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# An Argument for Same Sex Marriage

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**An Argument for Same Sex Marriage**

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Spring 2006

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I would like to thank Macalester College for providing me with the education, skills and resources necessary to complete this project. My friends Neely Crane-Smith and Phil Chen were indispensable in times of confusion and writers block. I want to thank my father, mother, sister and boyfriend for a year of active listening. Finally, “thank you” to my dear advisor, Professor Adrienne Christiansen, without whom this would be just another long paper.

**“Ultimately, one hopes, liberty arguments and equality arguments will work in tandem to challenge the constitutionality of the bans.”**

**-Professor Carlos A. Ball**

## Table of Contents

<b>Chapter One: Same Sex Marriage and Constitutional Law</b>	<b>Page 3</b>
The Fourteenth Amendment	Page 5
The Two Sides of Liberty	Page 10
<b>Chapter Two: Literature Review</b>	<b>Page 15</b>
Arguments for Rational Relation Standard	Page 19
Arguments for Heightened Scrutiny	Page 22
Arguments for Strict Scrutiny	Page 25
<b>Chapter Three: Relevant Case Law</b>	<b>Page 30</b>
<i>Meyer v. Nebraska</i>	Page 31
<i>Pierce v. Society of Sisters</i>	Page 33
<i>Skinner v. Oklahoma</i>	Page 34
<i>Griswold v. Connecticut</i>	Page 37
<i>Loving v. Virginia</i>	Page 39
<i>Zablocki v. Redhail</i>	Page 40
<i>Turner v. Safely</i>	Page 42
<i>Lawrence v. Texas</i>	Page 44
<b>Chapter Four: An Argument for Same Sex Marriage</b>	<b>Page 49</b>
Suspect Classification: A Dead End Road	Page 50
The Road Less Traveled: Fundamental Rights	Page 52
Liberties Involved in the Right to Marry	Page 53
Due Process and the Protection of Liberty	Page 57
Equal Protection	Page 60
<b>Chapter Five: Conclusion</b>	<b>Page 64</b>
<b>Bibliography</b>	<b>Page 68</b>

## Chapter One

### Same Sex Marriage and Constitutional Law

On February 24, 2004, President George W. Bush called for a federal constitutional amendment that would define a marriage in the United States as one man and one woman, husband and wife. The President's call was a response to several years of debate and legislation over marriage in the U.S. Seemingly endless legislation regarding same sex marriage has been fervently debated at the federal and state level for several years.<sup>1</sup> During the Presidential election, state-by-state votes on the amendment were sponsored by the Republican Party.

As a result of the proposed amendments, same sex marriage has taken its place among the top campaign issues, next to abortion and the death penalty, as a consideration for voters at the polls. If voters endorse same sex marriage, they will rarely support a candidate who opposes it.<sup>2</sup> Opinions on same sex marriage are considered an ideological dividing line between "red" and "blue" states. Campaign-focused arguments about the future of same sex marriage have exploded since the last Presidential election.

Questions arise about the constitutionality of the proposals as the arguments about same sex marriage increase and policy makers react to that discourse. Will an anti-same sex marriage amendment be added to the Federal Constitution? Could such an amendment hold in court? Many of the 2004 amendments to state constitutions were

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<sup>1</sup> Charles E. Mauney Jr., "Landmark Decision or Limited Precedent: Does Lawrence v. Texas Require Recognition of a Fundamental Right to Same Sex Marriage?" Cumberland Law Review 35 (2005): 147.

<sup>2</sup> Katherine M. Franke, "Sexuality and Marriage: The Politics of Same-Sex Marriage Politics," Columbia Journal of Gender and the Law 15 (2006): 236.

responses to Hawaii's and Massachusetts' decisions to allow same sex marriages.<sup>3</sup> While some states have made steps towards legalization, the results have been minimal. The Hawaii Legislature has recently reversed its court decision to allow same sex marriage and Massachusetts same sex marriage contracts have been declared null and void by the governor of Massachusetts. The Massachusetts cases will be heard in the Federal Supreme Court within the next two years and these cases will likely be the battle ground for a Federal decision on same sex marriage.<sup>4</sup>

