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ACT OF INFIDELITY: WHY THE DEFENSE OF MARRIAGE ACT IS UNFAITHFUL TO THE CONSTITUTION

Monolithic control of the value transmission system is "a hallmark of totalitarianism . . . ."¹

INTRODUCTION

In Romer v. Evans,² the Supreme Court held invalid a Colorado state constitutional amendment which prohibited government action or policies designed to protect homosexuals from discrimination. This decision struck such a powerful blow for the cause of gay and lesbian³ rights that the opinion was hailed by some as "without doubt the most important and symbolically momentous decision of the 1995-96 term."⁴ In truth, however, Romer did not even prove to be the year's "most important and symbolically momentous" judicial ruling from the perspective of gay and lesbian advocacy, much less from a more general perspective. That honor was reserved for the ruling of Baehr v. Miike.⁵

In Miike, a Hawaii circuit court declared that the state of Hawaii had failed in its attempt to demonstrate a compelling state interest in withholding the right to legal marriage from same-sex couples. Miike took a major step toward legalizing same-sex marriages in Hawaii.⁶ The prospect of legal same-sex marriage seizes the imagination of the homosexual community precisely because marriage represents the full integration of gay and lesbian citizens into the American polity. As one gay and lesbian publication noted, "Even the first win for lesbian/gay rights in the

³ "Gay men and lesbians" has become the current term of choice but this paper will occasionally use the politically incorrect term "homosexuals" to refer to gay men and lesbians. Although some commentators find the word problematic, a (relatively innocuous) single-unit appellation vastly improves the fluidity of prose and the clarity of thought. See, e.g., David Link, Comment, The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples, 23 Loy. L.A. L. Rev. 1055, 1059 n.25 (1990) (asserting that "homosexual," used as a noun, implies a being "whose sole dimension is an erotic one"). But see Andrew Sullivan, Virtually Normal at ix (1995) (concluding that, although somewhat clinical, "homosexual" is the "most neutral term available").
⁴ David J. Garrow, The Rehnquist Reins, N.Y. Times, Oct. 6, 1996, § 6 (Magazine), at 82.
⁶ See id. at *21. Only the state's immediate appeal prevented the trial court's ruling from being final.

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Supreme Court in a generation could not really eclipse same-sex marriage as the top lesbian/gay legal story for 1996." Romer signified progress in the extension of constitutional protections to homosexuals, but Miike, on a much more visceral level, generated hope that homosexuals would soon be able to circumvent their greatest obstacle to full equality.

In anticipation of what would be a watershed event in civil rights reform, the U.S. Congress undertook to prevent this dream of equality from coming to pass. Taking the "unprecedented step of defining marriage, rather than deferring to state's [sic] definitions as had been the practice," Congress enacted the euphemistically titled Defense of Marriage Act ("DOMA")—which President Clinton signed into law on September 21, 1996. DOMA proclaims:

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

Furthermore, DOMA limits the federal definition of marriage by specifying:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between

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8 See Sullivan, supra note 3, at 185 ("[Same-sex marriage] is the first step in any resolution of the homosexual question—more important than any other institution, since it is the most central institution to the nature of the problem, which is to say, the emotional and sexual bond between one human being and another. If nothing else were done at all, and gay marriage were legalized, ninety percent of the political work necessary to achieve gay and lesbian equality would have been achieved."); Link, supra note 3, at 1140 ("Same-sex marriage is without question the most comprehensive and satisfactory answer to the problems facing gay and lesbian couples."); David L. Chambers, What If?: The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 Mich. L. Rev. 447, 450 (1996)("[P]ermision for same-sex couples to marry under the law would signify the acceptance of lesbians and gay men as equal citizens more profoundly than any other nondiscrimination laws that might be adopted.").


10 See id.

one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.\(^\text{12}\)

At first glance, several questions come to mind about DOMA. First, "Exactly which families are being defended by this law?" Presumably, Congress would answer that DOMA protects the traditional nuclear family (i.e., mother married to father with each child biologically related to both parents). That answer would be much more compelling if more Americans lived in traditional families. As of 1989, only 27% of American households consisted of two parents with children, down from 40% in 1970.\(^\text{13}\) As of 1982, 25% of American children under the age of 18 did not live with both biological parents.\(^\text{14}\) By contrast, nontraditional families based on homosexual unions are on the rise. While scholars contest the exact figures (regarding the number of children raised by gay parents),\(^\text{15}\) many gay men and lesbians have made abundantly clear the fact that they wish to participate in the institution of marriage\(^\text{16}\) and that

\(^{12}\) Id. § 3 (codified as amended at 1 U.S.C. § 7).


\(^{15}\) In 1989, the editors of the *Harvard Law Review* claimed, “Approximately three million gay men and lesbians in the United States are parents, and between eight and ten million children are raised in gay and lesbian households.” William Eskridge, *The Case for Same-Sex Marriage* 110 (1996) (quoting THE EDITORS OF THE HARVARD LAW REVIEW, *SEXUAL ORIENTATION AND THE LAW* 119 (1989)). William Eskridge notes that the Harvard editors based their figure on “a secondhand report of a panel of family law experts at an ABA meeting . . . . [N]ot a very good cite.” Id. at 245 n.61. He considers both figures too high. *See id.* at 110; *see also* Carrie G. Costello, Esq., *Legitimate Bonds and Unnatural Unions: Race, Sexual Orientation, and Control of the American Family*, 15 Harv. Women’s L.J. 79, 140 (1992) (estimating one-quarter of gay men and one-third of lesbian women in America are parents and that six to fourteen million children are being raised in lesbian and gay households).

\(^{16}\) A 1994 poll conducted by *The Advocate* found that two-thirds of the gay men polled wanted to get married, 85% were "open to the idea" and only 15% were uninterested. *See Eskridge, supra* note 15, at 79 (citing Janet Lever, *Sexual Revelations, Adv.,* Aug. 1994, at 17, 24). In a 1995 survey conducted by the same magazine, 70% of 2,600 lesbians indicated they would marry if legally possible. *See Chambers, supra* note 8, at 449-50 (citing Janet Lever, *Lesbian Sex Survey, Adv.*, Aug. 22, 1995, at 27). The same survey also revealed that 46% of lesbians and 30% of gay men polled said that they “had exchanged rings or had [held] a commitment ceremony.” *Id.* at 449 n.5. This yearning for matrimonial legitimacy manifested itself on the national stage when, as part of an April 1993 march for gay and lesbian rights in Washington, D.C., “[h]undreds of couples joined together and exchanged vows in the
they “want to have children, do have children, and rear them in families.” No causal link has been identified between the decline of the traditional nuclear family and the rise of nontraditional homosexual families. Homosexuals compose such a small portion of the general populace that the notion that one has anything to do with the other is laughable. If one is looking for the root cause of the decline of the traditional family, one would have better luck examining the ascension of no-fault divorce laws in most states, the epidemic of unwed teenage pregnancy and the changing status of women who no longer have to remain in bad marriages out of economic dependency. In short, DOMA deprives already burdened (nontraditional) families while doing nothing to address the problems of those (traditional) families it is purportedly “defending.”

Second, “If the states cannot even agree on the fundamental definitions of ‘male’ and ‘female,’ how can they all subscribe to a unitary definition of ‘marriage?’” Modern technology has blurred gender definitions by permitting persons born male to become female, and vice versa. Can a postoperative male-to-female transsexual marry a man? Looking to “gender identification and sexual equipment,” New Jersey’s intermediate appellate court has held that “she” can. Other states, looking to chromosomes (male-to-female transsexuals still retain a male XY pattern; they do not develop a female XX pattern), have determined “she” cannot. Whether one defines gender according to genitalia or chromosomes, “[a]t least one of these states has legally recognized a form of same-sex union. Which one?” This impact of DOMA on transsexual marriages may look like a marginal issue, but the definitional conflict among the states speaks to the more general, underlying concern of interstate recognition. The plight of transsexuals, whose marriages lose and regain their validity as they travel from state to state, illustrates the danger inherent in any attempt by a state to define whom a person may


17 Eskridge, supra note 15, at 110.
18 Id. at 93.
21 Technically, beyond the transsexual context, some states have indirectly recognized same-sex marriages—although they may not realize it. Native American cultures have long recognized same-sex marriages (called “berdache” marriages) which are valid under tribal law. See id. at 92. “Some states have explicitly recognized tribal marriages as valid under their state law, and such recognition implicitly validated some same-sex marriages under state law.” Id. (citing, as an example, 1957 Cal. Stat., ch. 2121, § 1).
22 Id. at 93.
marry. That is, DOMA sacrifices uniformity and predictability as America takes on the appearance of a mere confederacy, rather than a union.\textsuperscript{23}

Third, "Before enacting this law, did Congress give any weight to the writings and arguments of the nation's legal scholars, the people who have devoted their lives to studying the logic and evolution of our laws?" This question is the easiest to answer: no, Congress did not. Between 1990 and June 1995, "only one of seventy-two articles, notes, comments, or essays focusing primarily on same-sex marriage (only 1.4\%) fully defended the heterosexuality requirement for marriage."\textsuperscript{24} Even that lone maverick of the sampling failed to make an argument against same-sex marriage on legal grounds (he based his position on religious grounds).\textsuperscript{25} So, if Congress did not base its legislation on scholarly analysis,\textsuperscript{26} where did it turn for inspiration? As one of the two branches of government directly controlled by majoritarian politics (the executive being the other), Congress turned to the most volatile arbiter of social policy there is: popular sentiment. A 1989 survey indicated that 69\% of Americans disapprove of the legalization of homosexual marriage.\textsuperscript{27} More recent

\textsuperscript{23} Some proponents of DOMA have extolled it as a bulwark protecting "states' rights." See, e.g., Letter from Harvard Law Professor Laurence H. Tribe to U.S. Senator Edward Kennedy (May 24, 1996), in 142 Cong. Rec. S5931-33 (daily ed. June 6, 1996) (criticizing "states' rights" argument as well as, more generally, DOMA's dubious constitutionality) [hereinafter "Tribe Letter"]. Such rhetoric echoes the battle cry of the Confederacy during the U.S. Civil War. Thus, an analogy between the Confederacy and DOMA supporters seems more than appropriate. After all, advocates for the former sought to deny the full indicia of citizenship to a certain group—just as advocates for the latter are trying to do today—in the name of states' rights.

\textsuperscript{24} Lynn D. Wardle, A Critical Analysis of Constitutional Claims for Same-Sex Marriage, 1996 BYU L. Rev. 1, 18-19 (1996). Professor Wardle partly attributes this overwhelming disparity to "an intellectual taboo against expressions unsympathetic to gay and lesbian prerogatives." \textit{Id.} at 20. Oddly, she does not even acknowledge the possibility that most academics (according to her sampling) favor same-sex marriage because the arguments against it lack moral and intellectual merit.

\textsuperscript{25} See \textit{id.} at 19 n.70 (citing Herbert W. Titus, Defining Marriage and the Family, 3 Wm. & Mary Bill Rts. J. 327 (1994)). Titus' piece repudiates secular legal analysis of the best interests of society and espouses "theological and natural law arguments opposing same-sex marriage and other family-redefining proposals." \textit{Id.} at 19 n.70. Professor Wardle does note that several recent law review articles have criticized "particular doctrinal arguments for same-sex marriage" without rejecting the concept of same-sex marriage altogether. \textit{Id.} at 19 n.71. For example, she observes that, in one article, Cass Sunstein criticizes a range of constitutional arguments in favor of same-sex marriage but makes clear that he "does not defend the heterosexuality requirement or oppose same-sex marriage." \textit{Id.} (citing Cass R. Sunstein, Homosexuality and the Constitution, 70 Ind. L.J. 1 (1994)).

\textsuperscript{26} Laurence Tribe's letter to Congress (written at the behest of Senator Edward Kennedy, Democrat of Massachusetts) detailing DOMA's constitutional deficiencies apparently fell on deaf ears. See generally Tribe Letter, \textit{supra} note 23.

surveys have yielded similar results. Although there are some desultory indications that religious and moral mores may be growing more tolerant towards same-sex marriage, such attitudinal shifts seem to be moving at a glacial pace. Simply put, DOMA owes its birth to the union of Capitol Hill realpolitik with the straight majority's unbridled fear.

The aforementioned issues—Congress's inattention to the real problems afflicting American families, the potential nightmare of multifarious, state-created definitions of marriage and politicians' disdain for scholarly opinion—take secondary status to the critical question: "Is DOMA constitutional?" Based on the constitutional doctrine articulated by the U.S. Supreme Court, the answer is no. Several different modes of analysis substantiate this conclusion. Part I of this paper dem-

and Federal Judicial Recognition of Danish Same-Sex Marriages, 16 NOVA L. REV. 809, 809 (1992)).

28 Professor Wardle reports that polls show Americans opposing same-sex marriage by a margin of about two to one. See Wardle, supra note 24, at 57 (citing, among others, ROBER CENTER AT UNIVERSITY OF CONNECTICUT, PUBLIC OPINION ONLINE (reporting on TIME/CNN/Yankelovich Partners Inc. poll, taken June 15-16, 1994, released June 17, 1994: "Do you think marriages between homosexual men or between homosexual women should be recognized as legal by the law? Yes - 31%, No - 64[%], Not Sure - 5[%]").). One may wonder at the fact that Professor Wardle does not try to diminish public opinion against same-sex marriages (by attributing it, say, to homophobic taboos) in the same manner she does scholarly opinion (by attributing it to an "intellectual taboo" favoring homosexuals). Such preconceived bias leaves her article's stance against same-sex marriage looking more outcome determinative than objectively reasoned.

29 Paul Reidinger, Politically Expedient: What are Legislators Really Up to When They Pass Laws of Dubious Constitutionality?, 82 A.B.A. J. 79, 80 (Oct. 1996). The political power of mass homophobic bias should not be underestimated. An argument can be made that such bias ultimately led to the defeat of the Equal Rights Amendment. One commentator quotes an anti-ERA organizer as saying, "For one thing, [the ERA] would allow gays to marry and adopt children. If anything ever happened to me, I don't want to think that gays could adopt my children." COSTELLO, supra note 15, at 130 (quoting JOHN D'EMIlio & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 353 (1988) (citation omitted)).

30 "While the major sects and denominations of the Jewish and Christian faiths continue to disapprove of homosexual conduct and same-sex marriage, some are moving toward greater acceptance." Julienne C. Scocca, Society's Ban on Same-Sex Marriages: A Reevaluation of the So-Called "Fundamental Right" of Marriage, 2 SETON HALL CONST. L.J. 719, 761-62 (1992) (footnote omitted). The appendix to Professor Eskridge's book excerpts letters from twelve clergy members of various denominations (including the Jewish faith) voicing their support of same-sex marriages. ESKRIDGE, supra note 15, at 193-217. Several universities, such as Harvard, are currently considering allowing same-sex couples to perform commitment ceremonies within their chapels. See Janie Kim, Task Force Appointed to Investigate Same-Sex Unions at Memorial Church, HARV. L. REC., Feb. 28, 1997, at 1, 4.

