1997

Defense of Marriage Act: Isn't It Ironic ... Don't You Think? A Little Too Ironic?

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Comment

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Defense of Marriage Act: Isn’t It Ironic . . . Don’t You Think? A Little Too Ironic?¹

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¹. ALANIS MORISSETTE, Ironic, on JAGGED LITTLE PILL (Maverick Recording Co. 1995). The irony in prohibiting same-gender marriages has been noted from several different perspectives. See, e.g., James Trosino, American Wedding: Same-Sex Marriage and the Miscegenation Analogy, 73 B.U. L. Rev. 93 (1993)(equating many prejudices against same-gender marriages with prejudices against interracial marriages); Laurence H. Tribe, Toward a Less Perfect Union, N.Y. Times, May 26, 1996, at E11 (noting the irony of using DOMA as a measure to protect states’ rights). See also infra section III.A.
I. INTRODUCTION

With a rarely matched haste and a calculated display of power, Congress confidently placed its political credibility on the line and passed the Defense of Marriage Act (DOMA).\(^2\) DOMA "relaxes" the constitution,\(^3\) makes a sacrificial offering of federalism,\(^4\) repudiates the separation of powers doctrine,\(^5\) and has little or no constitutional authority to support its enactment.\(^6\) Nevertheless, Congress determined that the threat of same-gender marriages necessitated such action.\(^7\)

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DOMA has two basic provisions:

§ 2(a) 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.


§ 3(a) 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 one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is husband or a wife.


5. H.R. Rep. No. 104-664, at 6 & n.16 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2910 (calling the Hawaii Supreme Court's interpretation of the Hawaii Constitution's Equal Rights Amendment a "clearly erroneous interpretation" based on statements by one member of the Hawaii Legislature); id. at 24-30, reprinted in 1996 U.S.C.C.A.N. 2905, 2928-34 (making clear that one purpose of DOMA is to dictate to the courts proper judicial interpretation). See also Testimony I, supra note 4, at S5932 (testimony of Prof. Tribe)(stating that 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 [clause] as judicially interpreted shall instead to be entitled to no faith or credit at all!").

6. Testimony I, supra note 4, at S5932 (statement of Prof. Tribe).

DOMA was enacted in response to a 1993 Hawaii Supreme Court decision\(^8\) that many feared would result in the legalization of same-gender marriages. Calling this decision the “greatest breakthrough” in the legal assault against marriage, Congress acknowledged that the United States Constitution\(^9\) and various legal doctrines\(^{10}\) could allow same-gender couples to travel to Hawaii, get married, and then return home with valid marriage licenses.\(^{11}\) DOMA supporters argued legislation was needed to “combat” this result.\(^{12}\)

DOMA grants to states an exemption from the mandate of the Full Faith and Credit Clause\(^{13}\) so that a state can ignore a same-gender

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10. The various legal doctrines include the following: Uniform Marriage and Divorce Act (extinguishing public policy exceptions in favor of predictability, permanence, and stability of marriage), lex celebrationis (providing presumptive validation of marriages based on the law of the state in which they were performed), validation statutes (providing per se validation of all marriages from other states), conflict of law doctrine (creating a presumption favoring the validity of the marriage that is likely to be strong depending on the interests involved), choice of law doctrine (perhaps still applying the law of the state in which the marriage was contracted), and the unreliability of public policy exceptions (likely to be narrowly construed).


13. 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.

U.S. CONST. art. IV, § 1.
couple's valid marriage license issued by another state. Additionally, DOMA refuses to recognize and denies all federal benefits to any state-created legal marriage rights involving same-gender couples. Regardless of whether Hawaii or any other state adopts same-gender marriage laws by legislation, referendum, or judicial decision, DOMA declares that these laws will not be honored.

Under different circumstances, DOMA would represent an evisceration of political and constitutional principles. It reflects a calculated confidence that sufficient public hostility toward same-gender marriages supports such congressional overreaching and not only will be overlooked, but applauded as a necessary "strategy" to protect Americans from the threat of same-gender marriages.

This Comment examines the efforts of gays and lesbians to obtain marital rights and the resistance these efforts have encountered. An examination of the law demonstrates that prohibitions on same-gender marriages are unconstitutional at both the federal and state level, particularly with regard to the principle of equal protection.

Part II of this Comment begins with a discussion of the interests that marriage serves for the individual citizen and society in general. This Part makes clear that gay and lesbian couples are similarly situated to heterosexual couples with respect to marriage rights. Then, because most arguments against same-gender marriage focus on history and tradition, Part III offers an alternative view that suggests history and tradition actually advocate recognition of same-gender marriages. History and tradition also illustrate many principles that render bans on same-gender marriages unconstitutional. Part IV discusses the due process and equal protection problems that pervade the law and the role these problems play in bans on same-gender marriages. Part V builds on this discussion by documenting the constitutional problems that surround DOMA, while Part VI analyzes the interests advanced by DOMA. This analysis demonstrates that DOMA conflicts with the interests in marriage, family, and children,

17. The Author uses the labels gay and lesbian loosely to reflect individuals who struggle against gender roles as determinants of rights and privileges.
18. State prohibitions on same-gender marriages are governed by the Equal Protection Clause, which provides that "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4. If a federal classification contravenes the equal protection guarantee, generally the result is a due process violation of the Fifth Amendment. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.1, at 596 (6th ed. 1995). See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995)(holding that equal protection analysis under the Fifth Amendment is the same as under the Fourteenth Amendment); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
despite DOMA supporters’ assertions to the contrary. In the end, DOMA is unconstitutional because it serves as a classification for its own sake and fails to serve a legitimate government purpose.19

II. PURSUIT OF HAPPINESS

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.20

Most Americans seem to agree with the United States Supreme Court that marriage is an essential ingredient for happiness. A 1992 survey reported that seventy-eight percent of senior high school students indicated that a good marriage and family life was an “extremely important” goal.21 Of the fourteen life goals that students were asked to rank, a good marriage and family life ranked as the number one goal overall.22 Similarly, a 1989 survey of adults reported that a happy marriage was again the number one life goal of those polled.23

A. Securing the Blessing of Liberty

[As an American citizen, a law-abiding, taxpaying—major taxpaying—citizen, . . . I should be allowed the same rights, the same pursuit of happiness that every other citizen enjoys. Whatever they want to call it . . . As long as we have the same legal benefits and protections for me, and for my family—my family. That's all.24

“Marriage is a state conferred legal . . . status,”25 a necessary prerequisite in our society to the formation of a recognized “family.”26 Family status can be obtained in only two ways—legally through marriage or adoption or as a result of a blood relationship. Without access to marriage, gays and lesbians are incapable of creating for themselves a “recognized” family unit. Consequently, gays, lesbians, and

22. Id.
23. Id. (reporting a Massachusetts Mutual American Family Values Study).
24. We’re a Family and We have Rights, NEWSWEEK, Nov. 4, 1996, at 54 (interview with musician Melissa Etheridge who, along with her lesbian partner of eight years, had their first child in February 1997).
26. Throughout this Comment, the term “family” is used to refer to committed, interdependent relationships with or without children. This use acknowledges that two adults alone may comprise a family.
the children of gays and lesbians are denied many privileges and protections associated with family membership.27

No other arrangement, whether by contract or domestic partnership, is capable of producing the same quality of life as the ability to participate in a legally recognized family unit through marriage.28 "[T]he family unit does not simply co-exist with our constitutional system," but 'is an integral part of it,' for our 'political system is superimposed on and presupposes a social system of family units, not just of isolated individuals. No assumption more deeply underlies our society. . . ."29 Despite the compelling nature of a citizen's interests in marriage and family, the law excludes gays and lesbians from this fundamental aspect of human life.

Marriage and family serve a number of functions critical to both individuals and society.30 The government confers numerous benefits and protections on a marriage and a family because of the important and varied role these institutions play in the well-being of individuals and society as a whole. Family units allow individuals to “intertwine their energy and resources to accomplish individual and group goals.”31 The family is the central and “primary unit that provides the resources and social support needed to navigate life.”32 Family members care for each other and are committed to shared interests.33 Many tasks can be handled more effectively and productively when combined.34 Family units provide stability and permanence in the ordering of a society and provide both individuals and society the greatest potential for prosperity.


30. See, e.g., Janet Z. Giele, Decline of the Family: Conservative, Liberal, and Feminist Views, in PROMISES TO KEEP, supra note 21, at 89.

31. Arland Thornton, Comparative and Historical Perspectives on Marriage, Divorce, and Family Life, in PROMISES TO KEEP, supra note 21, at 69, 80.

32. Id.

33. See id. at 81.

34. See id.
The Supreme Court has repeatedly recognized the importance of marriage and family to both individuals and society. In *Smith v. Organization of Foster Families*, the Court recognized the importance of families to individuals in "the emotional attachments that derive from the intimacy of daily association." In *Griswold v. Connecticut*, the Court acknowledged that the family unit is protected because it contributes so powerfully to the happiness of individuals. Family associations meet the human need for closeness, trust, and love. The *Griswold* Court noted that the decision to marry is protected precisely because marriage "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." In *Boddie v. Connecticut*, the Court emphasized that "marriage involves interests of basic importance in our society." Even "[e]mployers depend on families to give the rest, shelter, emotional support and other maintenance of human capital that will motivate workers and make them productive."

For individuals, marriage and family status convey a full range of rights, benefits, and protections, including financial subsidies such as tax credits, the ability to share resources such as health insurance and social security or pension benefits, and economies of scale. In turn, these resources promote economic and emotional security and stability for family members. Within a legally recognized family, individuals are capable of drawing resources into the family as a unit, and these resources often can survive changes in the status of individual members. In the event one individual loses some protection, the family unit can rely on resources from another individual family member to provide security and stability.

Marriage also facilitates the acquisition and sharing of wealth. Property can be acquired and shared without tax consequences, and shared property, like shared resources, can be used more efficiently and productively. Additionally, marriage is capable of protecting the assets that individuals have acquired together. Assets acquired by either member of the marriage become part of the family's combined resources until no eligible member of the family remains. This offers security throughout life's changes and minimizes instability.

36. *Id.* at 844.
41. *Id.* at 376.
that might otherwise be caused by disruptions when assets are not easily transferable between individuals or cannot be shared.

The ability to share and transfer resources is a necessary element of economic interdependence. Individual interdependence reduces economic burdens on society. When disruption occurs, i.e., unemployment, family members are often capable of bearing this burden without reliance on outside resources. Moreover, married individuals have greater incentives to be productive, to acquire wealth, and to benefit others by sharing that wealth.

The legal status associated with “family” allows access to loved ones in cases of emergency and the ability to speak for family members when they cannot speak for themselves. Legal status provides both adults in the family unit the ability to react quickly in any medical emergency involving their children. Legal status presents a relationship structure to all third parties—employers, doctors, lawyers, other family members, and society as a whole.

Contrary to general perceptions, the same-gender marriage movement is not led by the political leaders of the “gay rights” movement, many of whom share an ambivalence toward the traditional institution of marriage. Others do not view marriage as a worthwhile goal. Instead, the struggle for gay marriage rights has been propelled largely by individual couples, often those who already are “living in virtual marriages” and raising children and who seek to protect their family unit in the legal context. For these couples, marriage is necessary to secure legal status for their “family” and their children, which often requires access to the benefits, privileges, and protections that only legal status can provide.

44. See Gabriel Rotelo & E.J. Graff, To Have and to Hold: The Case for Gay Marriage, NATION, June 24, 1996, at 11.

45. See id. See also William N. Eskridge Jr., A History of Same-Sex Marriage, 79 Va. L. Rev. 1419, 1486-93 (1993) (describing three arguments that gays and lesbians make against the value of same-gender marriages: (1) marriage is a terrible institution based on patriarchy, (2) assimilation is not desirable, and (3) it could lead to fractionalization in the gay community, that is, some gays and lesbians have more to gain by same-gender marriages than others based on their social status); Paula L. Ettelbrick, Since When Is Marriage A Path to Liberation?, reprinted in Suzanne Sherman, Lesbian and Gay Marriage: Private Commitments, Public Ceremonies 20 (Suzanne Sherman ed., 1992); Nancy D. Polikoff, We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,” 79 Va. L. Rev. 1535 (1993).

46. See generally Rotelo & Graff, supra note 44, at 11.

B. Promoting the General Welfare

Marriage and family benefit society in an infinite number of ways.48 The conflict over same-gender marriages is not a zero-sum game. Instead, each marriage and family is part of a system in which the prosperity and well-being of the whole system depends on the prosperity and well-being of each of its parts. The institutions of marriage and family should be viewed as a unifying force with shared goals relating to the well-functioning of each part.49 System unification is essential to avoid individual elements working independently of one another50 toward separate and often conflicting goals.51

Marriage and family have little value as mechanisms for preferring certain classes of individuals over others or for granting rights and benefits denied to others. The critical function of marriage and family suggests far more can be gained by same-gender marriages than what opponents of same-gender marriages argue will be lost.52 Gay families are capable of serving the same functions and promoting the same values and interests as traditional families.53 Government supports, protects, and promotes families because these units benefit society. Extending the benefits and protections associated with marriage and family to same-gender couples very well may be necessary to the well-being of the country.

Marriage and family are the primary vehicles by which individuals care for themselves and others. Society benefits when its members are capable of taking care of themselves. To achieve these goals, marriage and family throughout history54 have existed in many diverse forms,55 not limited by biology.56 While opponents of same-gender marriages rely on history and tradition to advocate against same-gen-

48. See generally Giele, supra note 30, at 107.
49. Ironically, the strongest and most dire criticism leveled against DOMA is its fractional effect. By diluting or relaxing the full faith and credit mandate, which is intended to be a unifying force under the federal system, DOMA undermines the Clause by returning the states to the status of "independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others." Testimony I, supra note 4, at S5931 (statement of Prof. Tribe)(citing Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943)). This is in sharp contrast to the Supreme Court's description of the Full Faith and Credit Clause as a "nationally unifying force" in which each state is "an integral part of a single nation, in which rights ... established in any [state] are given nationwide application." Id. at S5931-32.
50. Tribe, supra note 29, at 1433 n.88 (quoting Thomas C. Grey, Eros, Civilization and the Burger Court, 43 LAW & CONTEMP. PROBS. 83, 97 (1980)).
51. But cf Eskridge, supra note 45; Ettelbrick, supra note 45; Polikoff, supra note 45.
52. See generally Giele, supra note 30.
53. See Thornton, supra note 31, at 78-82.
54. See id.
55. Id.
56. See id. at 81. See also Retying the Knot, NATION, June 24, 1996, at 17 ("[V]ery little about marriage is historically consistent enough to be traditional. . . . Each
under marriages, history demonstrates that marriage has not always involved only two adults or carried religious connotations, or been recognized legally. Instead, marriage and family, in all its diverse forms, has worked well throughout history to serve the needs of the particular time.

