Zondervan, 1994. 104.

[6] Goldstein, Anne B. "History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick." *The Yale Law Journal* 97, no.6, 1073

[7] Ibid., 1073-1084.

sodomy laws had expanded to simply cover the "crime against nature" instead of sodomy or buggery, indicating a clear emphasis on enforcing sexual mores on a widespread scale, rather than merely isolating homosexuality.[8]

Homosexuality as a concept, however, did not exist in Western thought until the late 1800s, when sexuality was beginning to be recognized as a portion of one's identity. In fact, before the 1870s, illicit sexual acts were judged based on their content, participants, and how well these conformed to sex role stereotypes.[9] This distinction casts doubt on the common argument that opposition to homosexuality is deeply rooted in the traditions of American law. In fact, the opposition seems to have been purely directed toward deviant sexual behavior, of any sort.

Once homosexuality caught fire as a concept, it was not long before homosexual people began to identify themselves as homosexual. These people often rejected the idea that a piece of their self-defined identity was necessarily an illness or perversion, which required treatment. This resistance to changing orientation gave rise in the 1950s to a concept of homosexuality as a normal variance from the standard heterosexual orientation. Psychology followed in short order: by 1973, homosexuality was no longer officially considered a mental illness.[10]

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[8] Ibid,, 1073.

[9] Ibid., 1088.

[10] Ibid., 1090-1091

Judicial battles concerning homosexuality prior to 2003. It is against this cultural backdrop that a legal challenge to Georgia's anti-sodomy law arose: *Bowers v. Hardwick*, in 1986.[11] In the case of *Bowers,* a homosexual man, Hardwick, attempted to challenge the anti-sodomy law based on the right to privacy that had previously been recognized in *Griswold v. Connecticut*.[12] Consensual sex, Hardwick protested, should fall under the realm of private life, regardless of the participants. This view was rejected by the Supreme Court, which upheld the Georgia statute, finding that there was no constitutional protection for homosexuality, due to a lack of historical concern for, and in fact opposition to, a right to homosexuality.[13] As shown above, it is not quite accurate to say that American law has always opposed homosexuality in particular; this is one of the problems with the opinion that led it to be later overturned.

It was ten years before another landmark decision concerning homosexuality came down from the Supreme Court. *Romer v. Evans* concerned an amendment to the Colorado state constitution, which attempted to prohibit local governments from enacting any form of specific protection for homosexual citizens.[14] Under the Equal Protection Clause, the Court held that a state could not deny protection to a

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[11] Bowers v. Hardwick, 478 U.S. 186 (1986). http://www.lexisnexis.com/us/lnacademic/

[12] Griswold v. Connecticut. 381 U.S. 479 (1965). http://www.lexisnexis.com/us/lnacademic/

[13] Bowers v. Hardwick, 478 U.S. 186 (1986). http://www.lexisnexis.com/us/lnacademic/

[14] Romer v. Evans, 517 U.S. 620 (1996). http://www.lexisnexis.com/us/lnacademic/

class of citizens based on sexual orientation, because doing so lacked a legitimate state interest. In particular, it was unacceptable to pass a law which disadvantaged a politically unpopular group simply because the legislature expressed a desire to harm that group.[15]

In the same year as *Romer v. Evans*, the United States Congress passed the Defense of Marriage Act (DOMA), simultaneously relieving states of any requirement to recognize the same-sex marriage licenses any other state might issue and declaring that, in federal legislation, "marriage" referred exclusively to marriage between a man and a woman.[16] While, at the time it was passed, no state had recognized the validity of gay marriages, that fact would change in the coming decades. Eventually, DOMA would help pave the way for more challenges to the anti-homosexual laws in America.

In 2000, James Dale sought to challenge the Boy Scouts of America on their exclusion of homosexual scouts and scoutmasters, under the Equal Protection Clause. Unlike *Romer v. Evans*, the Supreme Court declined to intervene, holding that private organizations held a right to associate – or not associate – with persons freely, based on their ideologies, despite state antidiscrimination laws.[17]

The Changing Status of Homosexuality Since 2003

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[15] Ibid.,

[16] Defense of Marriage Act, 1996, Pub. L. No. 104-199. 104th Cong., enact. 21 September, 1996.

[17] Boy Scouts of America v. Dale, 530 U.S. 640 (2000). http://www.lexisnexis.com/us/lnacademic/

Lawrence v. Texas. It is almost impossible to say too much about *Lawrence v. Texas* when discussing gay marriage. In 2003, the Supreme Court overturned a Texas statute criminalizing sodomy, holding that it violated substantive due process, the concept of equity in lawmaking, under the Equal Protection Clause. In doing so, the Court not only overturned *Bowers v. Hardwick* before it, but also struck down implicitly any similar laws in effect in other states.[18]

Following Lawrence v. Texas. In the wake of this landmark decision, the legal setting for homosexuals in America changed dramatically. Following the precedent set down in *Lawrence*, and imitating the Hawaiian Supreme Court decision in *Baehr v. Miike*[19], Massachusetts – the former home of one of three explicitly anti-homosexual sodomy laws – became in 2003 the first state to legalize same-sex marriage, overturning the state's policy of denying marriage licenses to same-sex couples.[20]

Following the historic precedent set in Massachusetts, legal battles concerning gay marriage broiled across the country, most famously in the 2008

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[18] Lawrence v. Texas, 539 U.S. 558 (2004). http://www.lexisnexis.com/us/lnacademic/

[19] Baehr v. Miike, 74 Haw. 530 (1993). http://www.lexisnexis.com/us/lnacademic/. *Baehr v. Miike* was overturned by a voter referendum in Hawaii, which allowed the state legislature to ban gay marriage.

[20] Goodridge v. Department of Pubic Health, 798 N.E.2d 941 (2003). http://www.lexisnexis.com/us/lnacademic/

battle over California's Proposition 8, which proposed an amendment to the state constitution which would explicitly ban gay marriage.[21] The amendment was hotly contested across the nation, and has been challenged in court repeatedly in the case of *Hollingsworth v. Perry,* which was decided in 2012 by the Supreme Court.[22]

The most major development following *Lawrence* came, however, in the same year as *Hollingsworth v. Perry*, with the decision of *United States v. Windsor*. In that case, the Court overruled the section of DOMA that restricted the federal definition of marriage, on the grounds that it violated the Fifth Amendment's Due Process Clause[23]. It is in the aftermath of this case that I begin my analysis of the issue of gay marriage.

The Importance of a Legal Discussion on the Topic of Gay Marriage

The separation of church and state. Though not explicitly discussed in the Constitution, it is a common belief that religion – that is, religious opinion and belief – should not unduly interfere with the state – that is, the secular laws of the nation that affect everyone, regardless of religion. Marriage, being both a secular institution and a religious tradition, straddles this church-state dividing line. This dual nature of marriage makes a purely legal discussion difficult, as the issue will

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[21] Egan, Patrick J., and Kenneth S. Sherrill. *California's Proposition 8 What Happened, and What Does the Future Hold*. Washington, D.C.: National Gay and Lesbian Task Force, 2009. 2.

[22] Hollingsworth v. Perry, 570 U.S. ___ (2013). http://www.lexisnexis.com/us/lnacademic/

[23] U.S. v. Windsor, 570 U.S. ___ (2013). http://www.lexisnexis.com/us/lnacademic/

almost always have an undercurrent of religious concern. However, in no way does this difficulty exempt the issue from a careful legal examination.