31 One should keep in mind the question is not, "Would the U.S. Supreme Court, as currently constituted, find the Defense of Marriage Act constitutional?" That question falls beyond the scope of this paper.
onstrates why DOMA violates the Full Faith and Credit Clause. Part II examines DOMA’s violation of substantive due process rights. Part III explores how DOMA results in a blatant abridgment of equal protection of the law. Part IV questions whether DOMA could even withstand the Court’s least exacting level of scrutiny: rational basis review. Finally, Part V compares the state’s interest in enjoining same-sex marriage with the state’s interest in permitting same-sex marriage. These different lines of reasoning all lead to the same conclusion: DOMA does not pass constitutional muster.

I. FULL FAITH AND CREDIT ANALYSIS

Of the many ironies surrounding DOMA (e.g., it defends marriage by preventing it), the most prominent is that Congress claims its authority to write the law derives from the Full Faith and Credit Clause, the constitutional clause to which DOMA does the most violence. Article IV, Section 1 of the United States Constitution states: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” Although the clause clearly empowers Congress to enact general laws prescribing the “effect” of official state acts in other states, reading that power to completely nullify interstate recognition of state acts into the single term “effect,” amounts to “a play on words, not a legal argument.” The lesser power of prescribing the effect of full faith and credit simply cannot contain the greater power of negating full faith and credit altogether. Nonetheless, debating semantics alone ignores the constitutional history of the clause. A proper analysis entails reviewing how the Constitution’s Framers, the U.S.

32 U.S. Const. art. IV, § 1, cl. 1.
33 Senator Don Nickles, Republican of Oklahoma and the Act’s Senate sponsor, proclaimed that the Act demonstrates Congress’s Article IV power to “prescribe the manner in which [the public acts, records and judicial proceedings of every other state] shall be proved, and the effect thereof.” Reidinger, supra note 29, at 79.
34 See U.S. Const. art. IV, § 1, cl. 1.
36 Laurence Tribe elaborated on this point in his letter to Congress: [C]ongressional power to “prescribe... the effect” of sister-state acts, records, and proceedings, within the context of the Full Faith and Credit Clause, includes no congressional power to prescribe that some acts, records and proceedings that would otherwise be entitled to full faith and credit under the Full Faith and Credit Clause as judicially interpreted shall instead [be] entitled to no faith or credit at all!

The reason is straightforward: Power to specify how a sister-state’s official acts are to be “proved” and to prescribe “the effect thereof” includes no power to decree that, if those official acts offend a congressional majority, they need to be given no effect whatsoever by any State that happens to share Congress’s substantive views. Tribe Letter, supra note 23, at S5932.
Supreme Court and the states themselves have interpreted the Full Faith and Credit Clause. Upon reviewing the clause from these three perspectives, one can conclude not only that the Full Faith and Credit Clause bestows no power on Congress to enact such a law, but also that DOMA stands as a complete affront to the clause.37

A. THE FRAMERS' UNDERSTANDING

Any analysis of the Full Faith and Credit Clause must overcome one initial hurdle: that its scope and logic have remained relatively unexplored—especially as it pertains to marriage. When the Framers added the Full Faith and Credit Clause to the Constitution, "there was little debate over it."38 Historian Jack Rakove says, "There wasn't much discourse on the clause at the Constitutional Convention .... Mainly it was considered a step toward creating an integrated union, a way of saying that the states are less than fully sovereign and owe a good-faith obligation to the other states."39 One revision, however, suggests that the Framers believed the Full Faith and Credit Clause should be much more peremptory than discretionary. The Framers approved James Madison's proposal to change "ought to be given" to "shall be given."40 Although public policy exceptions have been read into the clause by succeeding generations,41 such exceptions can hardly be imputed to the "original intent" of the Framers.

37 Indeed, Professor Tribe expressed such a strong conviction regarding the "anterior question" of DOMA's noncompliance with the Full Faith and Credit Clause that he felt there was no need to attack DOMA on due process or equal protection grounds. See id. He feared the latter approaches would prove less successful in defeating DOMA since same-sex relationships garner "unfavorable legal treatment for no [discernible] reason beyond public animosity to homosexuals." Id. (citation omitted); see also Cass R. Sunstein, The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 97 n.492 (opining that the Supreme Court could strike down DOMA without concluding that same-sex marriages are protected by the Equal Protection Clause).

38 Habib A. Balian, Note, 'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status, 68 S. Cal. L. Rev. 397, 407 (1995) (citing 2 Max Farrand, The Records of the Federal Convention of 1787, at 445-50, 488-89 (rev. ed. 1911)). Aside from a brief proposal (which was never discussed again) by Charles Pinckney to include a provision for bankruptcy debts and some textual revisions by James Madison, not much was said about the clause. See id. at 407. In fact, there is some speculation that the Framers' reticence can be attributed to a nefarious intent behind the clause's insertion into the Constitution. To be blunt, it is possible that the motivation behind the Full Faith and Credit Clause "was to allow slave masters to move freely between states without fear of losing their slave property." Id. (citing Paul Finkelman, An Imperfect Union 21-22 (1981)).

39 Reidinger, supra note 29, at 80.

40 Balian, supra note 38, at 407 n.48 (citing 2 Max Farrand, The Records of the Federal Convention of 1787, 489 (rev. ed. 1911)). "This change was extremely important because it mandates that states must give full faith and credit to sister state judgments. Before the change this was optional by the states ... ." Id. at 407 n.48.

41 See infra notes 60-75 and accompanying text.
B. The Supreme Court's Understanding

Few of the Supreme Court's past opinions shed much light on DOMA's compliance (or lack thereof) with the Full Faith and Credit Clause. If one seeks judicial precedent, "it must be sought in analogous areas rather than in the context of the Full Faith and Credit Clause itself, for Congress has never attempted to exercise its Full Faith and Credit enforcement power to nullify rather than to enforce the mandate of that clause." Fortunately, insight can be found in a Supreme Court opinion on a closely analogous issue: the application of the Full Faith and Credit Clause to divorces. In *Williams v. North Carolina*, the Court stated:

> [W]hen a court of one state... alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the [F]ull [F]aith and [C]redit [C]lause merely because its enforcement or recognition in another state would conflict with the policy of the latter.

In *Williams*, the Court expressed two primary concerns in deciding that a divorce granted in one state would be valid in every state. First, the Court wanted to avoid "polygamous marriages." Without interstate recognition of divorces, divorced individuals who remarried could have been subject to criminal prosecution for bigamy or polygamy upon re-marriage. Second, the Court hoped to ensure "the protection of innocent offspring of marriages deemed legitimate in other jurisdictions." If a state deemed an individual a bigamist or polygamist, then the state would invalidate the individual's current marriage, rendering any children of that marriage illegitimate.

If one substitutes marriage for divorce, the Supreme Court's concerns expressed in *Williams* apply with equal force. Consider a same-sex couple which lawfully marries in Hawaii and then separates without a divorce. If other states were able to withhold recognition of the marriage, one of those parties could legally remarry in a nonrecognizing state but be subject to bigamy prosecution in Hawaii (or in any state that recognized the marriage). The illegitimacy issue bears just as much relevance. Children raised by same-sex couples legally married in Hawaii would be considered illegitimate in every state that withholds recognition.

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43 317 U.S. 287 (1942).
44 Id. at 303.
45 Id.
46 Id.
47 Of course, this hypothetical assumes that the state's final appeal in *Miike* will be unsuccessful.
48 See Balian, *supra* note 38, at 415.
of the marriage.\textsuperscript{49} In short, "a rule would be fostered which [would] . . . 'bastardize children [who are] supposed to be the offspring of lawful marriage.'"\textsuperscript{50}

Although marriage and divorce do not perfectly parallel each other in terms of legal strictures and consequences,\textsuperscript{51} the Court, in a subsequent related opinion, did not find the analogy too strained:

\begin{quote}
Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.\textsuperscript{52}
\end{quote}

This passage underscores the strength of the divorce analogy\textsuperscript{53} when considering the Supreme Court's potential review of DOMA. If the Court finds the analogy\textsuperscript{54} so persuasive as to rule that the effect of all legal marriages "should be the same wherever the question arises," then DOMA must fall.

\section*{C. The States' Understanding}

James Madison's revision of the Full Faith and Credit Clause and the reasoning behind \textit{Williams} are both telling, but they are not directly on point. Consequently, the Supreme Court would no doubt seek guidance from the only resource that has developed a thoughtful discourse on the application of the Full Faith and Credit Clause to marriage: the states themselves. As a bit of background, one should "begin by recognizing the general rule preferring validation of marriages, which exists with an 'overwhelming tendency' in the United States."\textsuperscript{55} According to

\begin{itemize}
\item \textsuperscript{49} See id. at 416.
\item \textsuperscript{50} \textit{Williams}, 317 U.S. at 301 (quoting Haddock v. Haddock, 201 U.S. 562, 628 (1906) (Holmes, J., dissenting)).
\item \textsuperscript{51} For example, one generally has to be a domiciliary of a state to get a divorce there while one generally does not have to be domiciled in a state to be married there.
\item \textsuperscript{52} \textit{Williams v. North Carolina}, 325 U.S. 226, 230 (1945) [hereinafter "\textit{Williams II}"].
\item \textsuperscript{53} Advocates within the gay and lesbian rights movement find \textit{Williams} and \textit{Williams II} highly dispositive. See Henry J. Reske, \textit{A Matter of Full Faith: Legislators Scramble to Bar Recognition of Gay Marriages}, 82 A.B.A. J. 32, 34 (Jul. 1996) (quoting Evan Wolfson, director of the Marriage Project of the Lambda Legal Defense and Education Fund Inc. as saying, "How can it be that divorce is honored throughout the country and marriage is not?").
\item \textsuperscript{54} A less obvious, but equally compelling, analogy can be found in \textit{Katzenbach v. Morgan}, 384 U.S. 641, 651 n.10 (1966), which states that Congress may not enact statutes that "dilute" a constitutional mandate's "self-executing force as authoritatively construed by the Supreme Court." Tribe Letter, supra note 23, at S5933 (referring to § 5 of the Fourteenth Amendment). By enacting DOMA, Congress has not simply tried to dilute the mandate of the Full Faith and Credit Clause, but to eviscerate it completely.
\item \textsuperscript{55} Cox, supra note 16, at 1064 (citing \textbf{WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS} § 116, at 362 (2d ed. 1993)).
\end{itemize}
this general rule, "marriages will be found valid if there is any reasonable basis for doing so."\textsuperscript{56} Courts have traditionally found the laws of the state in which the marriage was performed (or \textit{lex celebrationis}) to be a "reasonable basis" for recognition.\textsuperscript{57} That is, most courts subscribe to the belief that "a marriage valid when entered into should be recognized as valid everywhere."\textsuperscript{58} This widespread observance of \textit{lex celebrationis} is attributable to pragmatic concerns:

Substantively, states have interests not only in designating the parties who may lawfully marry, but also in promoting the stability of marriage as an institution. Thus, a state might want to recognize a marriage validly entered into in another jurisdiction to promote predictability and stability for the couple involved. Recognition may also further comity interests. Each state has an interest in ensuring that marital relationships entered into under its auspices are respected by other states.\textsuperscript{59}

Of course, as is the case with any general rule, certain exceptions have emerged over the course of time.

The Restatement (Second) of Conflict of Laws gives courts a framework within which to operate when determining whether to apply exceptions to the general rule of recognition. Section 283 states:

1. The validity of marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in [section] 6.

2. A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant

\textsuperscript{56} Id.


\textsuperscript{58} Id. "The traditional state rule for determining the validity of a marriage performed elsewhere is to rely upon the laws of the state in which it was performed." Farabee, supra note 27, at 277 (citing Joseph Hovermill, \textit{A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages}, 53 Md. L. Rev. 450, 454 (1994)).

\textsuperscript{59} In Sickness, supra note 57, at 2042 (footnotes omitted); see also Anthony Dominic D'Amato, Note, \textit{Conflict of Laws Rules and the Interstate Recognition of Same-Sex Marriages}, 1995 U. Ill. L. Rev. 911, 917 (1995) (articulating states' interests in "protecting the justified expectation of the parties" and in "maximizing the values of certainty, predictability and uniformity").
relationship to the spouses and the marriage at the time
of the marriage.60

Section 6 complements section 283 by stating, “A court, subject to con-
istitutional restrictions, will follow a statutory directive of its own state on
choice of law.”61 This framework basically prescribes a three-step mode
of analysis for courts.

In step one, the court must ask, “Did the forum state have the ‘most
significant relationship’ to the spouses when they married?”62 If the an-
ter is no, the court must recognize the marriage.63 If the answer is yes, in
step two, the court must ask, “Has the forum state issued a ‘statutory
directive’ prohibiting the marriage in question?” If the answer is yes, the
marriage is invalid within the state. If the answer is no, in step three, the
court must ask, “Does the marriage violate a ‘strong public policy’64 of
the forum state?” If the answer is yes, the marriage is invalid within the
state; if no, the marriage retains validity within the state.65

As yet, most states have not enacted statutes explicitly banning
same-sex marriages,66 but a small number of states have passed so-called

60 Restatement (Second) of Conflict of Laws § 283 (1971).
61 Id. § 6(1).
62 A comment to § 283 indicates that the state with the most significant relationship
would be the “state where at least one of the spouses was domiciled at the time of the marriage
and where both made their home immediately thereafter.” Id. § 283(2) cmt. j.
63 Under this interpretation of the Restatement, “adhering to lex celebrationis and refus-
ing to invalidate a marriage . . . would be appropriate even in the case of a couple who were
domiciled in a disapproving state, got married in Hawaii, and then moved to another disap-
proving state—the forum.” In Sickness, supra note 57, at 2044 n.34.
64 “A state’s public policy is expressed in its court decisions, constitution and legislation.
A state could not simply refuse to recognize [same-sex] marriages; the state’s legal materials
would have to establish same-sex marriages explicitly violate its public policy.” Farabee,
supra note 27, at 278. The existence of anti-sodomy laws within a state does not necessarily
constitute a “strong public policy” against same-sex marriages. Two factors support this asser-
tion. First, anti-sodomy laws have traditionally not been restricted to homosexuals. See Link,
dissenting)). Second, such laws are seldom enforced anymore. See D’Amato, supra note 59,
at 940 (citing Michael L. Closen & Carol R. Heise, HIV/AIDS and the Non-Traditional Fam-
ily: The Argument for State and Federal Judicial Recognition of Danish Same-Sex Marriages,
16 Nova L. Rev. 809, 829 & n.85 (1992)). One should keep in mind that, even in the most
celebrated sodomy case of recent memory, Bowers v. Hardwick, the state prosecutor had de-
cided not to press charges against the gay man who challenged the anti-sodomy statute. See
Link, supra note 3, at 1065-66 (citing Bowers v. Hardwick, 478 U.S. 186, 188 (1986)).
65 “If neither an evasion statute nor any clear public policy demonstrates that same-sex
marriages should not be approved, a state may be forced to recognize such unions under the
Full Faith and Credit [Clause] . . . .” Farabee, supra note 27, at 278 (footnote omitted).
66 Although, in anticipation of Hawaii’s impending recognition of same-sex marriage,
there has been a wave of legislation to ban same-sex marriages (and the recognition thereof),
only four states were initially able to get their “anti-marriage” bills enacted: Georgia, Idaho,
South Dakota and Utah. See id. at 249 n.61 (citing Telephone Interview with Evan Wolfson,
Director of Lambda Delta (April 8, 1996)). Similar legislation failed in Colorado, Indiana,
Kentucky, Maine, Maryland, Mississippi, New Mexico, Rhode Island, Virginia, Washington,
"Marriage Evasion Acts" that specify that "marriages performed in other states that violate their laws will not be recognized."67 The problem with such statutes, even if they do not explicitly forbid same-sex marriages, is that courts may feel free to "read" such a ban into the law.68 Perhaps leery of the havoc that such judicial discretion could cause, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") withdrew the Uniform Marriage Evasion Act69 and replaced it with the Uniform Marriage and Divorce Act70 ("UMDA"), which espouses a policy of recognizing a marriage if it is valid under the laws of the state where it was contracted.71 A comment following section 210 of the UMDA suggests that any "state adopting this Act should repeal the earlier one [i.e., the Uniform Marriage Evasion Act], if it exists therein."72 Even if every evasion statute were repealed, however, the "public policy" exception would still imperil the validity of every same-sex marriage.