Public policy debates that focus on ethnocentric assumptions of the superiority of one family form over another are deleterious to the public welfare. It is the family functioning, that is, the nurturing of family values and the interests served by families, that affects the quality of family life, not the form of the family. Such abilities are neither confined wholly to one type of family structure nor to heterosexuals, but instead to the capabilities, resources, and goals of the individuals that form the family unit. Many different family forms can perform these functions and society should be more interested in spreading these important capabilities, rather than in confining them.

Furthermore, many stresses placed on nontraditional families stem from their continued marginalization by a society that fails to accept them as legitimate and sees them as undeserving of equal support. These stress factors are then projected upon families of same-gender couples as inherent attributes, characteristics, or limitations of that family, rather than as the product of outside harms.

In many ways, same-gender marriages simply reflect a larger social trend. The nature of American families continually changes. A era's marriage institutionalizes the sexual bond in a way that makes sense for that society, that economy, that class.

57. See Retying the Knot, supra note 56, at 17 ("Then forget the patriarch Jacob, whose two wives and two concubines produced the heads of the twelve tribes."); Thornton, supra note 31, at 78-82.


59. See Retying the Knot, supra note 56, at 17 ("Forget centuries of European prole "marriages" conducted outside the law, in which no property was involved.").

60. Thornton, supra note 31, at 78-82.


63. Thornton, supra note 31.

64. Giele, supra note 30.


66. The traditional definition of family now comprises only 27% of this nation's 9.1 million households. Strasser, supra note 28, at 981 & n.466 (citing Ron-Christopher Stamps, Comment, Domestic Partnership Legislation: Recognizing Non-
1995 Harris survey shows that the general population has accepted diverse family forms as normal. Only three percent defined family as the traditional nuclear family. In Berger v. State, the New Jersey Supreme Court recognized that children biologically unrelated to their nuclear family did not negate that they lived and functioned as a family. Likewise, in City of White Plains v. Ferraioli, New York's highest court held that a zoning ordinance could not limit the definition of family to exclude a household that is a family in every sense except biological.

A limited view of marriage directly contradicts the importance of family, both to the individuals concerned and to society as a whole. The functionality and prosperity of "family life," regardless of its form or structure, should be an important national concern. "The most promising social policies for families and children take their direction from inclusive values that confirm the good life and well-being of every individual as the ultimate goal of the nation." Instead of asking how to exclude participants in the family unit, the better question is "how do society and the state support stable households in a world where the composition of families is changing, and how might same-gender relationships contribute to that end[.]"

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Traditional Families, 19 S.U. L. Rev. 441, 441-42 (1992). See also Martha F. Riche, The Future of the Family, Am. Demographics, March 1991, at 44 (stating that as of 1991, the number of American families fitting the traditional family structure had decreased to only 22%).

67. Giele, supra note 30, at 104. See also Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *17 (Haw. Cir. Ct. Dec. 3, 1996)("[T]here is diversity in the structure and configuration of families. In Hawaii, and elsewhere, children are being raised by their natural parents, single parents, step-parents, grandparents, adopted parents, hanai parents, foster parents, gay and lesbian parents, and same-sex couples. There are also families in Hawaii, and elsewhere, which do not have children as family members.").

68. Giele, supra note 30, at 104.


70. 313 N.E.2d 756, 758-59 (N.Y. 1974).

71. Giele, supra note 30, at 103-04.

72. Thornton, supra note 31, at 79.


III. HISTORY REPEATS ITSELF

When writing or interpreting the law, good character is more important than knowing the detail of case law or being prepared to argue that case in court. Courage, respect, consideration, kindness and a willingness to act when the odds are against you, define the outline of character. . . . The opinion of men is sometimes wrong, very wrong. Our duty is to rise when we know it is so, and declare for truth.75

Far from opposing same-gender marriages, history and tradition suggest something is terribly wrong with the arguments used to oppose same-gender marriages, arguments that are similar to those used to prohibit interracial marriages.76 States were free to forbid interracial marriages until 1967, when the United States Supreme Court held in Loving v. Virginia77 that such prohibitions violated the Equal Protection Clause. When defending the constitutionality of the Virginia antimiscegenation statute, the State argued such prohibitions were constitutional because both whites and blacks were prohibited from marrying members of another race. The Supreme Court rejected this argument, holding that antimiscegenation laws impermissibly infringed on an individual's right to marry and choose their spouse with no compelling government justification.78 Key to understanding the importance of Loving v. Virginia was the Court's rejection of the ideology of white supremacy.79

A. Tradition of Prejudice

Many crimes and injustices have been committed . . . in the name of God and virtue.80

The primary interest asserted by the government to support legislative bans on mixed-race marriages was the majoritarian morality. Interracial marriages were believed to be immoral and unnatural and as such inevitably would lead to moral and social decline.81 One court

75. Senator Robert Kerrey, 1996 Commencement Address, University of Nebraska College of Law, in NEBRASKA TRAnSCRIPT, Fall 1996, at 6 (Senator Kerrey, D-Neb., was one of 14 Senators who voted against DOMA).
76. Baehr v. Lewin, 852 P.2d 44, 67-68 (1993)(concluding that the substitution of "sex" for "race" is the only difference between prohibitions on same-gender marriages and prohibitions on interracial marriages); Ante, supra note 59, at 436-39; Trosino, supra note 1, at 93; Strasser, supra note 28, at 969-70.
77. 388 U.S. 1 (1967). While the Supreme Court could have relied on the Equal Protection Clause to strike down the bans on interracial marriages, this case is more notable for advancing a due process right to marry.
78. Id. at 11-12.
79. Id. at 11 (Stewart, J., concurring)("[T]he racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."). See also Kenneth L. Karst, Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation, 43 UCLA L. Rev. 263 (1995).
80. URVASHII VAID, ViRTuAL EQuALITY 377 (1995).
81. Id.
stated that "such connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good."82

Many white Americans believed it was God's truth that whites were superior to blacks, that racial mixing was an abomination to God, and such mixing would result in serious social harms.83 Interracial marriages, it was argued, were immoral because God did not intend for the races to mix84 based on purported proof of the "biological" difference between whites and blacks.85 In 1877, the reasoning was expressed this way: "there can not [sic] be any tyranny or injustice in requiring both alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities [sic], which declare that He has made the two races distinct."86 These moral arguments conclude that marriage is defined by nature, and hence, cannot be defined differently.87

Today, the biological fact that God made the sexes different is the justification for moral proscriptions against same-gender marriages,88 which is the same argument advanced to prohibit interracial marriages.89 During prohibitions on interracial marriages, whites were viewed as superior to blacks.90 Today, it is assumed that heterosexuals are superior to homosexuals. "Granting" rights to the inferior or flawed group grants them a legitimacy that the superior group does not believe they deserve and does not want them to have.91

83. Trosino, supra note 1, at 100.
84. "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix." Loving v. Virginia, 388 U.S. 1, 3 (1967)(quoting the Virginia trial court's opinion upholding the antimiscegenation statute).
85. Id.
86. Green v. State, 58 Ala. 190, 195 (1877). See also Trosino, supra note 1, at 108-11 (categorizing social justifications against same-gender marriages as analogous to social justifications for prohibiting interracial marriages).
87. Professor Lynn Wardle uses definitional arguments against same-gender marriages. See Wardle, supra note 74, at 38.
89. See Eskridge, supra note 45 (outlining social construction of definitional arguments); Strasser, supra note 28, at 921-34. See also Trosino, supra note 1, at 98-102.
90. Trosino, supra note 1, at 99-100.
During the debate over civil rights for blacks in 1864, the argument went this way:

Now, what does all this mean but mixed schools and perfect social equality? It is nothing more or less; and the next step will be that they will demand a law allowing them, without restraint, to visit the parlors and drawing-rooms of the whites, and have free and unrestrained social intercourse with your unmarried sons and daughters. It is bound to come to that—there is no disguising the fact; and the sooner the alarm is given and the people take heed the better it will be for our civilization.92

Arguments against same-gender marriages sound the same alarm. Professor Richard Duncan recently argued that same-gender marriages would "endorse the 'tragic illusion' that a same-sex relationship is no different than the union of a man and a woman."93 Professor Duncan added that same-sex marriage, which is at odds with what most people in this society believe—is certain to have many unintended (perhaps intended by some) consequences. For example, if marriage laws are amended to encompass homosexual couples, will public education be affected? Almost certainly it will. Curriculum used to teach children about human sexuality and family life will need to be revised to reflect the new paradigm. Books like "Heather Has Two Mommies"... designed to teach young children that homosexuality is just one more kind of love—will become required texts in public... schools.94

Those who argue against same-sex marriages, like those who argued against interracial marriage, propose that these inferior couples provide an unsuitable environment in which to raise children.95 In upholding a conviction under a state antimiscegenation statute, a court justified the need for the statute: "The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race."96 In 1871, one judge concluded that prohibitions against interracial marriages were justified "[t]o prevent violence and bloodshed which would arise from such cohabitation, distasteful to our people, and unfit to produce the human race in any of the types in which it was created."97

94. Id.
95. Trosino, supra note 1, at 99-100, 110-11.
97. Lonas v. State, 50 Tenn. (3 Heisk.) 287, 299-300 (1871).
In the 100 years prior to the Supreme Court's decision in Loving, only one state court struck down prohibitions against interracial marriages as unconstitutional. In Perez v. Lippold, a California court declared marriage "a fundamental right of free men" that cannot be prohibited absent "an important social objective and by reasonable means." To be constitutional, legislation regulating marriage "must be based upon more than prejudice and must be free from oppressive discrimination."

As the United States Supreme Court would later do in Loving, the Perez court rejected the state's contention that a law did not discriminate against any racial group because it applied equally to both races. "The right to marry is the right of individuals, not of racial groups." Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry. Rejecting the practical justifications for bans on interracial marriages, the court stated that "[i]t is no answer to say that race tension can be eradicated through perpetuation by law of the prejudices that give rise to the tension."

In Perez, the State also argued that "Negroes are socially inferior . . . and that the progeny of a marriage between a Negro and a Caucasian suffer not only the stigma of such inferiority but the fear of rejection by members of both races." The court replied, "[i]f they do, the fault lies not with their parents, but with the prejudices in the community and the laws that perpetuate those prejudices by giving legal force to the belief . . . ." The court concluded that the State failed to offer a compelling justification for the antimiscegenation law.

The concurring opinion specifically responded to the State's contention that the couple's children might be ostracized by society.

98. See Perez v. Lippold, 198 P.2d 17 (Cal. 1948). See also Trosino, supra note 1, at 102-07.
99. 198 P.2d 17 (Cal. 1948).
100. Id. at 19.
101. Id.
102. Id. at 20.
103. Id. at 21.
104. Id. at 25. See also Trosino, supra note 1, at 105 n.85 ("The court also rejected the state's argument 'that persons wishing to marry in contravention of race barriers come from "the dregs of society" and that their progeny will therefore be a burden on the community.' (citation omitted)).
106. Id.
107. For many years progress was slow in the dissipation of the insecurity that haunts racial minorities, for there are many who believe that their own security depends on its maintenance. Out of earnest belief, or out of irrational fears, they reason in a circle that such minorities are inferior in health, intelligence, and culture, and that this inferiority proves the need of the barriers of race prejudice. Id. (emphasis added).
ATTACK ON DOMA

That is something which the state is powerless to control and which it cannot prevent by legislation. It therefore furnishes no basis for legislation, either. It is something resting with the parties themselves, for them to decide. If they choose to face this possible prejudice and think that their own pursuit of happiness is better subserved by entering into this marriage with all its risks than by spending the rest of their lives without each other's company and comfort, the state should not and cannot stop them.108

It was not until 1967 that the United States Supreme Court followed the prophesy of the Perez court and struck down prohibitions against interracial marriages. The Supreme Court declared that "[m]arriage is one of the 'basic civil rights of man.'"109 The Court characterized marriage as a "fundamental freedom" that "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."110 "To deny this fundamental freedom on so unsupportable a basis . . . is surely to deprive all the State's citizens of liberty. . . ."111

B. Separate and Not Equal

The test of [freedom's] substance is the right to differ as to things that touch the heart of the existing order.112

Given the interests at stake, it is not surprising that for the last twenty years same-gender couples have been turning to lower courts to legitimize their marriages. Lower courts, however, universally have held that prohibitions on same-gender marriage violate neither the Due Process Clause nor the Equal Protection Clause.113 Opponents of same-gender marriages acknowledge that the Due Process

110. Id.
111. Id.
113. See Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995)(concluding that it made no difference whether the marriage statute discriminated against a gay couple when the sameness of their gender prevents them from entering into marriage in the first place); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973)(holding that same-sex couples are incapable of entering into marriage as that term is defined); Baker v. Nelson, 191 N.W.2d 185, 185-86 (Minn. 1971), cert. dismissed, 409 U.S. 810 (1972)(concluding that it was unrealistic to conclude the drafters of the state marriage statute would have used the term to mean anything other than marriage between individuals of the opposite sex); Singer v. Hara, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974)(stating that the marriage statute was "clearly founded upon the presumption that marriage, as a legal relationship, may exist only between one man and one woman"). But cf. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985)("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order . . . action violative of the Equal Protection Clause."); Baehr v. Lewin, 852 P.2d 44, 60 n.20 (Haw. 1993)("That the legislature, in enacting [the marriage statute], obviously contemplated marriages between persons of the opposite sex is not . . . outcome
Clause protects every individual's right to marry;\textsuperscript{114} nevertheless, these same opponents insist no such right exists for homosexuals.\textsuperscript{115} A different level of abstraction is invoked to suggest marriage means something different when applied to homosexual citizens because homosexual marriages are not so rooted in history and tradition that bans on same-gender marriage deny a homosexual individual any liberty interest.\textsuperscript{116}

A similar argument was offered and rejected by the Supreme Court in \textit{Loving v. Virginia},\textsuperscript{117} in which the Court found it irrelevant that interracial marriages were not rooted in history or tradition. In striking down the antimiscegenation law, the \textit{Loving} Court upheld the substantive due process right of every individual to marry the person of choice.\textsuperscript{118} The state cannot infringe upon this right unless it is necessary to accomplish some permissible government objective,\textsuperscript{119} one that is neither arbitrary nor reflective of invidious discrimination.\textsuperscript{120} To conclude homosexual marriages are not so rooted in history or tradition is to apply a different level of abstraction than was applied in \textit{Loving}.