How will this decision be made? As the amount of social, religious, political and strategic arguments surrounding same sex marriage grows, campaign-focused policy decisions increase. How will the Supreme Court separate the code of law from the politically motivated propaganda, if at all? Furthermore, what will the winning argument look like? While much of the discourse surrounding same sex marriage is social and religious in nature, I focus solely on the legal aspects of the debate. This thesis answers the question, "What might a sound legal argument for same sex marriage look like?" In order to answer this question effectively, this thesis focuses on several elements of the debate. In this chapter, I provide a brief overview of the aspects of constitutional law most relevant to my thesis. This chapter discusses the Equal Protection and Due Process clauses of the Fourteenth Amendment and the meaning of liberty in relation to these clauses. My argument relies heavily on these concepts and applies them to existing precedent to construct a legal rationale for same sex marriage. The first of these constitutional themes is the Fourteenth Amendment and its Equal Protection and Due Process clauses.

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<sup>3</sup> The Hawaii State Supreme Court ruled in favor of same sex marriage in the case of *Baehr v. Lewin* in 1996. The Massachusetts State Supreme Court followed in 2002.

<sup>4</sup> *Goodridge, et. al. v. Department of Public Health, et. al.* (2003).

## **Part One: The Fourteenth Amendment**

In order to understand a legal argument for same sex marriage, it is first necessary to determine what constitutional elements form the argument. The Fourteenth Amendment is an important part of the same sex marriage debate, as it is in my argument. Proposed by the thirty-ninth congress and ratified on June 13, 1868, the Fourteenth Amendment was intended to protect racial minorities, specifically African-Americans, from race-based discrimination.<sup>5</sup> It states,

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>6</sup>

The amendment is composed of several parts, called clauses. Two of these clauses are essential to my argument. They are the Equal Protection Clause and the Due Process Clause.

### **The Equal Protection Clause**

The Equal Protection Clause is made up of the section of the Fourteenth Amendment which reads, "...nor deny to any person within its jurisdiction the equal protection of the laws." While the first uses of the Equal Protection Clause were primarily focused on racial discrimination, it has developed historically and is now considered the constitutional test for any form of discrimination, race-based or

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<sup>5</sup> Lee Epstein and Thomas G. Walker, Constitutional Law for a Changing America (Washington: CQ Press, 2000) 614.

<sup>6</sup> Constitution of the United States of America. USCS Const. Amend. 14, § 1

otherwise.<sup>7</sup> Currently, US courts recognize three methods for applying the Equal Protection Clause in a case of suspected unlawful discrimination.<sup>8</sup>

The first of these methods is the “rational relation” standard for judicial review. This standard places a heavy burden of proof on the petitioner to demonstrate that the state’s policy in question exercises an irrational amount of discrimination. The state must merely demonstrate that the statute in question is *rationally* related to a *legitimate* government interest. This test is the easiest for the state to pass. However, the burden of proof gets heavier as the standard of review changes.

The second method for determining if a statute is discriminatory is the “heightened scrutiny” method of review. This intermediate level of scrutiny was articulated by the Court in *United States v. Virginia* when it identified that the state must have an *exceedingly persuasive* justification for the law and demonstrate that at least the challenged classification serves *important* governmental *objectives*. This standard has traditionally been applied to gender-based classification, but has been applied in cases which addressed anti-miscegenation laws like *Loving v. Virginia*.

Finally, the “strict scrutiny” standard of judicial review is applied to certain classes of discrimination which the court identifies as “suspect classes.” Traditionally, these are claims of discrimination based on race or national origin. This standard of review places a heavy burden of proof on the state. A law which receives this standard of review is considered unconstitutional unless the state can demonstrate that the

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<sup>7</sup> Epstein and Walker, 617.

<sup>8</sup> Epstein and Walker, 614-621. This selection of text informs the following section regarding the levels of scrutiny used in the application of the Equal Protection Clause.



discrimination is *substantially related* and necessary for the accomplishment of a permissibly state objective, or a *compelling state interest*.