Courts have demonstrated a propensity to use "the public policy exception expansively as an 'escape hatch' rather than narrowly as it was originally conceived."73 One can easily imagine that, in the minds of some state legislators and state judges, DOMA trumps the Restatement—and thereby vouchsafes even greater public policy discretion. Some states may disregard the narrow scope outlined by the Restatement and "employ the exception even when [the forum state] was not the state with the most significant relationship at the time of the marriage."74 The irony of the matter becomes apparent when one discovers that the exception was falling into desuetude and disfavor until DOMA revived it. The NCCUSL had taken a rather stern view of the exception to the point of

West Virginia, Wisconsin and Wyoming. See id. However, many states may consider DOMA some type of federal mandate encouraging them to "try again" to devise anti-marriage legislation. It is simply too early to tell how such bills will be received in state legislatures across the country in light of DOMA.


68 See Developments in the Law—Sexual Orientation and the Law, 102 HARV. L. REV. 1508, 1606 (1989) (noting that courts often "interpret" prohibitions on same-sex marriage into general marriage statutes) [hereinafter "Developments"].


71 See id. at § 210, 176-77; D'Amato, supra note 59, at 922 n.67; see also In Sickness, supra note 57, at 2051 (asserting that the withdrawal of approval for the Uniform Marriage Evasion Act indicates "further support for the unconditional interstate validity of legal marriages").

72 9A U.L.A. at 177.

73 In Sickness, supra note 57, at 2044 n.32 (citing William M. Richman & William L. Reynolds, UNDERSTANDING CONFLICT OF LAWS § 59, at 159-61, § 70, at 198 (2d ed. 1993)).

74 Id. at 2045.
eliminating it completely. The comment to section 210 of the UMDA plainly states:

[Section 210] codifies the emerging conflicts principle that marriages valid by the laws of the state where contracted should be valid everywhere, even if the parties to the marriage would not have been permitted to marry in the state of their domicil. . . . [This] section expressly fails to incorporate the "strong public policy" exception of the Restatement and hence may change the law in some jurisdictions. This section will preclude invalidation of many marriages which would have been invalidated in the past.\textsuperscript{75}

To date, eighteen states have adopted the UMDA validation section or some other type of marriage validation statute.\textsuperscript{76} Clearly, DOMA halted a general trend toward the unconditional recognition of marriages that conformed to the laws of the states where they were performed. Does this stunning reversal mean states will be able to withhold recognition of legal same-sex marriages by invoking either statutory directives or public policy? In a word, no.

Traditionally, a marriage has never been considered the type of "legal judgment" entitled to full faith and credit because the state's only role in the proceeding is to issue a marriage certificate.\textsuperscript{77} Instead, full

\textsuperscript{75} Unif. Marriage and Divorce Act § 210 cmt., 9A U.L.A. at 176 (citation omitted) (emphasis added). The text of § 210 itself provides that:

All marriages contracted within this State prior to the effective date of this Act, or outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicil of the parties, are valid in this state.

\textit{Id.} § 210, at 176. This section is a "paradigm validation statute." \textit{In Sickness, supra} note 57, at 2050. "[M]any states have used marriage validation statutes to adopt the basic conflict-of-laws principle that a marriage that is valid where it is entered into should also be valid in the 'new' state. Such statutes are designed to promote stability, predictability, and uniformity, and to protect the expectations of the parties to the marriage." \textit{Id.}

\textsuperscript{76} Arizona, Colorado, Illinois, Minnesota, Missouri, Montana and Washington have adopted the UMDA validation section while Arkansas, California, Idaho, Kansas, Kentucky, Michigan, Nebraska, New Mexico, South Dakota, Utah and Wyoming have enacted non-UMDA validation statutes. \textit{See id.} at 2051 n.71.

\textsuperscript{77} See Ballan, \textit{supra} note 38, at 403. The reason for the development of this "legal judgment" requirement is unclear. After all, the plain language of the Full Faith and Credit Clause accords recognition to public acts, records and judicial proceedings—not judicial proceedings alone. U.S. Const. art. IV, § 1, cl. 1. A strong argument can be made that a marriage certificate alone, absent any further legal proceedings, should warrant full faith and credit. \textit{See Ballan, supra} note 38, at 404 n.30. Courts have ruled that birth certificates are "public records" within the meaning of the clause because they are published and certified by the state. \textit{See id.} (citing Bennett v. Schweiker, 532 F. Supp. 837 (D.D.C. 1982)). Marriage certificates are "issued by the state and certified by the county clerk and therefore are arguably just as much a public record as a birth certificate." \textit{Id.} at 404.
faith and credit has generally applied to judgments requiring some sort of court enforcement, such as money judgments and judgments for specific performance or injunctions.\textsuperscript{78} A very simple proceeding is available to married couples who wish to obtain judicial decrees declaring their marital status: the declaratory judgment.\textsuperscript{79} A same-sex couple married in Hawaii could simply proceed to the nearest courthouse and file for a declaratory judgment asserting their status as a married couple. Such a judgment is entitled, without exception, to full faith and credit because a "valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim."\textsuperscript{80} Furthermore, when the Full Faith and Credit Clause applies, it does so "even if its application will interfere with a significant interest of another state."\textsuperscript{81}

Two objections may be raised to such use of declaratory judgments. First, one could note that, to obtain a declaratory judgment, there must be

\begin{itemize}
  \item \textsuperscript{78} Id. at 403 n.27. According to one commentator, the only reported case applying full faith and credit to validate a marriage is \textit{Ram v. Ramharack}, 571 N.Y.S.2d 190 (N.Y. Sup. Ct. 1991), a case involving a common-law marriage which, due to that very fact, had to be created by a court judgment. \textit{See} Balian, supra note 38, at 403.
  \item \textsuperscript{79} Of course, other types of judicial decrees could serve the same purpose. For example, a probate court may have to determine if a couple is legally married in order to fulfill a condition in a will or contract. \textit{See} Balian, supra note 38, at 404. Nonetheless, a declaratory judgment may be most useful because it remains available even in the absence of some other underlying controversy.
  \item \textsuperscript{80} Id. at 419 (quoting \textsc{Restatement (Second) of Conflict of Laws} § 17 (1988)) (emphasis added).
  \item \textsuperscript{81} Id. (citing Faunterley v. Lum, 210 U.S. 230 (1908), where Court held that when "a decree is entitled to full faith and credit, it must be given credit notwithstanding the state of the situs' public policy."). A proponent of \textsc{DOMA} could argue that the \textsc{Restatement}, quoted \textsuperscript{supra} note 80, and \textit{Faunterley} only prohibit public policy exceptions, but are silent with regard to statutorily created exceptions (i.e., evasion statutes). Therefore, the argument continues, states could use statutory exceptions to deny full faith and credit. This argument, however, fails. The \textsc{Restatement} and \textit{Faunterley} do not mention statutory exceptions most likely because they clearly violate the Full Faith and Credit Clause. Would the clause mean anything at all if states could create statutes in order to withhold recognition of the official acts of sister states with which they disagree? No, it would not. Public policy exceptions to quasi-official state acts (such as the issuance of marriage certificates) at least present a more difficult analytical question—because it is not clear whether the sister-state’s act is "official." In the case of an evasion statute denying full faith and credit to a clearly official state act (such as a legal judgment), however, such a statute must be unconstitutional. An examination of this nation’s common law bolsters this assessment. There is not a single reported civil case in which full faith and credit was not applied to a legal judgment because another state’s interest, whether expressed statutorily or as a vague public policy, was too strong. \textit{See} Balian, supra note 38, at 419 (citing Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 438 (1943)); \textit{see also} Hampton v. M’Connel, 16 U.S. (3 Wheat.) 234, 235 (1818) (stating the Full Faith and Credit Clause demands that "the judgment of a state court should have the same credit, validity and effect, in every other court in the United States, which it had in the state where it was pronounced"); \textit{cf.} Sunstein, supra note 37, at 97 n.492 ("Congress has never enacted a statute allowing states not to recognize any judgments of other states.").
\end{itemize}
an "actual controversy"—and no such controversy exists in a proceeding where both parties (i.e., the married couple) agree that a valid marriage exists. This objection overlooks one critical point: thanks to DOMA and the local evasion statutes it has inspired, marriage is per se an "actual controversy" for same-sex couples the moment they say "I do." The very purpose of a declaratory judgment is "to prevent an infringement of rights before it occurs." Through DOMA, Congress has created the potential for the "infringement" of any legally married same-sex couple's rights should they decide to travel to a nonrecognizing state—as is their right under the Fourteenth Amendment's Privileges and Immunities Clause. Without a declaratory judgment, a same-sex couple's marriage is not truly settled in terms of legal consequences and expectations. With a declaratory judgment, a homosexual couple can rest assured that their marital status must be recognized in every state and, therefore, that their Privileges and Immunities rights are unfettered.

Second, potential objectors could argue that declaratory judgments, which are technically equitable decrees, are not entitled to the same force and effect accorded other legal judgments. The only response to this objection is that there is no basis for making a distinction between declaratory judgments and other judgments when applying the Full Faith and Credit Clause. The Framers, in clear and express language, indicated that states must extend full faith and credit to all judicial proceedings. Nothing in the language of either the Full Faith and Credit Clause or its implementing statute suggests that declaratory judgments (or equitable decrees generally) fall beyond their purview. Also, the vast majority of states have adopted the Uniform Declaratory Judgment Act which states in no uncertain terms: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed . . . . [S]uch declara-

82 Balian, supra note 38, at 405 (footnote omitted); see also James A. Barnes, Civil Procedure, 10 Miami L.Q. 425, 429-33 (1956) (arguing that declaratory judgments are only applicable to justiciable controversies).

83 Balian, supra note 38, at 405 (citing Bell v. Associated Indep., Inc., 143 So. 2d 904, 907-08 (Fla. Dist. Ct. App. 1962)).

84 U.S. Const. amend. XIV, § 1.

85 Ironically, arguing that an "actual controversy" exists would be much more difficult in the absence of DOMA. Without DOMA, one could only claim that the general prejudice against homosexuals would generate the justiciable controversy—a much weaker argument. See, e.g., Balian, supra note 38, at 405. The fact that there is a federal law directly undermining marital decrees legally issued in a given state brings the controversy into greater relief.

86 See id. at 408.

87 Congress has effectuated the Full Faith and Credit Clause by providing that "[s]uch Acts, records, and judicial proceedings or copies thereof . . . shall have the same full faith and credit in every court within the United States [that they have in the state] from which they are taken." Id. at 400 (quoting 28 U.S.C. § 1738 (1988)).
tions shall have the *force and effect of a final judgment or decree.*

Thus, this second objection lacks force because there is no historical, textual or practical basis for any distinction to be made between declaratory judgments and other legal judgments.

The Full Faith and Credit Clause has one central purpose: to act as "a nationally unifying force . . . by making each [state] an integral part of a single nation, in which rights . . . established in any [state] are given nation-wide application." Practically speaking, the clause achieves this objective by avoiding "relitigation of adjudicated issues." So, as much as DOMA threatens to unravel the integrated fabric of the nation by denying full faith and credit to marriages, this law cannot do the same to marriages validated by legal judgments—that is, "adjudicated" marriages. Based on the understanding of the Full Faith and Credit Clause manifested by the Framers, the Supreme Court and the states, the clause did not imbue Congress with the power to enact DOMA—and it should be ruled unconstitutional. Should the Supreme Court fail to strike down DOMA, however, same-sex couples will *de facto* be able to repeal the law by seeking declaratory judgments. Thus, the fate of DOMA hinges not just on the constitutional interpretation of the highest Court, but also on the equitable power of every court.

II. DUE PROCESS ANALYSIS

DOMA impinges a fundamental right protected by the Due Process Clause of the Fifth Amendment: the right to marriage. Before conducting any type of due process analysis, the right in question must be defined at "a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected conduct." DOMA advocates may argue that homosexuals are attempting to read a "special right" into the Due Process Clause which simply is...
not there. Even a cursory review of Supreme Court opinions, however, reveals a fundamental right to marry.\textsuperscript{94} Hence, if properly framed, the issue is not, "Is there a right to same-sex marriage in addition to the right to marry?" Rather, the issue is, "Does the fundamental right to marry include the right to marry a same-sex partner?"\textsuperscript{95} Upon assessing the internal logic of the Supreme Court's due process doctrine, one must conclude that the fundamental right to marry includes the right to marry intrasexually.

A. THE TRADITION-CENTERED FOCUS OF DUE PROCESS DOCTRINE

Due process analysis is often characterized as "backward-looking" because it requires a great deal of emphasis on tradition and past practices.\textsuperscript{96} Unfortunately, with regard to same-sex marriage, a "traditional" view can impede the process of determining protected rights. First, the United States boasts a number of distinct and conflicting traditions. An appeal to a single, unitary tradition "incorrectly presuppose[s] that our moral traditions as a community are homogeneous."\textsuperscript{97} Since most cultures in the world currently have representatives in the United States, one must take a more worldly perspective in examining how same-sex marriages have been viewed "traditionally." This more worldly approach demonstrates that several ancient cultures (e.g., Egypt, classical Greece, imperial China, republican Rome and imperial Rome), as well as several modern cultures (e.g., certain societies in Africa, Asia and Australia), have accepted same-sex marriage.\textsuperscript{98} Nevertheless, even if one uses Judeo-Christian traditions to examine the validity of same-sex marriages, inconsistencies still abound. There is evidence that homosexuals were married in early Christian marriage ceremonies until more than four centuries into the Christian Era.\textsuperscript{99} Moreover, during the Middle Ages, the

\textsuperscript{94} See infra part II.B.
\textsuperscript{96} Cass Sunstein has characterized due process analysis as backward-looking and reverential of tradition in order to contrast it with equal protection analysis, which he considers forward-looking and critical of discriminatory traditions. See Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. CHI. L. REV. 1161, 1163 (1988).
\textsuperscript{97} Scocca, supra note 30, at 741 (citing David A.J. Richards, Constitutional Privacy and Homosexual Love, 14 N.Y.U. REV. L. & SOC. CHANGE 895, 902 (1986)).
\textsuperscript{98} See ESKRIDGE, supra note 15, at 6; see generally William N. Eskridge, A History of Same-Sex Marriage, 79 VA. L. REV. 1419 (1993); D'Amato, supra note 59, at 930 (noting traditions of same-sex marriage found throughout history). One should not attribute the embrace of same-sex marriage to "foreign" cultures alone. Native Americans have also been open to same-sex marriages. See Eskridge, supra note 15, at 6.
\textsuperscript{99} See Link, supra note 3, at 1085-86 (citing JOHN BosWELL, Christianity, Social Tolerance and Homosexuality 82-83 nn.100-03 (1980)).
Greek Orthodox and Roman Catholic Churches celebrated same-sex unions.  