The Declaration of Independence states that the duty of a government is to protect the rights of its citizens[24]. In the years leading up to *Brown v. Board of Education,* and again leading up to the Civil Rights Act of 1964, the federal government was called upon to fight for the rights of minority citizens, even against a majority oppression rooted in religious or philosophical grounds.

The federal government will play the central role in the discussion of gay marriage; while states may currently enact legislation recognizing the validity of same-sex marriage, a guarantee of the right will come only once either the legislative or judicial branch of the United States government recognizes it. Given the demonstrated reluctance of the legislature to remedy the problem, it falls to the judicial branch to apply the law.

Justice Stephen Breyer argues for a view of the Court's role in society that emboldens and defends the right of citizens to be active participants in their political system.[25] This view of constitutional interpretation is encouraging for same-sex marriage advocates; just as equal education can be construed to encourage political participation, so too can marriage equality be seen as encouraging homosexual persons to engage fully and enthusiastically in their political system, as marriage equality can be seen as a function of equal application

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[24] Declaration of Independence. 1776.

[25] Breyer, Stephen G. *Active Liberty: Interpreting Our Democratic Constitution*. New York: Vintage Books, 2006.

of the laws, as well as a function of the privacy he supports in his writings. Thus, according to Breyer, it is appropriate for the Courts to rule in this matter.

To determine the right or wrong way to interpret the Constitution would take a much deeper examination of American legal philosophy than is appropriate here. For the purposes of this thesis, I will assume that Breyer's view of the Court is correct and seems to be supported by the judicial activism seen in recent decades that seems to support him. Where it conflicts with the popular theory of originalism, I will follow Breyer's model.

A discussion of the law naturally tends to favor judicial precedent over legislative actions. As the final arbiter of the United States Constitution, the Supreme Court's holdings carry a significant amount of weight when determining what is and is not constitutional. For these reasons, there is a pressing need for the Court to make a decision.

Why it's just marriage. While, for the purposes of clarity, I refer to the topic at hand as same-sex marriage, it is important to clarify that I do not mean same-sex marriage as a discreet and separate entity from heterosexual marriage. Many opponents of marriage equality argue that banning same-sex marriage is not discriminatory, since any person may enter into a heterosexual marriage freely. However, the distribution of marriage benefits in this way does not satisfy the requirements of equality that will be demonstrated below. For now, I pose the following scenario, posed by Alex Rajczi, to the reader: would it be non-discriminatory if a majority decided that citizens could only name Caucasians as the

beneficiaries of their social security? The answer is, of course, that it would not; even though any person may partake in naming a Caucasian as the beneficiary of their social security, it deliberately excludes certain parties from partaking in the receipt of social security benefits.[26] As another example, consider the case of *Loving v. Virginia*: is it non-discriminatory to ban interracial marriage, because any person may marry another member of his or her race? The Court, in Loving, says that it is not.[27]

To this end, it is important to also clarify that the topic of discussion is not civil unions, but true legal marriage, titled that. While more or less equal in policy, it is not socially and psychologically equal for one to say one has a domestic partner, and to say that one has a spouse. As the Court held in *Brown v. Board of Education*, separate accommodations (or institutions) are inherently unequal and create inferiority by the mere separation.[28]

A Brief Preview of the Argument to Follow

Standards of review. I intend to examine this issue from a purely legal standpoint, and present a jurisprudence-based legal argument as to why it is

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[26] Rajczi, Alex. "A Populist Argument for Legalizing Same-Sex Marriage." *Monist* 91, no. 3/4 (2008): 483.

[27] Loving v. Virginia, 388 U.S. 1 (1967). http://www.lexisnexis.com/us/lnacademic/

[28] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). http://www.lexisnexis.com/us/lnacademic/

appropriate for the Court to strike down same-sex marriage bans as unconstitutional laws.

In the next chapter, I will briefly trace the histories and explain the jurisprudence of both the equal protection clause of the Fourteenth Amendment and the due process clauses of the Fifth and Fourteenth Amendment. Throughout the chapter, I will explore the equal protection clause and the due process clauses' effects on the same-sex marriage debate. Finally, I will pinpoint the correct basis for a same-sex marriage defense, and then explain why intermediate scrutiny is the appropriate standard of review for the same-sex marriage debate.

State interests. Using the standard of intermediate review pinpointed in my second chapter, I will investigate in my third chapter the various proposed state interests in opposition to same-sex marriage. The goal will be to determine whether any of the proposed state interests adequately satisfy the necessary standard of review, and discuss the impact of their failure to do so on the constitutionality of same-sex marriage legislation.

Conclusions. Once I have determined the constitutional right to same-sex marriage, I will briefly conclude by discussing the impact of same-sex marriage on modern society, and make a case as to why it is not a problem that same-sex marriage is on a path to be given constitutional status.

CHAPTER TWO

A Discussion of the Legal Framework of the Same-Sex Marriage Debate

Judicial Balancing Tests Concerning Civil Liberties

The Equal Protection Clause

A brief summary of the Equal Protection Clause. Any real defense of same-sex marriage must originate from the law. One of the main purposes of the American Constitution is to protect the minority from any oppressive will of the majority, regardless of the public opinion. Thus, whenever a minority group is significantly discriminated against, it is the duty and obligation of the government to protect them. However, not every instance of inequality is necessarily illegal under the Constitution; the point of many laws is to make distinctions and classifications, then apply rules based on those distinctions and classifications. Therefore, it falls to proponents of gay marriage to prove in a legal setting that they have been legally wronged and that some remedy is required. To this end, I will begin by examining one of the two main constitutional provisions that has been used to defend the rights of gay men and women: the Equal Protection Clause.

The Equal Protection Clause is a provision in the Fourteenth Amendment to the United States Constitution, passed shortly after the end of the Civil War. Through a Supreme Court practice known as incorporation, the Supreme Court has used the Fourteenth Amendment to ensure that the bill of rights is extended to all of the

citizens of the United States in all states, regardless of their status. The Equal Protection Clause, in particular, originates from the first section of the Amendment, which provides that,

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[1]

The key words are found in the last clause of the section – *equal protection of the laws*. The general thrust of the amendment is found in those five words: the amendment aims simply to ensure that no class of citizens is placed above or below another in the eyes of the law.[2]

The Equal Protection Clause, in jurisprudence, focuses on judicial balancing tests as its main tool to test laws. The generally important things that the court looks at to determine if the Equal Protection Clause is implicated in the implementation of a law is to determine whether the law uses a suspect method of classification. Based upon the degree to which either of these is true, the Court uses varying levels of scrutiny to determine whether the law is appropriately related to a legitimate state interest, and whether or not the law is overbroad in furthering its stated interest.

This current method of applying the Fourteenth Amendment is not, as will be shown below, the only interpretation the Court has ever taken on the issue. However, even taken in light of Equal Protection jurisprudence before the suspect classification

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[1] U.S. Const. amend. XIV, § 1

[2] Tussman, Joseph, and Jacobus TenBroek. "The Equal Protection of the Laws." *California Law Review* 37, no. 3 (1949): 342.

test came into usage by the Court, the crux of the law remained the same, giving it a long-standing tradition of protecting, to the best of the Court's understanding, the equal application of state law to all citizens of the United States.

In the case at hand, it will become apparent in the argument below that state-level bans on same sex do so on the basis of a classification that must at least be viewed as quasi-suspect – or, alternatively, on the basis of gender, which the court has labelled as quasi-suspect – once the relevant tests for that determination are applied properly to the gay and lesbian populations impacted by the laws.