The strict scrutiny standard determines whether a group is a suspect class using a three-tiered test. The group in question must be a discrete and insular minority, with a history of discrimination. Next, advocates must demonstrate that the group is defined by an immutable characteristic, and finally, the group must have disproportionately limited access to political power. These tiers of the strict scrutiny standard are difficult to define and are therefore frequently debated. “Applying such criteria is difficult and has given rise to sharp divisions of opinion among the justices” of the Supreme Court.<sup>9</sup>

In addition to the three-tiered test for suspect classification, strict scrutiny can be granted in cases involving the violation of a fundamental right. For example, any statute which prohibits freedom of speech would likely be granted strict scrutiny, regardless of the race of the petitioner, because freedom of speech is a fundamental right. Because this kind of scrutiny does not consider minority status, arguing that a violation of a fundamental right has taken place can be a strategic way to avoid demonstrating the three tiers of the test for suspect classification. I think it is difficult, if not impossible, to demonstrate that sexual orientation is a suspect classification using the three tiered test. Therefore, I argue that a fundamental right is violated when same sex couples are denied a marriage contract. My argument, presented in chapter four, relies heavily on the Due Process Clause but utilizes equal protection claims as well.

The Equal Protection Clause acts as a guideline for the Court and is open to many interpretations. How does a court determine if a group is *based* on an immutable characteristic, like skin color? What makes a state’s interest *compelling*, as opposed to

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<sup>9</sup> Epstein and Walker, 616.

*important?* What makes a right *fundamental*? These questions are highly contestable. A decision to apply one method of scrutiny over another is far from arbitrary, however. In fact, the standard of scrutiny applied will most likely determine the decision of the court in future same sex marriage cases. For this reason, the method of scrutiny applied to a case is a crucial determining factor of the decision.

### **The Due Process Clause**

The Equal Protection Clause is not the only constitutional consideration in the legal question of same sex marriage. The Due Process Clause of the Fourteenth Amendment has a role in the discussion as well. The Due Process Clause reads, “. . .nor shall any State deprive any person of life, liberty, or property, without due process of law.”<sup>10</sup> While straightforward, the Due Process Clause raises many questions. Questions of definition abound. What is “liberty?” What counts as “property?” And, of course, what is “due process of law?”

Due process has been defined in both procedural and theoretical terms. In reference to procedure, due process means the “course of legal proceedings according to rules and principles established in our system of jurisprudence for protection and enforcement of private rights.”<sup>11</sup> In other words, procedural due process is the process which is due to each citizen when he or she is confronted with the law. This includes the right to a fair trial, the reading of Miranda rights and other legal procedures.

My argument concerns the more abstract definition of due process, known as *substantive* due process. “‘Due process of law’ which the Fourteenth Amendment exacts

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<sup>10</sup> Constitution of the United States of America. USCS Const. Amend. 14, § 1

<sup>11</sup> Scott v McNeal, 154 US 34, 38 L Ed 896, 14 S Ct. 1108, 1894.

from states is a conception of *fundamental justice*, and is not satisfied by mere formal correctness, nor is it confined by any absolute rule.”<sup>12</sup> And so, there is more *substance* to due process than simply procedure.

Substantive due process deals directly with the fundamental rights which guarantee strict scrutiny protection. “Due process of law is summarized as a constitutional guaranty of respect for those personal immunities which are so rooted in the traditions and conscience of nation as to be ranked as fundamental or are implicit in concept of ordered liberty.”<sup>13</sup> This means that the Due Process Clause protects fundamental rights. It follows that any violation of a fundamental right is a violation of the Due Process Clause. Because I argue the fundamental right to marry is violated when same sex couples cannot be married, I also argue that there is a violation of the Due Process Clause, or a substantive due process violation.

Such a violation can come in many forms. The Due Process Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests.”<sup>14</sup> It protects life, liberty and property; important fundamental rights. While life and property deserve fervent protection, my argument is most concerned with the concept of liberty. In order to fully understand the substantive due process violation in my argument, it is necessary to understand two forms of liberty, positive and negative.

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<sup>12</sup> *Foster v Illinois*, 332 US 134, 91 L Ed 1955, 67 S Ct 1716, 1947.

<sup>13</sup> *Rochin v California*, 342 US 165, 96 L Ed 183, 72 S Ct 205, 25 ALR2d 1396, 1952.