In short, "what tradition dictates" depends on which tradition one chooses to emphasize.

A second problem with the "traditional" view of due process analysis is that any tradition is usually in a constant state of flux. Neither practices nor concepts remain static through time. For example, the _Book of Leviticus_ offers the most stinging condemnation of homosexuality in the Christian Holy Bible: "Thou shalt not lie with mankind, as with womankind; it is abomination."  

Closer inspection of _Leviticus_ also surfaces the following admonitions: adulterers and gay men must be executed; animal sacrifices must be made to the Lord; and menstruating women must cleanse themselves through animal sacrifices. These practices have hardly stood the test of time and few would argue for their reinstatement today. A more secular example is found in the pages of a book which could not be more secular: the dictionary. Although some dictionaries adhere to the conventional definition of marriage as the "[l]egal union of one man and one woman as husband and wife," others have adopted the gender-neutral definition of "an intimate or close union." Thus, whether the tradition is religious or secular, isolating any practice or concept in a fixed form is as difficult as catching quicksilver in a sieve.

### B. Marriage as a Fundamental Right

Despite the obvious deficiencies inherent in considering tradition at all, the Supreme Court has developed a due process doctrine centered on past conceptions of liberty. To have a fundamental right to engage in a particular practice, that practice must be deemed "implicit in the concept

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100 See Eskridge, supra note 15, at 6.
101 _Leviticus_ 18:22 (King James).
102 See Eskridge, supra note 15, at 101 (citing _Leviticus_ 3-4, 8, 12, 20:10-16). For further commentary on the antiquated precepts of _Leviticus_, see Sullivan, supra note 3, at 27-28; Scott K. Kozuma, Note, _Baehr v. Lewin and Same-Sex Marriage: The Continued Struggle for Social, Political and Human Legitimacy_, 30 Willamette L. Rev. 891, 891 n.3 (1994); Scocca, supra note 30, at 760 n.246.
104 _Webster's Ninth New Collegiate Dictionary_ 729 (1983); see also Eskridge, supra note 15, at 89 n.2 (listing dictionaries adopting gender-neutral definitions of marriage). Mark Strasser suggests that state legislatures that rush to declare same-sex marriages void may inadvertently be acknowledging the applicability of the term "marriage" to same-sex unions: "[T]he legislatures that explicitly reject same-sex marriage are themselves implicitly indicating that they do not believe that same-sex marriages are definitionally precluded—if such unions were definitionally precluded, pronouncements declaring them void would be unnecessary." Strasser, supra note 95, at 925. The same point applies to DOMA. One cannot defend DOMA by arguing that same-sex unions are definitionally precluded from the concept of marriage because, were that the case, Congress would not have been compelled to define marriage as the union of one man and one woman. See supra note 12 and accompanying text.
of ordered liberty.”105 Of course, this definition suggests the practice must be “deeply rooted in the traditions of the nation.”106 Through a series of opinions, the Court has indicated that marriage meets these criteria.

Several cases discuss the importance of marriage to individual liberty. Over a century ago, the Supreme Court referred to marriage, in Maynard v. Hill,107 as “the foundation of the family and of society, without which there would be neither civilization nor progress.”108 In 1923, the Court remarked that the right to marry is “essential to the orderly pursuit of happiness by free men.”109 In Skinner v. Oklahoma,110 a case striking down a sterilization scheme for certain classes of criminals, Justice Douglas’s opinion for the Court called marriage “fundamental to the very existence and survival of the race.”111 By the mid-sixties, a decade in which little reverence was shown for any institution, the Court set a new standard for the veneration of marriage when it said in Griswold v. Connecticut:112

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.113

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106 Wardle, supra note 24, at 33.
107 125 U.S. 190 (1888).
108 Id. at 211.
111 Id. at 541. Although this passage closely links marriage with the function of procreation, that link becomes attenuated in subsequent opinions. See infra notes 145-56 and accompanying text.
112 381 U.S. 479 (1965).
113 Id. at 486. Michael Sandel finds this passage especially applicable to gay men and lesbians because “like marriage, homosexual union may also be ‘intimate to the degree of being sacred . . . a harmony in living . . . a bilateral loyalty,’ an association for a ‘noble purpose.’” MICHAEL SANDEL, DEMOCRACY’S DISCONTENT 104 (1996). In fact, Professor Sandel decries the frequency with which Stanley v. Georgia, 394 U.S. 557 (1969)—a case upholding the right to view obscene materials in the privacy of one’s home—is employed, instead of Griswold, as a precedent for homosexual rights. See SANDEL, supra, at 106. He elaborates:

[T]he analogy with Stanley tolerates homosexuality at the price of demeaning it; it puts homosexual intimacy on a par with obscenity—a base thing that should nonetheless be tolerated so long as it takes place in private. If Stanley rather than Griswold is the relevant analogy, the interest at stake is bound to be reduced . . . to
Two years later, in striking down an anti-miscegenation statute, the Court, through the pen of Chief Justice Earl Warren, in Loving v. Virginia, stated, "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." The Loving Court went so far as to say that denial of this "fundamental freedom" constituted a deprivation "of liberty without due process of law."

In Zablocki v. Redhail, the Court refused to give effect to a Wisconsin statute which restricted the right of fathers in arrears with their child support obligations to marry. Zablocki is perhaps the most important case protecting the right to marry because the Court subjected a "marital impediment" statute to strict scrutiny for the first time. The Court reasoned that, since it would make "little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society," a fundamental right to marriage required acknowledgment. Furthermore, according to the Court, any statute that places a "direct legal obstacle in the path of persons desiring to get married" must be "supported by sufficiently important state interests and [be] closely tailored to effectuate only those interests." However, "reasonable regulations that do not significantly interfere with the decision to enter into the marital relationship may be imposed" without "sexual gratification." (The only intimate relationship at stake in Stanley was between a man and his pornography.)

Id. at 107.

114 388 U.S. 1 (1967).

115 Id. at 12.

116 Id. Since Loving was actually decided on equal protection grounds, some commentators have belittled the relevance of the case to any due process argument. To such commentators, the language about the fundamental right to marry is ancillary to the Court's invective against the challenged law's promotion of white supremacy. See, e.g., Scocca, supra note 30, at 724 (claiming the Loving Court's discussion of fundamental nature of right to marry was only "incidental" to primary issue of racial discrimination); Robert F. Drinan, The Loving Decision and the Freedom to Marry, 29 Ohio St. L.J. 358, 358-59 (1968) (arguing that, due to racist motivation of anti-miscegenation law, the Court did not have to "confront the question of the limits of the state's power to regulate the freedom of choosing one's spouse"). One critic offhandedly dispatches the Loving Court's discussion of fundamental rights as dicta. See Hannah Schwarzschild, Same-Sex Marriage and Constitutional Privacy: Moral Threat and Legal Anomaly, 4 Berkeley Women's L.J. 94, 99 (1988-89).


118 See Schwarzschild, supra note 116, at 102 (observing that Zablocki "represents the first time that the Court applied strict scrutiny to the right to marry").

119 Zablocki, 434 U.S. at 386.

120 Id. at 387 n.12.

121 Id. at 388.

122 Id. at 386.
incurs this exacting scrutiny.\textsuperscript{123} Once one realizes the huge obstacle \textit{Zablocki} sets for any statute that "significantly interferes"\textsuperscript{124} with the right to marry—strict scrutiny review is generally fatal in fact—one cannot overstate the impact of \textit{Zablocki} on the constitutional evaluation of marriage statutes such as DOMA.

In addition to the aforementioned cases explicitly commenting on the fundamental right to marry, several other Supreme Court opinions indirectly affirm the notion that governmental regulation of marriage should be minimal. In \textit{Roberts v. United States Jaycees},\textsuperscript{125} the Court stated that individual liberty necessitates the protection of certain intimate associations:\textsuperscript{126}

[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation . . . .

\textsuperscript{123} Although Justice Marshall's \textit{Zablocki} opinion does not use the exact words "strict scrutiny," the "closely tailored" test described therein seems to be the functional equivalent of strict scrutiny review. Under strict scrutiny review, as it is generally understood, the state must have a "compelling" interest to justify the statute in question. See Stacey Lynne Boyle, Note, \textit{Marital Status Classifications: Protecting Homosexual and Heterosexual Cohabitors}, 14 \textit{Hastings Const. L.Q.} 111, 119 (1986). Moreover, strict scrutiny prohibits the government from offering "underinclusive or overinclusive justifications for its statutes." Friedman, \textit{supra} note 14, at 149. \textit{Zablocki}'s "sufficiently important state interests" appear on par with "compelling state interests" and the \textit{Zablocki} Court's insistence on the suspect statute effectuating only those sufficiently important interests mandates a perfect fit between the statute's purpose and effect, with neither underinclusivity nor overinclusivity permitted. Thus, one can call \textit{Zablocki}'s scrutiny "strict"—honestly and without any hermeneutic sleight of hand.

\textsuperscript{124} If the \textit{Zablocki} Court did not elaborate what it meant by "significantly interferes," an exception big enough to swallow the rule could have been created. To wit, DOMA supporters could argue that the law does not elicit strict scrutiny because it does not significantly interfere with the fundamental right to marriage—that it merely regulates the "effect" of its recognition in other states. Fortunately, the \textit{Zablocki} Court did explain what it meant and thereby preempted such a position. In a case decided earlier in the same term, \textit{Califano v. Jobst}, 434 U.S. 47 (1977), the Court applied rational basis review in upholding a portion of the Social Security Act which terminated benefits to certain disabled individuals upon marriage. The \textit{Zablocki} Court distinguished the "deadbeat dad" statute from the Social Security Act by remarking that "[t]he Social Security provisions placed no direct legal obstacle in the path of persons desiring to get married" and that "there was no evidence that the laws significantly discouraged, let alone made 'practically impossible,' any marriages." 434 U.S. at 387 n.12. This description hardly applies to DOMA. Not only does it place direct legal obstacles in the path of same-sex couples (e.g., under DOMA's definition of marriage, no federal tax benefits of any kind can accrue to a homosexual spouse—so marriage becomes more costly for homosexuals than for all other citizens), it also significantly discourages same-sex marriages from occurring at all by facilitating their nonrecognition in states throughout the union. Based on the distinction articulated in \textit{Zablocki}, DOMA would have to withstand strict scrutiny to survive.

\textsuperscript{125} 468 U.S. 609 (1984).

\textsuperscript{126} Kenneth Karst considers the following list of values inherent in intimate association: the opportunity to enjoy the society of certain other people; the opportunity for caring, commitment, and love; the opportunity to know another human being as a whole person rather than as the occupant of a particular role; and the opportunity to be seen—and to see oneself—as a whole person rather than as an aggregate of social roles. See \textit{Tribe, supra} note 93, ¶ 15-21, at 1424 n.30 (citing Kenneth Karst, \textit{The Freedom of Intimate Association}, 89 \textit{Yale L.J.} 624, 630-36 (1980)).
The constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.\textsuperscript{127}

The Roberts Court displayed keen concern not only for the intrinsic value personal relationships add to society, but also for the manner in which such bonds permit individual self-expression.\textsuperscript{128} In the epic opinion, \textit{Planned Parenthood v. Casey},\textsuperscript{129} the Court found that “[a]t 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.”\textsuperscript{130} Thus, the theme of individual autonomy based on personal, life-altering decisions threads its way from Roberts to Casey. Finally, in \textit{Moore v. City of East Cleveland},\textsuperscript{131} the Court struck down a city ordinance preventing extended families from inhabiting a single unit and shunned rigid definitions of “family” in an effort to protect the right “to come together for mutual sustenance and to maintain or rebuild a secure home life.”\textsuperscript{132} Such definitional flexibility lends itself to the assertion that “family” need not be a term dependent on sexual orientation. Taken together, \textit{Roberts}, \textit{Casey} and \textit{Moore} stand for the proposition that there are no correct, predetermined decisions for each individual to make in life.\textsuperscript{133}

\textsuperscript{127} \textit{Roberts}, 468 U.S. at 618-19 (citations omitted).

\textsuperscript{128} In analyzing \textit{Roberts’} language of self-definition, one commentator advances a novel argument in favor of homosexuals’ right to marry. According to this theory, for gay men and lesbians, the right to marry does not just spring from substantive due process, but from a “coalition” of due process protection and First Amendment protection. See Link, supra note 3, at 1078. The First Amendment guarantee of free expression is “critically important” to gay men and lesbians because “[u]nlike racial characteristics, or differences based solely on gender, homosexual citizens must assert their identity as a homosexual person through some form of speech before they may even have a public identity as a homosexual.” \textit{Id.} at 1078 n.176. Consequently, phrases such as “‘acknowledged,’ ‘admitted,’ or ‘self-identified,’ nearly always accompany the word ‘homosexual’ in conventional public discourse when referring to a homosexual speaker.” \textit{Id.} This argument provides an added dimension to the same-sex marriage debate: the idea of marriage, beyond its practical benefits and symbolic cachet, as a public proclamation of full citizenship. If some citizens are denied the right to this proclamation (especially the minority group that relies on expression more than other minority groups), it becomes difficult to see how the First Amendment could not be implicated.

\textsuperscript{129} 505 U.S. 833 (1992).

\textsuperscript{130} \textit{Id.} at 2807.

\textsuperscript{131} 431 U.S. 494 (1977).

\textsuperscript{132} \textit{Id.} at 505.

\textsuperscript{133} Justice Blackmun made this point in his \textit{Bowers v. Hardwick} dissent:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many “right” ways of conducting those relationships, and that much of
and, to the extent one’s choices determine one’s identity, the Due Process Clause shields the right to make those choices without governmental interference.

C. THREE PUTATIVE JUSTIFICATIONS FOR DOMA—AND WHY THEY FAIL

Although the fundamental nature of marriage for every citizen becomes manifest upon reviewing the relevant case law, marriage, by its very nature and to a greater degree than just about all other fundamental rights, necessitates the involvement of the state. “[U]nlke such activities as abortion and access to birth control,” explains one commentator, “[marriage] does not exist independent of the state.”\textsuperscript{134} Furthermore, “marriage is an institution by which the state gives additional rights to individuals who choose to form that intimate association.”\textsuperscript{135} As such, the marriage contract is “controlled by the state—and . . . is ‘subject to the control of the legislature.’”\textsuperscript{136} One state court judge once went so far as to say, “[T]here are, in effect, three parties to every marriage, the man, the woman and the state.”\textsuperscript{137} Still, the mere fact that the state plays a vital role in the exercise of this fundamental right does not diminish its due process protection. The line between “state involvement” and “governmental interference” arguably may be ephemeral, but it is a line the Supreme Court must draw in subjecting DOMA to strict scrutiny, as required by \textit{Zablocki}. Three putative governmental interests can be supplied to rationalize DOMA. Unfortunately for backers of DOMA, all three stand as rationalizations which collapse under strict scrutiny.