A discussion of the legal history of the equal protection clause. The Fourteenth Amendment was ratified in 1868, just one year after the end of the Civil War. Unsurprisingly, many of the early cases that explored its impact were racially charged, balancing state's rights with the newfound civil rights and liberties of the African-American race. Setting aside the question of the "privileges and immunities" clause, which was discussed in the Slaughterhouse cases, it only took until 1877 for the amendment to become the basis of a landmark Supreme Court decision, in the case of *Strauder v. West Virginia*.[3] The case concerned the exclusion of black men from serving on juries, a restriction which meant that former slaves accused of crimes were tried by purely white juries, a distinction which by its nature led to a biased application of the law. As the opinion reads, "What is this [the Fourteenth

[3] The Slaughter-House Cases, 83 U.S. 36 (1873). http://www.lexisnexis.com/us/lnacademic/

Amendment] but declaring that the law in the States shall be the same for the black as for the white … ?" While the case does not reference explicitly the idea of suspect classifications, and the decision does not hinge upon the right to a jury of one's peers as a fundamental right, Justice Strong does make it clear that a classification among citizens solely based upon race is not permissible within the scope of the Fourteenth Amendment. [4]

Perhaps, however, the most infamous early interpretation of the Equal Protection Clause comes from *Plessy v. Ferguson*, which allowed states to require separate accommodations for black and white citizens, under the premise that these accommodations were "separate but equal."[5] This decision, while rightly considered odious in the modern era, did set a consistent test for the legality of racially charged laws. Based off of *Plessy*, the Court did hold that, while separate accommodations were acceptable, state-run accommodations must be available for both white and black citizens.[6] The Court also held that conditions for black and white citizens needed to be truly equal, theoretically (though not in actuality)

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[4] Strauder v. West Virginia, 100 U.S. 303, 307. (1880). http://www.lexisnexis.com/us/lnacademic/

[5] Plessy v. Ferguson, 163 U.S. 537 (1896). http://www.lexisnexis.com/us/lnacademic/

[6] Missouri ex. rel. Gaines v. Canada, 305 U.S. 337 (1938). http://www.lexisnexis.com/us/lnacademic/

invalidating instances of separation where accommodations were not truly equal.[78] In this regard, *Plessy* determines that the laws, in order to satisfy the Equal Protection Clause, must be equal. While Plessy concerns race, the principle of equality can be applied outside of the issue of race. The next breakthrough in Equal Protection jurisprudence came from the widely known *Brown v. Board of Education* case, which overturned *Plessy* and held that forcible segregation between races violated the spirit of the Fourteenth Amendment.[9]

One of the earliest cases to adopt varying levels of judicial scrutiny based on the consideration of classifications and fundamental rights was *Skinner v. Oklahoma*, which involved the forced sterilization of certain criminals. Based on the fundamental right to procreate, the Court applied strict scrutiny to the law, which failed on that basis.[10] Until 1976, all cases were tried under either rational basis or strict scrutiny, with intermediate scrutiny being added in *Craig v. Boren*, which dealt with gender discrimination.[11]

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[7] Sweatt v. Painter, 339 U.S. 629 (1950). http://www.lexisnexis.com/us/lnacademic/

[8] McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950). http://www.lexisnexis.com/us/lnacademic/

[9] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). http://www.lexisnexis.com/us/lnacademic/

[10] Skinner v. State of Oklahoma, ex. rel. Williamson, 316 U.S. 535 (1942). http://www.lexisnexis.com/us/lnacademic/

[11] Craig v. Boren, 429 U.S. 190 (1976). http://www.lexisnexis.com/us/lnacademic/

One of the curiosities of Equal Protection jurisprudence is the continuing denial of the Court to extend full suspect classification status to anything other than racial and religious groups, despite the presence of other groups that seem similarly disadvantaged – such as, in this case, homosexual men and women. The impact of this denial, at first blush, is to make laws discriminating by means other than race easier to pass. However, despite this barrier, certain denials of equal protection have still failed under lesser tiers of scrutiny. In *Romer v. Evans*, for instance, despite the lack of a suspect classification, the Court struck down a Colorado state amendment that prohibited the legislature from affording special protections to homosexuals.

An important piece of the jurisprudence of the Fourteenth Amendment is that the Court has limited its application consistently; the Fourteenth Amendment applies to the states, not to the federal government, which is limited more appropriately by the Fifth Amendment's Due Process clause. This distinction does not indicate that the federal government is immune to the forces of Equal Protection; instead, the same effect is achieved through the usage of the Fifth Amendment, which was held in *Bolling v. Sharpe* to have the force of the Equal Protection Clause in cases where the Fourteenth Amendment is inapplicable.[12]

Potential applications of the equal protection clause to the same-sex marriage debate. The Equal Protection argument is easily applicable to the same-sex

[12] Bolling v. Sharpe, 347 U.S. 497 (1954). http://www.lexisnexis.com/us/lnacademic/

marriage debate, mostly on the grounds that most of the prohibitions on same-sex marriage have come exclusively from the states. Two questions must be answered concerning the application of the Equal Protection Clause in the case of state bans of gay marriage: first, whether there is a fundamental right being actively harmed by denying same-sex couples the ability to marry. The equal protection jurisprudence available shows that there is: the right to marry the person of one's choosing. In fact, multiple cases throughout the court's history have demonstrated that the right to marry is a fundamental right.

The case of *Meyer v. Nebraska* supports marriage as a fundamental right protected by the Fourteenth Amendment, noting in the midst of its discussion that, "Without doubt, it denotes not merely freedom from bodily restraint but also the right … to marry," making it clear that marriage falls within the scope of the Fourteenth Amendment's protections.[13] *Skinner v. Oklahoma* reaffirms, "Marriage and procreation are fundamental," and even states that the right to marry and procreate is "one of the basic civil rights of man."[14] *Griswold v. Connecticut* states that marriage is "a right of privacy older than the Bill of Rights."[15]

Given the court's jurisprudence which consistently acknowledges the right to marry as a fundamental right that precedes even the writing of the Constitution

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[13] Meyer v. Nebraska, 262 U.S. 390, 399 (1923). http://www.lexisnexis.com/us/lnacademic

[14] Skinner v. State of Oklahoma, ex. rel. Williamson, 316 U.S. 535, 541. (1942). http://www.lexisnexis.com/us/lnacademic/

[15] Griswold v. Connecticut, 381 U.S. 479, 486. (1965). http://www.lexisnexis.com/us/lnacademic/

which protects it, it is nearly impossible to comprehend that marriage could be anything but a fundamental right. However, the argument can be made from these cases that there is a right to marry, but not necessarily to marry *anyone.* That is, the argument can be made that the state may rightfully restrict, in pursuit of a legitimate state purpose, whom a person may choose to marry. While rulings before 1967 are open to this interpretation, after 1967 the law is much more black and white: the right to marry involves the free choice of whom to marry.