Courts also have attempted to distinguish the equal protection holding in \textit{Loving} from equal protection challenges against prohibitions on same-gender marriages. \textit{Singer v. Hara}\textsuperscript{121} is a typical example. In \textit{Singer}, a Washington court held that denying two men the

\begin{itemize}
\item dispositive \ldots Legislative action, whatever its motivation, cannot sanitize constitutional violations.
\item Wardle, \textit{supra} note 74, at 28-39.
\item \textit{See}, e.g., \textit{Baehr v. Lewin}, 852 P.2d 44 (Haw. 1993)(recognizing that prohibitions on same-sex marriages implicated the Equal Protection Clause, but reasoning there was no fundamental right of persons of the same sex to marry because same-sex marriage was neither rooted in Hawaii's traditions nor implicit in the concept of ordered liberty such that failure to recognize the interest would result in the sacrifice of liberty or justice), \textit{reconsideration granted in part}, 875 P.2d 225 (Haw. 1993). Substantive due process includes those fundamental liberties that are "implicit in the concept of ordered liberty." \textit{Palko v. Connecticut}, 302 U.S. 319, 325 (1937). Also incorporated within this test are liberties "deeply rooted in this Nation's history and tradition." \textit{Moore v. East Cleveland}, 431 U.S. 494, 503 (1977).
\item 388 U.S. 1, 9-10 (1967).
\item Id. at 12.
\item Id. at 11. \textit{Loving} involved a racial classification and so the Court applied strict scrutiny, which required the government to justify the classification based on a compelling interest. The Court concluded that there was no such interest.
\item The term "invidious" means arbitrary, irrational, and not reasonably related to a legitimate purpose. \textit{Black's Law Dictionary} 826 (6th ed. 1990).
\end{itemize}
right to marry did not violate the Fourteenth Amendment. The court reasoned that

[in Loving ... the parties were barred from entering into the marriage rela-
tionship because of an impermissible ... classification.... [Two men] are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the rec-
ognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.122

The court's reasoning in Singer illustrates the circular use of defini-
tional arguments to justify bans on same-gender marriages.123 Yet, a definitional justification to an equal protection or due process chal-
lenge offers no support for denying same-gender marriages because the definition of marriage itself is being challenged.

Despite the Singer court's conclusory statement, the two men were prohibited from marrying based on their sex. The logical result of the court's argument is that the classification is permissible because it applies equally to both genders. Yet, this argument was rejected by the Loving Court. To argue that the prohibition against interracial mar-
riages applied equally to both races "represents a limited view of the Equal Protection Clause."124 Instead, the Equal Protection Clause examines the distinctions made by the classification and whether such distinctions are necessary to achieve a legitimate government pur-
purpose, not resting on discrimination alone.

At the time of Loving, prohibitions on interracial marriages were considered permissible classifications.125 For many of the same rea-
sons, prohibitions on same-gender marriages are believed to be per-
missible classifications. Prohibitions on interracial marriages existed for a long time before it became well-recognized that these prohibi-
tions were justified by impermissible motivations. Modern recognition of suspect discrimination rests on a long evolution of consciousness about unequal and unnecessary dividing practices that serve no legiti-
mate purpose and fail to reflect an individual's capacity to contribute to a family or to society.126 Even today many Americans still believe

122. Id. at 1192.
123. See also Eskridge, supra note 45, at 1427-32 (describing how courts employ defini-
tional arguments to reject constitutional challenges to prohibitions of same-
gender marriages); Strasser, supra note 28, at 922-34.
125. In Pace v. Alabama, 106 U.S. 583 (1883), the Supreme Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and an African-American and imposed a greater penalty than a statute prohibiting similar conduct by members of the same race, finding no equal protec-
tion violation.
126. The "most celebrated footnote in constitutional law," footnote 4 in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), essentially predicted that legislation involving suspect classifications would require a more intense scrutiny by the courts. Lewis F. Powell, Jr., Carolene Products Revisited, 82 COLUM. L.
interracial marriages are flawed or inferior. Yet, most Americans no longer believe that personal distaste for interracial marriages is a sufficient justification for restricting one's choice of marriage partners.

Opponents of same-gender marriages offer additional reasons for why the race classification in Loving is inapposite to the analogy of same-gender marriages. Discrimination based on race provides a valid rights-based argument because blacks are victimized for who they are. Discrimination against homosexuals does not because they are victimized for what they do. Opponents manipulate lines between status and conduct to justify denying rights-based arguments to homosexuals. In reality, discrimination against homosexuals is directed at who they are as much as at what they do. It is homosexual identity or status that "links discrimination on the basis of sexual orientation with discrimination on the basis of race or sex." "[O]rientation is a matter of one's inner life and not merely one's outer conduct. Orientation encompasses desires, fantasies, thoughts, urges, and drives that one often cannot prevent or control—even if one can resist these impulses in one's external behavior." Heterosexuals, like homosexuals, experience these same emotions. Heterosexuality, like homosexuality, is a sexual orientation status. The issue then becomes whether government can prefer one orientation over another.

The Loving analogy demonstrates that Americans have a history of believing that certain marriage dyads are superior to others. Yet, just as they were incapable of supporting bans on interracial marriages, definitional arguments are incapable of supplying the legitimate purpose needed to support bans on same-gender marriages. Even if het-

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127. While prohibitions against interracial marriages were held unconstitutional in 1967, a 1991 Gallup Poll of white Americans found that 45% disapprove of interracial marriage.

128. Civil Rights are reserved for "legitimate" and "deserving minorities." Religious conservatives argue that gay people do not qualify as a legitimate minority because we do not face the same discrimination or have the same experience as racial minorities; that because homosexuality is a sexual behavior, it is a moral issue, not an issue of justice or rights; and that gay rights constitute the legitimation of homosexuality and therefore bestow a "special" status on gay people.


132. See id. at 218.
erosexual marriages are superior or even optimal, that justification
alone cannot support restrictions on same-gender marriages. To sug-
gest discrimination against homosexuals is legitimate because it is not
exactly like racial discrimination ignores the obvious and is counter-
productive. This reasoning requires discrimination to deteriorate be-
yond a level of intolerance and inequality that courts have required in
the past. Further, the argument fails because the concept of suspect
discrimination is not something that lends itself to being fully settled
in advance.

When examining the treatment of homosexuals under the law, the
question should be—what does “equal” require in this particular con-
text? The answer necessarily involves recognition of a wide range
of values and interests. Current debates over homosexuality still re-

tect linear or hierarchial discussions of superiority or inferiority. The
focus of these debates is the need to deny “equality” to homosexuals to
discourage homosexual behavior and maintain the superiority of het-
erosexual behavior. When the Supreme Court struck down bans on
interracial marriages in Loving v. Virginia, it repudiated the theory
that interracial marriages between blacks and whites threatened
white supremacy. In essence, prohibitions on same-gender mar-
rriages reflect a similar theory that such marriages threaten the supe-
riority of heterosexuality.

Professor Laurence Tribe has suggested that a theory of antisubju-
gation rather than antidiscrimination better serves equal protection
analysis. The antisubjugation principle aims to break down legally
created or legally reenforced systems of subordination that treat some
people as second-class citizens. "When the legal order that shapes
and mirrors our society treats some people as outsiders or as though
they were worth less than others, those people have been denied the
equal protection of the laws. The "citizenship clause of the four-
teenth amendment . . . does not allow for degrees of citizenship: no
citizen is 'more equal' than any other."

133. See Cass R. Sunstein, General Propositions and Concrete Cases, 31 Wake Forest
L. Rev. 369, 373 (1996). See also Vaid, supra note 80, at 336 (arguing that dis-


134. Id. at 1514-21.
135. Tribe, supra note 29, at 1515.
136. Id. at 1515.
137. Id.
138. Id.
Attempts to subordinate particular groups of citizens have extended well beyond race. Gender roles also have been used throughout history to prescribe proper behavior, especially for women, and to proscribe other wrongs or immoral behavior. In 1872, in Bradwell v. Illinois, a case Professor Cass Sunstein has called one of the three "genuinely humiliating decisions in American constitutional law," the United States Supreme Court upheld an Illinois statute that prohibited women from practicing law. Sunstein used the concept of humiliation to describe public pronouncements about a certain group's role in society. This is reflected in Justice Bradley's concurring opinion explaining the prohibition.

The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

One commentator restated and then challenged Bradley's argument. "These laws did not seek to make women unequal; they simply recognized God-given difference. . . . Today, of course, we know better, and modern courts have indeed invalidated legislatively imposed, status-based disabilities heaped upon women." Today, discrimination based on sexual orientation simply reflects additional beliefs about gender, and of correct behavior, with regard to assigned gender roles.

C. Tolerance but Not Equality

We must never forget that it is a constitution we are expounding.

Some legal scholars argue that even though bans on same-gender marriages may lack merit under the law, practical considerations may suggest that the rights of homosexuals should be left to the majority through the democratic process rather than to courts intervening to uphold equal protection challenges. In short, the majority simply is not yet ready for same-gender marriages. These practical arguments suggest Americans should be allowed time to arrive at an understanding of their own prejudices toward homosexuals. The authority of the judiciary could be jeopardized if courts act in contravention of the ma-

139. Id. at 1518.
140. 83 U.S. 130 (1872).
141. Sunstein, supra note 130, at 70-71.
143. Amar, supra note 129, at 217.
145. See, e.g., Sunstein, supra note 130, at 98-99.
jority's position. Moreover, if courts act prematurely, opposition will
galvanize and lead to a strong movement for constitutional amend-
ments overturning judicial decisions, thereby jeopardizing important
interests. Affirming rights of gays and lesbians could weaken the
antidiscrimination movement that is operating in democratic arenas
and could provoke increased hostility and even violence against
homosexuals.

Practical arguments also were used to justify the "separate but
equal" doctrine. In Plessy v. Ferguson, the second case in Sun-
stein's "humiliation trio," the Supreme Court held that it was rea-
sonable to act with reference to established usages, customs, and
traditions, with a view to the promotion of people's comfort, and to
preserve the public peace and good order. In Plessy, Homer Plessy,
who was seven-eights Caucasian and one-eighth African, a mixture
that was not discernable to him, insisted that he be allowed to sit in a
coach where white passengers were accommodated. Plessy insisted he
was entitled to every recognition, right, privilege, and immunity se-
cured to the white citizens of the United States by the Constitution.
In advancing the separate but equal doctrine and rejecting Plessy's
equal protection argument, the Court reasoned that

If the two races are to meet upon terms of social equality, it must be the result
of natural affinities, a mutual appreciation of each other's merits and a volun-
tary consent of individuals. . . . "[T]his end can neither be accomplished nor
promoted by laws which conflict with the general sentiment of the community
upon whom they are designed to operate."

The impact discrimination has on the lives of gays and lesbians can
be better understood by comparing the doctrine of "separate but
equal" to the argument "tolerance but not acceptance." Professor
Wardle asserts that marriage rights for same-gender couples go be-
yond social tolerance and compel social approval. When gay and
lesbians fight for equal rights, it is characterized as a "demand for
special preferred status, not merely for tolerance." This argument
suggests certain rights are reserved for certain deserving members of
society who are preferred. Under this argument, there is no differ-
ence between not favoring and disfavoring; instead, those who are "not

146. Id. at 97.
147. 163 U.S. 537 (1896).
148. Sunstein, supra note 130, at 70-71.
150. Id. at 551 (quoting People v. Gallagher, 93 N.Y. 438, 448 (1883)).
151. See e.g., Wardle, supra note 75, at 58-62 (classifying the difference between toler-
ance and preference). Cf. Duncan, supra note 93 (suggesting that even tolerance is
too much).
152. Wardle, supra note 74, at 60.
153. Id. at 60.
154. Duncan, supra note 92, at 593.
favored" simply should expect to be given fewer rights.155 Rights are viewed as benefits that society can grant to some of its constituents and can withhold from others, not as basic human rights.156

Hindsight illustrates the flaw in Wardle's reasoning. In upholding the separate but equal doctrine and conviction in Plessy, the Court emphasized that Plessy incorrectly insisted upon riding a coach used by a race to which he did not belong.157 According to the Court, the statute, which made Plessy's conduct criminal, was constitutional158 because the purpose of the law was not to oppress a particular class.159 Thus, enforced separation did not violate the Equal Protection Clause.160

In stark contrast, Justice Harlan's dissent emphasized that Plessy's conduct should not be criminalized.

It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate coaches for his race, if his rights under the law were recognized. But he objects, and ought never to cease objecting to the proposition, that citizens of the white and black races can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway.161

Justice Harlan understood the resulting harms of the separate but equal doctrine. Harlan refused to acknowledge that the purposes of the doctrine could be justified by majority preferences, custom, or legislative policy.162

Just as the Plessy decision perpetuated the disguised harm facilitated by the separate but equal doctrine,163 practical arguments also camouflage the impact discrimination has on the lives of gays and les-

155. "Civil rights are newly defined as a reward given by society for good behavior. Such rights are deemed benefits that society grants to some of its constituents—the deserving minorities—rather than as basic human rights and values." Vaid, supra note 80, at 182. Under this articulation of civil rights doctrine, important liberty interests are not broad and inalienable rights, but privileges that are earned and rewarded. Id. Further, gays and lesbians have no rights until supermajoritarian support manifests such rights. The problem with this argument is that gays and lesbians are not asking courts to announce new rights not identifiable in the Constitution's text, but are asking for the same rights already granted to all other citizens. Populism arguments manipulate constitutional principles to define away gay and lesbian liberty and to jeopardize their right to equal protection by characterizing them as a "suspect group" rather than a suspect class. See Eskridge, supra note 45, at 1433.