One potential state interest is procreation. DOMA’s advocates may argue that the statute promotes procreation by discouraging same-sex marriages. This interest suffers three fatal flaws. First, it has no grounding in reality. No marriage license in the nation is granted “on the condition that the couple bear children; and the marriage is no less legal and the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds."


\textsuperscript{135} Id.

\textsuperscript{136} Tribe, supra note 93, § 15-21, at 1432 (quoting Maynard v. Hill, 125 U.S. 190, 205 (1888)).

\textsuperscript{137} Schwarzschild, supra note 116, at 105 (quoting Fearon v. Treanor, 5 N.E.2d 815, 816 (1936)).
no less defensible if it remains childless.” 138 If such a criterion did exist, it would affect elderly, sterile and impotent couples in addition to homosexual couples. 139 The country’s soaring illegitimacy rate 140 is evidence that “marriage is neither a logical nor a biological predicate of procreation.” 141 In fact, DOMA works to discourage procreation because “some same-sex couples may elect not to have children precisely because their relationship is not sanctioned by the state.” 142 Second, DOMA is both underinclusive and overinclusive with respect to this interest. It is underinclusive because “many married heterosexual couples cannot, or elect not to, have children.” 143 It is overinclusive because millions of gay men and lesbians can and do have children. 144

Third, the Supreme Court has handed down a litany of opinions severing the conceptual link between marriage and procreation. Turner v. Safley 145 is chief among these cases. In Turner, a unanimous Court upheld the right of prisoners to marry even if the strictures of confinement preclude procreation. The Court considered marriage’s other attributes—its “expression[ ] of emotional support and public commitment”; its reflection “of religious faith as well as . . . of personal dedication”; its expectation of full consummation; and its function as a “precondition to the receipt of government benefits”—in deciding it was still worthy of constitutional protection. 146 The potential for procreation appeared nowhere in the opinion as a valid criterion for invoking the right to

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138 Sullivan, supra note 3, at 179.
139 See Eskridge, supra note 15, at 96.
140 Social scientists project a “50 percent illegitimacy rate by the turn of the century.” Strasser, supra note 95, at 953 n.253 (quoting Mary McGrory, No Legitimate Solution in Sight, WASH. POST, Mar. 16, 1995, at A2).
141 Id. at 953. Besides, empirically speaking, the “real danger to human survival is from overpopulation, not underpopulation.” Friedman, supra note 14, at 161 (citing generally A.J. Stuart, Overpopulation: Twentieth Century Nemesis (1958)).
142 Developments, supra note 68, at 1610; see also Strasser, supra note 95, at 959 (speculating gay men and lesbians might be deterred from procreating “precisely because they are barred from marrying”).
143 Developments, supra note 68, at 1610.
144 See supra note 15 and accompanying text; see also Strasser, supra note 95, at 960 (arguing that, even had the Supreme Court ruled that marriage was only a fundamental right for the purpose of procreation, “marriage would still be fundamental for gays and lesbians who are also raising children needing a stable and loving environment”); Developments, supra note 68, at 1610 (finding same-sex marriage restrictions overinclusive in serving the interest of procreation because “gay and lesbian couples can have children”).
146 Id. at 95-96.
marry.\textsuperscript{147} In \textit{Michael H. v. Gerald D.},\textsuperscript{148} the Court upheld a California statute presuming a child’s father to be the natural mother’s husband, not the biological father.\textsuperscript{149} According to \textit{Michael H.}, the marital priorities of family stability supersede procreational interests determined solely by biology. In short, the Court does not equate protecting marriage with protecting procreation. Finally, \textit{Griswold v. Connecticut},\textsuperscript{150} which protects the right to contraception,\textsuperscript{151} and \textit{Roe v. Wade},\textsuperscript{152} which regards the right to an abortion as among a woman’s fundamental rights, stand for the general proposition that “a purported state interest in increasing human population cannot sustain a [statute]”\textsuperscript{153} that violates a fundamental right. In neither case did the procreation argument emerge as a justification for the challenged anti-contraception and anti-abortion statutes—leaving one to wonder if the states themselves found the argument even “marginally credible.”\textsuperscript{154} Overall, due to its lack of connection to actual practices, its underinclusivity and overinclusivity, and the line of Supreme Court cases repudiating it, the interest in procreation proves to be not only less than compelling—but less than coherent as well.

A second putative interest furthered by DOMA is the protection of children. Children benefit from the “legal advantages their parents receive”\textsuperscript{155} and one could argue that condoning same-sex marriages would dilute those advantages (both material and social). Additionally, discouraging same-sex marriages reduces the likelihood a homosexual couple will feel comfortable raising children and, therefore, reduces the number of children who will have to endure the stigma of living in a same-sex household. Again, the twin demons of underinclusivity and overinclusivity rear their ugly heads. DOMA would be underinclusive in trying to satisfy this interest because millions of children already live in same-sex households\textsuperscript{156} and are denied all the advantages that accrue to the

\textsuperscript{147} Based on the logic of \textit{Turner}, homosexuals should be higher in the nuptial hierarchy than convicts. If the marriage right still obtains for individuals who cannot procreate and cannot even have sex (i.e., prisoners), then \textit{a fortiori} the right should obtain for individuals who can at least have sex freely (e.g., homosexuals not in prison). \textit{Cf.} Marks v. Marks, 77 N.Y.S.2d 269 (Kings County Sup. Ct. 1948) (holding that the impossibility of procreation does not allow the state to bar a couple from marrying).

\textsuperscript{148} 491 U.S. 110 (1989).

\textsuperscript{149} \textit{See id.} at 121, 129.

\textsuperscript{150} 381 U.S. 479 (1965).


\textsuperscript{152} 410 U.S. 113 (1973).

\textsuperscript{153} Friedman, \textit{supra} note 14, at 161; \textit{see also} Eskridge, \textit{supra} note 15, at 131 (interpreting \textit{Griswold} and \textit{Roe} to demonstrate that “the state cannot impose a procreation goal on married couples”).

\textsuperscript{154} Friedman, \textit{supra} note 14, at 161 n.176.

\textsuperscript{155} \textit{Id.} at 162.

\textsuperscript{156} \textit{See supra} note 15 and accompanying text.
offspring of legal marriages. DOMA would also be overinclusive by leaving unscathed the benefits accruing to childless heterosexual couples who marry and never have children. As for the "stigma" issue, the best way to counter the opprobrium that hounds the children of same-sex marriages is to validate such marriages in the eyes of the law. "Such recognition," contends one commentator, "would do more good than harm because this would tend to legitimize the offspring of such unions."\(^{157}\) In *Palmore v. Sidoti*,\(^ {158}\) the Court found that a mother cannot lose custody of her child simply because of the societal prejudice against her interracial marriage and concluded that children are best protected by objecting to stigmatization, not fueling it. Yet, DOMA does nothing to assist the children of same-sex couples and actually exacerbates their plight by reducing their chances of being raised by legally married parents. Thus, DOMA is not "closely tailored" to the furtherance of the interest in "protecting children" but, in light of the number of children it harms, it may be well suited to undermining that interest.

A third governmental interest justifying DOMA could be the promotion of the nation's sense of morality. Of course, in a country as diverse as the United States, all citizens never reach a consensus on any moral issue; so, the "nation's sense of morality" actually means the "majority's sense of morality." With regard to same-sex marriage, most Americans' opposition seems attributable to nothing more than animosity towards gay men and lesbians (especially since the "procreation" and "protection of children" rationale lack cogency).\(^ {159}\) While appealing to widespread bigotry may help members of Congress win elections, the Supreme Court has never masked its disdain for laws animated by prejudice. The Court has stated that "mere public intolerance or animosity cannot be the basis for abridgment of . . . constitutional freedoms."\(^ {160}\) In *Palmore* especially, the Court conceded that public prejudice may be one of the costs of living in a free society, but it is not a cost which should be legitimized in the eyes of the law. "The Constitution cannot control such prejudices but neither can it tolerate them," declared the *Palmore* Court, "[p]rivate biases may be outside the reach of the law, but the law cannot,

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157 Friedman, supra note 14, at 164; see also Erik J. Toulon, *Call the Caterer: Hawaii to Host First Same-Sex Marriage*, 3 S. CAL. REV. L. & WOMEN'S STUD. 109, 125-26 (1993) ("[I]f the state truly has an interest in protecting children, same-sex marriages would be permitted, thereby furthering the emotional security of children who are members of such families.").


159 A cynic could assert that this generalization about "most Americans" comprises judges. See, e.g., Schwarzschild, supra note 116, at 125 ("Whether judges rely on their individual sexual tastes or couch these inclinations as the moral views of 'right-thinking people,' it seems likely that their legal conclusions rest, at least in part, on personal orientation and normative models of morality.").

directly or indirectly, give them effect.” Therefore, one need not even reach the question of whether DOMA is closely tailored to this interest because the answer to the antecedent question of whether the interest is compelling is clearly no. When the “state interest in promoting majoritarian morality is based on ‘irrational prejudice and fear of unconventional activities and lifestyles,’” that interest is not merely uncompelling, but illegitimate. DOMA finds no justification in moral norms which, without preventing any “objective and concrete harm,” seek to abridge the fundamental right to marriage.

D. THE IRRELEVANCE OF BOWERS

Since (1) the Supreme Court has interpreted the Constitution to say there is a due process right to marriage; (2) DOMA works to restrict the free exercise of that right; and (3) DOMA is not closely tailored to serve a compelling state interest, one is hard-pressed to devise a due process argument in support of DOMA. Nonetheless, one Supreme Court case, Bowers v. Hardwick, lays the foundation for a pro-DOMA due process argument. Upon careful consideration, however, one realizes that any pro-DOMA argument based on Bowers amounts to nothing more than an exercise in sophistry. Bowers has no bearing on the constitutionality of DOMA.

In upholding a Georgia statute outlawing sodomy, the Bowers Court found that “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated” and, consequently, that the right to engage in homosexual sodomy does not enjoy constitutional protection. This opinion has led some commentators to conclude that, “[i]f a state constitutionally may prohibit same-sex sexual relations, as it may under Bowers... then a prohibition against homosexual marriage can easily be upheld...” The next logical inference would be that, if states can prohibit

161 466 U.S. at 433.
162 Developments, supra note 68, at 1611 (quoting Ingram, A Constitutional Critique of Restrictions on the Right to Marry—Why Can’t Fred Marry George—or Mary and Alice at the Same Time?, 10 J. CONTEMP. L. 33, 55 (1984)).
163 Friedman, supra note 14, at 167; cf. Laurence H. Tribe, American Constitutional Law § 15-19, at 981 (1978) (stating in First Amendment context that “harms existing only in the eye or mind of the voluntary beholder cannot justify restricting otherwise protected behavior”).
164 478 U.S. 186 (1986). For further discussion of Bowers, see supra notes 64 and 133.
165 The Georgia statute, like most statutes of its ilk, applied to heterosexual sodomy as well as homosexual sodomy. See supra note 64. For some inscrutable reason, the Court treated the statute as if it applied to homosexual sodomy alone.
166 478 U.S. at 191.
same-sex marriage, then the federal government can assist them in withholding recognition of such marriages by enacting DOMA. One little detail ruins this syllogistic endeavor: the *Bowers* Court said nothing about outlawing same-sex marriages.\(^{168}\)

The power to ban sodomy by no means contains the power to restrict marriage. One need only juxtapose *Bowers* with the Court's holdings relating to the fundamental right to marriage in order to bask in this revelation. As William Eskridge argues, *Turner*, perhaps more than any other case, illustrates the distinction between restricting sex and restricting marriage.\(^{169}\) Professor Eskridge notes: "[U]nder *Turner*, t]he state can prohibit sex between inmates, can prohibit sex between inmates and outsiders, and can regulate and probably prohibit sex between inmates and their spouses. Nonetheless, the state cannot prohibit inmates from marrying without showing a factually supportable penological interest."\(^{170}\) One can thus infer from *Turner* that "the state has more freedom to regulate sex than it has to regulate who may marry."\(^{171}\) With this distinction in mind, *Bowers* then stands for the rather limited proposition that "states have fairly broad discretion in regulating nonmarital sexual activity"\(^{172}\) but says nothing about the right to marriage. Therefore, just as states may criminalize sodomy between unmarried heterosexuals without being able to preclude sodomy between married heterosexuals, states may also criminalize sodomy between unmarried homosexuals without being able to preclude sodomy between married homosexuals.\(^{173}\)

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168 The very language of *Bowers* indicates its irrelevance as a precedent for the issue of same-sex marriage. Professor Strasser articulates this point when he says, "[T]he Court could not in good faith echo its *Bowers* decision by claiming that there is '[n]o connection between family, marriage, or procreation on the one hand' and same-sex unions on the other . . . [S]ame-sex marriage may have to be recognized as a fundamental right before sodomy can be included within the right to privacy." Strasser, *supra* note 95, at 975 (quoting *Bowers* v. Hardwick, 478 U.S. 186, 191 (1986)).

169 See *Eskridge*, *supra* note 15, at 134.

170 *Id.*

171 *Id.*

172 *Id.* at 134-35. Professor Eskridge subsequently explains that prohibitions of same-sex marriage would not be constitutionally justified by an interest in discouraging sodomy. *See id.* at 136. Even accepting arguendo the dubious premise that discouraging sodomy constitutes a compelling state interest, prohibitions on same-sex marriage would be both overinclusive and underinclusive pursuant to this interest and therefore would fail Zablocki's "closely tailored" requirement. *See id.* Some homosexual couples engage in nonsodomic sexual activities (e.g., mutual masturbation, bondage, "frottage") so marriage prohibitions would be overinclusive as applied to them. *See id.* Furthermore, many heterosexual couples engage in sodomy, so the prohibitions would be underinclusive as applied to them. *See id.* If subjected to strict scrutiny, neither state prohibitions nor DOMA would seem closely tailored to this particular interest.

173 See Strasser, *supra* note 95, at 975. One commentator offers an interpretation of *Bowers* vis-a-vis the right to marry slightly different from Professor Eskridge's and Professor Strasser's. *See Friedman, supra* note 14, at 164. According to this commentator, *Bowers* permits states to criminalize sodomy even within the marital relationship but does not permit
Another point should be made to those who rely heavily on Bowers\textsuperscript{174} in concluding homosexuals have no due process right to marriage: the opinion has been almost universally condemned as wrongly decided.\textsuperscript{175} Professor Eskridge observes that the "disposition and reasoning [of Bowers] have been criticized from every perspective known to law professors."\textsuperscript{176} Even Charles Fried, staunch conservative scholar and Solicitor General during the Reagan Administration, has "urged that Bowers be overruled as inconsistent with the principles of the earlier precedents."\textsuperscript{177} Still, no hue and cry from the academy can match the force of the most damning condemnation of all: Justice Powell, whose concurrence with the majority decided Bowers by a vote of 5-4, has publicly admitted that he made a mistake in concurring with the majority in Bowers.\textsuperscript{178}

Any commentator trying to build a pro-DOMA due process argument based on Bowers should realize what land developers in the Florida states to prohibit same-sex marriages altogether. See id. ("There is no necessary contradiction between recognizing the family rights of same-sex couples and criminalizing sexual acts such a couple is capable of performing."). So, while this commentator agrees with Professor Eskridge and Professor Strasser that Bowers does not limit the right of homosexuals to marry, she disagrees with them as to how far the state can go in regulating sexual activity. This view does not accord much weight to the right to marital privacy created by Griswold and Zablocki as do the views of Professor Eskridge and Professor Strasser. One should note that Turner seems more in line with this commentator's position (regarding the regulation of marital sex) than with the position of Professors Eskridge and Strasser. For a similar interpretation, see Developments, supra note 68, at 1606-07 n.23 ("Just as Mormons did not forfeit the right to free exercise of religion simply because the state proscribed polygamy, a practice that their religion once espoused, so too homosexuals do not forfeit their fundamental right to marry because the state can proscribe sodomy.").