The landmark case of *Loving v. Virginia* in 1967 struck down state bans on miscegenation, or interracial marriage, on the grounds that the statute violated both the Fifth and Fourteenth amendments.[16] The Virginia law in question forbade white and non-white persons from marrying, imposing a criminal penalty for attempting to circumvent the law. Richard Loving (a white man) and his wife (a black woman) left Virginia to be married in the District of Columbia. Upon their return, they were indicted and tried under the law, and subsequently sentenced to a year in jail, or a 25-year exile from the state of Virginia. [17]

In the opinion, the Court elaborated that the marriage does indeed fall under the purview of the State's police power.[18] However, the Court also clarified that the police power is not immune to equal protection claims, either. According to the opinion, mere equal application of a law is not enough to save it from being struck

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[16] Loving v. Virginia, 388 U.S. 1 (1967). http://www.lexisnexis.com/us/lnacademic/

[17] Ibid., 2-7

[18] Ibid., 7

down under the Equal Protection Clause, and that the Court must examine legislation for "arbitrary and invidious discrimination." Furthermore, the Court held explicitly that, "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."[19] This statement could not have meant merely the right to marry in general, as Mr. and Mrs. Loving were free under Virginia law to marry persons of their own race without reprisal from the state; instead, the fundamental right lies in the choice to be married to a person of one's choosing without unreasonable or baseless obstacles, such as, in the case of *Loving*, the race of one's partner. Furthermore, the Court holds in *Loving* that, despite equal application, the law must satisfy a "very heavy burden" of justification.[20] In the case of race, this calls for "the most rigid scrutiny."[21] While the Court might invalidate the law on these grounds, however, they continue on to emphasize the importance of the violated right, indicating that the Equal Protection Clause might best be used to nullify, in this case at least, the claimed state interest.[22]

While merely implicating such a fundamental right is enough to trigger at the very least heightened scrutiny from the Court, it is worthwhile to discuss the second question that arises from an equal protection claim: classification status. While the

[19] Ibid., 8

[20] Ibid., 9

[21] Ibid., 11

[22] Ibid.,

court has never recognized anything other than race and religion as suspect classes and, indeed, seems loath to do so, this has by no means been a unanimous decision on the part of the justices. In his dissent in *Massachusetts Board of Retirement v. Murgia*, Thurgood Marshall points out that there are certain classes, which the court declines to view as suspect, that are still unfairly burdened by discrimination.[23] If, as Court jurisprudence holds, the laws are to uphold civil liberty, then any individual unfairly injured must have a remedy available under the law.[24] As Mark Strasser explains, there are a number of relevant criteria that can be applied to a characteristic to determine whether or not it the classification of it is "suspect." These criteria include powerlessness, a lack of control of the characteristic, and that the characteristic be a status and not merely an activity.[25] Based on these three criteria, it is clear that homosexuality should be treated as *at least* a quasi-suspect class, on par with gender, and as such, those burdened by their sexuality deserves similar remedies to those burdened by their gender.[26] Furthermore, if homosexuality as a quasi-suspect classification is denied, the laws in question impact gender unfairly, as well.

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[23] Massachusetts Board of Retirement v. Murgia, 427 U.S. 307. (1976). http://www.lexisnexis.com/us/lnacademic/

[24] Marbury v. Madison, 5 U.S. 137, 163. (1803). http://www.lexisnexis.com/us/lnacademic/

[25] Strasser, Mark Philip. *Legally Wed: Same-sex Marriage and the Constitution*. Ithaca, N.Y.: Cornell University Press, 1997. 30-38.

[26] Ibid., 30.

The first criterion to address is powerlessness. Homosexuals are dramatically in the minority in American politics, making them a politically easy class to burden. While it is true that the political climate for homosexuals has been improving over the past few decades, it is absurd to say that their moderate political gains eliminate their right to judicial protection.

The second criterion for examining a classification is control. A suspect classification must be something that an individual cannot readily control. Without a full societal consensus on whether homosexuality is a biological fact or not, this criterion is harder to examine properly. However, given that, even if homosexuality is caused by environmental factors as opposed to biological ones, these environmental factors are likely so deeply rooted in childhood that it is still not something that homosexual persons can readily control.[27] Additionally, we can see in this criterion another avenue for a classification that burdens the laws: gender. Gender has already been declared by the Court to be a quasi-suspect class.[28] Being immutable, then, it is legally problematic to restrict a person's choice of partner based solely on his or her own gender.

The final determination to be made is whether homosexuality is a status or an activity. According to Strasser, the distinction between activity and status is an important one, as status distinctions are protected, even when the main symptom of

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[27] Ibid., 35-36.

[28] Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) http://www.lexisnexis.com/us/lnacademic/

the status is to engage in a particular activity.[29] For instance, in *Robinson v. California*, the Court held that the *status* of being a drug addict was not punishable by law, while the *activity* of taking drugs could be punished by the state as desired.[30] Sexual orientation is clearly not an activity, given that one may be gay while choosing not to act upon one's desires. However, similar to religion, it is defined mainly by behavior and, similar to the way in which the Court protects the expression of one's religion through personal behaviors.

In fact, despite the fact that religion is a classification that has a powerful influence on the political climate, the fact that it is readily changed, and the fact that it is predominately characterized by activity, the Court still affords religion suspect classification status. Thus, it is clear that the same level of scrutiny ought to be afforded to homosexuality as a classification, thus giving the Court another reason to apply at least heightened scrutiny to the case of homosexual marriage. Continuing the above argument for gender, additionally, it is clear that being a male or a female is not an activity, but a status – a man is not suddenly a woman just because he elects to engage in feminine activities; likewise, a woman does not turn into a man merely by acting masculine.

The other important equal protection case concerning the same-sex marriage debate is *Romer v. Evans*. In *Romer*, the Court declined to support a Colorado amendment that prohibited legislatures within the state from giving special

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[29] Ibid., 37-38.

[30] Robinson v. California, 370 U.S. 660 (1962). http://www.lexisnexis.com/us/lnacademic/

protections to homosexuals. The Court rejected the notion that the law merely placed homosexuals on the same level as other citizens of Colorado, holding that homosexuals must be given the right to seek equal protection of the laws and that there was no possible state interest in the law other than an illegitimate desire to cause harm to homosexuals.[31]

The Due Process Clause

A brief summary of the due process clause. The Due Process Clause, as it is generally understood, originates from the Fifth Amendment of the United States Constitution, which states,

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The key words to take note of in the Fifth Amendment are, "… nor be deprived of life, liberty, or property, without due process of law."[32] In Bolling v. Sharpe, as noted above, the Supreme Court stated that the Fifth Amendment's due process requirement has the effect of enforcing the standards of the Equal Protection Clause on the federal government[33].

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[31] Romer v. Evans, 517 U.S. 620 (1996). http://www.lexisnexis.com/us/lnacademic/
[32] U.S. Const. amend. V, § 1

[33] Bolling v. Sharpe, 347 U.S. 497 (1954). http://www.lexisnexis.com/us/lnacademic/

The thrust of due process in this sense is that the laws enacted by the federal government must be fair and unbiased without interfering with certain fundamental rights which are protected by the Constitution, either specifically enumerated or, as the right of privacy was found to be in *Griswold*, existing in the "penumbras" of the amendments.[34] These fundamental rights, so goes the theory, are either immune or nearly immune to abridgment by the federal government.

Worth noting here is that, as the companion to the Equal Protection Clause, the Due Process Clause in the Fifth Amendment applies only to the federal government, and not to the state governments. While this Due Process clause does then seem to have a more national feel to it, it actually limits the possibilities for resolving the same-sex marriage debate significantly, since typical court jurisprudence does not require the federal government to enact a law, but merely stops it from enacting one. Since same-sex marriage is not subject to a nationwide ban, the federal government's ability in this instance is somewhat more limited than that of the states.

Regardless of this limitation, the Fifth Amendment Due Process Clause holds value in the same-sex marriage debate for its jurisprudence on what protections surround a fundamental right. The concept of substantive due process is acknowledged in the Fourteenth Amendment as well, and due process is defined the same throughout the legal precedents at hand, requiring one consistent standard for what qualifies as a fundamental right.

