Confronting America's Ambivalence towards Same-Sex Marriage: A Legal and Policy Perspective

Justin R. Pasfield
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Family Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol108/iss1/11

This Student Work is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
CONFRONTING AMERICA’S AMBIVALENCE TOWARDS SAME-SEX MARRIAGE:
A LEGAL AND POLICY PERSPECTIVE

I. INTRODUCTION ................................................................................... 268

II. CURRENT LEGAL STATUS AND RECENT DEVELOPMENTS .......... 270

III. IDENTIFYING THE RIGHTS AT STAKE ......................................... 272

IV. LEGAL SUPPORT FOR EQUAL RIGHTS ........................................... 275
   A. Constitutional Interpretation ...................................................... 275
   B. The Equal Protection Clause ..................................................... 277
      1. Romer v. Evans and Purposeful Discrimination .................... 278
      2. Comparing Romer to Other Statewide Referendums ............. 280
   C. The Due Process Clause ........................................................... 282
      1. Loving and its Legacy: Marriage is a Fundamental Right ....... 282
      2. Lawrence v. Texas ............................................................... 286
   D. The Establishment Clause ......................................................... 289
   E. The “Forgotten” Amendment ..................................................... 291

V. ADDRESSING LEGAL ARGUMENTS AGAINST SAME-SEX MARRIAGE .. 293
   A. Morality and Religion ............................................................... 293
      1. Condemnation of Homosexuals ........................................... 294
      2. Rebutting Morality and Condemnation ................................. 294
   B. Legitimate State Interests ........................................................ 295
      1. Procreation ........................................................................ 295
      2. Child Rearing .................................................................... 297
   C. Democratic Theory .................................................................. 297

VI. PUBLIC POLICY ANALYSIS ............................................................ 299
   A. Synopsis of America’s Current Acceptance Level .................... 299
   B. An Overview of the Compelling Policy Reasons for Acceptance ........................................... 300
      1. Protecting Children and Families ..................................... 300
      2. Religious Arguments .......................................................... 302
      3. Economic Policy ................................................................. 303

VII. AN UNEXPLORED COMPROMISE AND A PERMANENT SOLUTION .... 304
   A. Returning “Marriage” to its Roots, Embracing Religious Freedom, and Protecting the Integrity of Religion ................................. 305
   B. This Solution Hedges “Separate But Equal” Arguments ............. 306
   C. A Realistic Assessment of the Solution ..................................... 306

VIII. CONCLUSION .................................................................................. 307
I. INTRODUCTION

The issue of same-sex marriage poses difficult questions for America in the moral, ethical, and legal realms of society. This controversial issue has proven to be capable of dividing the country. With the wave of recent legal developments concerning the recognition of same-sex unions, the future of the law is very much in doubt. America is in a period of constant flux with regard to gay rights. Questions remain as to how this issue will develop in the courts, legislature, and the private sector alike.

Upon objectively analyzing the many credible arguments for and against legal recognition of same-sex unions, legal acceptance emerges as the just answer. This Article examines the compelling support for this conclusion in detail, claiming that the totality and legitimacy of arguments supporting equal rights represents overwhelming evidence that acceptance is the optimal solution. The "acceptance" endorsed in this Article need not necessarily come from judicial intervention; this is but one scenario in a variety of options explored. Instead, the focus is on logical ends rather than often divisive means.

Compelling arguments supporting equal rights for same-sex couples exist in many areas of the law. Most notably, the Bill of Rights, by intensely protecting civil liberties, provides the most persuasive and credible support through the Equal Protection Clause, the Due Process Clause, and the Establishment Clause. Individually and collectively, these principles show that the Constitution supports equal rights for same-sex couples. Beyond the Constitution, justifications for equal rights exist in subjects such as morality, religion, and economic theory, to name a few. Most importantly, acceptance of equal rights for homosexuals embodies the ultimate values and principles that are the cornerstone of this country: freedom and liberty.

This Article approaches same-sex marriage from many different angles. Numerous articles advocate a single method to obtain equal rights, but few provide multiple options or discuss the interconnectedness of different ap-

2 U.S. CONST. amend XIV, §1.
3 Id.
4 U.S. CONST. amend I.
proaches. Because of this cross-sectional analysis, brief and succinct arguments are appropriate.\(^6\)

Additionally, this Article operates on the premise that there are two common conflicts implicit with the issue of same-sex marriage: 1) the struggle for equal rights of marriage (the benefits of marriage); and 2) the struggle for the institution of marriage.\(^7\) Because of this premise, and in the interest of brevity, the focus herein is on the equal rights side of the equation.\(^8\) Viewing this Article in that light not only helps explain the rights-oriented position that is endorsed, but also encourages the reader to draw their own conclusions about the significance of a single word in the larger debate. Fittingly, the permanent solution endorsed near the conclusion embraces the dual nature of the problem by proposing a compromise. It ultimately seeks to avoid conflict over the institution of marriage altogether.

Part II provides background on gay rights by explaining the current state of rights and by highlighting recent developments in the United States. Part III describes ways homosexual couples are discriminated against by identifying the rights that these couples are denied. Part IV represents the heart of the analysis, and provides detailed legal rationales reflecting that same-sex couples should be granted equal rights under the law.\(^9\) Primarily, this Part claims that the recent wave of legislation specifically forbidding legal recognition of same-sex unions is transparently unconstitutional in the eyes of precedent. Secondarily, this Part claims that beyond the constitutionality of civil union bans, equal rights for same-sex couples are guaranteed under the Constitution.

Part V refutes legal arguments against equal rights for same-sex couples. Part VI explores compelling policy reasons to move towards equal rights, touching on moral, religious, and economic principles. These policy arguments help lead to the logical conclusion that, even if the Supreme Court decides that equal rights for same-sex couples are not technically mandated by the Constitu-

\(^6\) Indeed, lengthy individual essays could be written on most of the issues explored in this Article, and much of the cited material provides further clarification and discussion.

\(^7\) See generally David B. Cruz, "Just Don't Call it Marriage": The First Amendment and Marriage as an Expressive Resource, 74 S. CAL. L. REV. 925 (2001) (documenting the dualistic nature of the issue of same-sex marriage).

\(^8\) In other words, this examination of same-sex unions takes a rights-oriented approach and downplays the issue of whether or not homosexual couples should have co-ownership of the word "marriage." Instead, this Article focuses on the constitutional argument that homosexual couples should be afforded every one of those legal rights that are implicit in traditional marriage. Therefore, unless otherwise stated, the word "marriage" is used to represent legal rights implicit with heterosexual marriage, and not necessarily co-ownership of that word. Using the words "civil unions," or "domestic partnerships" is not preferable in this arrangement because the real world application of these terms typically does not represent all of the rights of marriage. See infra notes 10-13 and accompanying text. Much has been discussed concerning the significance of changing the definition of marriage, and the impact that this would have on the psyche of America. See Cruz, supra note 7.

\(^9\) The Equal Protection Clause, Due Process Clause, Establishment Clause, and constitutional interpretation are among the legal issues explored in this Section.
tion, equal rights are good for society. Lastly, Part VII endorses an unexplored compromise to the current stand-off that is capable of enduring constitutional scrutiny and allows all sides to claim victory.

II. CURRENT LEGAL STATUS AND RECENT DEVELOPMENTS

A broader perspective of same-sex marriage shows how other nations are dealing with this complex issue. Around the world, the current legal state of gay rights is extremely varied. In Europe, homosexuality has gained stronger acceptance than in other parts of the world. The following table illustrates the current international acceptance level of same-sex unions.

<table>
<thead>
<tr>
<th>Countries</th>
<th>Rights Obtained</th>
<th>Year</th>
</tr>
</thead>
</table>

These facts show that over the last twenty years, other parts of the western world have steadily recognized the importance of providing equal rights to homosexuals. This indicates an international movement towards rights for same-sex couples; an "emerging awareness" that same-sex unions are deserving of legal protection.


11 Id. at 2007-08. The entire chart (other than the information on Canada and Spain) was comprised of information obtained from the Harvard Law Review.

12 Id. at 2008. These "registered partnerships" include most, but not all rights of heterosexual marriage. Id.

13 Id. The "same-sex unions" noted above grant fewer rights than "registered partnerships." Id.


15 Lawrence v. Texas, 539 U.S. 558, 572 (2003). Though this term was used by the Supreme Court in the context of private sexual conduct, the analogy can be made to same-sex marriage. Id.
In the United States, the level of legal acceptance for homosexuals has been in constant flux during the last fifteen years. In one of the more significant developments, the Defense of Marriage Act ("DOMA"), was signed into law during President Bill Clinton's first term. DOMA not only defines marriage as a union between a man and a woman for federal purposes, but it also discretely allows any state to refuse the recognition of any "right or claim" of a same-sex couple "arising from such relationship." This second aspect of DOMA has a more drastic impact on equal rights, making it clear that, no matter what the circumstances, states are not obliged to give same-sex couples any legal rights.

Following the setback of DOMA, there has been progress towards equal rights, most notably taking place in the judiciary. The Supreme Court opinions of Romer v. Evans and Lawrence v. Texas presented homosexuals with previously elusive judicial protection. Vermont became the first state to recognize civil unions in 1999. In 2003, Massachusetts went even further by becoming the only state to recognize same-sex marriages. These strides have helped bring the issue of same-sex marriage to the forefront of American politics.

17 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) [hereinafter DOMA]. No lavish signing ceremony took place, as it was signed at 12:50 a.m. on September 21, 1996, less than six weeks before a hotly contested presidential election. James M. Donovan, DOMA: An Unconstitutional Establishment of Fundamentalist Christianity, 4 MICH J. GENDER & L. 335, 336 (1997). This circumstantial evidence can lead readers to their own conclusion regarding the politics surrounding its passage.
18 28 U.S.C. § 1738C (2000). "No State... shall be required to give effect to any public act... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State... or a right or claim arising from such relationship..." (emphasis added). This authorization for states to ignore the Full Faith and Credit Clause of the Constitution is another aspect of the law that is constitutionally suspect. Donovan, supra note 17, at 337.
19 It is undisputed that the possible effects of DOMA are far-reaching. Donovan, supra note 17, at 337. However, despite DOMA's notoriety, the effects thus far have largely been symbolic, and it is rarely the subject of litigation. Nonetheless, in one of its first legal challenges in a bankruptcy hearing, it survived rational basis, citing procreation and child-rearing as legitimate state interests. See In Re Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004).
20 517 U.S. 620 (1996). Romer marked the first time that homosexuals were protected under the Equal Protection Clause. Id. This case is discussed in great detail in Part IV.
21 539 U.S. 558 (2003). As a result of Lawrence, consensual homosexual conduct can no longer be criminalized. Id. This case is discussed in great detail in Part IV.
Subsequent to these courtroom developments, the 2004 elections delivered a tough blow to the momentum that the gay rights movement had achieved. Through these elections, eleven states banned same-sex marriage, and eight of those also banned civil unions. Even in Oregon, considered a progressive state, a ban was passed. Perhaps the only favorable election result came from Cincinnati, Ohio, where voters chose to repeal a 1993 measure that precluded homosexuals from receiving rights and protections based on their status. Soon after the 2004 national election, the California legislature became the first one in the country to approve a bill permitting same-sex marriages.