\textsuperscript{174} In her diatribe against same-sex marriage, Lynn Wardle refers to Bowers as "the most important precedent." Wardle, supra note 24, at 34.

\textsuperscript{175} Granted, this point may be more political than legal but, since jurists often base their judgments on the scholarly approval or disapproval of certain precedents, it is a point which demands attention.


\textsuperscript{177} Eskridge, supra note 15, at 134 (citing Charles Fried, Order and Law, 81-84 (1991)).

\textsuperscript{178} See Scocca, supra note 30, at 737 n.97 (citing Linda Greenhouse, When Second Thoughts in Case Come Too Late, N.Y. Times, Nov. 5, 1990, at A14).
Everglades have known for years: the foundations for success are just not there. Considering Bowers does not speak to the issue of same-sex marriage, has elicited resounding reproach from the academy and has been called a mistake by its decisive voter, one wonders about the attraction to Bowers. Whatever the root of its appeal, Bowers poses no obstacle at all to a due process attack on DOMA. To recapitulate the three prongs of that attack: (1) the Supreme Court recognizes the fundamental right to marry; (2) DOMA works to restrict the free exercise of that right; and (3) DOMA is not closely tailored to further a compelling state interest. Consequently, DOMA infringes on due process protections guaranteed by the Fifth Amendment and can therefore be ruled unconstitutional on that basis.

III. EQUAL PROTECTION ANALYSIS

By enacting DOMA, the federal government has failed to provide certain citizens with the equal protection of the law mandated by the Fifth Amendment.\textsuperscript{179} Two alternative arguments manifest themselves in support of this position. One argument is that DOMA denies equal protection to homosexuals, as a class, by aiding states in withholding recognition of same-sex marriages. Another argument is that sexual orientation is irrelevant since DOMA shapes its restrictions along gender lines. According to the latter argument, DOMA fails to pass muster because it is an instrument of gender discrimination. Both arguments can be persuasive and both have some flaws. However, upon close examination, the gender discrimination argument seems the stronger of the two. Review of the gender discrimination argument leads to the conclusion that DOMA unconstitutionally discriminates on the basis of gender.

A. THE SUSPECT CLASS ARGUMENT

At first glance, the equal protection doctrine, unlike the tradition-centered due process doctrine, appears amenable to the protection of homosexuals as a disadvantaged social group. As Cass Sunstein explains, “the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were

\textsuperscript{179} Although the Fifth Amendment does not feature an explicit “Equal Protection Clause” as does the Fourteenth Amendment, the Supreme Court has interpreted the Fifth Amendment’s Due Process Clause as incorporating the Fourteenth Amendment’s Equal Protection Clause—and has thereby imposed a duty of equal protection on the federal government. \textit{See} Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (stating that although the Fifth Amendment does not specifically mention equal protection, “the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive”); \textit{see also} Korematsu v. United States, 323 U.S. 214, 235 (1944) (Murphy, J., dissenting) (positing that federally sanctioned internment of Japanese Americans “deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment”).
expected to endure.” The Court echoed this assessment of the equal protection doctrine by stating it “is not shackled to the political theory of a particular era . . . . Notions of what constitutes equal treatment . . . do change.” This forward-looking approach, coupled with the negative (albeit muddled) impact of Bowers on due process advocacy, has caused many same-sex marriage proponents to gravitate towards equal protection arguments. 

Under traditional equal protection analysis, the scrutiny with which the Court examines a law depends upon whether the law creates a suspect classification. Suspect classifications trigger either strict scrutiny or heightened, intermediate scrutiny. To pass strict scrutiny, legislation must be closely tailored to give effect to a compelling state interest, while intermediate scrutiny demands that laws “serve important governmental objectives and . . . be substantially related to achievement of those objectives.” Both levels, to varying degrees, extend equal protection solicitude to “discrete and insular” minorities, or those in a suspect class. The critical question, then, is “What constitutes a suspect class?”

The Supreme Court has developed the following five criteria to identify suspect classifications: (1) the class has endured a long history of discrimination; (2) the characteristic has no effect on the group’s ability to contribute to society; (3) the group has virtually no political power; (4) members of the class bear a badge of distinction; and (5) the characteristic by which the class is identified is immutable. Thus far, the Court has conferred suspect class status, warranting strict scrutiny, to race, nationality, religion and alienage. Similarly, the Court has assigned quasi-suspect status to gender and parentage (i.e., individuals born out-of-wedlock).
Having defined the criteria establishing suspect and quasi-suspect classifications, the next logical question becomes, “Do homosexuals meet these criteria?” For three of the requisite elements, the answer is clearly yes. Documented incidents of historical discrimination are legion—easily satisfying the “history of discrimination” criterion. Indeed, considering the dearth of uplifting chapters in American gay and lesbian history, it is not an exaggeration to say, “[T]he history of homosexuality has been largely a history of opprobrium.”

William Eskridge lists several legal discriminations suffered by homosexuals in this century alone:

[Y]ou could not have a job in the federal or most state civil services, have a national security clearance, serve in the armed forces, immigrate to the United States or (if you slipped in by mistake) become a U.S. citizen, use the U.S. mails for your informational magazines, obtain some professional and business licenses, dance with someone of the same sex in a public accommodation, loiter in a public place, hold hands with someone of the same sex anywhere, or (heaven forfend) actually have intercourse with someone of the same sex.

The second criterion regarding a group’s ability to contribute to society barely necessitates discussion. Even vociferous opponents of same-sex marriage seldom make the claim that homosexuals are unable to fully contribute to society as a result of their sexual orientation. As Professor Eskridge notes, “No impartial judge, no executive officer, no respected professional, no competent senator, no unbiased observer of any scruple is willing to say that sexual orientation bears any relation to lesbian and gay people’s ability to participate in and contribute to society.”

The third criterion, the lack of political power, is also met by homosexuals. Fearing societal discrimination, a majority of homosexuals still conceal their sexual orientation in public. This closeted existence stifles their ability to organize and make their presence felt politically. The fact that DOMA was able to pass both Houses of Congress—escaping even a veto from the White House—underscores this point. Thus, there is

194 Tribe, supra note 93, § 15-21, at 1427 (footnote omitted).
195 Eskridge, supra note 15, at 180.
196 Id. at 177.
197 See id. at 180.
198 Writing before the passage of DOMA, Professor Eskridge exhibits an eerie prescience on the subject: “Antigay amendments proposed in the U.S. Senate are regularly adopted by huge margins . . . . In short, for every two steps forward the gay rights movement often suffers a step or two backward because of sometimes hysterical backlash against homosexuality.” Id. at 181. Lynn Wardle challenges the political powerlessness of homosexuals by noting that homosexuals have higher incomes and are better educated than the average American. See Wardle, supra note 24, at 93 (citing Stephen Zamansky, Colorado’s Amendment 2 and Homo-
little dispute that the first three suspect class criteria apply to homosexuals.

Turning to the two remaining criteria (the "badge of distinction" and the immutability of the group's distinguishing trait), one confronts the main obstacles to claiming unequivocally that classifications based on sexual orientation are "suspect." It is difficult to identify a discernible badge of distinction because "homosexuals are born afresh in every generation and every social, racial, and economic class."\(^{199}\) Gay men and lesbians "have no identical family; with each birth, they are presented with a lottery of social and economic circumstance . . . . [which] can lead to great privilege as much as to destitution."\(^{200}\)

A possible "badge of distinction" could be found in stereotypical homosexual "traits." As insulting as stereotypes about "effeminate" gay men and "masculine" lesbians are, such traits would at least furnish outwardly detectable signifiers defining the group. However, reality does not always coincide with legal theorizing. Research indicates that, in terms of gender role behavior, most gay men are not effeminate and most lesbians are not masculine in appearance or behavior.\(^{201}\) In reality, no badges of distinction exist for homosexuals. As for the question of immutability, the evidence is, at best, inconclusive. The scientific community has yet to embrace a credible study establishing "firm support for [the] biological determinism of homosexual behavior."\(^{202}\) However, it would be foolish to categorically reject biology as a component of sexual orientation because it remains unclear what role biology plays in relation to "early child development, experience, psychology, and [the other] social factors . . . in the constellation of influences that affect human choices about sexual behavior."\(^{203}\) This tenuous link between biology

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\(^{199}\) SULLIVAN, supra note 3, at 153.

\(^{200}\) Id.

\(^{201}\) See Link, supra note 3, at 1061 (citing Peplau & Gordon, The Intimate Relationships of Lesbians and Gay Men, in CHANGING BOUNDARIES: GENDER ROLES AND SEXUAL BEHAVIOR 228-29 (1983)).

\(^{202}\) Wardle, supra note 24, at 72. "Opinion in the scientific community is mixed at best, with the majority supporting a social conditioning theory that incorporates a limited genetic predisposition." Farabee, supra note 27, at 266 (citing NATIONAL INSTITUTE OF MENTAL HEALTH TASK FORCE ON HOMOSEXUALITY, FINAL REPORT AND BACKGROUND PAPERS 77 (1972)).

and homosexuality renders any claim of immutability unsubstantiated and possibly even disingenuous.

Some commentators have challenged the value of criteria (such as the badge of distinction and immutability) that are dependent on visible, biological characteristics. Professor Sunstein, for one, has asserted, "Immutability is neither a necessary nor a sufficient basis for treatment as a 'suspect class.'" Professor Eskridge concedes that homosexuals are neither discrete nor insular. However, Eskridge responds, women are also "neither insular (everywhere you find men you find women) nor a minority (they are more than half the population)" but gender discrimination still yields heightened scrutiny for equal protection purposes. If one considers the select categories to which the Court has assigned "suspect class" status, Professor Eskridge's point about internal inconsistency acquires even greater force. Of the four suspect categories (race, nationality, religion and alienage) and the two quasi-suspect categories (gender and birth out-of-wedlock), only race, gender and the circumstances of birth are truly immutable. Further, only race and gender are physical manifestations—or "badges of distinction"—that are difficult to hide. Also, not every nationality and religion demarcates a discrete and insular group in American society. German-Irish Protestants do not face the same marginalized existence that, say, Iranian Muslims do in this country. Obviously, it is not difficult to find the gaping holes in the Court's "suspect class" framework.

Nevertheless, the incoherence of the Court's equal protection doctrine does not vitiate one inescapable fact: the behavioral aspect of homosexual identity separates homosexuals from minorities whose identities are determined purely by factors beyond their control. Many members of the black and Latino communities reject (and perhaps resent) "the argument that gays are another minority group just like themselves, struggling for equal rights." People of color all along the political

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204 Some commentators believe that the success of future civil rights cases on homosexuals' behalf hinges on the emergence of scientific evidence proving the immutability of homosexuality. See, e.g., Craig M. Bradley, The Right Not to Endorse Gay Rights: A Reply to Sunstein, 70 IND. L.J. 29, 38 (1994) ("[I]f homosexuality can be shown to be, at least in part, 'immutable,' the argument for gay rights will enjoy more success in the courts."); Farabee, supra note 27, at 266 (suggesting that, unless homosexuality is considered "a naturally occurring biological condition, . . . . homosexuals are unlikely to achieve suspect class status").


206 See Eskridge, supra note 15, at 179 n.j ("Lesbians and gay men are a minority but are typically anonymous or closeted rather than discrete (you cannot tell by looking) and are often dispersed rather than insular (though there are gay ghettos in most major cities)").

207 Id.


spectrum, from Colin Powell, avatar of the Gulf War, to bell hooks, subversive black feminist, have expressed this sentiment. Even some gay rights advocates, such as Andrew Sullivan, consider the comparison to other minorities a facile one:

Homosexuals can pass. Most blacks cannot. Most Latinos cannot. Women cannot. Even Jews, who are perhaps the closest analogy to homosexuals in this regard, are more easily identifiable: when they have no Jewish physical features, they have Jewish families and Jewish lineages. They can be traced. But homosexuals are born in the midst of the other; they have the names of heterosexuals; they have no identifiable characteristics; and they reappear randomly in every generation. They have more power in this respect than any comparable minority, because they have the power to define and choose the moment and nature of their public identity.

This passage powerfully articulates that homosexuals differ from other minorities in that they have a choice. The term “choice” does not refer to “being homosexual or not being homosexual” but, rather, to “letting the world know or not letting the world know.” This element of choice imbues homosexuals with a sui generis quality that distinguishes them from other minorities—and dilutes any parallels (e.g., a history of discrimination) drawn between homosexuals and other minorities.

The Court, perhaps in response to the perception that its assortment of suspect and quasi-suspect classes is irrational, has displayed a reluctance to create any new suspect categories. Keep in mind, even the

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210 “Skin color is a benign non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument.” Id. at 82 (quoting Letter from General Colin L. Powell to Representative Patricia Schroeder (May 8, 1992), in David F. Burrelli, Homosexuals and U.S. Military Personnel Policy, Jan. 14, 1993, at 25-26).

211 Hooks contends:

The need to make gay experience and black experience of oppression synonymous seems to be one that surfaces much more in the minds of white people. . . . While it in no way lessens the severity of such suffering for gay people, or the fear that it causes, . . . in a given situation the apparatus of protection and survival may be simply not identifying as gay.

. . . White people, gay and straight, could show greater understanding of the impact of racial oppression on people of color by not attempting to make these oppressions synonymous, but rather by showing the ways they are linked and yet differ.


212 SULLIVAN, supra note 3, at 152.

213 In Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), the Court found that an ordinance which denied a special use permit for the operation of a group home for the mentally retarded violated principles of equal protection—but refused to rule that the mentally retarded constituted a suspect class.
ostensible landmark opinion that struck a blow for gay and lesbian rights, *Romer v. Evans*, did not classify homosexuals as a suspect class. Instead, the Court merely struck down Colorado’s anti-gay amendment because it bore no “rational relationship to a legitimate government purpose.” One may conjecture that, if the Court were to classify homosexuals as a suspect class, it would have done so in *Romer*. Based on that refusal, the Court, as currently constituted, would probably not consider homosexuals a suspect class in evaluating DOMA. From an analytical perspective, this trend need not be considered an obstacle for gay and lesbian equality. As demonstrated, the current set of suspect and quasi-suspect classes makes little sense, but adding sexual orientation to their ranks would only add to the confusion (indeed, the Court would fashion a sounder framework by rescinding some of the extant suspect and quasi-suspect categories—for example, everything except race and gender—than by incorporating a new category). The element of choice argument differentiates gay men and lesbians from other minorities to such a degree that the equal protection doctrine would seem almost arbitrary if a minority group, whose identity is at least partially self-actuated, were considered a suspect class. Application of suspect class status to individuals who may (or may not) choose to be recognized as members of an oppressed group produces an insuperable amount of conceptual discord. The notion of “choosing” to join a suspect class stands contrary to the very purpose of the constitutional guarantee of equal protection: ensuring that the nation’s laws protect those citizens (whether they wish to be or not) categorized as members of “minorities.” This discord would exist regardless of the current Court’s tendencies. Therefore, suspect class status seems to be properly withheld from gay men and lesbians for the purposes of equal protection analysis. Of course, concluding that homosexuals do not compose a suspect class does not end the equal protection analysis. Advocates of same-sex marriage have the alternative of attempting “to achieve heightened scrutiny . . . by focusing on sex[-based] rather than sexual orientation-based classifications.”