<sup>14</sup> *Washington v Glucksberg*, 521 US 702, 138 L Ed 2d 772, 117 S Ct 2258, 97 CDOS 5008, 97, 1997.

## **Part Two: The Two Sides of Liberty**

Liberty was a national value before our nation was a nation.<sup>15</sup> It is, in the simplest of descriptions, fundamental. However concrete its role is in our nation's democracy, the definition of "liberty" is highly flexible. It is a term which plays many roles in our government and code of law without having a clear definition. For the purpose of my argument, I require a two part definition of "liberty." The idea that there are two kinds of liberty was functional in the Founding of the nation, although it was not outwardly acknowledged. Today, two terms are used to describe the two kinds of liberty. Those terms are "positive" and "negative" liberty.

The two-part definition of "liberty" describes the relationship between the individual and the government, be it state or federal. In essence, the terms "negative" and "positive" describe the role of the government in the life of the citizen and the actions of the citizen in relationship to the government. What results are two kinds of liberty; one includes privacy and the other includes recognition.

### **Negative Liberty and the Right to Privacy**

Negative liberty is a conception of liberty which limits the role of government in its citizens' lives. The liberties which compose this category were developed as early as the Founding. They are in the "freedom from" category, which includes the freedom from unreasonable search and seizure and cruel and unusual punishment. Also included among the negative liberties is the right refuse to harbor soldiers during wartime. While different

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<sup>15</sup> Alexander Hamilton, "The Federalist No. 1," *The Origins of the American Constitution*, ed. Michael Kammen (New York: Penguin, 1986) 126. "...of those men who have overturned the liberties of republics the greatest number have begun their career, by paying an obsequious court to the people, commencing Demagogues and ending Tyrants."

in magnitude and topic, these freedoms share a common theme: the government must stay out of certain fundamental aspects of the lives of its citizens. In other words, the relation between the government and its people is negative; there is no government involvement beyond legislating to limit the role of government.<sup>16</sup>

While many of the cornerstone negative liberties were articulated at the dawn of this nation, others have developed as the nation's history has progressed. The right to privacy is one such new liberty. "The assertion that the law should recognize a right to privacy originated in an 1890 law review essay by Samuel Warren and Louis Brandeis calling for 'a general right to privacy for thoughts, emotions, and sensations.'"<sup>17</sup> Privacy was introduced as a constitutional concept in contraception cases during the 1960's. Among these are *Eisenstadt v. Baird* and *Griswold v. Connecticut* in 1965. While these cases concerned an idea of privacy different than the privacy torts that Warren and Brandeis defended, the concept of limited government intrusion is consistent within both ideas of privacy. *Griswold* will be discussed further in chapter three, though a discussion of the right to privacy is necessary here.

The right to privacy was directly associated with marriage and intimate relationships early in its development as a constitutional concept. In *Eisenstadt*, Justice William Brennan stated, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a

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<sup>16</sup> Michael Kammen, introduction, *The Origins of the American Constitution*, (New York: Penguin, 1986) ix. "[Political liberty]... meant freedom of action so long as it was not detrimental to others."

<sup>17</sup> William N. Eskridge Jr. And Nan D. Hunter, *Sexuality, Gender and the Law* (New York: Foundation Press, 2004) 9.

child.”<sup>18</sup> Clearly, the right to privacy is a negative liberty; a right which is respected when the government does not act, or intrude, in the lives of its citizens.

The right to privacy has expanded to include other “matters so fundamentally affecting a person,” like sexual conduct. In the case of *Lawrence v. Texas (2003)*, the Court overturned a previous ruling, *Bowers v. Hardwick (1986)*, and ruled against state regulation of same sex sexual behavior. Once again, the government was kept from intruding, quite literally, into the private bedrooms of its citizens.

One of the most useful examples of negative liberty is the right to choose to terminate a pregnancy. Since *Roe v. Wade (1971)*, the government has been obligated to stay out of the private choices of women during the first six months of pregnancy. The right to choose is a negative liberty, and stems from the right to privacy articulated in cases like *Planned Parenthood v. Casey (1992)* and *Griswold (1962)*.