After observing the volatility of this issue over the last several years, questions remain as to what the next developments will be. How will each side fight for public opinion? Will the wave of state constitutional amendments survive judicial challenge? And, most importantly, what is the next step?

III. IDENTIFYING THE RIGHTS AT STAKE

The following question is the starting point in addressing the issue of same-sex marriage: How are gay and lesbian couples discriminated against by not being able to form a legal union? This legitimate question must be answered in order to challenge the current laws. Without injury (here in the form of unequal treatment), same-sex couples would not have standing to bring suit.

http://www.cnn.com/2004/LAW/08/12/same-sex.marriage/index.html. These marriages in San Francisco were later held to be void. Id.

25 See Hitt, supra note 1.
26 Id. The eleven states that banned same-sex marriage are Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Oregon, and Utah. Id.
28 In Oregon, an amendment to preclude gays from getting special rights was previously defeated by the voting public. See the failed initiative at Measure 9, http://www.sos.state.or.us/elections/nov72000/guide/mea/m9/m9.htm (last visited Feb. 6, 2005).
29 See Hitt, supra note 1.
30 Corey Moss, Gay-Rights Groups Hope Courts Will Overturn Marriage Bans, http://www.mtv.com/chooseorlose/headlines/news.jhtml?id=1493459 (last visited Nov. 4, 2004). The original measure passed in 1993 was similar in nature to the measure that was struck down in Romer. Id.
31 California Legislature Approves Gay Marriage, http://www.foxnews.com/story/0,2933,168643,00.html (last visited Sept. 19, 2005). This measure remained subject to veto by Governor Schwarzenegger at the time of publication. Id.
32 West Virginia Equal Rights Forum at the West Virginia University College of Law (Oct. 18, 2004).
33 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Standing is proved by 1) injury in fact; 2) causation; and 3) redressibility. Id.
The following is a summarized list of the many rights that homosexual couples are denied by being unable to form a legal union:

**Associational Rights**
- Visitation Rights in Hospital Situations
- Notification Rights Upon Death or Injury to a Partner

**Financial Privileges and Property Rights**
- Joint Tax Returns
- Rights in Bankruptcy Proceedings
- Inheritance Rights

The rights at stake are not limited to these brief lists, and these lists emphasize those rights obtained through heterosexual marriage.

These are perhaps the rights that even a minimal level of compassion would yield to—regardless of belief in the righteousness of homosexuality. Much common ground is possible with these rights. See generally Emily Taylor, Across the Board: The Dismantling of Marriage in Favor of Universal Civil Union Laws, 28 OHIO N.U. L. REV. 171 (2001).

Id. If a partner in a same-sex relationship is killed or hospitalized, the other partner will not be notified and may have trouble obtaining vital information. The following is a harsh example of this reality:

In 1983, Sharon Kowalski was almost killed in a car wreck, and her lifetime partner, Karen Thompson, who arrived at the hospital long before anyone else, was not even allowed to inquire about her condition. She was refused any answers because the hospital did not consider her a family member, despite the fact that Karen probably knew Sharon better than anyone else. Not until many hours later, when Sharon's parents arrived, did Karen learn that her partner would be disabled for the rest of her life. Following, Sharon's parents, with the help of a court, precluded Karen from visitation because a legal relationship between them was nonexistent.

Id. at 173 n.13 (citations omitted).

Id.

Some of these financial rights can be established through alternative means (such as contract law, employer initiative, etc.), but many of these alternatives take time, money, and are vulnerable to defeat.

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (2003). This case is the infamous Massachusetts Supreme Court case that granted homosexuals the right to marry. The rights cited from that case, though relevant to Massachusetts, symbolize the categories of rights denied to homosexual couples in other states across America, as well as those rights denied by the federal government. Id.

See generally A. Mechele Dickerson, Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status, 67 FORDHAM L. REV. 69 (1998). Many states structure their homestead exemptions to "heads of households," for which homosexual couples usually cannot qualify. Id. This means that homosexual couples are much more likely to lose their home in the event of a bankruptcy. Id.

Goodridge, 798 N.E.2d at 955. Examples of inheritance rights that same-sex couples do not have are rights implicit in intestate succession and elective share. Id. Intestate succession rights are automatic inheritance rights when a spouse does not leave a will. Elective share gives the
• Insurance and Benefits Coverage\textsuperscript{42}
• Property Rights\textsuperscript{43}
• Rights in Divorce\textsuperscript{44}

\textbf{Non-Financial Rights}
• Spousal Privilege for Testimony in Court\textsuperscript{45}
• Social Recognition\textsuperscript{46}
• Expression of Marriage\textsuperscript{47}
• Freedom from Mental Anguish and Peace of Mind\textsuperscript{48}

This general list does not illustrate the full magnitude of the rights at stake. The U.S. General Accounting Office has identified 1,138 federal rights that are given to couples based on marital status alone.\textsuperscript{49} Explaining each of these rights individually is beyond the scope of this Article. Additionally, an important right not listed above is perhaps the most compelling: children’s rights in same-sex households.\textsuperscript{50}

surviving spouse certain property rights when the deceased spouse has not provided for them in their will. \textit{Id.}
\textsuperscript{42} Charles R. P. Pouncy, \textit{Marriage and Domestic Partnership: Rationality and Inequality}, 7 \textit{TEMP. POL. & CIV. RTS. L. REV.} 363, 366 (1998). Examples of these are retirement benefits and health care. \textit{Id.}
\textsuperscript{43} See \textit{Goodridge}, 798 N.E.2d at 955. These rights are often intertwined with inheritance rights. An example of this is when a same sex couple lives together for 30 years and one dies without a will. The family of the deceased gets priority over all of the property before the surviving partner does. \textit{Id.}
\textsuperscript{44} \textit{Id.} at 956. Divorce rights include alimony, child support, and equitable division of marital property upon divorce. \textit{Id.} Because same-sex couples cannot marry, the default laws that govern divorces are not available to them.
\textsuperscript{45} \textit{Jack B. Weinstein and Margaret A. Berger, \textit{Weinstein’s Evidence Manual }\S 18.05[1]} (6th ed. 2003). Though these rules vary from state to state, spouses typically possess a right to refuse to testify against their spouse. This rule is contained in Supreme Court Standard 505. \textit{Id.} West Virginia’s spousal privilege rules are contained in \textit{W. VA. CODE }\S 57-3-3 to -4 (2000).
\textsuperscript{46} See Pouncy, supra note 42.
\textsuperscript{47} See \textit{Cruz}, supra note 7 at 928-29. Same-sex couples are denied the “unique expressive resource that is civil marriage.” \textit{Id.}
\textsuperscript{48} See Barbara J. Cox, \textit{But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal}, 25 \textit{VT. L. REV.} 113 (2000). Failure to recognize same-sex marriages can arguably place a “‘badge of inferiority’” on the couples involved. A legal union also affords its participants protections (many listed above) that lead to peace of mind and security for those involved. \textit{Id.}
\textsuperscript{49} Letter from American Academy of Matrimonial Lawyers to Author 2 (Nov. 10, 2004) (on file with the West Virginia Law Review). Another source identifies 1,049 rights. See \textit{Same-Sex Marriage in the United States, supra} note 23.
\textsuperscript{50} See Lewis A. Silverman, \textit{Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union}, 102 \textit{W. VA. L. REV.} 411 (1999). This issue is explored separately in Part VI, and as such, description of the rights of children is relegated to that point.
Nevertheless, understanding the general nature of the rights at stake is very important in making the case for acceptance. The sheer quantity and magnitude of those rights listed above is striking and can be persuasive in and of itself. Even many that disagree with homosexuality or same-sex marriage may be inclined to provide a minimum level of protection to homosexual couples for pragmatic reasons. Simply, articulating these rights denied is the first step in forming a constitutional challenge. It can also be the first step in convincing people that homosexual couples should not be deprived of these rights.

IV. LEGAL SUPPORT FOR EQUAL RIGHTS

The following analysis explores the current status of Supreme Court precedent, explains the significance of a principled approach, and illustrates several constitutional arguments that may appear before the Court. For the sake of simplicity, this Section is organized by the following constitutional issues: constitutional interpretation, the Equal Protection Clause, the Due Process Clause, the Establishment Clause, and the “forgotten” Ninth Amendment.

A. Constitutional Interpretation

An effective analysis of the legal arguments for same-sex marriage requires a principled approach to the Constitution. Such an approach views the Constitution, and, more specifically, the Bill of Rights, as a set of principles (“organic law”) that provide a framework to guide the nation through changing times. Rather than interpreting the Constitution as code, it is more appropriate to view the founding document as a set of abstract principles that are capable of guiding the nation through changing times.

51 A prominent pragmatic reason to allow same-sex unions is to prevent dependence on the government. Presumably, dependence on the government can occur in the absence of benefits from a legal union (health care, insurance), and in the absence of protections of legal unions (alimony, support payments, etc.). Other pragmatic reasons will be explored in Part VI. See infra notes 188-227 and accompanying text.

52 BLACKS LAW DICTIONARY 249 (7th ed. 2000). A constitution is defined as “the fundamental and organic law of a nation or state, establishing the conception, character, and organization of its government, as well as prescribing the extent of its sovereign power and the manner of its exercise.” Id.

53 Joel Feinberg, Law from the Perspective of the Judge, PHILOSOPHY OF LAW 108, 111 (6th ed. 2000). When speaking to the Judiciary Committee about constitutional interpretation, then Judge John Roberts provided words supporting a principled view: “‘I depart from some views of original intent,’ Judge Roberts said, without naming names. ‘I think you need to look at the words they use,’ referring to the framers of the Constitution, ‘and if the words adopt a broader principle, it applies more broadly.’” Roberts went on to claim that some uses of broad language (including “‘liberty’” and “‘due process’”) indicate that “‘they were crafting a document that they intended to apply in a meaningful way down the ages.’” See Adam Liptak and Robin Toner, Roberts Parries Queries on Roe and End of Life, THE NEW YORK TIMES, September 15, 2005, at A1.
of being “adapted to the various crises of human affairs.”

Through following this outline of principles, the country is guided towards good governance. Therefore, questions should not only be asked about same-sex marriage concerning constitutional jurisprudence, legal validity, and other positive law, but broader questions should also be asked. What position on same-sex marriage best embodies the principles that are implicit in the Constitution? What position better represents doctrines of equality, liberty, and freedom?

This principled form of interpretation is as old as the Constitution itself. Broadly defined as functionalism, even the framers realized that constitutional interpretation should not be constrained by their perceptions of the world. When speaking to the framers’ intentions of how to treat the Constitution, the Court has stated: “They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” Therefore, even under an original intent lens, the framers envisioned a functionalist interpretation of the Constitution.

It is against this philosophical backdrop that more finite constitutional arguments supporting same-sex marriage unfold. Stopping short of claiming an unambiguous constitutional mandate for same-sex marriage, this Section will show that Supreme Court precedent exists that reasonably supports recognition of same-sex marriages — as will be illustrated, similar leaps have been taken in the past. Most importantly, this Section proves that the constitutional principles of equality, liberty, and justice are on the side of equal recognition. The following arguments unfold in order of immediate relevancy.

54. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819). In his widely renowned opinion, Chief Justice John Marshall, himself appointed by John Adams, declared: “we must never forget, that it is a constitution we are expounding . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”

55. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (Harvard University Press 1980). Nonoriginalism, noninterpretivism, and other variations on a functionalist view advocate reading beyond the norms that are clearly implicit in the Constitution and enforcing norms that cannot be discovered within the four corners of the document.

56. H. Jefferson Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885, 948 (1985). Much historical research has been aimed at proving that the modern notion of original intent is historically inaccurate: “[A]t the time, that term referred to the ‘intentions’ of the sovereign parties to the constitutional compact,” and not “to the personal intentions of the framers or of anyone else.” Further problems persist with traditional original intent interpretation, including discerning group decision making, inadequate evidence of intent, ambiguity, and ultimately a different reality in the late 1700s when the framers drafted the Constitution. PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW 12 (1996).

57. Lawrence, 539 U.S. at 578-79.
B. The Equal Protection Clause

Because of the presence of compelling Supreme Court precedent related to the issue of banning civil unions, this Article confines its Equal Protection analysis to this specific issue, and does not extend to the granting of all marriage rights. The Due Process Clause analysis explores the argument that the Constitution guarantees same-sex couples marriage rights.

The assertion of "equal protection of the laws" contained in the Fourteenth Amendment has a long and rich history since its inception in the wake of slavery in 1868. The Supreme Court has historically used this clause to ensure equality for minorities, women, aliens, and even homosexuals. As with any equal protection challenge, the starting point is rationality review: is the discriminatory statute in question rationally related to a legitimate state interest?

59 U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."). Ratification of the Fourteenth Amendment occurred on July 9, 1868 after the Civil War as a way to ensure equality for the newly freed slaves. Id.
60 The following table serves as a general reminder of the Court's standards of review when it performs Equal Protection analysis:

<table>
<thead>
<tr>
<th>Standard</th>
<th>Classification at Issue</th>
<th>General Test</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strict Scrutiny</td>
<td>Race, Religion, National Origin, Alienage</td>
<td>Compelling state interest Narrowly tailored / necessary</td>
</tr>
<tr>
<td>Heightened / Intermediate Review</td>
<td>Sex / Gender, Illegitimacy</td>
<td>Important state interest Substantially related</td>
</tr>
<tr>
<td>Minimum Rationality Review</td>
<td>Age, Disability, Sexual Orientation</td>
<td>Legitimate state interest Rationally related</td>
</tr>
</tbody>
</table>


For cases generally demonstrating a heightened standard, see generally United States v. Virginia, 518 U.S. 515, 524 (1996) (applying a heightened standard in the context of sex/gender); Clark v. Jeter, 486 U.S. 456 (1988) (applying a heightened standard in the context of illegitimacy and noting that "[t]o withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective"); Craig v. Boren, 429 U.S. 190 (1976) (applying a heightened standard in the context of sex/gender and further clarifying that "a party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification").

61 Rationality review first found its way into a Supreme Court opinion way back in 1819, albeit in regards to the Necessary and Proper Clause. McCulloch v. Maryland, 17 U.S. (4 Wheat.)
Since the discriminatory effect of marriage laws on same-sex couples is self-evident, no exercise is needed to prove that denial of the equal rights of marriage is de facto discrimination. Rather, discussion of the legal consequences implicit with differing types of discrimination is warranted (namely, invidious/purposeful discrimination as compared to incidental discrimination).\(^6\) \(\textit{Romer v. Evans,}\)\(^6\) a landmark Supreme Court case, effectively illustrates sexual orientation discrimination and the implications of purposeful discrimination.

1. \textit{Romer v. Evans} and Purposeful Discrimination

\textit{Romer} held invalid a Colorado state constitutional amendment that forbade the state, its local governments, and public agencies to enact any statute that would entitle homosexuals to protected status or allow a claim of discrimination, among other protections.\(^6\) The purpose of the failed amendment was to counteract anti-discrimination statutes passed in places like Aspen, Boulder,

---


\(^6\) In the Supreme Court’s analysis of racial discrimination, these two types of discrimination are referred to as “de jure” discrimination and “de facto” discrimination. De jure discrimination is the enactment of a law that, even if facially neutral, has a purpose or motive to discriminate. De facto discrimination is the enactment of a law that is always facially neutral in its language but has a disadvantaged impact or effect. See \textit{Kathleen Sullivan and Gerald Gunther, Constitutional Law} 713 (14th ed., Fountain Press 2001).


\(^{65}\) \textit{Id.} at 635.

\(^{66}\) \textit{Id.} at 624.

Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state of local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:

‘No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.’

\textit{Id.}
and Denver. In its reasoning, the *Romer* court relied on equal protection analysis, marking the first time that homosexuals were protected in a Supreme Court decision. Under this analysis, the court held that the state did not have a legitimate interest, and determined that this legislation was "born of animosity toward the class of persons affected." *Romer* stands for the proposition that communities cannot be pre-empted from protecting or establishing rights for homosexuals.

The Court's extension of scrutinizing legislation with a discriminatory purpose towards classifications based on sexual orientation is profound. Because of *Romer*, if purposeful discrimination can be proven against homosexuals, the discriminatory laws are much easier to invalidate. This extension is significant because many recent marriage laws (especially those that ban any rights of marriage), appear to be implemented solely to discriminate against homosexuals.

Despite the far-reaching effects of invalidating purposeful discrimination, using this logic does not ensure that equal rights are automatically provided. Even when taking purposeful discrimination into account, many laws without a discriminatory purpose exist that prevent same-sex couples from having equal rights. However, taking purposeful discrimination into account would mean that a massive amount of legislation approved in the past decade would immediately become constitutionally suspect. This legislation includes all laws banning civil unions, DOMA, and other measures taken to prevent homosexuals from obtaining rights. These implications mean that *Romer* is per-

67 *Id.* at 623-24. These statutes sought to bar discrimination in employment, housing, insurance, and public accommodations on the basis of sexual orientation. *Id.* at 626-27.

68 *Id.* at 631.

69 *Id.*

70 *Id.* at 634.

71 *Id.* at 624.

72 The Court has a long history of protecting politically unpopular groups through invalidating purposeful discrimination. See Hunter v. Underwood, 471 U.S. 222 (1985) (disenfranchised black voters); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (purposeful discrimination against blacks); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (purposeful discrimination against Chinese). These are just three prominent cases that frown upon purposeful discrimination.

73 This is exactly what *Romer* held. 517 U.S. at 635-36.

74 See, e.g., W. VA. CODE § 48-1. Many states, including West Virginia, have recently changed laws to specifically define marriage in a way to exclude homosexual couples. *Id.* Other examples include the eleven states that banned same-sex marriage as a result of the 2004 elections. See Hitt, supra note 1.

75 For example, the purpose of the original marriage laws enacted in the Eighteenth and Nineteenth centuries was presumably to provide recognition to common law marriages, not to specifically discriminate against homosexuals (since homosexuality was largely a crime, same-sex marriage was not even on the radar screen).

76 Extensive analysis is not needed to show that the purpose of these laws is to ensure that same-sex couples do not receive rights — for the most part, this discriminatory purpose is facially
haps even more valuable than Loving or Lawrence\textsuperscript{77} are toward gay rights causes in the short term.

2. Comparing Romer to Other Statewide Referendums

The next logical step for judicial intervention is to enforce Romer against the practice of banning civil unions. In November 2004, eight states passed laws by popular vote that altered their state constitutions.\textsuperscript{78} The following is an example of a referendum that passed: "(1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."\textsuperscript{79} These referendums effectively ban the granting of rights to homosexual couples.

The state constitutional amendment invalidated in Romer shares many similarities with state constitutional amendments that were passed during the 2004 elections: 1) they were achieved by statewide referendum;\textsuperscript{80} 2) they were "born of animosity towards the class of persons affected;"\textsuperscript{81} and 3) they have a discriminatory purpose (by preventing rights from being obtained or becoming a "protected class"\textsuperscript{82}).

Indeed, amendments like Utah's symbolize a pre-emptive attack on rights for homosexuals, for none of the states gave homosexual couples any legal rights before the referendum.\textsuperscript{83} This type of legislation is operating on very shaky ground because of its oppressive qualities. In light of civil rights developments, using the legislature to prevent a group from obtaining rights is something that the Court continually rejects.\textsuperscript{84} As an assertive action to prevent civil rights, it inherently faces a higher level of scrutiny than laws that grant civil rights unequally.

\begin{footnotesize}
\begin{itemize}
\item These are two other cases analyzed in detail in this Article. See infra notes 92-131 and accompanying text for a discussion of these cases.
\item See Hitt, supra note 1. The eight states are Arkansas, Georgia, Kentucky, Michigan, North Dakota, Ohio, Oklahoma, and Utah. Id.
\item See Hitt, supra note 1; Romer, 517 U.S. 620, 623 (1996).
\item Romer, 517 U.S. at 632. It is plausible that arguments exist that the laws roots are not because of "animus," but because of protecting families or protecting the sanctity of marriage. These justifications are explored in Part V.
\item Id. at 624. Without a doubt, many legal protections are implicit to marriage or civil unions. See Hitt, supra note 1.
\item See generally Romer, 517 U.S. 620; Loving v. Virginia, 388 U.S. 1 (1967); Hunter v. Underwood, 471 U.S. 222 (1985) (disenfranchised black voters); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (purposeful discrimination against blacks). Indeed, the Court has an extensive history of prohibiting the use of the legislature to disadvantage minorities.
\end{itemize}
\end{footnotesize}
The consequences are dire when banning rights that homosexuals have never possessed. For example, because of statutes like Utah’s, any proposed legislation that would give homosexuals even a minimum level of rights faces likely defeat in the eyes of the prohibitory statute. If any rights accorded to homosexuals are established to be “equivalent”\(^8\) to rights of marriage, the new statute outlaws it. When taken to the extreme that these amendments have been in banning any rights arising from a homosexual relationship, it seems difficult to comprehend it passing rationality review. What rationale exists to deny protection to a child, or to prevent visitation rights?\(^9\) Indeed, it would be hard for the Supreme Court to rule that the banning of rights not achieved is constitutional since it has already ruled exactly the opposite in Romer: “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”\(^{10}\)

In wrapping up discussion on Romer, three main points exist that support equal protection for homosexuals. First, and most importantly, by finding that a law disavowing any possibility of a “protected” status is unconstitutional,\(^8\) it indicates that the recent banning of civil unions is unconstitutional. Second, it reinforces the Supreme Court adage that morals legislation cannot be motivated by “animus” towards a particular group.\(^9\) Lastly, in what cannot be over-emphasized, it officially establishes that homosexuals, just like so many other legal classifications, are worthy of Equal Protection under the Fourteenth Amendment.\(^9\) Having such strong precedent in Romer, along with the Court’s traditional frowning upon purposeful discrimination, means that the invalidation of civil union bans is the most timely, legally valid claim for equal rights.\(^9\)

---

\(^8\) See supra note 79.