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[34] Griswold v. Connecticut, 381 U.S. 479 (1965). http://www.lexisnexis.com/ln/academic/

While it is unrealistic to expect the courts to ever mandate that the federal government pass a law supporting same-sex marriage – and in fact, such an order would be a vast overreach of judicial power – the discussion of the applications of due process for the same-sex marriage debate is a worthwhile topic. The Fourteenth Amendment also calls upon due process as one of its building blocks, and in fact contains its own due process clause. Therefore, the discussion of fundamental rights for the purpose of an equal protection argument should rightly be framed within the context of substantive due process as defined by the Court. As such, much of the above discussion of fundamental rights applies here as well, though there are additional rights that are supported explicitly by due process that are at issue as well. To narrow the issue into a manageable network of precedent for this discussion, I will focus my discussion of due process on the Fourteenth Amendment cases, which carry more practicable precedent for solving the same-sex marriage issue.

A discussion of the relevant legal history of the due process clause. There are somewhat fewer cases in recent judicial history for understanding and applying due process claims in non-economic settings than there are for equal protection. The first truly important case is *Griswold v. Connecticut*, which affirmed an unenumerated right to privacy. *Griswold* held that, in the "peunumbras" and "emanations" of the First, Third, Fourth, and Fifth amendments, which create spheres of privacy safe from government intrusion, there existed a fundamental right to privacy that could be protected by the Ninth Amendment.[35]

[35] Ibid.,

Also worthy of discussion of Due Process is the fact that, in *Loving v. Virginia*, the Court also ruled that the miscegenation statute in question violated the due process clause due to the statute's infringement on the fundamental right of marriage, as noted above.[36] Following *Loving*, the next major due process case concerning marriage and sexual freedom was *Zablocki v. Redhail*, which dealt with a Wisconsin statute that required noncustodial parents of children to seek a court order before obtaining a marriage license. The Court struck down the statute on equal protection grounds, but Stewart's concurrence elucidates the idea that, for the simple uneven denial of a right, regardless of the classification used, can be tried under the Fourteenth Amendment's due process clause, which requires narrow tailoring to a substantial state interest, which he held was not the case in the Wisconsin law.[37]

Following not long on the heels of *Romer v. Evans*, the case of *Lawrence v. Texas* in 2003 explicitly supported the fundamental right of a person to engage in private, consensual sex with whomever he or she chooses, explicitly denying moral disapproval as a legitimate state interest with which to abridge the right to sexual privacy.[38] Notably, Justice Kennedy wrote in the majority opinion that, "personal decisions relating to marriage, procreation, contraception, family relationships,

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[36] Loving v. Virginia, 388 U.S. 1 (1967). http://www.lexisnexis.com/us/lnacademic/

[37] Zablocki v. Redhail, 434 U.S. 374 (1978). http://www.lexisnexis.com/us/lnacademic/

[38] Lawrence v. Texas, 539 U.S. 558 (2003). http://www.lexisnexis.com/us/lnacademic/

[and] child rearing" were protected by the Constitution, citing *Planned Parenthood v. Casey* in stating as much, reiterating the need for the "autonomy of the person in making these choices."[39] In fact, Kennedy explicitly extends this right of autonomy to homosexuals, solidifying the grounds for a challenge of marriage bans that remove the autonomy called for by *Casey.*[40] This autonomy comes from a set of cases that established a right to privacy in one's sexual and relational decisions, involving *Griswold v. Connecticut*[41], *Eisenstadt v. Baird*[42], and *Roe v. Wade*[43].

The opinion does not claim that sodomy is a fundamental right. What it does claim, however, is that the law fails the rational basis test; there is not a legitimate state interest in moral disapproval, according to the Court.[44] Explicitly, Kennedy uses prior precedent to claim that "a bare desire to harm a politically unpopular group" cannot be considered a legitimate state interest.[45] The Court uses rational basis to strike down the law, then, relying on previous Court cases concerning personal relationships. This provides some basis for the argument that same-sex

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[39] Ibid., 574

[40] Ibid.,

[41] Griswold v. Connecticut, 381 U.S. 479 (1965). http://www.lexisnexis.com/us/lnacademic/

[42] Eisenstadt v. Baird, 405 U.S. 438 (1972). http://www.lexisnexis.com/us/lnacademic/

[43] Roe v. Wade, 410 U.S. 113 (1973). http://www.lexisnexis.com/us/lnacademic/

[44] Lawrence v. Texas, 539 U.S. 558 (2003). http://www.lexisnexis.com/us/lnacademic/

[45] Ibid., 580

marriage, concerning a personal relationship, ought to be viewed under a rational basis standard. However, marriage has been elevated in American society above other personal relationships, and is specifically a fundamental right deserving of strict scrutiny.

Furthermore, Kennedy references *Romer*, arguing that statues that serve only to "impos[e] a broad and undifferentiated disability on a single named group" are not constitutionally acceptable.[46] In the case of same-sex marriage, this is the case: the laws banning it, as will be shown in my next chapter, provide no tangible benefits to the state or citizens, and only serve to impose a disability on homosexual couples.

It is worthwhile at this point to discuss Scalia's dissent in *Lawrence*. While Justice O'Connor in her concurrence explicitly denies that the decision in Lawrence could be used to support same-sex marriage[47], Scalia in his dissent makes the point that, without a validation for morally-based laws, state laws against same-sex marriage are not sustainable.[48] This argument holds water, as I will show in the next chapter, and essentially forms the basis of the argument for same-sex marriage.

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[46] Ibid.,

[47] Ibid., 585

[48] Ibid., 590

Scalia frames the equal protection argument[49] well; if the problem with the law is that men can only violate the law with other men, and women with other women, then the same can be said easily for same-sex marriage.[50] This mirrors the argument from *Loving*, though the difference between race and gender is notable due to the varying standards of scrutiny the Court applies to those classifications. As Scalia notes, an interest in "preserving the traditional institution of marriage" is merely an oblique way of "describing the State's *moral disapproval* of same-sex couples."[51]

Finally, though it hails from the Fifth Amendment and not the Fourteenth, the recent case of *U.S. v. Windsor* bears discussion, as the only ruling by the Supreme Court on the issue of gay marriage at all. In the ruling, the Court held that the federal government's refusal under the Defense of Marriage Act to acknowledge same-sex marriages recognized by the states used the classification of homosexuality to impose restrictions and disabilities, a purpose that the Court rejected, stating that, "DOMA seeks to injure the very class New York seeks to protect. By doing so it

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[49] While *Lawrence* is most useful in determining state interest and as an example of substantive due process, there is an equal protection factor to the case. Similarly, *Loving v. Virgnia* can aid in understanding what qualifies as a fundamental right under the due process clause, despite being an Equal protection case.

[50] Lawrence v. Texas, 539 U.S. 558, 600 (2003). http://www.lexisnexis.com/us/lnacademic/

[51] Ibid., 601

violates basic due process and equal protection principles applicable to the federal government."[52]

Windsor can be construed to be problematic for same-sex marriage, as it appears to support the right of the states to define marriage without interference from the federal government. However, it is not so problematic as to make the issue of same-sex marriage outside the realm of the Court. There are a few things that the Court reiterates here that help to give the important notes of *Lawrence* more precedential force. Notably, the Court echoes *Lawrence* in holding that "a bare congressional desire to harm a politically unpopular group" could not satisfy the need for a legitimate basis for the law.[53] Furthermore, the Court clarifies that Due Process entails a particular right to liberty.[54] This liberty protects citizens from being drawn into distinct and arbitrary classes (such as, the Court seems to imply, classes based upon sexual orientation).