156. Vaid, supra note 80, at 182.


158. Id. at 550-52.

159. See id. at 551.

160. Id. at 548.

161. Id. at 561 (Harlan, J., dissenting).

162. Id. at 558 (Harlan, J., dissenting).

163. Tribe, supra note 29, at 1519 ("Perhaps the nineteenth century Louisiana lawmakers who decided to minister to the sensibilities of their white constituents
bians. While stability often is a good thing, an unjust system should be made less stable. To the extent that law minimizes harm to the lives of gays and lesbians, social turmoil inevitably will result. Thus, the costs associated with practical arguments suggest this may be one of those times when "judicial minimalism" could be a "blunder." Courts must address the issue of whether a statute is consistent with the Constitution; it is the validity of the statutory purpose achieved that must stand or fall. This is the role served by judicial review—to ensure laws are consistent with the Constitution. Such a role cannot be considered improper "judicial activism."*

D. Rights by Consent

Practical arguments suggest that minimal judicial interference with the subjugation of gay and lesbians serves the purpose of preventing social turmoil. This argument differs significantly from arguments based on "constitutional populism." Constitutional populism advocates using the community's morality to legitimize government actions. That is, absent specific constitutional prohibitions, the majority has a right to decide how all should live. Proponents of this view fail to distinguish the "acceptable principle"—political power is best entrusted to the majority—from the "unacceptable principle"—the majority can do whatever they will and is beyond resistance.

by mandating segregated railway coaches simply never gave a thought to how this would affect Homer Plessy.

164. See Sunstein, supra note 130, at 380.
165. Id. at 399.
167. "The framers of the Constitution knew . . . there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."
169. Id. at 68, 86 (stating that H.L.A. Hart identified such a view as "moral populism").
170. Id. at 86 & n.126 (citing H.L.A. Hart, Law, Liberty, and Morality (1963)). See also Ralph Ketcham, Framed for Posterity: The Enduring Philosophy of the Constitution 27 (1993)(stating that "republicanism" was the underlying philosophy of the framers such that representatives made laws for the good of the nation as a whole; democratic philosophy, as used by Aristotle, had come to mean
Constitutional populism arguments used to justify bans on same-gender marriage redefine rights to avoid implicating specific constitutional prohibitions. By redefining rights as they relate to homosexuals, constitutional populists can deny homosexuals the same constitutionally protected rights granted to other citizens. Without a constitutionally protected interest, morality alone—irrebutable presumptions that homosexuality is unnatural and therefore immoral—serves as a sufficient rational basis for denying equal protection to homosexuals. Allowing same-gender couples to marry would legitimize and thereby rebut contrary irrebuttable presumptions.

Yet, laws that create irrebuttable presumptions have been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments because the presumptions create arbitrary classifications. In Stanley v. Illinois, the United States Supreme Court held that a state could not conclusively presume that an individual, unwed father is unfit to be a parent. Instead, the Due Process Clause required the state to provide a hearing on the issue of parental fitness. Likewise in Cleveland Board of Education v. LaFleur, the Supreme Court held that a state could not presume a teacher was in-

171. See discussion supra note 155.
172. See, e.g., Wardle, supra note 74, at 53-54.
173. It is essential to understand what the Constitution is, and what it is not. It is the instrument by which the people created a government and invested it with certain powers, directed to a specific end. The Constitution does not create any rights of, or grant any rights to, the people. It merely recognizes their primordial rights, and constructs a government as a means of protecting and preserving them. . . . [T]he very first section of the Constitution acknowledges that, by virtue of their species and nothing more, all persons are free and equal, and possess certain natural, inherent, inalienable rights. These include, but are not limited to, the enjoyment of life and liberty, the pursuit of happiness, and freedom of expression. . . . The purpose of the government born of the Constitution is to protect these individual liberties, not to take them away.
Commonwealth v. Wasson, 842 S.W.2d 487, 502 (Ky. 1992)(Combs, J., concurring)(stating that a criminal statute proscribing consensual homosexual sodomy violates privacy and equal protection guarantees of the Kentucky Constitution).
174. In fact, a growing body of data rebuts the claimed presumption that homosexuality is unnatural. See, e.g., id. at 489-90 (compiling a list of social, cultural, and medical authorities who assert that homosexuality is a natural human phenomenon).
175. See Vlandis v. Kline, 412 U.S. 441, 446 (1973)(holding that a state may not classify as “out of state students” those who do not belong to that class based on a presumption made by the state).
177. Id.
capable of teaching merely because she was four or five months pregnant.

The logic of the Court's holding in these cases seems correct given the purpose of the enactment of the Fourteenth Amendment—rejecting arbitrary classifications. Ultimately, constitutional populism arguments have no credibility unless constitutional principles are overhauled and the Equal Protection Clause ceases to have any meaning.179

IV. I NOW PRONOUNCE YOU...

I can only hope . . . the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.180

Government has played a central role in perpetuating the marginalization of gays and lesbians. Legislatures and courts have relied on the United States Supreme Court's holding in Bowers v. Hardwick181 to justify violating homosexual's constitutional rights. Though the Court's holding in Bowers did not involve an equal protection challenge, the case is used to deny homosexuals equal protection of the laws. Not surprisingly, Bowers v. Hardwick is the third case in Sunstein's "humiliation trio."182

Applying the reasoning in Bowers, it is argued that if homosexual conduct can be criminalized, it would be anomalous to find that discrimination against homosexuals violates equal protection guarantees. If it is constitutionally permissible for a state to make homosexual conduct criminal, surely it is constitutionally permissible for a state to enact other laws disfavoring homosexuals.183

This argument has been criticized on several grounds. First, Bowers held only that criminalization of sodomy did not offend substantive due process.184 But, "[t]he Court explicitly refused to address the

179. Professor Welch argues that constitutional populism would preclude any judicial review. Constitutional populism allows a court to read the element of legitimacy out of its evaluation of the constitutionality of statutes because every statute's means are rationally related to some end. Without the additional element of legitimacy, no statute is capable of violating a rational basis test. Welch, supra note 168, at 70-71, 79-86.
182. Sunstein, supra note 130, at 70-71. See also VARD, supra note 80, at 134 ("[Bowers] is to the growing gay rights movement what Plessy v. Ferguson was to the civil rights movement and what Dred Scott v. Sandford was to the abolitionists. Each of these decisions reflects the Court's failure to recognize the equal humanity and personhood of members of a minority group.").
184. Amar, supra note 129, at 231.
equal protection issues at stake." Second, this argument dangerously blurs the key constitutional difference between status and conduct. In his Romer dissent, Justice Scalia stated that "[i]f it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual 'orientation' is an acceptable stand-in for homosexual conduct."

Professor Akhil Amar called this conclusion "one of the most troubling passages ever to appear in modern [Supreme Court decisions]." For starters, the word "special" in the first sentence is a cheat. The issue here is the right of gays and bis to have the same right against orientation discrimination enjoyed by heteros qua heteros. And unless all bets are off when "homosexuals" are involved, the second sentence suggests that—as a matter of general principle—orientation is an acceptable stand-in for conduct. But Justice Scalia himself must know this is not the case, and so he qualifies his claim with the phrase "where criminal sanctions are not involved." Why? Because otherwise, to use orientation as a stand-in a law would be an obvious bill of attainder.

The manipulation of conduct and status categories as applied to gays and lesbians illustrates yet another way in which the law as applied to homosexuals is different than the law as applied to heterosexuals.

A. Stranger to Our Laws

In Bowers v. Hardwick, the Supreme Court held that no right to privacy or intimate association could protect Michael Hardwick from arrest and conviction for performing fellatio with another consenting adult in the privacy of his own bedroom. The Court upheld this statute only as it applied to homosexuals. Even though the statute applied equally to heterosexuals, the Court refused to address

185. Id.
186. Id. at 230.
188. Amar, supra note 129, at 231.
189. Id. Professor Amar also notes that the bill of attainder principle is not limited to criminal cases.
190. VMD, supra note 80, at 137 ("Nan Hunter is right to characterize the status-conduct distinction as an 'artifact of the categories of legal doctrine.' Homosexuality is far more than a lifestyle, a status, or a sexual act for most of us who are gay. Gayness is our identity, our life, our family, our being.").
whether these rights would protect heterosexual couples engaging in the same behavior.\textsuperscript{193}

Prior to \textit{Bowers}, the Supreme Court frequently had recognized a commitment to the fundamental right of privacy.\textsuperscript{194} Despite this precedence, the \textit{Bowers} Court refused to recognize privacy protections for homosexuals. The rational for this contrary holding in \textit{Bowers} rested on Justice White's conclusion that there is "no connection between family, marriage, or procreation" and "homosexual activity."\textsuperscript{195} Since privacy rights largely have evolved from issues relating to the family, White concluded it would be facetious even to suggest that two adult homosexuals engaging in consensual sex in the privacy of their home were involved in an intimate association protected by the Constitution.\textsuperscript{196} Thus, homosexuals have no "fundamental right to engage in homosexual sodomy."\textsuperscript{197}

Justice White's conclusion reflects a tendency to reduce gay or lesbian identity to sex. Failure to see the homosexual as an individual accounts for much of the arbitrary treatment gays and lesbians receive under the law\textsuperscript{198} and ignores constitutional themes used to protect all other citizens.\textsuperscript{199}

The Court's distinction between heterosexual and homosexual privacy rights and rights of intimate association is arbitrary for several reasons. First, the Court's reliance on a long history of prohibitions on sodomy was "beside the point."\textsuperscript{200} The Court had acknowledged in its previous term that the "pure[st]' of 'common law pedigree[st]' cannot ensure the continuing constitutional validity of long-practiced inva-

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\begin{footnotesize}
\textsuperscript{193} Shortly after \textit{Bowers}, the Supreme Court declined to review \textit{Post v. State}, 715 P.2d 1105, 1109 (Okla. Crim. App. 1986), cert. denied, 479 U.S. 890 (1986). In \textit{Post}, a state appellate court had overturned a heterosexual sodomy conviction on the ground that the federal constitutional right of privacy had been extended by the Supreme Court "to matters of sexual gratification," at least with respect to heterosexuals. Apparently the Court saw no conflict between the \textit{Post} holding and its holding in \textit{Bowers}.

\textsuperscript{194} "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974). \textit{See also} Stanley v. Georgia, 394 U.S. 557 (1969)(holding that a state cannot criminalize the private possession of obscene materials in the home, even though obscene materials are not protected by the First Amendment).


\textsuperscript{196} \textit{Id.} at 194.

\textsuperscript{197} \textit{Id.} at 190-93.


\textsuperscript{199} Even conservative columnist George Will deemed the Court's distinction between the sexual privacy at issue in \textit{Bowers} and prior privacy rulings as unprincipled. George F. Will, \textit{What "Right" to be Let Alone?}, WASH. POST, July 3, 1986, at A23.

\textsuperscript{200} Tribe, supra note 29, at 1427.
\end{footnotesize}
\end{flushleft}
sions of body or home." Neither "the length of time a majority has held its convictions [nor] the passions with which it defends them can withdraw legislation from th[e] Court's scrutiny."

In dissent, Justice Blackmun commented on the irony of the Court's reliance on history as justification for the sodomy law. Noting that the majority relied heavily on the longstanding prohibitions against sodomy dating back to the drafting of the Constitution to justify the legitimacy of the statutes criminalizing the behavior, Blackmun pointed out that the Court in *Loving* rejected history as a justification for prohibitions on interracial marriages. Indeed, reliance on historical prohibitions would prohibit many currently protected activities such as divorce, contraception, abortion, and even fornication. As Justice Blackmun noted, it is "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."

Second, the Court has protected the freedom of personal choice in matters relating to marriage and family under the right of privacy. The treatment of gays under DOMA would deprive them—and no one else—of the freedom of personal choice in such matters. As the Court noted in *Eisenstadt v. Baird*, the constitutionally protected right of privacy inheres in the individual, not the marital couple. *Eisenstadt*

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201. *Id.* (quoting *Tennessee v. Gardner*, 471 U.S. 1 (1985)).
202. *Bowers v. Hardwick*, 478 U.S. 186, 210 (1986)(Blackmun, J., dissenting). See also *Commonwealth v. Wasson*, 842 S.W.2d 487, 497 (Ky. 1992)("We view the United States Supreme Court decision in *Bowers v. Hardwick*, as a misdirected application of the theory of original intent. To illustrate: as a theory of majoritarian morality, miscegenation was an offense with ancient roots. It is highly unlikely that protecting the rights of persons of different races to copulate was one of the considerations behind the Fourteenth Amendment. Nevertheless, in *Loving v. Virginia*, the United States Supreme Court recognized that a contemporary, enlightened interpretation of the liberty interest involved in the sexual act made its punishment constitutionally impermissible." (citations omitted)).
205. Fornication is not constitutionally protected per se, but many states have decriminalized fornication in spite of history and religion. Moreover, the Supreme Court has extended privacy rights traditionally associated with the family to intimate relationships outside of the marital context. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972)(holding that to provide access to contraceptives to married but not unmarried individuals who are similarly situated violates the Equal Protection Clause).
ATTACK ON DOMA

concerned a statute that granted only married persons access to contraceptives. The Court analyzed the statute's validity under the Equal Protection Clause and looked for a rational basis to justify the different privacy protections accorded to married and unmarried persons under the statute. The Court held that if the state did not restrict married individuals' access to contraceptives, then the state could provide no justification for restricting the same access to unmarried individuals. Whatever rights an individual may have with respect to accessing contraceptives, the rights must be the same for unmarried and married individuals.

Read in light of Bowers, Eisenstadt demonstrates that the right of privacy is far broader for heterosexuals than it is for homosexuals. If in other cases the Court applied the same standard it used in Bowers, the Court would not recognize many of the interests already included in the right of privacy. For example, using contraceptives could still be prohibited because the Eisenstadt Court found no fundamental right to obtain contraceptives. Instead, the right to access and use contraceptives flows from the larger privacy right—an individual's right to engage in and make choices about intimate sexual relations, including freedom of procreative choice. Thus, "[t]he essential 'liberty'... surely embraces the right to engage in nonreproductive sexual conduct that others may consider offensive or immoral." Yet, Bowers denies this right to homosexuals.

The early twentieth century attack against contraceptive use is "almost word for word, the [same] charge hurled by every critic of homosexuality—and for the same reasons." In Margaret Sanger's era, contraception was blamed for perverting natural functions, perpetuating immorality, fostering egotism, and enervating self-indulgence. Dire social consequences were predicted. By the early twentieth century, states had a long history of criminalizing the use of contraceptives.