\(^8\) A detailed examination of legitimate state interests takes place in Section V.


\(^8\) Id. at 624.

\(^8\) Id. at 634.

\(^9\) In what often goes unnoticed, the Lawrence decision (discussed in the context of the Due Process Clause) decriminalizing homosexual conduct in 2003 only enhances the 1996 holding in Romer, for it was still technically legal to criminalize homosexual conduct at the time of the Romer decision. The court chose to leave this logical fallacy for another day (a fact that was duly noted in the Romer dissent). Id. at 640 (Scalia, J., dissenting). To be sure, if Romer did not assert Equal Protection back in 1996, a vital link in constitutional protection would be missing.

C. The Due Process Clause

Due Process arguments in this Section focus on same-sex couples receiving rights of marriage, and not just the banning of civil unions. The following two Supreme Court decisions from different eras will be used to analyze the Due Process Clause: Loving v. Virginia and Lawrence v. Texas. Although these cases do not signal a holding as strong as Romer for the purposes of same-sex marriage, their presence gives the court sound rationale to ensure equal rights for homosexual couples.

1. Loving and its Legacy: Marriage is a Fundamental Right

Loving v. Virginia is a historic civil rights case that struck down a Virginia statute forbidding a "white person" from marrying a "colored person." In this case, a white man and black woman were sentenced to jail for a year when they married each other in 1958. In reversing the conviction, the U.S. Supreme Court relied on both substantive due process and equal protection to invalidate the statute. As equal protection was expanded upon above, Loving

92 U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law.").
93 388 U.S. 1 (1967).
94 Id. at 6. At the time, fifteen other states contained similar statutes to Virginia's: "Marriages void without decree. – All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." Id. at 4 n.3 (citing VA. CODE ANN. § 20-57 (1960 Repl. Vol.)). The unconstitutional Virginia statute then provided very technical definitions for "white persons" and "colored persons." Id. at 5 n.4.
95 Id. at 2-3. A vivid account of the Lovings' ordeal is as follows:

Mildred did not know that interracial marriage was illegal in Virginia, but Richard did. This explains why, on June 2, 1958, he drove them across the Virginia state line to Washington, D.C., to be married. . . . Five weeks later, on July 11, their quiet life was shattered when they were awakened early in the morning as three law officers "acting on an anonymous tip" opened the unlocked door of their home, walked into their bedroom, and shined a flashlight in their faces. Caroline County Sheriff R. Garnett Brooks demanded to know what the two of them were doing in bed together. Mildred answered, "I'm his wife," while Richard pointed to the District of Columbia marriage certificate that hung on their bedroom wall. "That's no good here," Sheriff Brooks replied. He charged the couple with unlawful cohabitation, and then he and his two deputies hauled the Lovings off to a nearby jail in Bowling Green.

96 Loving, 388 U.S. at 12. Equal Protection analysis (strict scrutiny) was used for racial classifications, and Due Process analysis was used to establish marriage as a fundamental right: There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodies in these statutes, classifications so directly
CONFRONTING AMERICA'S AMBIVALENCE

will be analyzed in this Article solely in the context of marriage rather than race. The *Loving* decision spawned a rich legacy\(^7\) that has increased the level of scrutiny applied to laws that regulate marriage, has increased access to marriage, and has enhanced notions of personal autonomy. As such, *Loving* has been influential in shaping people’s perception of marriage.

The most important idea that *Loving* and its legacy presents in the context of gay rights is that it unequivocally establishes that marriage is a fundamental right under the Due Process Clause.\(^8\) This establishment is paramount because under subsequent Supreme Court decisions, there must be a compelling reason to deny a citizen a fundamental right if the law “significantly interfere[s]” with that right.\(^9\) The right to marriage is protected in the right to privacy, where similar rights such as reproductive freedoms, raising children, and consensual homosexual relations reside.\(^10\)

In *Loving*, the Supreme Court went out of its way to emphasize that marriage is a fundamental right; the Court could have just as easily relied solely on strict scrutiny for racial classifications to invalidate the law. In fact, since the Court’s decision, *Loving’s* legacy has been its assertion that marriage is “a fundamental right,” rather than its strict scrutiny application for racial classification.

---

subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.

*Id.*


\(^8\) *Loving*, 388 U.S. at 12 (“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.”).

\(^9\) *Zablocki*, 434 U.S. at 386-87. This case held that a law preventing one from marrying if they are behind on their child support payments is unconstitutional. In clarifying the majority’s analysis, Justice Marshall reasoned:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. See *Califano v. Jobst*, ante, p. 47; n.12, *infra*. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.

*Id.* Justice Powell’s concurrence endorses a “compelling state purpose” standard. *Id.* at 399.

specifically, Zablocki v. Redhail provides a vital link by emphasizing a "'critical examination'" for any law that "significantly interferes" with the fundamental right to marry. Additionally, another parallel drawn to Zablocki is the concept of state coercion in giving up the right to marry:

These persons are absolutely prevented from getting married. Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry. And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental.

This "fundamental right" point, and the implications thereof cannot be over-emphasized, because it means that the justification for the law must withstand heavier scrutiny than a non-fundamental right. Therefore, even if the Court declines to use heightened scrutiny in Equal Protection analysis, heightened scrutiny is alternatively available under substantive due process analysis due to Loving and its offspring.

Loving and its legacy also lend some needed perspective on the issue because it illustrates that society's concept of marriage has evolved over time. Loving reflects that marriage used to be confined to races, a notion that most consider preposterous today. This paradigm shift reflected in Loving and its legacy resulted in marriage being less about property rights and procreation, and more about love and commitment: "[Marriages] are expressions of emotional

102 434 U.S. at 383. "Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination' of the state interests advanced in support of the classification is required." Id. (citing Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 312, 314 (1976)).
103 Id. at 387.
104 Id. at 388. "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." Id. Perhaps even stronger support for higher scrutiny of laws effecting marital status can be found in Justice Stevens' concurrence: "A classification based on marital status is fundamentally different from a classification which determines who may lawfully enter into the marriage relationship. The individual's interest in making the marriage decision independently is sufficiently important to merit special constitutional protection." Id. at 403-04.
105 Likewise, forty years from now, people may look back on the banning of same-sex unions in a similar distasteful light.
support and public commitment. These elements are an important and significant aspect of the marital relationship."

Related to this perception shift is the Loving Court’s rejection of a religious argument that is similar to one used against homosexuals. One variation of a morality argument was front and center in Loving, and was in fact used as reasoning in the trial court’s opinion upholding the discriminatory statute:

‘Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.’

The Court’s disfavor for using morality as a compelling state interest will be explored later, but it is useful to highlight this tendency here since it was demonstrated in Loving.

As important and useful as Loving may be, it is essential to recognize the distinctions between Loving and any homosexual movement. Recognizing these distinctions not only honors the racial struggle implicit in Loving as unique, but also presents the facts accurately. In Loving, the challenged state statute not only failed to recognize the defendants’ marriage, but also sent violators to jail for one to five years if they married. No punishment of this sort is at issue for same-sex marriage, rather the debate is over the legal recognition of that marriage. While this does not mean that Loving is incomparable to any same-sex marriage case, it does mean that Loving does not explicitly mandate same-sex marriage. Loving elevated marriage’s role as a fundamental right, and helped set the legal playing field for marriage laws.

106 Turner v. Saflcy, 482 U.S. 78, 95-96 (1987). The Turner court even hints at First Amendment arguments in its dicta: “many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication.” Id. at 96.

107 Although the use of religious arguments is explored in greater detail later in the paper, a quick synopsis of a variation of an extreme, oversimplified religious argument was spoken by Senator Jesse Helms while debating DOMA: “‘God created Adam and Eve, not Adam and Steve.’”

108 388 U.S. 1, 3 (1967) (quoting the trial court’s opinion).

109 See infra notes 155-69 and accompanying text.

110 Id. at 4.

111 See Strasser, supra note 101 at 771. The significance of this difference of jail time has yet to be adequately explained. Loving would have no doubt turned out the same way if there was simply a law prohibiting legal recognition, as is the case with gay marriage. See id. at 772.

112 Perhaps the absence of the same-sex marriage issue in Loving is a blessing in disguise, for while the principled support for same-sex marriage from this case is strong, the 1967 Court probably did not foresee this connection.
In summary, Loving and its legacy relate to same-sex marriage not only by supplying some needed perspective, but also by presenting the appropriate level of scrutiny to apply to marriage laws: "Marriage is one of the ‘basic civil rights of man,’ . . ." and therefore a denial of this right must withstand heavier scrutiny than a denial of a non-fundamental right.

2. Lawrence v. Texas

Unlike Loving, Lawrence directly addresses the issue of homosexual rights and, while the Court does not go so far as to mandate same-sex marriage, it provides a necessary step to ensure equal rights for homosexuals. To be sure, any discussion of gay rights and same-sex marriage would not be complete without addressing this landmark case and its many implications for same-sex marriage.

In Lawrence, two homosexual men were charged with criminal sodomy when a police officer, responding to a reported weapons disturbance, witnessed these men "engaging in a sexual act." After criticizing the majority's rationale in Bowers v. Hardwick, the Lawrence Court unequivocally overruled the much maligned Bowers holding in asserting a liberty interest in "intimate conduct." Although much of the majority's dicta implies heightened scrutiny, the actual holding reveals that Texas's statute does not survive rationality review. In the Court's reasoning, much support can be found for legal recognition of same-sex unions.

Implicit in the Court's holding is the logical conclusion that homosexuality can no longer be a crime. This fact is a setback to the opposition's argument against same-sex marriage because the former legitimate state interest of preventing homosexuality can no longer be used. This basic holding clears the way for a legal challenge concerning same-sex marriage, since it would have

---


114 See Mark Strasser, Lawrence and Same-Sex Marriage Bans, 69 BROOK. L. REV. 1003, 1004 (2004). In short, Lawrence is (and may remain) the most discussed case for gay rights, right there on par with Brown, Loving, and Griswold in constitutional law notoriety. As such, the Lawrence holding provided a jumpstart to the gay rights movement back in 2003 because of its unequivocal decriminalization of homosexual conduct. Id.

115 539 U.S. 558, 563 (2003). The Texas statute provided: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." Id.

116 478 U.S. 186 (1986). Bowers upheld the legality of a law criminalizing sodomy. Id. at 196.

117 Lawrence, 539 U.S. at 562-67.

118 See id. at 574. Heightened scrutiny is implied through the court's comparison to other privacy rights subject to heightened scrutiny such as marriage, procreation, family relationships, and child rearing. Id.

119 See id. at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").
been nearly impossible to convincingly argue for same-sex marriage when homosexual activity is legally criminalized. In fact, somewhat ironically, the dissent accurately captures the essence of the holding better than the majority: "Today’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." 120

Beyond the importance of the Court’s basic holding is the abundance of support (either direct or indirect) provided in various parts of Lawrence’s four separate opinions. 121 With respect to same-sex marriage, the most weighty and explicit support is found in several passages from Justice Kennedy’s majority opinion. One of them reads:

... our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” 122

These general allusions to civil liberties transcend many rights issues. However, specific to marriage, the liberty interests at stake that the Court identified are “‘intimate and personal choices,’” “‘personal dignity and autonomy,’” and “‘the right to define one’s own concept of existence.’” 123 It is arguable that the state denies homosexual couples this “dignity” when it refuses to grant homosexual couples the rights that it grants other monogamous relationships.