Many of the harms suggested in *Windsor* can also apply to the denial of same-sex marriages on the state level. Couples which are not recognized as married under the law lack the ability to jointly apply for healthcare, the protection of laws protecting immediate family members of United States federal officials, raises the cost of raising families, and devalues the relationship between partners.[55]

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[52] U.S. v. Windsor, 570 U.S. ____, 20 (2013). http://www.lexisnexis.com/us/lnacademic/

[53] Ibid., 20

[54] Ibid., 25

[55] Ibid., 23, 24

Summary Remarks

Based on this analysis of case law, one thing remains clear: in order for either the equal protection or due process defenses for gay marriage to pass constitutional muster, they must implicate some issue which raises the level of scrutiny applied by the Court. While the facts are in place to recognize homosexuality as a suspect class, the Court has shown reluctance to do so, leaving the fundamental rights analysis as the most powerful argument in favor of homosexual marriage rights. However, as discussed above, there is an argument to be made concerning gender discrimination. Based on this, at least intermediate scrutiny should be applied by the Court, regardless of whether Equal Protection or Due Process is used to review the case, which requires an important state interest for which the law is proportionally written. To this end, a discussion of potential state interests, and why these potential interests ultimately fail to justify the abridgement of homosexual marriage rights, is the next appropriate step.

CHAPTER THREE

A Consideration of Legal Arguments Against Same-Sex Marriage

Proposed State Interests and Counter-Arguments

General Remarks

The goal of refuting the arguments of same-sex marriage opponents. In the previous section, I demonstrated that intermediate scrutiny was the lowest standard of review acceptable for considering the issue of same-sex marriage from a constitutional standpoint, based upon the restriction of a fundamental right – the right to marriage – or else due to the gender discrimination inherent in these laws, both of which requires that the state's laws be proportionally tailored to further an important state interest. In order to demonstrate that same-sex marriage bans are an unconstitutional infringement of liberty, I will refute commonly-proposed arguments for state interest in the case of same-sex marriage bans, and explain where they fail to meet the requirements of intermediate scrutiny.

The law does not require that banning same-sex marriage merely be related to the state's goals; rather, the law requires that banning same-sex marriage be a proportionally tailored response to meet the state's goals – that is, it must be narrowed to focus on the state's important interest that the law seeks to further[1]. To

[1] Zablocki v. Redhail, 434 U.S. 374 (1978). http://www.lexisnexis.com/us/lnacademic/

that end, I aim to point out critical flaws in the rationale of each argument, which show that a ban on same-sex marriage is not a closely tailored response to any of the state's arguments.

Common Arguments and Refutations

Marriage as procreation. Opponents of same-sex marriage argue that marriage is rightly seen as having a function of encouraging responsible procreation.[2] Because same-sex couples are not capable of procreation, they argue, it is unreasonable to grant them a marriage license, which is intended for opposite-sex couples that will start families and have children. For proponents of the responsible procreation argument, marriage's main function is to encourage "a unitary action in which the male and female become really biologically one" through coitus, fulfilling a commitment which is "fulfilled by bearing and raising children together."[3]

Furthermore, proponents of responsible procreation argue that there is a fundamental difference in how heterosexual and homosexual couples procreate, "To put it succinctly, the responsible-procreation defense surmises that same-sex couples already procreate responsibly and that the rights and responsibilities of

[2] Opening Brief for Appellant, Sevcik v. Sandoval. Case No. 12-17668 http://www.lambdalegal.org/

[3] Lee, Patrick. "Marriage, Procreation, and Same-Sex Unions." *Monist* 91, no. 3/4 (2008): 423.

marriage should be limited to furthering the goal of encouraging more responsible procreation by heterosexuals."[4]

The last common permutation of the responsible procreation argument is that, were states to legalize same-sex marriage, there would be a decrease in the number of heterosexual marriages, thus increasing the likelihood of children being born out of wedlock and becoming a burden on the state's welfare system.

There are a multitude of problems with these viewpoints, not the smallest of which is the sheer number of contradictions to it already present within the American legal system. First, as Justice Scalia points out in his dissent in *Lawrence v.* Texas, our legal system already permits the marriage of the old and the infertile, which is problematic for an argument rooted in procreation.[5] Second, there is no legal requirement in any state that couples seeking a marriage license affirm a desire to procreate; in fact, *Griswold v. Connecticut* and *Eisenstadt v. Baird* make it clear that the right *not* to procreate is constitutionally protected.[6][7][8]

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[4] Nice, Julie A. "The Descent of Responsible Procreation: A Genealogy of an Ideology." *Loyola of Los Angeles Law Review, Forthcoming* (2012). 783.

[5] Lawrence v. Texas, 539 U.S. 558, 605 (2003). http://www.lexisnexis.com/us/lnacademic

[6] Donnell, William J., and David Arthur Jones. "Marriage-Eligibility Issues." In *The Law of Marriage and Marital Alternatives*, 47. Lexington, Mass.: Lexington Books, 1982.

[7] Griswold v. Connecticut, 381 U.S. 479 (1965). http://www.lexisnexis.com/us/lnacademic/

[8] Eisenstadt v. Baird, 405 U.S. 438 (1972). http://www.lexisnexis.com/us/lnacademic/

Griswold is a controlling case in the matter of procreation. The case makes it clear that the marital relationship (including any sexual relations) fall within the zone of privacy created by the First, Third, Fourth, and Fifth amendments. Furthermore, the Court specifically states that a law which has a maximally destructive impact on that relationship cannot stand as acceptable under current and historical Supreme Court jurisprudence.[9] Thus, the idea that marriage is primarily for the purpose of procreation is unsupported by current precedent – it's already up to individual couples to decide whether or not to procreate, and in fact *Eisenstadt v. Baird* makes it clear that the choice of whether or not to procreate applies equally to all couples.[10]

To argue that marriage is designed to encourage heterosexual couples to procreate responsibly, and thus is not necessary for same-sex couples, also ignores recent advancements in reproductive technology. It is no longer impossible, and in fact it is common, that same-sex couples utilize artificial means of reproduction to beget children.[11] Thus, it is still important for same-sex couples to have the protections and benefits of marriage, in order to allow them the protections for the family unit that come along with marriage.

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[9] Griswold v. Connecticut, 381 U.S. 479 (1965). http://www.lexisnexis.com/us/lnacademic/

[10] Eisenstadt v. Baird, 405 U.S. 438 (1972). http://www.lexisnexis.com/us/lnacademic/

[11] Donnell, William J., and David Arthur Jones. "Marriage-Eligibility Issues." In *The Law of Marriage and Marital Alternatives*, 47. Lexington, Mass.: Lexington Books, 1982.

Finally, the concern that heterosexual couples – otherwise ready to marry – will decline to marry based solely on the legalization of opposite-sex marriage is, in the aggregate at least, so far unsubstantiated. A study from 1989 to 2009, sampling all fifty states and the District of Columbia, and comparing those which legalized same-sex marriage to those which did not, found no differences in marriage trends between the two types of states.[12]

The summary of these arguments is thus: the state's proposed interest in procreation is shaky at best, given the lack of other legislation to this end, as well as the lack of sociological data backing the state's claims. Even if the state's claim that these laws protect procreation is assumed to be true, however, much more closely tailored laws to promote responsible procreation are imaginable. A blanket ban on same-sex marriage fails to proportionally tailor itself to the task of protecting procreation; thus, its position as a state interest is inadequate to excuse the infringement of the fundamental right of marriage.