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216 Gay men and lesbians who come out of the closet have made a conscious decision to withstand the discrimination and abuse concomitant to homosexuality. Women and people of color make no such decision. Therefore, their minority status is thrust upon them, not “self-actuated.” The spirit of the equal protection doctrine seems solicitous of people in the latter position more than it does people in the former.
217 Farabee, *supra* note 27, at 266.
B. THE GENDER DISCRIMINATION ARGUMENT

In *Craig v. Boren*,218 the Supreme Court subjected gender classifications to heightened scrutiny when it said such classifications “must serve important governmental objectives and must be substantially related to the achievement of those objectives.”219 DOMA erects two types of gender classifications—one empowers states to consider gender in extending the protection of their laws and the other enables the federal government to consider gender in extending the protection of federal law. By granting states leave to deny full faith and credit only to marriages “between persons of the same sex,”220 DOMA has created a gender classification. Consider the following hypothetical. A state refuses to recognize same-sex marriages pursuant to the authority conferred by DOMA. Woman A marries Woman B in Hawaii and subsequently moves to this nonrecognizing state. If this state denies a marital benefit to Woman A (e.g., the option of filing a joint state tax return), the denial will be directly imputable to her gender. If Woman A were a man, she could not be denied the marital benefit.

DOMA’s second gender classification is even more blatant. By proclaiming that the federal definition of marriage is limited to unions between “one man and one woman,”221 DOMA once again distributes legal benefits along gender lines. If Woman A were a federal employee, for example, she would not be able to include her spouse on her employee health plan solely because of her gender. Due to these dichotomous gender classifications, *Craig* requires that DOMA be subjected to intermediate scrutiny. As discussed above,222 DOMA would have a very difficult time surviving strict scrutiny or any type of heightened scrutiny.223

In response to this assertion of gender discrimination, proponents of DOMA may counter that DOMA does not make any distinction according to gender because it applies to men and women equally. States may withhold recognition of same-sex marriages regardless of each couple’s shared gender. This “equal application” argument carries a certain common sense appeal but also has a glaring flaw: the Supreme Court has

218 429 U.S. 190 (1976)
219 *Id.* at 197.
220 Defense of Marriage Act, supra note 11, § 2.
221 *Id.* § 3.
222 See supra part II.C.
223 Although intermediate scrutiny obviously is not as exacting as strict scrutiny, DOMA does not appear to be “substantially related” to its putative interests—i.e., promoting procreation, protecting children and maintaining a certain sense of morality—any more than it seems “closely tailored” to them—which is to say, not at all. With regard to the first two interests, DOMA is still both underinclusive and overinclusive. As for the final interest, promoting majoritarian prejudice remains an illegitimate state interest, regardless of the intensity of the Court’s scrutiny (i.e., DOMA could not stand even if it “perfectly fit” this interest).
already repudiated the “equal application” argument as a justification for the abridgment of equal protection. In *Loving v. Virginia*, the Court rejected Virginia’s claim that its anti-miscegenation statutes did not engage in “an invidious discrimination based upon race” because they equally punished “both the white and the Negro participants in an interracial marriage.” In explaining why the Virginia statutes violated the Fourteenth Amendment’s Equal Protection Clause, the Court stated:

> [W]e reject the notion that the mere “equal application” of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations . . . . In the case at bar . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The scope of *Loving’s* precedential effect clearly prevents the Court from ever upholding a racial classification merely because it is applied equally. The murkier question is, “Can *Loving’s* preemption of the ‘equal application’ argument be analogized to apply in a gender context?”

Several courts have refused to recognize an analogy between antimiscegenation laws and laws against same-sex marriage and, therefore, have upheld the constitutionality of state laws restricting marriage to heterosexuals. Still, a plurality of the Hawaii Supreme Court, in *Baehr v. Lewin*, bucked this trend of narrowly interpreting *Loving*—and applied its rejection of the “equal application” argument to a statute

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224 388 U.S. 1 (1967).
225 Id. at 8.
226 Since state statutes were at issue in *Loving*, Virginia’s laws violated the Fourteenth Amendment’s guarantee of equal protection, not the Fifth Amendment’s guarantee. See supra note 179 and accompanying text.
229 852 P.2d 44, reconsideration granted in part, 875 P.2d 225 (Haw. 1993). *Baehr v. Lewin* was the earlier procedural incarnation of *Baehr v. Miike*. *Lewin* imposed on Hawaii the burden of presenting a compelling state interest to which its prohibition of same-sex marriages was narrowly tailored—a burden the state failed to meet, on remand, in *Miike*. See supra notes 5-6 and accompanying text. One should note that the *Lewin* court subjected the contested statute to strict scrutiny based on the Equal Protection guarantees of the Hawaii Constitution, not the U.S. Constitution. See *Lewin*, 852 P.2d at 67. Article I, section 3 of the Hawaii
enjoining same-sex marriages. The Lewin court explicitly adopted the analogy in responding to its one dissenting member:

We understand that [the dissenting] Judge Heen [believes] that “HRS § 572-1[, the law in question,] treats everyone alike and applies equally to both sexes[,]” with the result that “neither sex is being granted a right or benefit the other does not have, and neither sex is being denied a right or benefit the other has.” The rationale underlying Judge Heen’s belief, however, was expressly considered and rejected in Loving .... Substitution of “sex” for “race” and article I, section 5 [of the Hawaii Constitution] for the [F]ourteenth [A]mendment yields the precise case before us together with the conclusion we have reached.230

By finding the Loving analogy persuasive, the Hawaii Supreme Court set the stage for the subsequent lower court ruling in Miike that legalized same-sex marriages in that state (pending appeal, of course).231 However, the Lewin court’s endorsement of the Loving analogy, by itself, does little to invalidate the “equal application” argument. As mentioned earlier, other courts have not found the analogy convincing and have not perceived a heterosexual requirement for marriage to be a form of gender discrimination. Since the conflict among state courts offers little guidance, one must assess the pertinence of the analogy by looking to the objectives of the Loving Court itself.

Undoubtedly, the Loving Court was primarily focused on rendering racially discriminatory (albeit equally applied) laws unconstitutional. The Court took great pains to denounce anti-miscegenation laws as “invidious racial discrimination”232 and “odious to a free people.”233 Nonetheless, does the Loving Court’s intention to curb racial discrimination preclude applying its reasoning in other contexts? Some, such as Professor Wardle, argue that “the language of Loving is specifically targeted at racism, not at other categories of classification.”234 She supports her claim by further stating that, “the great social harms produced by such divisions by race are simply not akin to those produced by divisions by sexual orientation.”235 One problem with this narrow interpretation of

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230 852 P.2d at 67-68 (quoting Heen, J., dissenting) (citation omitted).
231 Since Congress enacted DOMA in anticipation of Hawaii’s legalization of same-sex marriage, one could conclude that the Lewin ruling was the basis of DOMA’s conception.
232 Loving, 388 U.S. at 10.
233 Id. at 11 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).
234 Wardle, supra note 24, at 78.
235 Id.
Loving is that the equal protection doctrine has expanded since the Court's decision. While it may be true that "[n]othing in the [Loving] Court's equal protection analysis or language implies disapproval of discrimination against same-sex relations or even hints of any concern about permitting only male-female marriage,"\(^{236}\) modern equal protection analysis now comprises discrimination along nonracial axes such as nationality, religion and gender.\(^{237}\) In light of this doctrinal expansion, Loving's application cannot be limited to racial discrimination alone.

A second problem with Wardle's narrow interpretation is that it confuses the claim of gender discrimination with the claim that homosexuals are a suspect class. One may agree with Professor Wardle that divisions according to race are not "akin" to divisions according to sexual orientation, but that issue is irrelevant to a discussion of gender discrimination. By granting quasi-suspect status to gender classifications, the Court has already conceded that gender classifications are "akin" to racial classifications. Professor Wardle misses this point entirely when she says, "[N]othing in the [Equal Protection Clause of the] Fourteenth Amendment discloses a[n] . . . intent to protect or promote the social or legal equality of homosexual relations."\(^{238}\) Even if true, the same cannot be said about gender equality after Craig and its brethren. Professor Wardle and those who share her view do not realize that the Loving analogy only acquires cogency in making an argument for gender equality, not an argument for homosexual equality. Attacking DOMA and all state prohibitions of same-sex marriage as improper gender classifications does not require reading a mandate for homosexual equality into the Fifth Amendment, the Fourteenth Amendment or any other part of the Constitution. Such an attack merely protects gender equality as already required by the Court. In sum, the Wardle position of limiting Loving to racial classifications cannot be accepted for two reasons: (1) the position ignores the development of equal protection doctrine in the years since Loving and (2) the position misconstrues the gender equality approach as a homosexual equality approach.

However, if one rejects the Wardle position, there remains another, more thoughtful argument against analogizing Loving into the gender equality context. In Loving, the Virginia statute barred whites but not non-whites from interracial marriages.\(^{239}\) The Court found that the asymmetrical contours of the classifications indicated that they were "measures designed to maintain White Supremacy."\(^{240}\) The State of Vir-

\(^{236}\) Id.

\(^{237}\) See supra notes 189-193 and accompanying text.

\(^{238}\) Wardle, supra note 24, at 79.

\(^{239}\) 388 U.S. at 11 n.11.

\(^{240}\) Id. at 11.
Virginia viewed white "purity" (not racial "purity" in general) as essential in maintaining white supremacy over the other supposedly inferior races. This white supremacist objective rendered the restrictions patently unconstitutional. This aspect of Loving strains the gender analogy. As one commentator notes, "[T]he [Virginia] statute stigmatized Blacks, but not whites. An identical argument cannot be made in the same-sex marriage context: the restrictions would not seem to have any more tendency to stigmatize women than men." To get a perfect parallel, DOMA and the related state prohibitions would have to bar male same-sex unions but permit female same-sex unions so that "male supremacy" would not be undermined by signs of effeminacy.

Still, the imperfection of the Loving analogy does not rob it of its utility. Laws against same-sex marriage may not stigmatize one gender as inferior to the other but they do lead to another outcome which the Court has found constitutionally impermissible: the reinforcement of traditional sex roles. In Craig, the Court held that disparate legal drinking ages for men and women could not be based on the "weak congruence between gender and the characteristic or trait that gender purported to represent." In Mississippi University for Women v. Hogan, the Court struck down a classification which "perpetuate[d] the stereotyped view of nursing as an exclusively woman's job." According to the Hogan Court, governmental classifications must be "free of fixed notions concerning the roles and abilities of males and females." In Roberts v. United States Jaycees, the Court stated, "[D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities." The Court has even recognized a parallel between racial discrimination and gender discrimination in the reinforcement of traditional roles. In Personnel Administrator of Massachusetts v. Feeney, the Court observed that "[c]lassifications based on gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination"; such classifications may undergird the notion that the "female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." Taken

241 Friedman, supra note 14, at 145 n.76.
242 Craig, 429 U.S. at 199.
244 Id. at 729.
245 Id. at 724-25 (emphasis added).
247 Id. at 625.
249 Id. at 273.
as a whole, the Court’s opinions on gender discrimination indicate that statutes reinforcing archaic gender roles must be struck down even if they are “rationalized by an attitude of ‘romantic paternalism.’”

Restrictions on same-sex marriage, on either the state or federal level, impose antiquated gender roles on the institution of marriage. Prohibiting same-sex marriages “reproduces specific gender roles by enforcing a system in which gender is always relevant to the possibility of intimate relations, and by obsessively focusing on a single type of sexual conduct in which men and women have set, stereotyped positions.”

By restricting marriage to heterosexuals, DOMA and its related state statutes subscribe to an “ideology . . . in which women are naturally heterosexual and naturally desirous of marrying men, which naturally results in their bearing children.”

It does not require a great leap in logic to surmise that gay men and lesbians face open hostility (of which the restriction on marriage is just one example) precisely because they threaten traditional gender roles by “allegedly engaging in activities ‘inappropriate’ for their sex.”

One commentator notes that “[m]uch of the psychological literature examining homophobia has concluded that support for the traditional gender-role structure is a primary cause of homophobia.” Furthermore, the “nonnuclear character of many gay families poses an additional threat to majoritarian norms” by undermining the belief that a “family” can only sprout from a heterosexual union. If same-sex unions gain the imprimatur of marriage, then inevitably, same-sex couples will gain social acceptance as parents as well; such a conceptual shift could irrevocably alter traditional notions of the family unit. All academic theorizing aside, it “should be clear from ordinary experience that the stigmatization of the homosexual has something to do with the homosexual’s supposed deviance from traditional sex roles” and that laws inhibiting same-sex marriage provide a means for preserving those roles.

252 William M. Hohengarten, Note, Same-Sex Marriage and the Right to Privacy, 103 YALE L.J. 1495, 1528 (1994); cf. Cox, supra note 16, at 1112 (arguing that sodomy laws “impose traditional sex roles”).
253 Eskridge, supra note 98, at 1510.
254 Strasser, supra note 95, at 946.
256 Costello, supra note 15, at 138 (citing BRIAN MILLER, Preface, HOMOSEXUALITY AND THE FAMILY at xii (Frederick W. Bozett ed., 1989)).
Thus, the imperfection of the *Loving* analogy does not prove fatal to a gender equality argument against DOMA. Unlike the Virginia statute in *Loving*, DOMA does not overtly stigmatize one group in order to elevate another. Nonetheless, DOMA performs the equally invidious function of buttressing "archaic and stereotypic notions"\(^{258}\) of particular gender roles. This observation yields two immediate corollaries. First, the maintenance of traditional gender roles parallels the promotion of white supremacy in *Loving* as an unjustifiable statutory objective. Consequently, the "equal application" argument rejected in *Loving* also fails in the gender context, leaving no other credible justifications for DOMA's gender-based discriminatory effect. Second, regardless of *Loving*’s reach, DOMA is unconstitutional exactly because of its reinforcement of traditional gender roles. As the formulations in *Craig* and *Hogan* indicate, "[s]ince it began subjecting sex-based classifications to heightened scrutiny, the Court has never upheld a sex-based classification resting on normative stereotypes about the proper roles of the sexes."\(^{259}\) There is no reason for the Court to depart from this practice in evaluating DOMA. Moreover, one struggles to conceive of a legislative motive other than homophobia fueled by an obsession with ancient gender roles that could have given rise to DOMA. For these reasons, the Court should strike down DOMA as an unconstitutional gender classification which bolsters outdated notions of the "appropriate" roles of men and women.