Courts could have concluded that it was anomalous to find that discrimination against individuals who used contraceptives violated equal protection guarantees. If it is constitutionally permissible for a

209. Id. at 447.
210. Id. at 453.
211. Id.
212. See, e.g., Strasser, supra note 28.
213. Id. at 971-72 (concluding that the standard applied "would not have been met by many of the interests already included within the right to privacy").
216. Rotelo & Graff, supra note 44, at 12.
217. Id.
218. Id.
219. Strasser, supra note 28, at 972.
state to criminalize the use of contraception, surely it is constitutionally permissible for a state to enact other laws disfavoring individuals who use contraception. Individuals who use contraceptives could be classified separately from other citizens for different treatment under the law based on their conduct and their status as "contraception users." This analysis would be consistent with the narrow standard applied in *Bowers*. Yet this limited application of the court's narrow analysis has been reserved for homosexuals only.

Justice Blackmun argued that the *Bowers* majority applied the wrong level of specificity in its analysis. "This case is no more about 'a fundamental right to engage in homosexual sodomy,' . . . than *Stanley v. Georgia* was about a fundamental right to watch obscene movies . . . ."\(^{220}\) In *Stanley v. Georgia*,\(^{221}\) the Supreme Court held that private possession of obscenity in the home cannot be made criminal. Yet the *Bowers* majority held that there was no privacy right to engage in homosexual sodomy in the privacy of one's home.\(^{222}\) By characterizing the rights of homosexuals differently than the rights of heterosexuals, an anomaly results. Two homosexual men can watch a video depicting sodomy in the privacy of their home, and they are constitutionally protected. If the same two men actually engage in sodomy in the privacy of their own home, however, they are not constitutionally protected.\(^{223}\)

The *Bowers* concurrence's reliance on religion is equally misplaced. Throughout history, Judeo-Christian morality has condemned many practices as immoral. To the extent states no longer punish such prac-

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223. The impact of discrimination on the lives of homosexuals is especially dramatic in relation to the facts in *Bowers*. Michael Hardwick was arrested and jailed for behavior that had taken place in his home, a sanctuary afforded special protections under the Fourth Amendment. Tribe, *supra* note 29, at 1424.

In [no setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated."

Payton v. New York, 445 U.S. 573, 601 (1980). In *Payton v. New York*, 445 U.S. 573, 617 (1980), Justice White in dissent wrote that police procedures must at a minimum "protect individuals against the fear, humiliation, and embarrassment of being roused from their beds in states of partial or complete undress." Ironically, "Hardwick was watched, seized and handcuffed by police in his own bedroom—the arresting officer refused even to leave the room or turn his back while Hardwick and his companion dressed." Tribe, *supra* note 29, at 1424-25. Nevertheless, Justice White, writing for the *Bowers* majority, "brushed aside" Hardwick's claim for sanctuary in his home. *Id.*
tices, reliance on Judeo-Christian morality is arbitrary. Distinctions based on homosexuality also lack evenhandedness. These distinctions place moral burdens on one class of citizens, but not on others. Even in states that still criminalize heterosexual sodomy, heterosexuals can engage in sodomy and still marry. The only justification for this distinction is to argue that the secondary effects of sodomy between two consenting homosexuals is different—more immoral or harmful—than the effects of sodomy between two heterosexuals. But this requires demonstration of a harmful effect to justify the disfavored treatment of homosexuals based on morality, something the Bowers Court said was unnecessary. But, the Court's precedent usually has required a showing of harm to justify morality as a rational basis for laws.

In Eisenstadt, the Supreme Court rejected the State's argument that morality alone could justify prohibitions against an unmarried individual's right to access contraceptives. Instead, the Court held that this rationale was dubious, particularly because prohibitions on access to contraceptives by unmarried individuals would have little effect on deterring fornication, the state's asserted objective.

Again, in Carey v. Population Services International, the Supreme Court held that when a state burdened a fundamental right, its justification for the burden requires more than an unsupported assertion. Both parties in Carey conceded that no evidence supported the conclusion that teenage sexual activity increases in proportion to the availability of contraceptives. In cases other than Bowers, morality has been upheld as a legitimate justification for regulating con-

224. The purpose of these illustrations is not to advocate for immoral behavior, but to demonstrate the arbitrary application of the law as applied to homosexuals.

225. "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." Bowers v. Hardwick, 478 U.S. 186, 196 (1986). But cf. Tribe, supra note 29, at 1428 ("Because Georgia's sodomy law slices deeply into the sanctity of the home and the autonomy of private sexual choices, it cannot be defended . . . by 'the mere assertion that the action of the state finds justification in the controversial realm of morals.' (quoting Poe v. Ullman, 367 U.S. 497, 545 (1961)(Harlan J., dissenting)).

226. "Georgia would be required to show an actual connection between the forbidden acts and the ill effects it seeks to prevent." Bowers v. Hardwick, 478 U.S. 186, 209-10 n.3 (1986)(Blackmun, J., dissenting). See also Welch, supra note 168 (concluding that Barnes v. Glen Theatre, 501 U.S. 560 (1991), was the first case to usher in "constitutional populism," allowing the majoritarian morality to dictate a rational basis for laws without a showing of harm from the proscribed behavior).


228. Id. at 448.


230. Id. at 695.
duct without proving secondary effects because all members of the community shared the moral burden equally.

In *Barnes v. Glen Theatre, Inc.*, the Supreme Court upheld a state ban on public nudity as it applied to barroom dancing. The regulation required dancers to wear pasties and a G-string. The plurality opinion accepted the premise that nude dancing was sufficiently expressive to receive some minimal First Amendment protection, yet upheld the regulation because the statute was not aimed at expression, and the rights of the dancers were only incidentally burdened.

In a concurring opinion in *Barnes*, Justice Scalia concluded that morality provided a sufficient rational basis to uphold a neutral law. The law was neutral because the state's interest in preventing public nudity was neutral. Scalia suggested he might find more reason to suspect the regulation or to require a higher burden of justification if the regulation burdened one group engaging in nudity, while turning a blind eye to nude beaches or other instances of nudity. In pitching the argument, Justice Scalia reiterates the "constitution populism" argument: absent a constitutional prohibition, morality alone serves as a rational basis for the law. But surely that can be true only in the case of a "general" law, when the burden is shared equally by all citizens. The element of government neutrality is a requirement of all government-made law.

**B. Without Religion**

The arbitrary use of morality to deny gays and lesbians equal rights is further illustrated by analyzing how religion is used to justify bans on gay marriage. Even if a majority of religious groups condemn such behavior, the state still cannot justify imposing religious judgments on the entire citizenry. Central to understanding this argument is the concession that not all homosexuals are "without religion" and not all religious groups condemn homosexuality. Reliance on

232. *Id.* at 566-67.
233. *Id.* at 575, 580 (Scalia, J., concurring).
234. *Id.* at 573-74.
235. *Id.* at 575.
237. Opponents of same-sex marriage have never clarified the line between morality and religion, yet most opponents have used religious moral arguments to justify their positions.
religious-based morality as a justification for bans on same-gender marriages assumes that no competing religious interests are at stake. The erroneous assumption is that homosexuals must necessarily be nonreligious. In fact, more than 300 congregations of the Metropolitan Community Church have formed specifically to serve the religious needs of the gay and lesbian community,\(^\text{239}\) and other congregations welcome gay and lesbian members.\(^\text{240}\)

Homosexuals lobby just as vigorously to encourage churches to honor same-sex unions as they lobby to gain legal recognition precisely because marriage also has spiritual significance to many same-gender couples. Gays and lesbians are not without their own religions and religious beliefs simply because their beliefs do not espouse homosexuality as a sin. To the extent gays and lesbians are denied fundamental rights based on others' religious beliefs, they become victims of religious persecution.\(^\text{241}\)

C. Criminal

Cases since Loving v. Virginia confirm that the right to marry is of fundamental importance for all individuals.\(^\text{242}\) Even accepting the argument that gays and lesbians suffer discrimination not for who they are, but for what they do, precedent involving marriage interests illustrate that homosexual conduct receives significantly different treatment than the conduct of other citizens. Further, this precedent has rejected the idea that consent requirements can be imposed arbitrarily on an individual's right to marry.

In Zablocki v. Redhail\(^\text{243}\) the Supreme Court struck down as unconstitutional a Wisconsin statute that prohibited citizens who defaulted on court-ordered child support from marrying without state consent. The Court reiterated that the "right to marry is of fundamental importance for all individuals,"\(^\text{244}\) even those who had proven themselves not up to the task. When a classification significantly interferes with an individual's access to marriage, critical examination

\(^\text{239.}\) The Universal Fellowship of Metropolitan Community Churches, Bylaws and Mission Statement (July 1993)(on file with the Nebraska Law Review).

\(^\text{240.}\) See Sherman, supra note 238.

\(^\text{241.}\) "A government can not be premised on the belief that all persons are created equal when it asserts that God prefers some." Lee v. Weisman, 505 U.S. 577, 606-07 (1992)(Blackmun, J., concurring).

\(^\text{242.}\) The Supreme Court has been careful "to avoid declaring that marriage is a fundamental right and has preferred to speak of 'fundamental interests' and 'basic rights,' suggesting that perhaps something less than the strictest level of judicial scrutiny may apply when laws infringe upon the marital interest." Wardle, supra note 74, at 29 n.111. For the purposes of this Comment, however, this distinction has only incidental relevance.


\(^\text{244.}\) Id. at 384.
of the state's interests is required.\textsuperscript{245} The Zablocki Court held that there was no clear connection between the state's asserted interest in the welfare of children and the means chosen to effectuate that interest of restricting the right to enter marriage.\textsuperscript{246}

Likewise, in Turner v. Safley,\textsuperscript{247} the Supreme Court upheld a facial challenge to a regulation that restricted a state prison inmate's right to marry. The regulation permitted an inmate to marry only with the prison superintendent's consent, which could be given only when justified by "compelling reasons." While the Court agreed that a prisoner's right to marry is subject to substantial restrictions as a result of incarceration, it also held that important attributes of marriage remain, even taking into account the limitations imposed by prison life, to form a constitutionally protected relationship interest.\textsuperscript{248} The Court characterized those attributes of marriage as the expression of emotional support and public commitment; the expression of personal dedication; a precondition to the receipt of government benefits, property rights, and other less tangible benefits; and the eventual consummation of the marriage.\textsuperscript{249}

The Court used a "reasonableness test," and struck down the prison regulation as unconstitutional. A reasonable regulation requires a "valid, rational connection" between the regulation and a legitimate and neutral governmental interest forwarded to justify its interest.\textsuperscript{250} The regulation will not be sustained when the logical connection between the regulation and the asserted goals is so remote as to render the policy arbitrary or irrational, or when the government's objective is illegitimate.\textsuperscript{251} Applying this test, the Turner Court found an "exaggerated," and thus facially invalid connection between the

\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} 482 U.S. 78 (1987).
\textsuperscript{248} Id. at 95-96.
\textsuperscript{249} Id. With regard to the last interest, it can be assumed the court is referring to individuals' interest in the sexual intimacy of their marriage relationship. It is argued that homosexuals are incapable of consummating their marriages. Yet, consummation of marriages generally has been regarded as a legal justification for getting out of the marriage, not a legal requirement for entering into the marriage. See Keane, supra note 9, at 526 & n.183. The Supreme Court has stated that all marriages are presumed valid without mention of its consummation. Sondrea Joy King, Ya'll Cain't Do That Here: Will Texas Recognize Same-Sex Marriages Validly Contracted in Other States?, 2 Tex. Wesleyan L. Rev. 515, 541 n.193 (1996)(citing Loughran v. Loughran, 292 U.S. 216, 223 (1934)). It could be argued that same-sex marriages are not legally permissible because homosexuals would have to violate state antisodomy laws to consummate their marriages. Yet, this would not be true in states that have abandoned their criminal sodomy laws.
\textsuperscript{250} Id. at 89-90.
\textsuperscript{251} Id.
prison's interest in security and the restriction on marriage.252 The Court noted that "[t]hese incidents of marriage . . . are unaffected by the fact of criminal confinement or the pursuit of legitimate corrections goals."253 The Court reasoned that an individual's relationship interests in marriage are significant enough that not even a compelling state interest in criminal conduct could completely override the criminal's fundamental interest in marriage.254 "Our task . . . is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'"255

Zablocki and Turner illustrate yet another anomaly that results from the unequal treatment of homosexual's marriage rights. Turner concluded that relationship interests in marriage are not significantly altered by conduct or status, even when the conduct itself is criminal or unprotected, and even when the need to confine individuals based on their criminal conduct has been sufficiently justified based on threats to the general welfare. Further, Turner recognizes that in all cases, the individual's interests in marriage must be balanced against the government's interests in restricting an individual's right to marry. No presumption of constitutionality exists when government restrictions significantly interfere with the individual's ability to enter into marriage. By analogy, then, restrictions against same-gender marriages must balance gay and lesbian marital interests against the necessity of the important government interest advanced by prohibitions against same-gender marriages.

While the logic in Turner seems to require application of the above analysis to same-sex marriages, lower courts have sidestepped equal protection challenges to prohibitions on same-gender marriages by relying instead on substantive due process arguments.256 Like the Bowers Court, lower courts hold that homosexual behavior is not so rooted in history and tradition to qualify for constitutional protection.257

252. Id. at 90-91.
254. Id. at 95-96.
255. Id. at 96, 85 (emphasis added)(quoting Procunier v. Martinez, 416 U.S. 396, 406 (1974), overruled by Thornburgh v. Abbott, 490 U.S. 401 (1989)). Only one time has the Supreme Court upheld a prohibition against marriage in the case of prisoners. Butler v. Wilson, 415 U.S. 953 (1974). In Butler v. Wilson, the state prohibited inmates serving a life sentence from marrying. In such situations, the Court held that the State justified its interest as part of the punishment for crime involving a life sentence because the asserted penological objective was sufficiently important to justify the deprivation of the right to marry.
256. See, e.g., Baker v. Nelson, 191 N.W.2d 185, 185-86 (Minn. 1971)(arguing that the traditional definition of marriage as between one woman and one man is controlling), appeal dismissed, 409 U.S. 810 (1972). But cf: John Boswell, Same-Sex Unions in Premodern Europe (1994); Eskridge, supra note 45.
Constitutional scholars and several courts have suggested these conclusions result from a misunderstanding of the principal differences between due process and equal protection. The Due Process Clause is tradition-protecting, while the Equal Protection Clause is tradition-correcting. The Due Process Clause is meant to safeguard rights, while the Equal Protection Clause assures that those rights are applied equally, or if not applied equally, that sufficient justification supports the distinction.

Even courts refusing to extend the right to marry to homosexuals based on a due process analysis have suggested the marriage interest is not constitutionally immune from evenhanded regulation. While the Equal Protection Clause does not prevent the government from enacting laws based on substantive value choices, it does require evenhanded application of these values.