One who wants to gauge the significance of this portion of Justice Kennedy’s opinion need look no further than Justice Scalia’s lengthy dissent. 124 One of his heaviest criticisms of the majority’s decision concerned the above

---

120 Id. at 604 (Scalia, J., dissenting).
121 See id. (Kennedy, J., writing majority opinion; O’Connor, J., concurring; Scalia, J., dissenting; Thomas, J., dissenting).
122 Id. at 574 (quoting Justice O’Connor’s plurality opinion in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).
123 Id.
124 Id. at 603 (Scalia, J., dissenting).
passage, as he expressed the view that it supports same-sex marriage. Indeed, this admission regarding the Court’s reasoning as a basis for same-sex marriage speaks for itself in terms of its importance for a possible future decision. However, despite these somewhat exaggerated claims, Lawrence in and of itself does not grant homosexuals marriage rights.

Another relevant passage in Lawrence that alludes to marriage reads: “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 Constitution allows homosexual persons the right to make this choice.” Suffice it to say, Justice Kennedy does not elaborate on this “personal bond,” but one can infer that he is alluding to intimate relationships whether they be heterosexual or same-sex. This reference supports an argument that in order to have this “personal bond,” marriage or an equivalent legal union, must be available to same-sex couples.

One last aspect of Lawrence that assists the legal argument for same-sex marriage is the level of disfavor the Court showed in using pure moral disapproval to regulate conduct that does not hurt others. Because most marriages have public components, arguments that same-sex marriages do hurt other people are bound to be made, though the Lawrence Court did not explore any possible injury inflicted by legalizing same-sex marriages. The disfavor shown to moral disapproval as a justification, as well as further exploration of any injury associated with same-sex marriage, are explored in further detail in Section V. However, as Lawrence announces the “general rule” of the Court that moral disapproval without injury does not satisfy rationality review, this important principle is acknowledged.

In summary, Lawrence signifies the major first step in obtaining equal rights for gays by decriminalizing homosexual conduct. This development undermines and dilutes the opposition’s argument in multiple ways. Additionally, the majority’s reasoning is very open to the prospect of same-sex marriage.

125 Id. at 604. Justice Scalia offers a synopsis of the majority opinion: “which notes the constitutional protections afforded to ‘personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,’ and then declares that ‘persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.’” Id.
126 Id. at 567. Indeed, in his dissent, Justice Scalia also cited this passage as the court’s support for same-sex marriage. Id. at 604-05.
127 Id. at 567 (“This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person . . . .”).
129 See Strasser, supra note 114, at 1011.
130 See supra note 127 and accompanying text which discusses the “general rule” of Romer.
131 Lawrence, 539 U.S. at 567.
D. The Establishment Clause

Generally, Establishment Clause case history is just as extensive and diverse as that of the other clauses discussed in this Article. However, unlike the other clauses explored in this Article, no Supreme Court cases exist that address the intersection of homosexuality and the Establishment Clause.

Establishment Clause review indicates that laws with a religious purpose can be invalidated. Many laws can easily be determined to have a religious purpose once the legislative records are taken into account. At a minimum, the Establishment Clause calls into question the constitutionality of DOMA and the many state laws banning same-sex unions.

Because “the Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions,” a purpose of institutionalizing a reli-

132 “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend I (emphasis added).


135 The Establishment Clause has been tested in conjunction with homosexuality on several occasions, where the various courts have consistently declined to use it as a basis for granting homosexuals equal rights. See Rubinstein, supra note 5, at n.52 (citing Hatheway v. Sec’y of the Army, 641 F.2d 1376, 1383-84 (9th Cir. 1981); Nat’l Gay Task Force v. Bd. of Educ., No. CIV-80-1174-E, 1982 WL 31038, at 11 (W.D. Okla. June 29, 1982), rev’d on other grounds, 729 F.2d 1270 (10th Cir. 1984), aff’d, 470 U.S. 903 (1985); People v. Baldwin, 112 Cal. Rptr. 290, 292 (Ct. App. 1974); Steward v. United States, 364 A.2d 1205, 1208-09 (D.C. 1976)). Ultimately, when courts have been faced with Establishment Clause challenges to traditional, older marriage laws, secular reasons such as procreation, protecting children, and promoting the public health are given to deflect the attention from religion (the merits of these secular arguments are explored later in the Article). See Taylor, supra note 35, at 178-79.

136 See Donovan, supra note 17, at 342. The “Lemon Test” is summarized as follows: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . .; finally, the statute must not foster ‘an excessive government entanglement with religion.’” Id. (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)). Additionally, a law without secular purpose is presumptively motivated by religion. Id. at 341.

137 Id. at 349-54. Because of the transparency of how laws that ban same-sex marriage or civil unions were passed, and because of who traditionally sponsors legislation targeted against same-sex couples, many laws can easily be determined to have a religious purpose. Id.

In other words, laws that are on shaky constitutional ground are those that have been passed with the specific purpose to deny same-sex couples equal rights, and can also be traced to religious origins.

Proving a religious purpose is certainly feasible in many cases upon examination of a law’s legislative history. A look at the debate in Congress over DOMA reveals:

We as legislators and leaders for the country are in the midst of a chaos, an attack upon God’s principles. God laid down that one man and one woman is a legal union. That is marriage, known for thousands of years. That God-given principle is under attack. There are those in our society that try to shift us away from a society based on religious principles to humanistic principles; that the human being can do whatever they [sic] want, as long as it feels good and does not hurt others. When one State wants to move towards the recognition of same-sex marriages, it is wrong... We as a Federal Government have a responsibility to act, and we will act.\textsuperscript{140}

Statements like these contained in the legislative record, by those who cosponsored the bill,\textsuperscript{141} leave little room to dispute that the purpose of DOMA was to institute a “‘religious principle.’”\textsuperscript{142} Time and time again, legislation that is pursued to deny rights to same-sex couples relies extensively on religious principles.\textsuperscript{143}

\begin{footnotes}
\item[139] See Rubinstein, \textit{supra} note 5, at 1598 (citing Lynch v. Donnelly, 465 U.S. 668, 688-90 (1984)). Similar to the test that the Court has developed for Equal Protection, if a religious purpose can be identified in enacting the law, the Court is much more likely to invalidate it. \textit{Id.}
\item[140] 142 CONG. REC. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer) (emphasis added). Even West Virginia’s Senator Robert C. Byrd has read directly from the Bible to support his argument:

I hold in my hands a Bible, the Bible that was in my home when I was a child. This is the Bible that was read to me by my foster father. It is a Bible, the cover of which having been torn and worn, has been replaced. But this is the Bible, the King James Bible. And here is what it says in the first chapter of Genesis, 27th and 28th verses: ‘So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth...’ And when God used the word ‘multiply,’... [h]e was talking about procreation, multiplying, populating the Earth.

\item[142] 142 CONG. REC. H7486. Rep. Buyer himself openly admits it is a “‘religious principle.’”
\item[143] The highest profile example of this is the failed attempt at a federal constitutional amendment to ban same-sex marriage. H.R.J. Res. 56, 108th Cong. (2004).
\end{footnotes}
However, this recent wave of legislation banning same-sex unions does not mean that marriage laws on the books before the gay marriage debate are as suspect. In these instances, a religious purpose will not be as easily identifiable. Similar to the Equal Protection Clause argument discussed above using Romer, the reach of this Establishment Clause argument would have the effect of simply invalidating laws aimed at banning homosexual unions, but would do nothing to improve same-sex couples’ chances at being included in what remains. An Establishment Clause argument would only prevent further discriminatory laws from being implemented rather than grant homosexuals the rights of marriage.

For now, the Establishment Clause argument seems to be in the background despite its relevance and legal validity. The reality that homosexual rights has not had as strong a connection to the Establishment Clause as it has to other clauses such as the Equal Protection Clause and the Due Process Clause is rather perplexing when confronted with the reality that religion represents the root of modern homosexual condemnation. However, because of the undeniable link between religion and condemnation of homosexuality, an Establishment Clause argument remains valid.

E. The “Forgotten” Amendment

The final legal argument that is briefly raised in this Section is the presence of a helpful context clue that can be used in conjunction with other legal arguments. Though seldom invoked, the "forgotten" Ninth Amendment is a silent yet potent protector of civil rights. This Amendment reads that "[the rights listed in the Constitution] shall not be construed to deny or disparage others retained by the people." The symbolism in invoking this clause need not be overlooked, for the only same-sex marriage challenge that has reached the Supreme Court thus far used the Ninth Amendment in part.

---

144 See supra notes 140-43 and accompanying text.
145 Griswold v. Connecticut, 381 U.S. 479, 488-90, n.6 (1965) (citing Bennett B. Patterson, THE FORGotten NINTH AMENDMENT (1955)). The Ninth Amendment has been coined as the "forgotten" amendment. Id. After a lengthy vacation, the Ninth Amendment made its return to a Supreme Court opinion in Griswold. Phoebe A. Haddon, An Essay on the Ninth Amendment: Interpretation for the New World Order, 2 TEMP. POL. & CIV. RTS. L. REV. 93, 94, 97 (1992). Since then, it has been used with increasing regularity. Id. at 96-98.
146 U.S. CONST. amend. IX. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Id. This amendment is one of the unheralded protectors of civil liberties and quite possibly hedges against assaults on civil liberties that never take place. See generally, Griswold, 381 U.S. at 488-90 (Goldberg, J., concurring). Without its presence, constructionists would have a much better case to claim that citizens’ rights are limited to those explicitly listed in the Bill of Rights. Id. The right to privacy, for instance, might be interpreted entirely differently. Id. In this way, its silent nature can be deceiving.
147 This challenge (which was summarily dismissed) used the Ninth and Fourteenth Amendments. Baker v. Nelson, 409 U.S. 810 (1972).
The Ninth Amendment is a signal revealing that fundamental rights exist beyond those spelled out in the first eight amendments; a door where further rights can be found. Essentially, the rights protected by the Ninth Amendment are equivalent to the word "liberty," minus the rights expressly granted in the first eight amendments. This includes the infamous "penumbra" identified in *Griswold v. Connecticut* that protects marital privacy rights. As neither marriage nor privacy are rights that are specifically enumerated in the Constitution, the Ninth Amendment is arguably relevant in these instances. The amendment is thus most effective when raised alongside liberty (substantive due process) claims.

The presence of this amendment also helps dismiss notions that the founders could have possibly provided for every civil rights dilemma in the future. Indeed, the Ninth Amendment is not proof in and of itself that the Constitution mandates same-sex marriage. Rather, it is an indication that the tradition and history of the nation supports an expansive view of rights. Raising the Ninth Amendment in conjunction with other doctrines only adds to the persuasiveness of those arguments. It also adds to the repertoire of constitutional devices available to fight for civil rights.