Marriage as childrearing. Other opponents of same-sex marriage hold that marriage is designed to encourage responsible parenting of children. Children need a mother and a father, proponents of this argument explain, and same-sex marriage by definition denies a child of such a union either a mother or a father.[13] Given the

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[12] Dinno A, Whitney C (2013) Same Sex Marriage and the Perceived Assault on Opposite Sex Marriage. PLoS ONE 8(6): e65730. doi:10.1371/journal.pone.0065730

[13] Opening Brief for Appellant, Sevcik v. Sandoval. Case No. 12-17668 http://www.lambdalegal.org/

obvious deficit in parenting, then, it is important not to encourage it by legalizing same-sex marriage.

While the well-being of children is definitely an important state interest, this argument against same-sex marriage fails in a few areas; first, in many states, we already accept that same-sex couples make fine enough parents to adopt children. If they are acceptable parents, then denying them the stability of the family unit that marriage confers – something which complicates family law in the event of a split, for instance – does not increase the quality of childrearing. Second, it is not proven that children of same-sex parents fare any less well than those of opposite-sex parents, and in fact the American Psychological Association holds that the two types of parents are equivalent.[14] In fact, a meta-analysis of multiple studies found that there were no significant differences between the children of heterosexual and homosexual parents in almost all areas.[15] While no study in this area could possibly be completely unbiased, the aggregation of studies may be a more reasonable method, as it helps to control for various deficiencies in the individual studies, such as those that have concerns with sample size.

Emily Gill explains in *An Argument for Same Sex Marriage* that numerous studies, small and large, have found that there is "comparable equality between

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[14] "Lesbian and Gay Parenting: Theoretical and Conceptual Examinations." American Psychological Association. January 1, 2005. http://www.apa.org/pi/lgbt/resources/parenting.aspx.

[15] Tasker, Fiona. "Same-sex parenting and child development: Reviewing the contribution of parental gender." *Journal of Marriage and Family* 72, no. 1 (2010): 35-40.

children from the two types of families."[16] Where there is a difference, Gill explains, is in terms of tolerance: children of same-sex parents tend to be more tolerant of same-sex relationships, and more expressive of feelings and empathy. However, Gill explains, this tolerance is likely to be the product of a connection to a minority, rather than the product of specifically homosexual parenting.[17]

Even in the face of studies that support the notion that a child does best with his or her biological parents, a ban on same-sex marriage does not further the state's interest. Given that the APA does not see a difference between same-sex and opposite-sex parents, it is reasonable to say that same-sex marriage is no more damaging to childrearing than is remarriage after a divorce, which is permitted nationwide.

Given all of this evidence, the state's aim of promoting responsible parenting does not seem to be furthered by banning same-sex marriage. Furthermore, the denial of the protections that marriage confers upon a family may conceivably create dangerous and damaging instability[18] – for instance, without a legal marriage, a gay man may not be recognized as the father of his partner's child in the event of a hospitalization, preventing him from seeing his child and causing stress and pain not only to the parent, but to the child. Such a consequence runs counter to the

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[16] Gill, Emily R. "Same-Sex Marriage." In *An Argument for Same-sex Marriage: Religious Freedom, Sexual Freedom, and Public Expressions of Civic Equality*, 71. Washington, D.C.: Georgetown University Press, 2012.

[17] Ibid., 71-72.

[18] Opening Brief for Appellant, Sevcik v. Sandoval. Case No. 12-17668 http://www.lambdalegal.org/

state's interest in responsible parenting, given that the laws put additional strain on the very relationship (that of a parent and child) that they claim to protect.

It is obvious that a stable family structure is important to a child; that is the reason that marriage confers benefits for childrearing. By denying legal recognition of a child's family structure, the state actively interferes with the child's perception of his or her family's integrity and closeness, and denies a child the stabilizing effects of marriage on the whole, for demonstrably no purpose other than disapproval of same-sex couples and parenting by these couples. The Court has held that it is impermissible to punish the child with the goal of discouraging the parent, and should this line be more clearly and firmly drawn than when it comes to childrearing.[19]

Same-sex marriage and religious liberty. One argument against same-sex marriage that carries significant weight is that legalizing same-sex marriage will lead to a violation of religious liberty for those who oppose homosexuality on religious grounds.[20] Churches and religious institutions will be forced, opponents argue, to offer their services to promote homosexuality. Furthermore, religious business owners will be prohibited from refusing service to homosexual people

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[19] Opening Brief for Appellant, Sevcik v. Sandoval. Case No. 12-17668 http://www.lambdalegal.org/

[20] Feldblum, Chai R. "Moral Conflict and Liberty: Gay Rights and Religion." *Georgetown Law Library*, 2006. http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1080&context=facpub.

seeking to marry, and it will be impossible for citizens to reconcile their religious beliefs with the law.

The first of these concerns is easy to dismiss; churches and religious institutions are already permitted to decline to serve people based on religious views: for instance, it is common knowledge that Catholic churches will not permit those who have been divorced to be married within the church.[21] Similarly, religious institutions – such as private universities – are permitted to require certain religious backgrounds of their employees.[22] These provisions will apply equally well to concerns about being forced to condone same-sex marriage; put simply, the law already provides adequate solutions for institutions.

Personal citizens have something to lose; however, the Court has already held in analogous cases that the conflict between equality and moral objection of a sect of the population is resolved, at least in the case of marriage equality, by favoring equality. *Loving v. Virginia* legalized interracial marriage at a time when many Americans morally opposed it; their moral outrage did not persuade the Court to abridge interracial couples' right to marry the person of their choosing.[23]

The Court holds in many cases that the right to religious liberty is, in particular, the right to belief – actions that violate the laws do not become

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[21] Boston, Rob. "Sex." In *Taking Liberties: Why Religious Freedom Doesn't Give You the Right to Tell Other People What to Do*. Amherst, New York: Prometheus Books, 2014. 77.

[22] "Some Key Legal Considerations in Hiring" *Baylor.edu*. 2014. http://www.baylor.edu/content/services/document.php?id=49519.

[23] Loving v. Virginia, 388 U.S. 1 (1967). http://www.lexisnexis.com/us/lnacademic/

acceptable simply because of religious belief.[24] While religious liberty is a valid concern, it is important to note that the legalization of same-sex marriage does not mandate belief that the law is good; it is acceptable, and constitutionally protected, to believe that the law is bad. As Justice Scalia explains, "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[25]

The state *does* have the power to grant religious exceptions to the laws; however, it is not required to do so.[26] In light of this, however, it is conceivable that the law could allow for religious exemptions when the exemptions did not place a hardship on the couple seeking to be married; such a law would be much more closely tailored to the goal of promoting religious liberty than would a blanket ban on same-sex marriage.[27] The state oversteps its boundaries in presuming that the loudest public morals should be legislatively protected, but that is an argument for the next section.