The Equal Protection Clause, by contrast [to the Due Process Clause], protects minorities from discriminatory treatment at the hands of the majority. Its purpose is not to protect traditional values and practices, but to call into question such values and practices when they operate to burden disadvantaged minorities.

... It is perfectly consistent to say that homosexual sodomy is not a practice so deeply rooted in our traditions as to merit due process protection, and at the same time to say, for example, that because homosexuals have historically been subject to invidious discrimination, laws which burden homosexuals as a class should be subjected to heightened scrutiny under the equal protection clause. Indeed, the two propositions may be complimentary. In all probability, homosexuality is not considered a deeply-rooted part of our traditions precisely because homosexuals have historically been subjected to invidious discrimination. In any case, homosexuals do not become "fair game" for discrimination simply because their sexual practices are not considered part of our mainstream traditions.

To the extent conduct or status justifies barring same-gender couples from marriage, such justification violates the Equal Protection Clause because conduct and status are used against homosexuals to deny

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259. Sunstein, supra note 258, at 1174-76.

260. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). See also Zablocki v. Redhail, 434 U.S. 374, 403-04 (1978)("A classification based on marital status is fundamentally different from a classification which determines who may lawfully enter into the marriage relationship. The individual's interest in making the marriage decision independently is sufficiently important to merit special constitutional protection."). Regulations restricting the right to enter into marriage must be evenhanded.


262. Id. at 718-19.
them marriage rights in a way the justifications are not and cannot be used against heterosexuals.\textsuperscript{263}

\textbf{D. Threat}

[The deliberative conception of democracy . . . restricts the reasons citizens may use in supporting legislation to reasons consistent with the recognition of other citizens as equals. Here lies the difficulty with arguments for laws supporting discrimination . . . . The point is that no institutional procedure without such substantive guidelines for admissible reasons can cancel the maxim "garbage in, garbage out."\textsuperscript{264}]

At least one state now has recognized that prohibitions on same-gender marriages may violate equal protection guarantees. In 1993, the Hawaii Supreme Court in \textit{Baehr v. Lewin} held that under its state constitution the state’s marriage statute contained an impermissible sex classification.\textsuperscript{265} The Hawaii Constitution contains an equal rights amendment that prohibits the denial of civil rights on the basis of sex.\textsuperscript{266} The court did not recognize a fundamental right to enter into homosexual marriages. Instead, it recognized that the right to marry is a basic civil right. Since Hawaii’s marriage statute regulates rights and benefits on the basis of the applicants’ gender, the statute involved both a civil right and a sex-based classification.\textsuperscript{267}

The \textit{Baehr} court soundly rejected the State’s definitional argument to uphold the gender classification in marriage laws for several reasons.\textsuperscript{268} First, marriage is a state conferred legal status and a state defined classification.\textsuperscript{269} This implicates the equal protection challenge because the Hawaii Constitution makes all gender classifica-

\textsuperscript{263}. See Robinson v. California, 370 U.S. 660 (1962)(holding that status, as opposed to conduct, cannot be made a crime).

\textsuperscript{264}. Sunstein, supra note 133, at 59 (quoting \textit{John Rawls, Political Liberalism} 430-31 (2d ed. 1996)).


\textsuperscript{266}. The Hawaii Constitution provides that

\begin{quote}
No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.
\end{quote}


\textsuperscript{267}. Gender discrimination exists because a lesbian is told that she may not marry the person of her choice since she is not a man. Likewise, a man is told he cannot marry the person of his choice because he is not a woman. Because of sex, people are prohibited from doing something that they could do if of a different sex.

\textsuperscript{268}. \textit{Baehr v. Lewin}, 852 P.2d 44, 63 (Haw. 1993)("The facts in \textit{Loving} and the respective reasoning of the Virginia courts, on the one hand, and the United States Supreme Court, on the other, both discredit the [definitional argument] and unmask the tautological and circular nature of [the state's] argument . . . ." (citations omitted)).

\textsuperscript{269}. \textit{Id.} at 58.
tions expressly suspect.\textsuperscript{270} Second, denying access to obtain marriage status and denying the corresponding rights and benefits causes a significant harm.\textsuperscript{271} Finally, and perhaps most significantly, homosexual status is irrelevant to the equal protection challenge; same-gender couples are prohibited from marrying simply based on their gender. Because the statute involves gender classifications, the government must demonstrate a compelling reason to justify the distinction or the statute must fall.\textsuperscript{273}

The dissent disagreed that the state marriage statute involved a gender classification. The dissent fell in line with the definitional view of marriage as one man and one woman and distinguished \textit{Loving}. The issue involved in \textit{Loving} fit the marriage "definition."\textsuperscript{274} Therefore, the dissent reasoned that the definition of marriage treats everyone alike and applies equally to both sexes.\textsuperscript{275} This is the "separate but equal" argument that appears to justify regulations on terms

\textsuperscript{270} \textit{Id.} at 60. Racial classifications in marriage statutes required two whites or two blacks. Gender classifications prohibit two men or two women from marrying. In each instance the applicant can be prohibited from entering marriage because they are not the correct race or gender. In each instance, those applicants are disadvantaged, burdened, or harmed.

\textsuperscript{271} \textit{Id.} at 59.

\textsuperscript{272} \textit{Id.} at 54 n.14.

\textsuperscript{273} The Court determined that "strict scrutiny" was the proper test for a suspect classification based on gender under the Hawaii Constitution. In \textit{Frontiero v. Richardson}, 411 U.S. 677, 688 (1973), the Supreme Court agreed that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to strict judicial scrutiny." The plurality opinion in \textit{Frontiero} used both strict and intermediate scrutiny. The "Powell group" reasoned that intermediate scrutiny was sufficient to strike down the law and concluded that since strict scrutiny was unnecessary to the Court's conclusion, declaring strict scrutiny to be the proper standard for gender classifications should be avoided. This reasoning was applied in light of pending state ratification (which failed) of the Equal Rights Amendment, so there was sufficient reason to let the legislative process proceed.

The Hawaii Supreme Court thus concluded that

\begin{quote}
\textit{[t]he Powell group's concurring opinion ... permits but one inference: had the Equal Rights Amendment been incorporated into the United States Constitution, at least seven members (and probably eight) of the \textit{Frontiero} Court would have subjected statutory sex-based classifications to \"strict" judicial scrutiny.}

In light of the interrelationship between the reasoning of the Brennan plurality and the Powell group in \textit{Frontiero} ... and ... the Equal Rights Amendment—in the Hawaii Constitution ... we hold that sex is ... subject to the \"strict scrutiny\" test. It therefore follows, and we so hold, that (1) [Hawaii's marriage statute] is presumed to be unconstitutional (2) unless ... the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights.
\end{quote}


\textsuperscript{274} \textit{Baehr v. Lewin}, 852 P.2d. 44, 70 (Haw. 1993)(Heen, J., dissenting).

\textsuperscript{275} \textit{Id.} at 71 (Heen, J., dissenting).
of superficial equality. But, the *Loving* Court specifically rejected this argument. It was not the definition of marriage that failed in *Loving*. Rather, the definition was an insufficient government interest to support the burden of a constitutional right: the traditional definition of marriage that was in vogue at that time was an insufficient justification for the burden placed on an individual's decision to enter marriage.

The dissent in *Baehr*, like the proponents of bans on same-gender marriages, argued that the court's equal protection holding constitutes illegitimate judicial activism. The majority responded by reiterating basic equal protection principles. Laws that classify citizens for unique burdens or benefits must be justified or they violate the Equal Protection Clause. When the classification involves a fundamental right or a suspect class, the government's burden of justification is heightened. The majority recognized that the principle of equal protection limits legislative power. While "the legislature, in enacting [the state marriage statute], obviously contemplated marriages between persons of the opposite sex," legislative intent is not dispositive of the equal protection claim. The majority relied on *City of Cleburne v. Cleburne Living Center, Inc.*, in which the Supreme Court stated that even under a rational basis review, the government cannot "avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic." "It is plain that the electorate as a whole,... could not order...action violative of the Equal Protection Clause."

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276. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)(stating that if the separate but equal doctrine violated the equal protection clause, "it is not by reason of anything found in the [statute], but solely because the colored race chooses to put that construction upon it").


280. *Id.* at 67 (stating that "marriage is a basic civil right").

281. That marriage is a basic civil right "is relevant to the prohibition set forth in article I, section 5 of the Hawaii Constitution against discrimination in the exercise of a person's civil rights, *inter alia*, on the basis of sex." *Id.*

282. *Id.* at 60 n.20.


284. *Id.* at 448.

By taking the Full Faith and Credit Clause out of the legal equation... Congress will... protect the ability of the elected officials in each State to deliberate on this important policy issue free from the threat of constitutional compulsion.286

In Romer v. Evans, Justice Scalia characterized the debate over gay rights as a "culture war."287 Likewise, the battle for and against same-gender marriages can be viewed as a war mentality. The implications of the Baehr decision pose a serious threat to opponents of same-gender marriages. Members of Congress reacted to combat this threat and passed the Defense of Marriage Act of 1996 (DOMA).

DOMA has two provisions, each raising its own set of constitutional issues. The first provides that "[n]o State... shall be required to give effect" to same-gender "marriage" licenses issued by another State.288 The second provision defines marriage for all purposes of federal law as "only a legal union between one man and one woman as husband and wife."289 These provisions have two effects. First, states are granted an exemption from the Full Faith and Credit Clause so that no state would be required to recognize same-sex marriages that are legal in other states. Second, all federal benefits associated with same-gender marriage and family are denied even if a state has legalized these marriages.

When the Hawaii Supreme Court's decision in Baehr v. Lewin290 made same-gender marriages a likely probability in Hawaii, opponents of these marriages feared that if Hawaii validated same-sex marriage, other states also would have to recognize the validity of such unions. While courts perhaps could find public policy exceptions to invalidate certain marriages, a significant number of states either have enacted validation statutes or have adopted the Uniform Marriage and Divorce Act (Uniform Act), which presume the validity of marriages performed in other states.291 The Uniform Act expressly

287. Romer v. Evans, 116 S. Ct. 1620, 1637 (1996)(Scalia, J., dissenting)(holding unconstitutional Colorado's Constitutional Amendment Two, which prohibited any governmental action that would protect any person based on their "homosexual, lesbian or bisexual orientation, conduct practices or relationships").
290. 852 P.2d 44 (Haw. 1993).
291. See Note, supra note 11, at 2051 n.71. See also Keane, supra note 9, at 515 n.103. The following states have adopted the Uniform Act's validation section: Arizona, Colorado, Illinois, Minnesota, Missouri, Montana, and Washington. The following states have enacted their own validation statutes: Arkansas, California, Idaho, Kansas, Kentucky, Michigan, Nebraska, New Mexico, South Dakota, Utah, and Wyoming.
fails to incorporate a public policy exception for states in favor of stability and predictability.\textsuperscript{292}

Many commentators have challenged the constitutionality of DOMA,\textsuperscript{293} including several constitutional scholars who testified before Congress during the DOMA debates.\textsuperscript{294} Congressional power to enact the first provision in DOMA, which creates a categorical exception to the Full Faith and Credit Clause in regard to same-gender marriages, has been emphatically challenged.\textsuperscript{295} As a matter of "first principles," Congress is confined to exercise those powers expressly delegated to it by the Constitution.\textsuperscript{296} Those powers not expressly delegated are reserved to the states via the Tenth Amendment.\textsuperscript{297}

The House Report accompanying DOMA argues that the Full Faith and Credit Clause itself empowers Congress to enact DOMA.\textsuperscript{298} The second provision of the Full Faith and Credit Clause states that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."\textsuperscript{299} Congressional proponents of DOMA argue that the Clause should be read to mean that Congress shall be able to prescribe the effects of another state's acts.\textsuperscript{300} According to the House Report, this "narrow, targeted relaxation" of the Full Faith and Credit Clause is constitutional.\textsuperscript{301} Thus, if DOMA is unnecessary because states may rely on public policy exceptions to evade same-gender marriages, it cannot be unconstitutional for Congress to clarify that states have such authority.\textsuperscript{302} Proponents of DOMA suggest it is far "preferable" to "set forth.

\textsuperscript{292} See Note, supra note 11, at 2051 ("By rejecting the 'strong public policy' exception, the UMDA assumes that, except in the case of specifically prohibited marriages, states should ensure stability and predictability in familial relations by validating legal foreign marriages, whether or not the state's own law would permit the celebration of such a marriage locally.").

\textsuperscript{293} "[DOMA] is woefully ill-advised and is morally wrong." 142 CONG. REC. S10076 (daily ed. Sept. 9, 1996)[hereinafter Testimony I](statement of Rabbi Saperstein, Professor, Georgetown University Law Center). See also id. at S10079 [hereinafter Testimony II](statement of Herma Hill Kay, Dean, University of California School of Law).

\textsuperscript{294} Testimony I, supra note 4, at S5932 (statement of Prof. Tribe); Hearings, supra note 4 (statement of Prof. Tribe).

\textsuperscript{295} See Testimony I, supra note 4, at S5932 (statement of Prof. Tribe); Hearings, supra note 4 (statement of Prof. Tribe); Paige Chabora, Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996, 76 Neb. L. Rev. 603 (1997).

\textsuperscript{296} Testimony I, supra note 4, at S5932 (statement of Prof. Tribe).

\textsuperscript{297} Id. at S5932 (statement of Prof. Tribe)(quoting New York v. United States, 505 U.S. 144, 155-56 (1992)).

\textsuperscript{298} Id. at S5932 (statement of Prof. Tribe)(quoting United States v. Lopez, 115 S. Ct. 1624, 1626 (1995); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).


\textsuperscript{300} U.S. CONST. art. IV, § 1.

\textsuperscript{301} Id. at 28, reprinted in 1996 U.S.C.C.A.N. 2905, 2932.

\textsuperscript{302} Id.
specific statutory guidelines to direct the courts” as to what the law should be in this complicated area, “rather than to leave it to the uncertain and inefficient prospect of litigation.”

Such reasoning is faulty for two reasons. First, Congress has no power to alter or “relax” the Constitution even if Congress could achieve the same result through constitutional means. Second, public policy exceptions under the Full Faith and Credit Clause, as well as under the conflict of laws doctrine, require judicial proceedings to determine the applicable law and rights of the parties. Congress is powerless to circumvent the judicial process, even if Congress ultimately would achieve the same results as a judicial proceeding. Denying parties access to courts to adjudicate constitutional rights most likely violates previous Supreme Court precedent.