Over time, the right to privacy has developed into a hodgepodge of rights, most associated with private relationships. Because privacy was not originally articulated as a fundamental liberty, its importance and mere existence is contested. Critics, like Robert Bork, have argued that the right to privacy is never outwardly articulated in the Constitution, nor is there any history of legislative intent to develop a right to privacy.<sup>19</sup> Regardless, the right to privacy is now firmly rooted in case precedent. “The Supreme Court has repeatedly held that one aspect of liberty afforded constitutional protection under the Due Process Clause is the right of privacy.”<sup>20</sup> It has taken its place among our

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<sup>18</sup> Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed.2d 349. 1972.

<sup>19</sup> Robert Bork, “Neutral Principles and Some First Amendment Problems,” *Indiana Law Journal* 47 (1971): 8-9.

<sup>20</sup> JoLynn M. Schlichting. “Minnesota’s Proposed Same Sex Marriage: A Flamingly Unconstitutional Violation of Full Faith and Credit, Due Process and Equal Protection.” *William Mitchell Law Review* 31 (2005): 1649.

negative liberties. Among the category of negative liberties, privacy is most essential to my argument for same sex marriage.

Negative liberty is only half of the two-part definition of “liberty”. The concept of positive liberty is also necessary for a rigorous argument in favor of same sex marriage. Positive liberty is the opposite of negative liberty; as opposed to protecting privacy, positive liberties are guaranteed government actions.

### **Positive Liberty and Recognition**

Since the Founding of the United States, United States citizens have been entitled to certain things. This concept of “freedom to” liberties is at the core of civil rights and is what separates democracy from fascism. Foundational positive liberties are those actions in which citizens are free to engage without government punishment.

Positive liberty is not reserved solely for the citizen, however. The government, too, must act. Both government and citizen are *inactive* when negative liberties are concerned (the citizen does not have to do certain things for the government and the government is prohibited from requesting certain things of its citizens). Contrarily, positive liberty imposes obligation on the government. These obligations of the state to its citizens can be financial, as is the case with Social Security and tax refunds. Other positive obligations include access to polling places to facilitate the right to vote. Most pertinent to my argument, however, is the obligation of the state to recognize some intimate relationships as marital. The case of *Loving v. Virginia (1967)* was the first significant Supreme Court case involving recognition of a marriage. This case, and its relationship to my argument, will be discussed in following chapters.

A legal argument for same sex marriage can come in many forms. Indeed, when one has an objective in mind, the Constitution can appear as a tool for achieving that objective. Many have chosen the tools of civil rights, others one of equal protection, while still others view same sex marriage as an issue of federalism and the rights of individual states.

While there are many ways to construct the case for same sex marriage, some are more straightforward than others. I aim to piece the constitutional issues together to form a fairly simple and cohesive line of reasoning that legitimizes same sex marriage. This thesis applies the Due Process and Equal Protection clauses, with a foundation of case precedent, to the question of same sex marriage and concludes that same sex marriage should be legal in the United States. The foundational constitutional themes have been review in this chapter. In the next chapter, I examine the literature which currently shapes the same sex marriage debate and demonstrate the necessity for an un-biased and comprehensive legal argument. I describe the case law which contributes to my argument in chapter three of this thesis. Finally, in chapter four, I demonstrate that the Fourteenth Amendment of the Constitution requires equal distribution of the liberties associated with the fundamental right to marry. My argument is based on case precedent and current legal scholarship and is formulated as a comprehensive Fourteenth Amendment argument for same sex marriage. This thesis places itself in a body of scholarship which is composed of contradictory and incomplete perspectives. These perspectives are discussed in the following chapter.



## Chapter Two

### Literature Review

The amount of scholarly or popular literature produced to address same sex marriage has increased dramatically over the past several years. This is due for the most part to the case of *Lawrence v. Texas* in the legal field and Republican attempts to amend the Constitution in the political field.