In summary, the legal arguments presented in this Section are all capable of coming before the Court in the future. Each of these clauses gives the Court a reasonable basis to ensure equality for homosexuals. Specifically, *Romer* shows that the Court has already spoken to the issue of legislation targeting homosexuals. As such, the scenario of a Supreme Court decision holding that

---

148 The Supreme Court dealt with the Ninth Amendment just seven times before *Griswold*. Cameron S. Matheson, *The Once and Future Ninth Amendment*, 38 B.C. L. Rev. 179, 188 (1996). After *Griswold*, it has found its way into subsequent court opinions. Opinions (either plurality, concurrence, or dissenting) since *Griswold* that have used the Ninth Amendment in a similar expansive manner include *Roe v. Wade* and *Hodgson v. Minnesota*. See Haddon, *supra* note 145, at 94. The unsuccessful challengers of a sodomy statute in *Bowers v. Hardwick* also used the Ninth Amendment in its claims. 478 U.S. 186, 189 (1986) (*overruled by Lawrence v. Tex.*, 539 U.S. 558 (2003)).

149 See Matheson, *supra* note 148, at 190.

150 381 U.S. at 488-90 (Goldberg, J., concurring).

151 See *supra* notes 92-131 and accompanying text for a complete discussion on substantive due process claims. It is no coincidence that most of the cases that have used the Ninth Amendment have used it in conjunction with the Due Process Clause. See *Griswold*, 381 U.S. at 488-90; *Baker*, 409 U.S. 810; *Roe v. Wade*, 410 U.S. 113, 152 (1973).

152 See *Ely*, *supra* note 55; see also Matheson, *supra* note 148, at 182-184. A brief history of the Ninth Amendment shows that its inclusion was insisted by the Antifederalists who worried that the new Federal government retained too much power. *Id.* James Madison drafted a proposed bill of rights, which provided the basis for the Ninth Amendment. *Id.* at 185. While further details are debatable, it is largely agreed that it was included to squelch fears that listing rights in the Constitution would imply that no others exist. *Id.*

153 The only Supreme Court challenge (which was summarily dismissed) relating to same-sex marriage used the Ninth and Fourteenth Amendments. *Baker*, 409 U.S. 810; see also *Griswold*, 381 U.S. at 488-90; *Roe*, 410 U.S. at 152.
efforts to ban homosexuals from receiving rights are unconstitutional is the most realistic form of judicial intervention. Beyond the importance of judicial intervention, however, remains the conclusion that acceptance of same-sex marriage comports with constitutional principles; it is the just end result.

V. ADDRESSING LEGAL ARGUMENTS AGAINST SAME-SEX MARRIAGE

As noted above, any constitutional analysis concerning the issue of same-sex marriage provides multiple legal arguments supporting it. Conversely, the legal arguments opposing equal rights for homosexuals are numerous, but not as diverse. Many of these arguments inherently fall back on religion and morality, which, as presented, display moral disapproval towards homosexuals. Those arguments that do rely on a legitimate state interest (procreation, child rearing, financial interests) additionally have holes that ultimately put their ability to withstand rationality review in question. Lastly, there are arguments against same-sex marriage that are grounded in legal and social theory rather than a moral or state interest argument. Each one of these arguments will be explored in kind.

A. Morality and Religion

Many different levels of morality arguments exist that oppose equal rights for same-sex couples. Some can be considered quite extreme, and some are mild in comparison. This Article does not attempt to pigeonhole all of the morality arguments into one representation. Rather, this Article presents one prevalent variation of the morality argument, consistently found in Supreme Court opinions, that is used against homosexuals.

156 Christian evangelist Jerry Falwell has blamed the terrorist attacks on ""the pagans, and the abortionists, and the feminists, and the gays and the lesbians who are actively trying to make that an alternative lifestyle." Susan J. Becker, Tumbling Towers as Turning Points: Will 9/11 Usher in a new Civil Rights Era for Gay Men and Lesbians in the United States?, 9 WM. & MARY J. WOMEN & L. 207, 220 (2003) (quoting The 700 Club (CBN television broadcast, Sept. 13, 2001)).
157 An example of a milder argument is the notion that homosexuals should not be blamed for their sexual orientation; it is a mental health problem that can be treated. See American Psychological Association, Sexual Orientation and Homosexuality, http://www.apahelpcenter.org/articles/article.php?id=31 (last visited Sept. 25, 2005) (noting the existence of the position that homosexuality is a mental illness). While this argument does contain the implicit conclusion that homosexuality is wrong, it does not vilify homosexuals to the degree that other positions do. This position is not supported by the psychiatric community. Id.
1. Condemnation of Homosexuals

Condemnation of homosexuals and/or homosexual behavior is found in a segment of the religious community. In these circumstances, religion is often directly used as a justification to condemn homosexuals.158 Related to this perspective is the concept of a “homosexual agenda.”159 The idea that gay people desire to destroy traditional society by breaking down institutions such as marriage, family, and education.160 As described by Justice Scalia in his Lawrence dissent: “Today’s opinion is the product of a Court, . . . 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.”161 Primarily, these arguments involve vilifying or demonizing homosexuals and homosexual conduct, often by comparing it to deviant sexual behavior.162

In justifying this condemnation of others’ behavior, ancient roots, tradition, and religion are often cited: “Decision of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.”163 These Supreme Court justifications that support condemnation (or judgment) provide remarkably little rationale behind these condemnations, simply proclaiming: “[p]roscriptions against that conduct have ancient roots.”164

2. Rebutting Morality and Condemnation

Alluded to earlier, the point of relying on morality is expounded upon in Lawrence. In both Justice Kennedy’s majority opinion and Justice O’Connor’s concurring opinion, words are found that elaborate on the Court’s tendency to view pure moral disapproval with skepticism.165 Justice Kennedy explores this point in detail in discussing the court’s use of morality in Bowers:

---

158 See Becker, supra note 156, at 221-22.
159 Lawrence, 539 U.S. at 602 (Scalia, J., dissenting).
160 See Dent, supra note 155, at 616-17.
161 Lawrence, 539 U.S. at 602 (Scalia, J., dissenting).
162 See Dent, supra note 155, at 637. Seemingly taking Justice Scalia’s lead, prominent Senator Rick Santorum reflects the claim: “If the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.” Sean Loughlin, Santorum Under Fire for Comments on Homosexuality, http://www.cnn.com/2003/ALLPOLITICS/04/22/santorum.gays/index.html (last visited Jan. 31, 2005).
164 Id. at 192.
165 Lawrence, 539 U.S. at 571, 582 (2003).
It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. . . . These considerations do not answer the question before us, however.\footnote{\textit{Id.} at 571.}

Justice O'Connor sharply criticizes the use of moral disapproval in stating: "\[W\]e have 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."\footnote{\textit{Id.} at 582.} Additionally, in reducing the opponent's argument to pure moral disapproval, the court implicitly erodes at rationality review. Clearly, same-sex marriage was on Justice O'Connor's mind when she wrote these words as she later specifies that reasons other than moral disapproval exist to promote the institution of marriage — albeit without specifying those reasons.\footnote{\textit{Id.} at 585.} Nevertheless, O'Connor's digression is a revealing view of the Court's thinking on this matter and supports the view that pure moral disapproval is not a legitimate reason to withhold rights.\footnote{\textit{Id.} at 599.}

**B. Legitimate State Interests**

Due to the Court's disfavor of pure moral disapproval as a state interest, secular justifications are needed to oppose same-sex marriage. The following rebuts more widely used interests that are less suspect than pure moral disapproval.

1. **Procreation**

The state interest of procreation has often been cited as an interest to justify same-sex marriage bans.\footnote{See Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003); Baker v. Vermont, 744 A.2d 864 (Vt. 1999).} However, the state interest of procreation in marriage has dwindled significantly over the years as the concept of marriage has evolved.
First of all, procreation is not a requirement in marriage, and the emergence of contraceptives has given couples further control over procreation.\(^{171}\) Secondly, adoption, artificial insemination, surrogate parents, and other non-traditional means provide the same ends of having a son or daughter.\(^{172}\) These advances also allow same-sex couples to procreate. None of these alternatives, which are widely used by heterosexual couples, are generally regarded as diminishing the legitimacy of a marriage.\(^{173}\) Essentially, arguing that the purpose of marriage is for procreation denigrates the marriages of straight couples who choose not to, or cannot, have children.

Additionally, perhaps in part because of the aforementioned changes in marriage, the concept of marriage has shifted from property-oriented and child-oriented to love and commitment oriented.\(^{174}\) These changes have deemphasized the procreation role in marriage. Simply, the state interest in procreation as being the foundation of the institution of marriage has fallen into disfavor over the years. More specifically, procreation has not been a legitimate enough interest for denying marriage in multiple cases.\(^{175}\)

Examples of the court endorsing the love and commitment purpose of marriage over the procreation function of marriage are plentiful.\(^{176}\) When directly confronting the issue of what marriage means, the *Griswold* court gave the following surprising 1957 definition of marriage:

Marriage is the coming together for better or 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.\(^{177}\)

In sum, the technological, societal, and legal advances over the last century show that procreation surely is a function of marriage, but is no longer regarded as an essential part of marriage. Simply, "[t]he law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal [of procreation]."\(^{178}\) For this reason, procreation is essentially no longer as legitimate of a state interest as it was in the past.


\(^{172}\) See *Silverman*, supra note 50, at 424.

\(^{173}\) See *Goodridge*, 798 N.E.2d at 961; *Baker*, 744 A.2d at 882.

\(^{174}\) See *Hamilton*, supra note 128, at 336.

\(^{175}\) *Zablocki* v. Redhail, 434 U.S. 374 (1978); *Turner*, 482 U.S. 78 (1987); *Baker*, 744 A.2d at 217; *Goodridge*, 798 N.E.2d 941 (Mass. 2003). Implicit in their holdings, these cases all rejected the procreation argument to a certain degree.

\(^{176}\) Id.

\(^{177}\) *Griswold*, 381 U.S. at 486.

\(^{178}\) *Baker*, 744 A.2d at 217.
2. Child Rearing

The state interest of child rearing is perhaps the most legitimate of them all. It reinforces the family unit, and the state has an undisputed interest in providing an "optimal" setting for the welfare of children. However, upon further investigation, it becomes apparent that this legitimate state interest is not rationally served by banning same-sex marriage.

In fact, children's interests are actually hurt by preventing same-sex marriage. Because of the vast amount of evidence that supports this position, this argument is fully explored in the policy section of the paper, and as such, it is pertinent here to only point out that children of same-sex unions are the ones who suffer by the state's position. The end result of using child-rearing as a justification for prohibiting same-sex marriage reaches the opposite conclusion: protecting children is a reason to legalize same-sex marriage.

C. Democratic Theory

Perhaps the most logical of the anti-gay rights approaches to the issue relies more on democratic theory than constitutional text. In fact, this approach to democracy often directly conflicts with constitutional text. This position, which represents one variation of democratic theory, advocates that the majority rules, and that traditions and mores can only be changed by the political process, not through the courts.

A revealing look at this approach is often reflected in Justice Scalia's opinions: "[P]ersuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more require a State to criminalize homosexual acts - or for that matter, display any moral disapprobation of them - than I would forbid it to do so." According to this methodology, the democratic process is the only engine for change, judicial restraint is the policy, and the will of the people prevails in all circumstances.