Congress also has made it more difficult for gays and lesbians to enact same-gender marriage legislation at the state level. Ironically, Congress has interfered with the democratic process and significantly diluted the credibility of the argument that gays and lesbians, needing no political protection, do not merit suspect status. Regardless of whether states allow people of the same sex to marry, whether the decision is made by the state supreme court, by referendum, by a state legislature, or by a combination thereof, the “only real force [DOMA] will have will be to deny a state and the people of that state the right to make decisions on the question of same-sex marriage.” In unneutral terms, Congress has disadvantaged gays and lesbians by constructing obstacles in their political path.

The Supreme Court’s holdings in both Romer v. Evans and Hunter v. Erickson suggest that DOMA may violate the Due Process Clause of the Fifth Amendment by imposing a unique burden on gays and lesbians alone. By passing DOMA, Congress gave states

303. Id.
304. See Romer v. Evans, 116 S. Ct. 1620, 1628 (1996) (“A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”).
305. See, e.g., id. at 1629 (Scalia, J., dissenting) (characterizing gays and lesbians as a “politically powerful minority”). But see Amar, supra note 129, at 232-33 (“Justice Scalia suggests that the inequality imposed—forcing gays and bis to win their rights statewide while heteros can win locally—is a justified reaction to queers’ special clout as a ‘politically powerful minority.’ They are organized; they ‘reside in disproportionate numbers in certain communities’; they ‘have high disposable income’; they ‘possess political power much greater than their numbers.’ But much the same could be said—and in some times and places has been said—of Jews. Surely Justice Scalia would not allow Colorado to handicap Jews in elections.”).
309. See Hearings, supra note 4 (testimony of Prof. Sunstein).
a vested interest in not granting marital status to same-gender couples because of states' interest in having their laws recognized in other jurisdictions\footnote{See Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *19-20 (Haw. Cir. Ct. Dec. 3, 1996). The State asserted that DOMA pronounced a compelling interest in securing and assuring the recognition of Hawaii marriages in other jurisdictions that supported the ban on same-gender marriages. The court agreed it was an important issue, but found no additional evidence to support the State's argument. \textit{Id.}} and by making it impossible for states to administer their marriage laws evenhandedly. These two effects of DOMA might influence a state in deciding whether to permit same-gender marriage in the first place.\footnote{See Testimony III, \textit{supra} note 293, at S10079 (statement of Dean Kay).}

Most notably, the questionable constitutionality of DOMA did not delay Congress in its zeal to combat the threat of same-gender marriages. Confident that its intentions would be well-received by a majority of the public, Congress defended its actions as necessary to protect the states from having same-gender marriages foisted on them by "judicial fiat."\footnote{H.R. Rep. No. 104-664, at 7 (1996), \textit{reprinted in} 1996 U.S.C.C.A.N. 2905, 2911. \textit{Id.} at 6, \textit{reprinted in} 1996 U.S.C.C.A.N. 2905, 2910.} While acknowledging that Congress has no say in how the Hawaii Supreme Court interprets its state constitution, the House Report purports to reveal that the citizens of Hawaii do not want marriage licenses issued to couples of the same-gender and this provides a sufficient reason to enact federal legislation to prevent "judicial activism" from legalizing same-gender marriages.\footnote{Testimony I, \textit{supra} note 4, at S5932 (statement of Prof. Tribe)(calling the congressional action a "power grab").} In so arguing, Congress made a calculated and potentially risky decision that sufficient hostility toward same-gender marriages would support Congress' "power grab."\footnote{Testimony II, \textit{supra} note 293, at S10078 (statement of Rabbi Saperstein)("Whatever the result of this . . . legislation, a legal quagmire awaits us.").}

If Congress has guessed wrong, some very unpleasant consequences may result. If even one or two states adopt same-gender marriages, DOMA could backfire, resulting in a "legal quagmire."\footnote{Even if Congress invoked the Commerce Clause as authority to enact DOMA, the Supreme Court's holding in \textit{United States v. Lopez}, 514 U.S. 549 (1995), that Congress had exceeded its scope of authority in enacting the Gun Free School Zone Act, also would suggest DOMA is unconstitutional.} Can the federal government recognize heterosexual marriages only when valid same-gender marriages exist without violating due process? How will DOMA impede a citizen's right to travel?\footnote{Id. at 6, \textit{reprinted in} 1996 U.S.C.C.A.N. 2905, 2910.} Will DOMA make a state's evenhanded administration of their family law impossible?

Ironically, the constitutional issues surrounding DOMA and relatively disregarded by Congress raise questions concerning Congress'
ability to act constitutionally in light of the political realities of contemporary lawmaking. Ironically again, it is precisely this type of abuse of power that mandates judicial review.\textsuperscript{317} Congress rejected the credibility of another branch of government and then asserted that this power grab was necessary but limited—"intruding only to the extent necessary to forestall the impending legal assault."\textsuperscript{318} Then it fastidiously asserted that DOMA will have no effect whatsoever on the manner in which any individual state, including Hawaii, may prescribe its own marriage laws.\textsuperscript{319} Despite its bald assertions, Congress has made it more difficult for states to administer their marriage laws. Congress has made it clear that unless "states happen to share Congress' view"\textsuperscript{320} regarding their own marriage laws, the state is on its own.

VI. LEGITIMATE GOVERNMENT PURPOSE?

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.\textsuperscript{321}

DOMA is unconstitutional for yet another reason—it fails to advance the asserted governmental interests, and the interests DOMA does advance fail to serve legitimate governmental purposes. While legal commentators disagree about the role of ends-analysis in rational basis tests,\textsuperscript{322} any heightened scrutiny requires that the statutory means be related to some legitimate government purpose.\textsuperscript{323} The Supreme Court's previous precedent relating to marriage,\textsuperscript{324} and the Court's holding in Romer v. Evans\textsuperscript{325} suggest heightened scrutiny

\begin{itemize}
  \item \textsuperscript{317} THE FEDERALIST No. 78 (Alexander Hamilton)(Jacob E. Cooke ed., 1961)(describing the roles of the three branches of government).
  \item \textsuperscript{319} Id. at 25, reprinted in 1996 U.S.C.C.A.N. 2905, 2929.
  \item \textsuperscript{320} Tribe, supra note 1, at E11.
  \item \textsuperscript{321} M'Culloch v. Maryland 17 U.S. (4 Wheat.) 316, 421 (1819)(emphasis added).
  \item \textsuperscript{322} But cf. Welch, supra note 168, at 86 ("[E]very means is perfectly related to some purpose. Only when certain purposes are found to be impermissible does the means-testing prong of the rational basis requirement have any significance. Thus a means-focused model designed to avoid value judgments about the legitimacy of legislative purposes . . . only obscures the process that must take place. Even under the deferential rationality standard, courts simply cannot review legislation without making difficult substantive choices.").
  \item \textsuperscript{323} Generally, this has been true of the Court's jurisprudence even under a rational basis analysis. See Reed v. Reed, 404 U.S. 71, 76 (1971)(quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). See also Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974)(quoting Reed v. Reed, 404 U.S. 71, 76 (1971)).
  \item \textsuperscript{325} 116 S. Ct. 1620 (1996).
\end{itemize}
should be applied to statutory bans on same-gender marriages:\footnote{326}{Strong arguments also can be made that bans on same-sex marriage constitute gender discrimination, which also would require heightened scrutiny. See Baehr v. Lewin, 852 P.2d 44, 68 (1993)(citing Loving v. Virginia, 388 U.S. 1 (1967)).} when the means employed by a statute do not relate to the statute's ends, the statutory purpose is illegitimate.\footnote{327}{Welch, supra note 168, at 85 (citing Robert W. Bennett, “Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CAL. L. REV. 1049, 1078 (1979)).}

DOMA's prime objective is to defend heterosexual marriage.\footnote{328}{It is not the interests of certain citizens that determine whether a right is fundamental for other citizens. If a convicted felon has a right to vote, it is because of interests of all citizens on that subject, but it is not the interests of felons that determine whether they have that right. See, e.g., Turner v. Safley, 482 U.S. 78 (1987). In Turner, the Supreme Court specifically rejected the following argument when prison officials argued that different marriage rights should apply to prisoners. We disagree . . . that Zablocki does not apply to prison inmates. It is settled that a prison inmate "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. Id. (alteration in original)(citations omitted).} As the discussion earlier illustrated, marriage is a fundamental interest for all citizens, regardless of their sexual orientation.\footnote{329}{Rights belong to individuals, not groups. See Karst, supra note 79, at 327. See also Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). Same-gender marriages are not announcing a new right.} To restrict a gay or lesbian citizen's interest in marriage, the restriction must advance at least some important governmental interest.\footnote{330}{Justifications for announcing a new right by legalizing same-gender marriages often rest less on the logic or validity of the argument, and more on the "slippery slope" theory. If the right to marry is a fundamental interest for all citizens, then the door opens to other challenges on restrictions to the right to marry. See William Raspberry, The "What Next" Dilemma, WASH. POST, Sept. 30, 1996, at A23 ("The insistence upon eternal certainties regarding matters of which we know very little can make some people cling to positions well beyond their logical defensibility.").}

The standards under \textit{Zablocki v. Redhail}\footnote{331}{434 U.S. 374 (1978).} and \textit{Turner v. Safley}\footnote{332}{482 U.S. 78 (1987).} reject the idea that a separate substantive due process test must be performed before homosexual individuals have the same right to marry as other citizens.\footnote{333}{It is unnecessary for the purposes of this Comment to determine whether the exact nature of the heightened scrutiny should be a rational basis "with a bite" or an intermediate review. The purpose of this section is to examine the relationship between restrictions placed on same-gender marriages and the interests advanced by those restrictions.}

It is not the interests of certain citizens that determine whether a right is fundamental for other citizens.\footnote{334}{See, e.g., Turner v. Safley, 482 U.S. 78, 95-96 (1987). In Turner, the Supreme Court specifically rejected the following argument when prison officials argued that different marriage rights should apply to prisoners. We disagree . . . that Zablocki does not apply to prison inmates. It is settled that a prison inmate "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. Id. (alteration in original)(citations omitted).}
constitutionally protected interest in the marriage relationship, and a homosexual citizen is similarly situated in relation to those interests. It follows that the citizen's right to marry cannot be restricted based on homosexual conduct alone. To say a government interest justifies restricting the right to marry to heterosexual citizens only is something altogether different from saying homosexual citizens have no right to marry in the first instance. The former cannot be used to justify the latter.

In Zablocki, the Court noted that justifying a marriage regulation that significantly interferes with an individual's interests in marriage requires a "critical examination" of the state's interests advanced in support of the classification. The Turner Court permitted substantial restriction on the rights of prisoners, but concluded that to be constitutional, restrictions on an inmate's right to marry must be reasonably related to a legitimate objective. In Turner, the Court found no such relationship and characterized the restriction as an "exaggerated response" to the concerns advanced in support of the restriction.

The Zablocki Court also distinguished between reasonable regulations on marriage and those that significantly interfere with the right to enter into marriage. Regulations may be imposed legitimately if they do not significantly interfere with decisions to enter into the marital relationship. In striking down a state statute restricting the right of "dead-beat dads" to marry, the Zablocki Court concluded that the statute significantly interfered with the right of such fathers to marry and failed to advance the asserted government interest in safeguarding the welfare of children. The statute simply prevented the applicant from marrying, without assuring the applicant's children would receive child support. Moreover, other means were available to accomplish the goal of safeguarding children without impinging on the right to marry.

Of significant importance for the present discussion was the Zablocki Court's finding that the marriage regulations were both significantly underinclusive and overinclusive. The marriage restriction was underinclusive in that it sought to protect support obligations only by limitations on marriage rather than other restrictions that sig-

335. See id. at 95-96.
338. Id. at 91.
340. In both Zablocki and Turner, the Supreme Court appeared to use the "least restrictive means" test. The Court noted, however, this was not the "least restrictive means test." Instead, the existence of alternatives may be evidence that the regulation is not reasonable. Turner v. Safley, 482 U.S. 78, 90 (1987).
nificantly affected the state's interest in that area.\textsuperscript{342} It was overinclusive because allowing marriage actually may better serve the state's asserted interest than would restricting it.\textsuperscript{343} By preventing marriage, the net result of the statute was the opposite effect of what the statute sought to advance.\textsuperscript{344}

Likewise, the Turner Court struck down a restriction on marriage because the restriction was not reasonably related to any legitimate prison objective and was both overinclusive and underinclusive.\textsuperscript{345} Prison officials in Turner identified two justifications for restricting prisoners' right to marry—concerns over rehabilitation and security. The evidence suggested that the only rehabilitative purpose served by the restriction on marriage related to Superintendent Turner's experience with several ill-advised marriage requests from female inmates.\textsuperscript{346} Based on this evidence, the Court concluded that the restriction was overinclusive. Superintendent Turner testified that male inmates did not pose the same problems and, generally, neither did female inmates who married civilians. Thus, the Court held that the proffered justification failed to explain why a rule restricting marriages for all inmates should be adopted.\textsuperscript{347} The Court expressed concern that such a "lopsided rehabilitation" objective was the justification for the broad marriage rule.\textsuperscript{348} "On this record . . . the almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives. We conclude, therefore, that the Missouri marriage regulation is facially invalid."\textsuperscript{349}

With regard to the security interest, the Turner Court noted that "[n]o doubt legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry, and may justify requiring approval of the superintendent."\textsuperscript{350} But the Court held that no evidence suggested the concerns cited would develop with or without marriage, and therefore the regulation did nothing to protect security.\textsuperscript{351} Further, available alternatives placed only a de minimis burden on security while still accommodating the inmates' right to marry.\textsuperscript{352} Due to its rather attenuated connection to the asserted in-

\textsuperscript{342} Id.
\textsuperscript{343} Id.
\textsuperscript{344} Id.
\textsuperscript{345} Turner v. Safley, 482 U.S. 78 (1987).
\textsuperscript{346} Id. at 98-99.
\textsuperscript{347} Id.
\textsuperscript{348} Id. at 99.
\textsuperscript{349} Id.
\textsuperscript{350} Id. at 97.
\textsuperscript{351} Id. at 97-99.
\textsuperscript{352} Id. at 98.
terests, the Court concluded the regulation could be characterized only as an exaggerated response to its objectives.353

In the context of same-gender marriage, Turner still would require a reasonable connection between the restrictions on same-gender marriages and a legitimate and neutral governmental interest (accepting for the moment that there is one) implicated by homosexual status. The "regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational."354 In addition, the Court's analysis of both the overinclusiveness and underinclusiveness of the challenged restrictions in both cases demonstrates that a reasonable classification is one that includes all persons who are similarly situated with respect to the purpose of the law. Arguments used to justify prohibitions on same-gender marriages also are grossly underinclusive and overinclusive because the proffered justifications apply equally to heterosexuals.