C. THE AMBIVALENT RESPONSE TO THE GENDER DISCRIMINATION ARGUMENT

Several commentators deride the gender equality approach in fighting for the recognition of same-sex marriage. Professor Eskridge finds there is a "transvestite quality to the argument . . . [in that it] dresses a gay rights issue up in gender rights garb."\(^{260}\) Similarly, since the Hawaii Supreme Court utilized the gender-based approach in *Baehr v. Lewin*, one commentator argues, "In terms of technical legal analysis, . . . [Lewin] does little to aid efforts to legitimize homosexuality."\(^{261}\) For the same reason, another commentator remarks that *Lewin* has "been embraced as an advance for the rights of gay men and lesbians, but it is far less a gay rights case than a gender equality case."\(^{262}\) While these critics may voice the reservations of some same-sex marriage advocates,

\(^{258}\) *Hogan*, 458 U.S. at 725.

\(^{259}\) Koppelman, *supra* note 257, at 218.

\(^{260}\) *Eskridge, supra* note 15, at 172 (emphasis omitted).

\(^{261}\) Kozuma, *supra* note 102, at 905.

they offer little reason to favor the “suspect classification” approach over a “gender discrimination” attack. Adding sexual orientation to the litany of “suspect” categories would simply take an abstruse, inconsistent analytical framework and make it more confused. There is no reason why homosexuals should constitute a suspect class but, for example, the mentally retarded should not.

A gender-based assault on DOMA avoids the suspect class quagmire altogether. The gender classifications of DOMA and any state same-sex marriage prohibition are indisputable, as is their support for rigid, archaic gender roles. The Court has established a clear line of precedents condemning such classifications as unconstitutional. Considering all these factors, the gender-based approach offers a sounder argument for the extension of constitutional equal protection to same-sex marriage than does the suspect classification approach. Any critic derogating the intellectual merits of this approach as catering to gender equality instead of gay rights fails to grasp the crux of the argument. That is, all discrimination against homosexuals ultimately derives from a manic obsession with gender roles—so disentangling the twin issues of gender equality and gay rights amounts to a futile, academic exercise. In real terms, every step toward gender equality must, by its very nature, also be a step forward for gay rights.

IV. RATIONAL BASIS ANALYSIS

Even if one casts aside the due process and equal protection arguments for some type of heightened scrutiny, there remains some doubt that DOMA could survive rational basis review—especially in the wake of Romer. Although rational basis review generally manifests a great deal of deference towards legislative rationalizations, the Romer Court applied rational basis review “with bite.”263 The Court found the Colorado amendment, which precluded “all legislative, executive, or judicial action at any level of state or local government designed to protect the [status of persons based on their homosexuality],”264 to be grounded in nothing other than “animus toward the class that it affects.”265 Accord-

263 In this respect, Cass Sunstein finds a thematic line of reasoning linking Romer and Cleburne. See Sunstein, supra note 37, at 59-64. In Professor Sunstein’s view, both the Romer Court and the Cleburne Court employed rational basis review to strike down laws expressing “a desire to isolate and seal off members of a despised group [i.e., homosexuals and the mentally retarded, respectively] whose characteristics are thought to be in some sense contaminating or corrosive.” Id. at 62. Professor Sunstein endorses this form of rational basis review “with bite” by concluding, “[Since] the proffered justifications were so weakly connected with the measures at issue, the Court was right to do what it did in both cases.” Id. at 63.

264 Romer, 116 S. Ct. at 1623.
265 Id. at 1627.
ing to the Court, a law based solely on “personal or religious objections to homosexuality” is not rationally related “to legitimate state interests.”

Romer raises considerable doubt that DOMA could survive rational basis review for one simple reason: the Colorado amendment in Romer, as baleful as it was, appeared far more “rational” than does DOMA. After all, one can easily conceive of a “poorly fitting but probably rational” justification for the Colorado amendment. For example, banning anti-discrimination legislation for homosexuals could be construed as a measure to preempt a rise in litigation. Such legislation could have spared Colorado’s courts the added congestion of criminal and civil cases brought under the color of “pro-gay” statutes. Although this justification boasts little in terms of coherence (i.e., reducing extant causes of action would do more to restrain overzealous litigants than would prohibiting potential causes of action before they exist), it does bear a patina of rationality. By contrast, every credible justification for DOMA rests either on the mistaken premise that all homosexuals are sterile and all heterosexuals have children (i.e., the procreation and “protection of children” arguments) or on an illegitimate state interest (i.e., legitimizing a prejudiced morality). The Colorado amendment merely tried to prevent extending legislative solicitude—solicitude which may encompass some but not necessarily all minority groups—to a particular minority group. DOMA works to prevent the extension of a fundamental right—which everyone outside the targeted group can exercise—to members of a particular group. By any standard, the discriminatory effect of DOMA is much more difficult to justify than that of the Colorado amendment in Romer; thus, the former appears more “irrational” than the latter. Consequently, the Court should hold DOMA unconstitutional if it applies rational basis review “with bite.”

Were one able to descry some modicum of rationality in DOMA, one still could not escape the strong implication of Romer that “it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior.” Romer represents a denouncement of laws reflecting the “judgment that certain citizens should be treated as social outcasts.”

266 Id. at 1629.
267 Sunstein, supra note 37, at 62.
268 See supra Part II.C.
269 See id.
270 Sunstein, supra note 37, at 62.
271 Id. at 63.
laws “motivated by a desire to create second-class citizenship.” In short, Romer condemns the type of law that DOMA exemplifies.

V. GOVERNMENTAL INTERESTS IN RECOGNIZING SAME-SEX MARRIAGE

Whether the level of scrutiny incurred is strict, intermediate or rational, both the proponents and detractors of DOMA tend to focus the debate on state interests in deterring same-sex marriages. In constitutional discourse, there must be some state interest to justify laws that appear to infringe upon individual rights—whether it is compelling, important or simply rational. Yet, any discussion of same-sex marriage should also consider the converse interests of the state—interests in permitting same-sex marriages. Full legalization (and perhaps even promotion) of same-sex marriages would serve at least four key governmental interests: (1) providing stability for the millions of children growing up in gay or lesbian households; (2) eliminating the need for marriage alternatives such as domestic partnerships; (3) promoting monogamy within the homosexual community; and (4) dispelling the appearance that the United States is becoming more of a confederacy, and less of a union.

Looking to the first interest, the children of homosexual parents would benefit both emotionally and economically from the legal recognition of same-sex marriages. Although many homosexual parents may find they can raise their children quite well without formalizing their relationships, “the absence of demands—even the absence of definition—for unmarried relationships makes it impossible to identify, much less enforce, an appropriate set of rights and duties . . . through objective legal rules.” In a nation as legalistic as the United States, “the commitments inherent in formal families . . . increase the likelihood of stability and continuity for children.”

From a pragmatic perspective, forging a legal bond between the child and the parent’s partner-spouse leads to several advantages for the child—among them: “1) Social Security and life insurance benefits; 2) the right to sue for the wrongful death of the nonbiological parent; 3)

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272 Id.

273 According to Professor Sunstein, “Congress’s decision to allow [through DOMA] nonrecognition here—unaccompanied by a decision to allow nonrecognition in other contexts including marriages involving minors or incestuous marriages—appears to be a form of impermissible selectivity of the sort found in Romer.” Id. at 97 n.492.

274 Hafen, supra note 1, at 486.

275 Id. at 475.

276 “[S]tepparent adoption involves marriage [to the biological parent] and is covered by statutory provisions that do not provide for adoption by unmarried partners.” Elizabeth A. Delaney, Note, Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child, 43 Hastings L.J. 177, 214 (1991).
the right to inherit under the rules of intestacy; 4) health insurance coverage under both parents’ policies; 5) the guarantee that the nonbiological parent could make medical decisions for the child in the event of an emergency; and 6) a legal obligation on the part of the second parent to economically support the child, even if the parents separate.” These advantages would not only increase the child’s security but would also reduce chances of the child needing state support. From an emotional perspective, children in homosexual households often form lifelong attachments to the “stepparent figure . . . and these attachments warrant recognition.” A child’s emotional well-being can be just as essential to proper development as the child’s physical well-being—and the state should endeavor to protect the former with the same urgency it does the latter. In effect, the nonrecognition of same-sex marriages punishes the children of homosexuals “for the ‘sins’ of their parents . . . [by denying them] the psychological, emotional, or financial benefits that might accrue if they were in . . . famil[ies] recognized by the state.” No state interest in discouraging same-sex marriage can possibly be worth the price such children are forced to pay.

Legalizing same-sex marriage would also eliminate the need for the domestic partnership which is the alternative to marriage adopted by various municipalities throughout the United States. Aside from the fact that domestic partnership appears to be an ersatz form of marriage which confers inferior benefits, this legal innovation poses a considerable

277 Green, supra note 134, at 421.

278 See Claudia A. Lewis, Note, From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage, 97 YALE L.J. 1783, 1799 n.87 (1988) (“The support obligations and clarification of rights that accompany marriage would benefit the children of homosexual parents and may reduce the community’s welfare burdens.”).

279 Chambers, supra note 8, at 465; see also Toulon, supra note 157, at 125-26 (“[I]f the state truly has an interest in protecting children, same-sex marriages would be permitted, thereby furthering the emotional security of children who are members of such families.”).

280 “While [decisionmakers] make the interests of a child paramount over all other claims when his physical well-being is in jeopardy, they subordinate, often intentionally, his psychological well-being to, for example, an adult’s right to assert a biological tie. Yet both well-beings are equally important, and any sharp distinction between them is artificial.” Delaney, supra note 276, at 179 n.13 (quoting JOSEPH GOLDSTEIN ET. AL., BEYOND THE BEST INTERESTS OF THE CHILD 4 (1973)).

281 Strasser, supra note 95, at 949; cf. Parham v. Hughes, 441 U.S. 347, 352 (1979) (holding that “it is unjust and ineffective for society to express its condemnation of procreation outside the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it”).

282 In a “domestic partnership” municipality, two individuals, regardless of gender, can register as partners and qualify “for health insurance, bereavement leave, insurance, annuity and pension rights, housing rights (such as rent-control apartments), adoption and inheritance rights.” Sullivan, supra note 3, at 181.

283 One sign of domestic partnership’s inferiority lies in its tax treatment. The IRS has ruled that benefits extended to domestic partners “are taxable income to the employee if the domestic partner” does not fit the Internal Revenue Code’s definition of “dependent.” Elbin,
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problem for the state. For while the domestic partnership option is largely perceived as an outlet for homosexuals' nuptial yearnings, domestic partners "don't need to have a sexual relationship or even closely mirror old-style marriage." Therefore, domestic partnerships could potentially "open a Pandora's box of litigation and subjective judicial decision-making about who qualifies." Therefore, domestic partnerships could potentially "open a Pandora's box of litigation and subjective judicial decision-making about who qualifies." Therefore, domestic partnerships could potentially "open a Pandora's box of litigation and subjective judicial decision-making about who qualifies." Recognizing same-sex marriages, however, would obviate the need for domestic partnerships in the first place and thereby break the litigious wave before it surges forth.

Given the brushfire rate at which AIDS and other sexually transmitted diseases are spreading throughout the country, it boggles the mind that the state could overlook its interest in promoting monogamous relationships. "Public policy," notes one commentator, "must either encourage relationships, or it must encourage the alternative to relationships, which is random sexual encounters." At this point, public policy dictates taking whatever measures will avert a worsening of the current health crisis. Granting recognition to same-sex marriage presents just such a measure due to the simple inverse correlation between long-term monogamous relationships and the spread of sexually transmitted diseases. No other state interest takes precedence over safeguarding the health of the populace.

supra note 14, at 1084-85 (citing Priv. Ltr. Rul. 90-34-048 (May 29, 1990)). Consequently, if an employee's domestic partner fails to satisfy that definition, that employee "must pay taxes on benefits his married co-workers receive tax free." Id. at 1085. Such disparities between the treatment of domestic partners and married couples have caused several commentators to reject domestic partnership as a viable alternative to marriage. See, e.g., Jennifer L. Heeb, Comment, Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy, 24 SETON HALL L. REV. 347, 359 (1993) (footnote omitted) (finding domestic partnership an "ineffective alternative for combatting the unequal treatment afforded to married heterosexual couples and committed homosexual couples"); Farabee, supra note 27, at 240 ("[D]omestic partnership laws . . . exist only at the municipal level in metropolitan areas and offer limited legal benefits."); Strasser, supra note 95, at 982 (emphasizing the fact that domestic partnerships "do not give individuals all of the rights they would have if they were married"); Link, supra note 3, at 1149 (branding domestic partnership "an inferior solution . . . a 'separate but equal' status for yet another group of people disenfranchised by the majority"); see also Valerie Richardson, Domestic Partners Don Gay Apparel, WASH. TIMES, Feb. 15, 1991, at A1 (calling San Francisco's domestic partnership ordinance "mainly symbolic, carrying few legal obligations and no benefits").

284 SULLIVAN, supra note 3, at 182.

285 Id.

287 Id.

288 See id. ("[G]iven the realities of AIDS, public policy would seem to demand that gay men, particularly, be encouraged to form stable relationships."); see also Lewis, supra note 278, at 1799 n.87 ("[S]tate recognition of homosexual marriage may promote public health
The final key interest—maintaining a unified nation—may be the most abstract but also the most fundamental. The impending recognition of same-sex marriages in Hawaii means that such marriages will be valid in at least some portions of the United States. At the same time, the existence of DOMA and its state progeny threatens to cleave fissures of conflict throughout the country. In light of this possibility, it becomes clear that the same-sex marriage debate can no longer be relegated to the margins as a "homosexual issue"; the debate now concerns every citizen because, for the first time in recent memory, the legal fabric of the nation seems to be fraying. The central question should not be, "What do gay men and lesbians have to gain from same-sex marriage?" but "What do all Americans have to gain from living within a unified nation?"  In short, full recognition of same-sex marriage would serve the most basic of state interests: maintaining national integrity.

CONCLUSION

The Defense of Marriage Act definitely pushes the envelope of constitutionality in an unprecedented fashion. Most students of constitutional law have cut their teeth on statutes which potentially violated due process or denied equal protection. DOMA not only traverses both those fields but also ventures into the less traveled domain of the Full Faith and Credit Clause. Nonetheless, whichever portion of the Constitution one chooses to invoke—be it the Due Process Clause of the Fifth Amendment or the Full Faith and Credit Clause of Article IV—DOMA defies its bounds. Furthermore, unlike most past constitutional transgressions, DOMA exists as a blight not just on a particular set of rights or even on a particular subset of society but on the legal infrastructure of the nation itself. There are many convincing arguments, from a number of perspec-

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289 These contrasting questions paraphrase a point made by one commentator: "The question is not what states specifically have to gain from recognizing Hawaii’s marriages, the question is what states have to gain from surviving within a unified nation." Ballan, supra note 38, at 425.
tives, in favor of striking down DOMA: full faith and credit; due process; equal protection. One can even challenge its rationality. DOMA is a dragon vulnerable to so many swords that choosing the one with which to slay it poses a perplexing task. Still, any approach should produce the same assessment: DOMA is unconstitutional and cannot stand as valid law. Should the Supreme Court ever reach this conclusion, and strike down DOMA, it will save many sacred bonds from the statute’s attenuating influence—the most important of which may be the bond between the states.

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