Because the question of same sex marriage indirectly relates to almost every other issue of law and politics, the literature which discusses same sex marriage touches on many debates. Aspects of the same sex marriage debate lead to questions about religion, federalism, interstate commerce and adoption law, among others. The literature that discusses civil rights, equal protection, liberty and due process most concerns my thesis. This literature is equally varied. While there are predictable arguments from the radical Christian right which argue that same sex marriage violates traditional family values,<sup>21</sup> and far-left arguments which support same sex marriage from the standpoint of civil rights,<sup>22</sup> there are other, less politically-split qualities of the discussion. This chapter reviews the scholarly and popular literature surrounding the same sex marriage debate and demonstrates that an un-biased and comprehensive legal argument is necessary. My argument is unique for this reason. This thesis is significant because it brings together many aspects of constitutional law, presenting a more complete, legal argument. Virtually none of the literature herein reviewed attempts this. The body of literature into which my argument fits is vast, and includes many debates on its fringes.

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<sup>21</sup> *The Gay Agenda: Gay Marriage*, film, The Report Multi-Media Resource Center, 1993.

<sup>22</sup> Brenda Feigen, "Same Sex Marriage: An Issue of Constitutional Rights, Not Moral Opinions," *Harvard Women's Law Journal* 27 (2004): 345.

The perspectives of queer theorists are among the less conventional arguments surrounding same sex marriage. Many of these scholars, including Paula Ettelbrick, are against same sex marriage. The fringe of the debate also includes the arguments of conservative academics like Andrew Sullivan, who supports gay marriage for its promotion of a conservative social institution. These arguments in the same sex marriage discussion run against the grain of the conventional socio-political sides of the debate. Still, one theme unites the many sides of the same sex marriage discussion in terms of civil rights and discrimination. That is the Fourteenth Amendment.

The Fourteenth Amendment plays a direct or indirect role in the civil rights and discrimination discussion of same sex marriage. Regardless of the overall thesis of the argument (for or against same sex marriage), an approach to the Equal Protection Clause or the Due Process Clause is developed, with or without intention. In many cases, both clauses are addressed.

Indeed, almost every argument that attempts to approach the law and its relationship to same sex marriage inevitably argues for either rational basis, heightened or strict scrutiny legal analysis. For example, it would be contradictory and counter-productive to support the suspect classification of homosexuals (thereby granting them strict scrutiny under the Equal Protection Clause) while simultaneously arguing against same sex marriage. The method of scrutiny supported by the author, therefore, can be inferred by the argument made.

For this reason, the standards of scrutiny applied by the Court in Fourteenth Amendment cases are an effective way to organize the literature surrounding the same sex marriage debate. The first group of arguments reviewed herein utilizes the rational

relation test, which places a heavy burden of proof on those in favor of same sex marriage and does not support homosexuals as a protected class. While this standard of review appears to support an argument against same sex marriage, paradoxically, some perspectives argue otherwise. In the first section of this review, I demonstrate how these arguments (those for and against same sex marriage) conflict and do not lead to the clarification of the question of scrutiny. It follows that they do not develop clear, legally applicable arguments.

Those arguments that support heightened scrutiny are equally confusing. In the second section of this review, I discuss those arguments which lend support to the heightened scrutiny standard of review. This standard has traditionally been applied to gender-based classification. The arguments which support this standard come from all sides of the political spectrum. Among them are the perspectives of radical feminists and queer theorists. While some of these arguments support gay marriage, others argue against it. Much of the inconsistency within these arguments stems from disagreement within the gay and lesbian community over how the gay rights movement should approach same sex marriage and the assimilation it implies. While valid and interesting, this lack of continuity within the community further confuses the practical application of gay rights arguments to a legal analysis of the same sex marriage issue. The inconsistency within the gay community infringes upon a consistent argument for heightened scrutiny because the argument relies on the nature of same sex relationships and, in order to be effective, must be applicable to all.