A. Overinclusive and Underinclusive with Regard to Those Similarly Situated

Heterosexuals and homosexuals are similarly situated with regard to the interests served by marriage. Opponents of same-gender marriages argue that the government's interest in children via procreation and childbearing is the most compelling justification for banning same-gender marriages. Procreation is perhaps the sole reason the government supports and prefers heterosexual marriage.355 If it was not for procreation, the government would have no interest in encouraging citizens to form families.356 Opponents then assume that because homosexuals cannot procreate, they are not similarly situated to heterosexuals.

Even if such arguments were true at one time, marriage laws are no longer administered this way with regard to heterosexuals. In Baehr, the Hawaii court found that reasons for marrying are not limited to a desire to procreate.357 Additionally, common sense suggests that the procreation argument is, at best, an understatement of the value of marriage to society.358 Supreme Court precedent also asserts that marriage involves far greater interests.359 Marriage has not

353. Id. at 97-98.
354. Id. at 89-90.
358. See supra Part II.
359. See, e.g., Turner v. Safley, 482 U.S. 78, 95-96 (1987)(listing various attributes of marriage, some of which are available even to prisoners).
been solely about procreation since the legalization of birth control in 1965, when the Supreme Court acknowledged the right of married couples to make nonprocreative choices with regard to their marital interests.\textsuperscript{360} Perhaps the most significant reason why this argument fails is because procreation is used against homosexuals in a way that it is not used against heterosexuals. To the extent gays and lesbians are denied marriage rights because they do not plan to procreate, have chosen not to procreate, or are unable to procreate, the ban violates the Equal Protection Clause.\textsuperscript{361} No justification exists for denying heterosexual couples the rights of marriage when their marriage interest is unrelated to procreation. The same can be said for homosexual couples.

Homosexual relationships, like heterosexual relationships, involve decisions relating to procreation and child-rearing. The decision whether or not to "bear or beget" children has been held to be a fundamental right under the Constitution.\textsuperscript{362} Government no longer can base the regulation of access to marriage on an individual's desire or ability to procreate. If failure or inability to procreate cannot affect a heterosexual's right to marry, then it cannot affect a homosexual citizen's right to marry unless some compelling interest distinguishes homosexuals from heterosexuals, and only so long as that interest is achieved by the most narrowly-drawn regulation.\textsuperscript{363}

The problem with the reasonableness of such a regulation is further complicated because gays and lesbians can and do procreate.\textsuperscript{364} Biologically, gays and lesbians have the same procreation capacity as heterosexuals. Gays and lesbians have children prior to their homosexual couplings, through artificial insemination or by surrogacy. Heterosexual couples can use the same methods of procreation. Even if such methods of procreation should be discouraged, millions of heterosexual couples procreate via these same means. Basing marriage rights on the method of procreation chosen would have a significant effect on heterosexual couples as well. To the extent that no such limi-

\begin{itemize}
\item Griswold v. Connecticut, 381 U.S. 479 (1965).
\item It has been estimated that between 10\% and 15\% of all married couples are unable to conceive. Keane, supra note 9, at 518 n.120 (citing Joan Heifetz Hollinger, \textit{From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction}, 18 U. Mich. J.L. Ref. 665, 673 (1985)). Further, it has been estimated that 4.4\% of white wives ages 18-24 expect to have no children. \textit{Id.} at 518 n.121 (citing Elisabeth M. Landes & Richard A. Posner, \textit{The Economics of the Baby Shortage}, 7 J. Legal Stud. 323, 336 (1978)).
\item \textit{Id.} at 686.
\item See, e.g., Kantrowitz, supra note 47, at 52 ("[S]perm banks say they're in the midst of what some call a 'gayby boom' propelled by lesbians.").
\end{itemize}
tations are placed on heterosexual couples, there is no justification for treating the marriage rights of homosexual couples differently because they may choose alternative methods of conception.

B. No Reasonable Relationship to Objective

DOMA simply fails to serve the government's interest in fostering procreation in the marital setting. In fact, by denying gays and lesbians access to marriage, DOMA fosters quite the opposite result. Gays and lesbians are forced to have children outside the marital setting. This neither defends the institution of marriage nor protects the institution from devaluation as suggested by DOMA proponents. Instead, DOMA perpetuates the devaluation of marriage. When citizens learn to survive and prosper without the benefits and protections of marriage, they begin to find that marriage lacks value.

Attempts to justify bans on same-gender marriages also ignore the reality that many gay men and lesbians are not only having children, but already are raising children and will continue to raise their children, with or without access to marriage. DOMA fails to advance the government's interest in protecting the welfare of children. First, by failing to recognize the legitimacy of these families, the children of gays and lesbians are denied legitimacy. Moreover, bans on same-gender marriages jeopardizes children because children raised by same-gender couples are denied the protections and benefits that accompany marriage. One witness who testified for the State in Baehr stated that children raised without the protection of marital status are at greater risk for, inter alia, poverty or economic hardship, and that these children would be helped if their families had access to various benefits of marriage.

Bans on same-gender marriages also fail to advance the government's interest in child-rearing. The Baehr court specifically found that the State failed to present sufficient evidence to demonstrate that gays and lesbians were unfit parents. To the contrary, a continually growing mountain of evidence indicates that homosexuals are as capable as heterosexual couples of raising happy, healthy, and well-

366. It has been estimated that 6 to 14 million children are raised by homosexual parents in at least 4 million households. See, e.g., Keane, supra note 9, at 519 n.124 (citing Daniel Goleman, Studies Find No Disadvantage in Growing Up in a Gay Home, N.Y. Times, Dec. 2, 1992, at C14).
368. Id. at *7 (finding of fact no. 46).
369. Id. at *8 (finding of fact no. 55).
370. Id. at *17-18 (findings of fact nos. 126-35, 139).
adjusted children. The state's evidence in *Baehr* presented perhaps the strongest evidence suggesting that gays and lesbians are fit parents. On remand, the State attempted to justify bans on same-gender marriage by asserting a compellng interest to promote the optimal development of children and that bans on same-gender marriage advanced that interest. Following the testimony of eight witnesses, the court found that the State failed to prove a causal link between same-sex marriage and its adverse effects upon the optimal development of children, or that the public interest in the well-being of children and families would be adversely affected by same-gender marriage. The court noted that one of the state's witnesses agreed that gay and lesbian parents "are doing a good job" raising children and, most importantly, "the kids are turning out just fine."

The Hawaii court's findings of fact support the arguments made in Part II of this Comment relating to the functions that the family serves. The court found that there is diversity in the structure and configuration of families in Hawaii and elsewhere. The evidence established that the single most important factor in the development of a happy, healthy, and well-adjusted child is the nurturing relation-

371. *Id.* at *21 (conclusion of law no. 18)(concluding as a matter of law that insufficient credible evidence supported the position that the public interest in the well-being of children and families would be adversely affected by same-sex marriages because all three witnesses for the State testified that gay parents can be as effective in raising children as heterosexual parents); G. Dorsey Green & Frederick W. Bozett, *Lesbian Mothers and Gay Fathers, in Homosexuality, Research Implications for Public Policy* 197, 198 (John C. Gonsiorek & James D. Weinrich eds., 1991); Cynthia L. Greene & Donald K. Butler, *Gay Parents Ruled Fit, Nat'l L.J., May 1, 1995, at A1, B9; Gregory M. Herek, Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 LAW & SEXUALITY 133, 157 (1991); *Homosexual Parents: All in the Family, 147 SCI. NEWS 42, 42 (1995); Shapiro & Gregory, supra note 47, at 76, 79 (reporting that the American Psychological Association now reports that more than forty studies indicate children of gay parents are likely to be as well-adjusted as the prodigy of traditional unions; society's reaction has the biggest impact on these children; there is a slightly higher incidence of homosexuality among these children, but researchers are unsure if it relates to heredity or to the possibility that these children likely view homosexuality differently; and no evidence indicates parenting style is responsible).

The research on lesbian and gay parents does have serious limitations, however, in that most studies are nonrandom, with subjects who are Caucasian, well-educated, from urban areas, and who are relatively accepting of their homosexuality. Green & Bozett, *supra*, at 199.


373. Four witnesses testified for the State and four witnesses testified for the plaintiffs. While the plaintiffs had no burden of proof in the case, they elected to present testimony.


375. *Id.* (finding of fact no. 135).

376. *Id.* at *17 (finding of fact no. 123).
ship between parent and child. The quality of parenting is the most significant factor affecting child development. The sexual orientation of a parent is not, in itself, an indicator of parental fitness.

C. No Legitimate Purpose

[T]o presume that morality follows heterosexual marriage ignores centuries of evidence that each is possible without the other.

The sole justification remaining for targeting same-gender couples for ineligibility with regard to the generally available privileges of marriage is to promote and preserve morality. Allowing same-gender couples to marry would legitimize homosexuality and threaten the government's ability to stamp homosexual behavior as illegitimate. This justification, however, fails to support the principles advanced by DOMA. The ability to regulate morality at the federal level implies a federal police power. Until DOMA, it was generally understood that no such federal police power existed. According to the constitutional principles of limited government, police powers are left to the states. The Supreme Court emphasized this principle in its recent holding in United States v. Lopez.

Prior to the Supreme Court's decision in Lopez, the Commerce Clause had been widely used to justify congressional power to intrude into areas traditionally within the exclusive domain of the states. The Lopez decision marked the first time in more than sixty years that the Court concluded Congress had exceeded its power under the Commerce Clause. The statute, the Gun Free School Zones Act of 1990, which made it a federal offense for an individual to possess a firearm in a school zone, was struck down. The Court held that an insufficient nexus connected the possession of a firearm and interstate commerce. As a result, the statute was invalid as an unconstitutional exercise of the congressional commerce power because it did not concern the regulation of economic activity. The Court reasoned that upholding the statute ultimately would grant Congress a limitless power to legislate under the Commerce Clause. "[I]t is difficult to perceive

377. Id. (finding of fact no. 125).
378. Id. ("Gay and lesbian parents and [same-gender] couples can provide children with a nurturing relationship and a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children.").
379. Johnson, supra note 74, at 47.
382. Id. at 118-19.
384. See id. at 563-64, 566.
any limitation on federal power, even in areas such as criminal law
enforcement or education where States historically have been sover-
ign.385 If the Court accepted the statute as a valid exercise of con-
gressional power under the Commerce Clause, it would be “hard-
pressed to post any activity by an individual that Congress is without
the power to regulate.”386

Growing from this concept of federalism has been the recognition
that Congress must respect areas traditionally reserved to the states
and refrain from legislating without a truly national purpose. Areas
in which state authority traditionally has been superior to federal au-
thority include activities that “[in the ordinary course of affairs, con-
cern the lives, liberties, and properties of the people, and the internal
order, improvement, and prosperity of the State.]”387 Family law and
domestic relations frequently are invoked as the paradigmatic areas
in which states have reserved power. Key to the Court’s holding in
Lopez was the recognition that the Constitution does not cede a police
power to the federal government.388

DOMA attempts to invoke federal police powers under the guise of
protecting state sovereignty and is little more than a policy that is in
effect, a “‘No Queers’ sign writ large.”389 If Colorado can have no such
sign without infringing on constitutional protections, surely the same
can be said when the federal government posts such a sign.390

VII. CONCLUSION

Very real consequences are associated with bans on same-gender
marriages. The subjugation of gay men and lesbian women dilutes or
defeats their incentive to productively participate in society. To be
productive citizens, homosexuals must assert themselves in a main-
stream that rejects them. Those willing to accept this challenge are
accused of demanding acceptance or even “special rights.”

To be productive citizens, homosexuals bear great risks.391 Some
must lie to keep their jobs, others live in daily fear of being “found
out.” With success comes an even greater fear that everything that
one has worked so hard to achieve may be taken away if an employer
discovers the true nature of the employee’s family. Homosexuals bear

385. Id. at 564.
386. Id.
389. See Amar, supra note 129, at 207 (characterizing Colorado’s Amendment Two as
a “No Queers sign writ large”).
390. Cf. id.
391. “The choice about whether to ‘come out of the closet’ can be of unsurpassed signif-
icance to homosexuals, since doing so can entail enormous social and economic
disadvantages, while declining to do so can exact an enormous price in fulfillment
and self-esteem.” Tribe, supra note 29, at 1434.
an equal share of the burden for the welfare of society, yet their contributions are not rewarded equally.

To take responsibility for their children, gays and lesbians face obstacles designed to make such responsibility extremely difficult. In most states, homosexuals are prevented from taking formal responsibility for the children they are raising through custody and adoption rights. The price is paid by the children who are denied the same security and opportunities to flourish and prosper as granted to other children. When a gay or lesbian parent pleads for the right to protect his or her family, the plea is characterized as a demand for acceptance or "special rights."

The reality of the treatment of homosexuals at the hands of the majority stands in stark contrast to the interests that serve a functional society. On a daily basis, politicians and citizens lament the dysfunction of unemployed individuals who do not take responsibility or provide for their children and who rely on the government and taxpayers for support. On the other hand, politicians and citizens force gays and lesbians to go to great lengths to succeed at work and to honor their family commitments, without support from government or society. Instead, gays and lesbians face obstacles placed in their path and designed to cut them off from participation in family relationships. How can incentives that perpetuate dysfunction by making it more difficult to obtain work or care for one's children and family serve any legitimate public purpose?

Ultimately, bans on same-gender marriages contravene the very objectives they supposedly serve.

Justice Brennan ... concluded that "homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that the discrimination against homosexuals is 'likely ... to reflect deep-seated prejudice rather than ... rationality.'"

Wholly unfounded, degrading stereotypes about lesbians and gay men abound in American society. ... [T]hese attitudes about gay people reflect "prejudice and antipathy" against gay people, because they do not conform to the mainstream. The stereotypes have no basis in reality and represent outmoded notions about homosexuality .... The fact that a person is lesbian or gay bears no relation to the person's ability to contribute [sic] to society. Rather than somehow being enemies of American culture and values, lesbians and gay men occupy positions in all walks of American life, participate in diverse aspects of family life, and contribute enormously to many elements of American culture.392

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