179 See Goodridge, 798 N.E.2d 941, 962. See also Dent, supra note 155, at 594.
180 See infra notes 188-227 and accompanying text.
181 See Lawrence v. Texas, 539 U.S. 558, 603-04 (2003) (Scalia, J., dissenting) ("[I]t is the premise of our system that those judgments be made by the people, and not a governing caste that knows best.").
182 Id. at 603 (Scalia, J., dissenting). An out of court statement attributed to Justice Scalia reads: "I believe in liberal democracy, which is a democracy that worries about the tyranny of the majority, but it is the majority itself that must draw the lines." See Scalia Slaps 'Abstract Moralizing,' CBS News (Sept. 29, 2004), http://www.cbsnews.com/stories/2004/09/29/national/main646403.shtml; Scalia: Some Judges Displaying Too Much Power, LAW.COM (Sept. 30, 2004) http://www.law.com/jsp/article.jsp?id=1096473910932. In a system like this, it is unclear what recourse, if any, the minority has.
The fallacy of this argument can be summed up in five words: "the tyranny of the majority."\textsuperscript{183} The fact that our country is not an absolute democracy,\textsuperscript{184} and that many safeguards exist against the tyranny of the majority indicate that even the founders did not subscribe to this approach. For example, the Electoral College, representative government, filibusters, and, most importantly, the Bill of Rights exist to show that the will of the people is to be the prominent guiding force, but not the controlling mechanism in each and every instance. Unambiguous Supreme Court comment on the matter reveals:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.\textsuperscript{185}

Therefore, many issues are not to be trusted with Congress or state legislatures. Protecting the minority from unfair treatment from the majority has been a theme throughout American history, and unequal treatment of homosexual couples fits within this category.\textsuperscript{186} Far too much circumstantial evidence exists showing that social change is not to be left solely to the will of the people.\textsuperscript{187}

Additionally, it shall be noted that even at its core, this majoritarian perspective is not even a real argument against gay rights, rather it is based upon the righteousness of the majority, and restraint in the judiciary. This ideological approach even theoretically embraces the notion of gay rights to an extent in that when the majority approves of it, the people have spoken, and that is to be the law. To endorse a rigid "might makes right" approach to social and legal policy not only ignores the purpose of the framers in drafting the Constitution, but also oversimplifies the complex type of government this country has: representative democracy.

\textsuperscript{183} \textit{Alexis De Tocqueville, Democracy in America} 113 (Richard Heffner ed., Penguin Books 1984) (1835). The "tyranny of the majority" is a phrase famously used by French political scientist Alexis De Tocqueville in describing possible downsfalls of American democracy. \textit{Id.}

\textsuperscript{184} Absolute democracy is unlimited power of the majority. \textit{See} Manuel Cereijo, \textit{An Absolute Democracy?}, http://www.amigospais-guaracabuya.org/oagmc166.php (last visited Sept. 25, 2005).


\textsuperscript{186} In the Supreme Court, the leading example is protecting minorities from racial discrimination. \textit{See} Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

\textsuperscript{187} \textit{Barnette}, 319 U.S. at 638.
In summarizing several opposing arguments to same-sex unions, the actual legitimate state interests cited by opponents to same-sex unions are ultimately not advanced by a policy of banning legal recognition. Other legitimate state interests that are discussed in Policy Section VI include economic principles and further family protection. Because most of the legitimate state interests actually work against bans, and the ones that do not (morality, procreation) are arguably not legitimate, these laws might have a hard time withstanding rationality review.

VI. PUBLIC POLICY ANALYSIS

Solely focusing on the courtroom ignores the driving force behind the laws: sound policy. This portion of the Article examines the other side of the equation that shapes opinions and often can be even more influential than what the Constitution says.

One reason this Article explores public policy is the reality that these arguments can drive change by legislature. It is important to remember the risk that is run by achieving change through the courts rather than the legislature. There is a “pragmatic fear that too rapid a march toward marriage equality will engender a popular backlash.”

Because of this, change via the legislature is all the more important for validation and sustainability. In sum, compelling policy reasons for equal rights are significant because they obtain the optimal outcome – change by the legislature, through the will of the people.

A. Synopsis of America’s Current Acceptance Level

Before presenting the numerous policy reasons for accepting gay rights, a brief summation of America’s general acceptance level is helpful. The Election 2004 nationwide exit polls revealed fresh information about where that level stands.

<table>
<thead>
<tr>
<th>Preferred Policy</th>
<th>Legally Marry</th>
<th>Civil Unions</th>
<th>No Legal Recognition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage</td>
<td>25%</td>
<td>35%</td>
<td>37%</td>
</tr>
</tbody>
</table>

Even though only a quarter of Americans support same-sex marriage, and the largest choice selected was “no legal recognition,” there is reason for optimism on the part of same-sex couples and equal rights advocates alike. A

---

188 See Harvard Law Association, supra note 10, at 2011. This type of phenomenon arguably occurred in both Alaska and Hawaii. Id.

189 Additionally, using policy reasons as a basis to shift the will of the people to more compassionate stances towards others would render the current legal battles moot because of the domino effect that this would have in changing the laws.

total of sixty percent of Americans believe in at least a variation of rights for same-sex couples. This indicates that even people who might think that homosexuality is immoral see the practical, compassionate, and pragmatic reasons to provide basic protection. Essentially, this dissonance is between peoples’ desire to embrace equality and people’s desire to comply with certain religious tenets. However, through this conflict there is common ground.

Regardless of this conflict within America, this and other evidence shows that overall social tolerance has increased over the past quarter century. One would expect this trend to continue if, as widely speculated, the gay rights movement mirrors other movements towards equal rights. Nevertheless, while tolerance has increased, social and legal acceptance has largely eluded homosexuals. What seems to be most pertinent to keep the country moving towards equality is to focus on the sixty percent who recognize a need to provide rights to same-sex couples.

B. An Overview of the Compelling Policy Reasons for Acceptance

1. Protecting Children and Families

Alluded to earlier, the argument that legal acceptance of homosexual couples protects children and thus, families, is perhaps the most persuasive because it directly counters a legitimate interest cited by opponents of equal rights: child rearing. Once that argument is nullified, the denial of rights is not capable of withstanding rationality review. Many consider this well-documented policy argument to be the one with the greatest legs because it appeals to society’s desire to provide for children.

One side to this position is from the perspective of a child in a same-sex adult household, a position over which the child has no control. As children in a same-sex adult household, they are the innocent victims of a system that

---

191 *Id.*
192 *See infra* Section VII.
193 *See supra* notes 10-14 and accompanying text.
195 *See Goodridge, 798 N.E.2d at 962-65.* The Massachusetts Supreme Court reached this conclusion in *Goodridge.* *Id.*
196 Extensive law review articles about this particular subject go back decades. In fact, a well written Article from the West Virginia Law Review back in 1999 covered this issue in detail, accurately predicting the importance of the issue of protecting children in the years to come. *See Silverman, supra* note 50.
197 *Id.* at 411.
198 *Id.* at 424-429. This usually occurs in one of three ways: 1) one partner is a biological parent to the child; 2) a parent receives custody through adoption; and 3) deliberate attempts by the partners to create a child including artificial insemination and surrogate parenting. *Id.*
will not allow legal recognition of their parents. Although a handful of states allow same-sex parents to obtain joint guardianship through adoption, this process is typically problematic for the legal guardian. The child’s status as victim means that they are denied many important rights that are incident to a parental relationship:

- Inheritance rights
- Uncertainty of custody upon death of the legal parent
- Tax benefits and other government benefits
- Employer (fringe) benefits
- No visitation, child support, or alimony upon parents’ separation
- Legitimacy

Simply, it is the children who suffer as a result of their parents’ inability to be legally married. Children should not bear the burden of legal discrimination against same-sex couples. The state’s legitimate interest in providing a stable home to raise children is a reason to allow same-sex marriages, not prohibit them. Indeed, the perspective of the child of a same-sex union is enough to fail rationality review in and of itself. This argument has proved persuasive in the courts in both the Massachusetts and Vermont Supreme Court opinions that require legal recognition of same-sex unions.

---

199 Id. at 429. The availability of these alternative means varies from state to state, and it does not even approach affording children all of the rights they would receive if their parents were married.

200 Id. at 429.

201 Id. at 430. “If the biological [parent] should die or become incapacitated due to a debilitating illness, the child’s relationship with the non-biological parent or parents, who may be the only other parent(s) the child has ever known, may be severed at the discretion of an unsympathetic judge. The narrow definition of family that refuses to legally recognize the emotional bond between the child and non-biological parent gives no protection to the relationship.” Id.

202 Id. at 436. The trickle down effect of their parents’ ability to file taxes has an economic effect on the child. Id.

203 Id. at 441.

204 Id. at 443. As just one example of many, when a public safety officer dies in the line of duty, the Bureau of Justice Assistance pays $100,000 to the surviving family. However, the surviving family does not include the same-sex mate or the non-biological child of the deceased. Id.

205 Id. at 447-48.

206 In refusing to recognize the child’s family unit, the state is arguably subjecting that child to ridicule and hardship.

207 See Silverman, supra note 50, at 457.

208 Id.

2. Religious Arguments

Although a pure religious argument has been determined not to be a legitimate justification for a law, its effect on the general public can be profound. Christianity will be the subject of the analysis in this subsection due to its presence in American society.

There is no need to provide all of the religious arguments for gay rights in detail, for that is to be left up to the religious scholars, and arguably does not deserve more than this brief divulgence in a legal journal. What is more important is to indicate that textual religious arguments supporting acceptance of homosexuality exist in abundance. Several churches have embraced this position by beginning to make acceptance of homosexuality (rather than condemnation) more of a priority. Some denominations have gone further than others in accepting homosexuals. Simply, there is plenty of room in religion for spirituality and acceptance of same-sex unions to co-exist.

See supra notes 132-44 and accompanying text.

See CNN.com Election 2004 Exit Polls, supra note 190. Fifty-six percent of 2004 voters indicate that they attend church at least monthly, whereas only fifteen percent indicated that they never attend church. Id.

Id. Eighty-one percent of 2004 voters identified themselves as Christian. Id.

MARY E. SWIGONSKI, FROM HATE CRIMES TO HUMAN RIGHTS 34 (2001). Six prominent passages exist in the Bible that explicitly condemn homosexuality (far less than the number of passages that condemn divorce or support a subordinate role for women, for that matter). Id. Additionally, there are numerous passages in the Bible that describe same-sex relationships in a positive light. Specifically, scripture describing the love between two women has been co-opted for use in religious marriage ceremonies. Id. at 40 (citing Ruth 1:16-17). Additionally, it is important to remember that in the past, religious arguments have been used to support slavery, women's oppression, mixed race marriages, and prohibition, among other causes. History demonstrates that meanings ascribed to scripture change over time. Id.