Same-sex marriage and public morals. Perhaps the most common of the arguments against same-sex marriage is the argument that the state has a right to safeguard against public immorality. Same-sex marriage, opponents argue, would

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[24] Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). http://www.lexisnexis.com/us/lnacademic/

[25] Ibid., 879

[26] Ibid., 906

[27] Berg, Thomas C. "What Same-Sex-Marriage and Religious-Liberty Claims Have in Common." *Northwestern Journal of Law & Social Policy* 5, no. 2 (2010): 206-35.

not only condone immorality, but open the door legally for far worse things, such as bestiality, incest, and obscenity.[28]

The response to this concern is as effective as it is simple: *Lawrence v. Texas* prohibits the infringement of liberty based solely upon moral disapproval, citing *Planned Parenthood v. Casey*, "Our obligation is to define the liberty of all, not to mandate our own moral code."[2930] Using *Casey*'s rationale, the Court more or less unequivocally states that, absent at least a *legitimate* state interest, curtailing the liberty to marry the person of one's choosing is unacceptable.[31]

Tellingly, even though O'Connor joined the majority opinion in *Bowers v. Hardwick,* she concurs in *Lawrence v. Texas*, stating that laws that inhibit personal relationships often fail, even under rational basis review, where distinctions between classes of citizens are drawn.[32] Simple moral disapproval or a "bare desire to harm" an unpopular group cannot stand as legitimate state interests in light of *Lawrence*.

Marriage is, demonstrably, a fundamental, constitutionally protected right. Given the evidence above, it is clear that the time for full legalization of same-sex

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[28] Lawrence v. Texas, 539 U.S. 558 (2003) http://www.lexisnexis.com/us/lnacademic/.

[29] Ibid.,

[30] Ibid., 571

[31] Lawrence v. Texas, 539 U.S. 558 (2003) http://www.lexisnexis.com/us/lnacademic/.

[32] Ibid.,

marriage is rapidly approaching, despite opposed parties' concerns. These concerns can be best explained by referring to Justice Scalia's dissent in *Lawrence v. Texas*. Scalia raises concerns about same-sex marriage in light of *Lawrence*, stating that, "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices."[33]

As I show here, there is a case to be made from *Lawrence* that same-sex marriage does indeed follow. However, there are important distinctions between Scalia's other concerns and the case of same-sex marriage. As put in the majority opinion in *Lawrence*, and as applies equally well to that case as to the problem of same-sex marriage, "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution."[34]

The easiest of these concerns to dismiss is that of masturbation – currently, no state actually criminalizes masturbation; the closest that any state law comes to doing so is Alabama's prohibition on the sale of objects used for sexual gratification.[35] However, as the Court opinion says in *Griswold v. Connecticut*, there

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[33] Ibid., 590

[34] Ibid., 578

[35] Waldo, Curtis. "Toys Are Us: Sex Toys, Substantive Due Process, and the American Way." Colum. J. Gender & L. 18 (2008): 807-810.

is a difference between a commercial statute and a blanket ban on action.[36] Thus, Scalia's concerns are invalid, given that no such laws actually exist.

Bigamy, adultery, and fornication are somewhat more ambiguously justified, though bigamy may carry additional economic and administrative concerns that mitigate the Court's willingness to accept it. The Court in Stanley v. Georgia, alternatively, has already ruled obscenity to be acceptable under a right to privacy in the home.[37] Public obscenity, on the other hand, carries with it the same state interests as those involved in keeping the peace and protecting children. Prostitution falls under commerce regulation, as well as public health due to the spread of disease, both of which have been held by the Court to be legitimate state interests.[3839]

Constitutionally, the right to engage in sexual intercourse freely illustrated in *Lawrence* implies the right *not* to engage in sexual intercourse.[40] To wit, if one may engage in sexual intercourse with whomever he or she desires, then it makes sense to say that the denial of that right – either in the positive, by coercion, or in the negative, by prohibition – stands counter to accepted legal doctrine. Given the

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[36] Griswold v. Connecticut, 381 U.S. 479, 485 (1965). http://www.lexisnexis.com/us/lnacademic/

[37] Stanley v. Georgia, 394 U.S. 557 (1969). http://www.lexisnexis.com/us/lnacademic/

[38] Roe v. Wade, 410 U.S. 113 (1973). http://www.lexisnexis.com/us/lnacademic/

[39] United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007). http://www.lexisnexis.com/us/lnacademic/

[40] Lawrence v. Texas, 539 U.S. 558 (2003) http://www.lexisnexis.com/us/lnacademic/.

radical nature of the *Lawrence* decision, it is hard to believe that the Court would undermine the sexual freedom and privacy there granted by granting constitutional protection to coercive sexual relationships.

The important distinction between, for instance, bestiality and adult incest and same-sex, then, marriage is one of health and informed, meaningful consent. The requirement for consent is the backbone behind our laws that state that children cannot consent to sexual relations, that intoxicated or otherwise impaired adults cannot consent to sexual relations, that *animals* – lacking, as they do, sophisticated means of communicating their desires – cannot consent to sexual relations. Incest, similarly, carries with it a concern about coercion. Furthermore, the law prevents incest and bestiality due to health concerns.[41]

As shown above, there is not an adequate state interest argument against same-sex marriage. Under Lawrence, moral disapproval cannot stand alone , failing to satisfy even the rational basis review as outlined by O'Connor in her concurrence to *Lawrence*. As such, there remains no legal standing to argue that the states' police powers concerning public morals justify drawing a distinction between straight and gay citizens for the purposes of marriage.

Concluding Remarks

[41] Beetz, Andrea M. "Bestiality/Zoophilia: A Scarcely Investigated Phenomenon Between Crime, Paraphilia, and Love*." Journal Of Forensic Psychology Practice* 4, no. 2 (April 2004): 8 .

Above, I have outlined the common arguments against same-sex marriage from a state interest standpoint. For each argument, I have demonstrated why the proposed state interest either is not furthered by a ban on same-sex marriage, is not a suitably important state interest, or else why same-sex marriage bans are not a closely tailored response to furthering that state interest. Given the lack of support for a same-sex marriage ban, under the Due Process doctrine, there is no constitutional support for a ban on same-sex marriage in any state. Thus, it is reasonable that the same-sex marriage bans in various states nationwide be overturned.

It is a principle of liberal democracy that rights and liberties are not curtailed without good reason. The best explanation of what constitutes a "good reason" comes from an article proposing a Populist defense of same-sex marriage: "A basic political principle is that the government must offer opportunities equally unless it has good reason not to, where the 'good reasons' must involve harm to others."[42] This principle is the driving force behind due process and equal protection jurisprudence; where rights are concerned, states must justify their actions and the divisions they draw between citizens. And where fundamental rights – such as the right to marriage – are concerned, states must justify them particularly well. In the case of same-sex marriage, no justification put forth by any opponents of same-sex marriage has the legal force necessary to excuse the abridgement of the fundamental marriage right. Like with any law, this implementation of the law maw

[42] Rajczi, Alex. "A Populist Argument for Legalizing Same-Sex Marriage." *Monist* 91, no. 3/4 (2008): 481.

potentially have unintended consequences, but those consequences do not change what the law is.

There is no time like now to discuss this issue. In January, the Court announced that it would hear four cases concerning same-sex marriage during the month of April, with a decision expected in June, concerning two major questions: "whether the Constitution requires states to issue marriage licenses to same-sex couples, and whether states must recognize same-sex marriages performed in other states where they are legal."[43] It is important to clarify once more that this is not a moral question so much as it is a legal one; whether or not the law is good does not impact whether or not it is the law. If the Court reads the history of the Equal Protection and Due Process clauses as they have in the jurisprudence of the past few decades, and applies the law as it stands now, the answer to both of the Court's questions will be in the affirmative.

[43] Barnes, Robert. "Supreme Court Agrees to Hear Gay Marriage Issue." *The Washington Post*, January 16, 2015. Accessed April 17, 2015. http://www.highbeam.com/doc/1P2-37593881.html?

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