An example of a broader argument is the historical and biblical role of Jesus as a champion for the oppressed. History and scripture shows that Jesus fought against the laws of his day that forbade certain classes of people from worshipping in a temple (these classes included outcasts, lepers, etc.). Jesus: The Mission, (Discovery Channel broadcast Feb. 12, 2005). This comparison is not being made to suggest that homosexuals are the social equivalent, only that Jesus had a compassionate message that embraced people traditionally shunned by the establishment.

See Wikipedia, the Free Encyclopedia, Same-Sex Marriage, http://en.wikipedia.org/wiki/Same-sex_marriage (last visited Sept. 25, 2005). Significant headway has been made with certain sects of Christianity in the direction of equal rights for same-sex couples, albeit with bitter divisions. Specifically, the Presbyterian Church has seen bitter divides develop in recent years. Id. Not only has there been progress in Christian sects, but also in Judaism, where Reform Judaism supports gay marriage and gay clergy. The United Church of Christ and Reform Judaism remain the highest profile examples of unequivocal acceptance of same-sex marriage and homosexuality in the religious sector. Id.

See U.S. Networks Reject Church Gay Ad, Dec. 1, 2004, http://www.cnn.com/2004/WORLD/americas/12/01/us.church.adban/index.html (last visited Sept. 25, 2005). Perhaps most well known, the United Church of Christ (a church with Puritan roots) has most openly invited homosexuals to the church in a controversial television commercial that was banned from network television. In the commercial, the church showed various classes of
3. Economic Policy

The Law and Economics ("L&E") school of thought sends mixed signals in its analysis of same-sex marriage.\textsuperscript{216} Although traditionally this school strives to be amoral in its analysis, morality often seems capable of factoring into the equation nonetheless.\textsuperscript{217} Despite this confusion, sound L&E arguments have emerged over the years that strongly support same-sex marriage.\textsuperscript{218}

One logical L&E argument operates on the widely accepted premise that contracts represent an efficient way for parties to form and maintain intimate relationships.\textsuperscript{219} Since a key L&E mantra states "'the law is efficient or tends toward efficiency,'" society should embrace the creation of these contractual unions.\textsuperscript{220} Certainly, prohibiting them does not comport with this emphasis on efficiency.

The logical extension of the L&E efficiency platform supports expanding contractual access to same-sex couples because not allowing same-sex marriage precludes these couples "from achieving the same degree of utility from their intimate relationships" as heterosexual couples can.\textsuperscript{222} This discrimination relegates homosexual couples seeking to marry "to a perpetual position of sub-optimal utility maximization and inequality."\textsuperscript{223}

The economic consequences are not limited to the particular homosexual couple whom the state denies the right to marry. In fact, all of society suffers as a result of non-utility maximization.\textsuperscript{224} Any inefficiency in the machin-
Recognizing same-sex marriage would encourage efficiency and stability within the economic model. These and other economic arguments can be persuasive because they appeal to people's sensibilities; it is a solution that is mutually beneficial for all of society.

VII. AN UNEXPLORED COMPROMISE AND A PERMANENT SOLUTION

The "outside the box" approach to the legal issue discussed in this Article admittedly has only a minor chance of widespread implementation in the near future. This resolution discussed below would have to be self-imposed, not the result of a court decision. It represents a sensible, rational, and efficient solution rather than a constitutionally mandated method. Most importantly, it requires an ever-elusive consensus of the people.

The following principled approach is a take on the concept of separation of church and state, and combines several of the legal and policy aspects described above: for all couples, heterosexual and same-sex, the government would stop recognizing "marriages" and would start to recognize "unions." Essentially, this play on words symbolizes an effort to separate the church and states' roles in "marriage." The significance of this solution lies in acknowledging the unnecessary entanglement that government-recognized marriage has created between the church and state. It also acknowledges the dualistic nature of unions as having distinct legal and spiritual/emotional components.

This solution represents a compromise because, for the opponents of same-sex marriage, the state would not vouch for the sanctity of marriage. Conversely, for the proponents of same-sex marriage, they would receive all of the legal rights that heterosexuals do. Essentially, this puts homosexual and heterosexual couples on the same level. In officially dropping the word "marriage," all of that word's historical, social, and religious implications would be left to the religious/private community.

See Bush, supra note 216, at 137. This utilitarian policy seeks wealth maximization for all.

See Nishimoto, supra note 218, at 384.

An economic benefit that has been noted in pop culture is the increase in commerce for states that provide same-sex marriages. This concept was even spoofed in a controversial Simpsons episode. See Dan Harris, 'The Simpsons' Dives Into Gay Controversy, http://abcnews.go.com/WNT/Entertainment/story?id=513522&page=1 (last visited Sept. 28, 2005).

Regrettably, the polar opposites that drive this debate often seem incapable of working together or agreeing on compromise. The convictions and inflexibility of those engaged in the battle will prevent otherwise logical solutions from being considered. Nevertheless, this approach will briefly be explored due to its soundness as a permanent solution.

See Taylor, supra note 35, at 191-92. This entanglement has grown as government's role has expanded. See id.

Id. Other unconventional and innovative solutions include changing the government's recognition of benefits from marriage-based to household-based, and shifting towards a functional
A. Returning "Marriage" to its Roots, Embracing Religious Freedom, and Protecting the Integrity of Religion

Yielding the word "marriage" to the religious community in essence returns the word to its origins.\(^{231}\) Marriage has been around much longer than democracy,\(^{232}\) and the opposite sex requirement has its roots in Christianity.\(^{233}\) Before the state ever got involved in marriage and marriage's role in property law, the church was the sole vehicle of matrimonial law.\(^{234}\)

This solution embraces religious freedom because it does not force any religions to recognize same-sex marriages if they do not desire to do so. These are private institutions, and as such, participation is completely voluntary.\(^{235}\) Participation in the state is by and large involuntary. In other words, those who do not agree with the treatment of same-sex couples by the church need not participate in that institution, or they may seek to reform it. However, unequal treatment in the government's sphere carries much larger repercussions due to its compulsory nature.

Refraining from mixing religion and government has directly contributed to this country's prosperity and success.\(^{236}\) Both government and religion benefit from being separate, which is evidenced by the success and sustainability of a voluntary church.\(^{237}\) Some religions will eventually recognize same-sex marriages, and some will not.\(^{238}\) Either way, letting these religions be self-determinative will only enhance the integrity of their final choices to recognize these unions. It sends a calming message to religious organizations that flatly oppose homosexuals: you can feel however you want, and the state will never force you to recognize same-sex marriage.

This solution also adequately reconciles so many peoples' internal conflicts about religion and equality. Instead of feeling as if one is forced to choose one over the other (equality or religion), this solution allows people to keep both ideals intact.

\(^{231}\) Taylor, supra note 35, at 175.
\(^{232}\) See generally William N. Eskridge, The Case for Same-Sex Marriage 15-50 (1996). The origins of marriage go beyond recorded history, and democracy as we know it has only existed less than 230 years. Id.
\(^{233}\) Hamilton, supra note 128, at 330.
\(^{234}\) Taylor, supra note 35, at 175.
\(^{235}\) As long as one has a social security number, goes to a public school, has a job, purchases anything, or uses any of the government's services, participation in government is not a choice.
\(^{237}\) Id.
\(^{238}\) See supra notes 210-15 and accompanying text (noting that several religions have begun to accept homosexuality and same-sex couples).
B. This Solution Hedges “Separate But Equal” Arguments

The solution of yielding the word “marriage” to religious institutions in favor of “unions” avoids the quandary created by establishing two separate systems that hope to serve the same purpose. The formation of any separate system will always be vulnerable to a “separate but equal” attack. In fact, the Goodridge court provided an advisory opinion holding that the establishment of two separate systems for heterosexual and same-sex couples is unconstitutional.

Theoretically, having two classifications for unions (same-sex versus heterosexual) that provide identical rights acknowledges nothing. However, history has shown that the public’s perception of this distinction plays a vital role. In sum, the constitutionality of such an arrangement of recognizing unions rather than marriages would not be in question, whereas a dual system approach would be much more constitutionally suspect.

C. A Realistic Assessment of the Solution

After having presented reasons to implement this solution, it is worth reiterating that this optimal solution, which ensures government neutrality, religious autonomy, and perhaps most importantly, constitutionality, is an unlikely scenario in the near future. The prospect of a court decision embracing this scenario is basically non-existent because current Supreme Court case law requires an ever-elusive religious purpose for invalidation under the Establishment Clause. Additionally, large-scale self-initiated change in this manner is improbable because the opposite sides appear too far apart even to consider a compromise. This stand-off reality is perplexing after illustrating the positive
attributes this solution has for both religion and equality. This compromise lets both parties save face and embraces/reflects the dualistic nature of this problem. In spite of its immediate improbability, this option is worthy of exploration because of its sensibility.

VIII. CONCLUSION

This Article advocates a multi-pronged strategy aimed solely at obtaining equal rights for same-sex couples. By providing this cross-section analysis, arguments for acceptance emerge which reflect that the sum of the arguments is far greater than any of their parts. Individually, the practical arguments herein are all capable of eroding at the marginal headway that has been had by opponents of equal rights. Collectively, they represent overwhelming evidence that same-sex couples will eventually find legal acceptance.

The Constitution guarantees equal rights in the Equal Protection Clause, provides the fundamental right to marry in the Due Process Clause, and ensures against the legislation of religious principle in the Establishment Clause. These doctrines found directly in the Constitution serve as the legal basis for obtaining equal rights for same-sex couples.

However, even more persuasive policy reasons for equal rights are rooted in social, economic, and moral theory. These sensible justifications are capable of shifting public opinion towards rights for same-sex couples. In other words, pragmatic justifications will lead people to the principled conclusions.

With time, equal rights for same-sex couples can become as normal as the right to privacy, the right to free speech, and the right to vote. In the meantime, however, the future remains uncertain. Without providing compelling support for acceptance in the courtrooms, legislatures, churches, and boardrooms, same-sex couples and their families will continue to be denied rights that are unquestionably given to others.

Justin R. Pasfield*

thinkable, and some would even abolish governmental recognition of unions altogether before putting homosexual and heterosexual relationships on the same legal plane. Id. An example of a community choosing to give up benefits as opposed to expanding them to other groups occurred in Jackson, Mississippi during the civil rights era. When faced with a court mandate to integrate their public pools, the city chose to close them. Id. at 1021-22 (citing Palmer v. Thompson, 403 U.S. 217, 247 (1971)). Surprisingly, nine years after Brown, the court upheld the pool closing. Id. A scenario like this for marriage is not as likely because of the benefits of marriage go so much further than mere pool privileges. Id. Also, on the side of same-sex marriage, there will inevitably be those that view this possible solution as not good enough. Some may view this scenario as an appeasement, or just another way of saying that same-sex couples will never obtain “marriage.”

* J.D. Candidate, West Virginia University College of Law, 2006; B.S. North Carolina State University, 2000. A special thanks to fellow law students Kelly Kotur, Sarah Wagner, and Nick Johnson for their help through the editing process. The author would also like to show his appreciation to the following WVU College of Law faculty for their assistance: Robert Bastress,
Vivian Hamilton, and Caprice Roberts. The author especially wants to thank Professor André Douglas Pond Cummings for serving as the author's Article Mentor. Lastly, the author would like to thank his wife Sarah for her love and support.