Similarly, disagreement over the nature of gay and lesbian identity impedes a unified argument for strict scrutiny. In the third section of this review, I will examine the

arguments which support strict scrutiny, the standard of review which protects minorities under a “suspect classification.” Suspect classification is a category that has traditionally been reserved for those discriminated against based on race. This categorization raises many questions regarding the nature of homosexuality itself. While some argue that identifying one’s self as gay man or a lesbian is an expression of an immutable characteristic, an expression of identity<sup>23</sup> others believe that gay and lesbian identity is defined by the act of gay or lesbian conduct, or sex. “The conduct-centered view holds that what a person does determines what she is; the status-centered view argues that her sexuality is so central to her identity that what she is exists independently of what she does.”<sup>24</sup> Among those in the “identity camp,” the endorsement of same sex marriage is split. On the other side, those that support an act-based classification are, for the most part (sometimes unintentionally), against the classification of gay men and lesbians as a suspect class. This does not mean, however, that these arguments do not support same sex marriage. The possible existence of a gay gene and the implications of such a discovery for both sides of the acts/identity debate pose the possibility that while identity appears to be the clear path to suspect classification, it may not necessarily lead to same sex marriage.<sup>25</sup>

Indeed, organizing the same sex marriage debate using the Equal Protection Clause demonstrates a lack of consistency within the debate. This organization demonstrates that there are many “sides” to this argument. It is necessary for a *practical*,

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<sup>23</sup> Allyson Albert, “Irreconcilable Differences? A Constitutional Analysis as to Why the United States Should Follow Canada’s Lead and Allow Same Sex Marriage,” Brooklyn Journal of International Law 30 (2005): 547.

<sup>24</sup> Nan D. Hunter, “Life After Hardwick,” Harvard Civil Rights-Civil Liberties Law Review 27 (1992): 531

<sup>25</sup> Robert Alan Brookey, Reinventing the Male Homosexual: The Rhetoric and Power of the Gay Gene (Bloomington: Indiana University Press, 2002). 118-148.

*legal* analysis of the issue, however, to analyze how the foundational themes of these arguments relate to the law, specifically the Fourteenth Amendment. Such an analysis demonstrates the lack of any solely legal argument for or against same sex marriage. The following sections present the body of literature surrounding the same sex marriage debate. The sections are organized by method of scrutiny. The first of these is the rational relation standard.

### **Part One: Arguments for Rational Relation Standard**

The rational relation standard of judicial review challenges gay men or lesbians to demonstrate that the questionable discrimination against them is not rationally related to the goals of the state. In most cases discussed herein, those goals are to limit the rights of same sex couples, which I do not consider a legitimate state interest. This standard of scrutiny places the burden of proof on the petitioner to make such a demonstration. Oddly, the prevailing precedent which supports the rational relation test for sexual orientation is a case in which the petitioners won, despite their burden of proof. That case is *Romer v. Evans*, decided in 1993.

*Romer* considered a Colorado state constitutional amendment which barred the classification of homosexuals as a group to be protected from discrimination. The Court ruled against Colorado. The holding described a violation of the Equal Protection Clause based on the rational basis test for judicial review. This case contributes a great deal to the question of classifying of homosexuals as a protected group. In applying the rational relation test for judicial review, the Court determined that “a bare desire to harm a

politically unpopular group cannot constitute a legitimate government interest.<sup>26</sup> The Court ruled against the statute on the ground that it was self defeating; in preventing the classification of homosexuals, the state of Colorado classified them as a group not available for classification. While the decision is limited in its scope, the majority opinion demonstrates that the Court is becoming more sensitive to gay and lesbian rights and that those rights *can* be protected under a rational relations test.

*Romer* demonstrates that the application of the Equal Protection Clause through the rational relation test can result in a decision in favor of gay and lesbian rights. Such a precedent lends a great deal to those who support same sex marriage but do not consider the question of same sex marriage from a civil rights perspective. One such argument is made by Andrew Sullivan.<sup>27</sup> Sullivan describes a conservative argument in support of same sex marriage. His reasoning is based primarily of the value of the emotional and financial stability of the marriage commitment. Sullivan argues that, just as it is for heterosexuals, marriage promotes conservative values in the gay and lesbian community. Because these values are, according to Sullivan, beneficial to society, as many individuals as possible should be allowed to marry. Sullivan argues that the state should treat same sex and heterosexual couples as equal. This claim is most supportive of a rational relation standard of review, the standard which does not make a clear distinction between the majority and minority.

Sullivan may not understand, however, that his argument agrees with that of politically conservative homophobic activists. Sullivan's argument does not present a clear legal path to same sex marriage. If any legal analysis can be derived, it is an

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<sup>26</sup> *Romer v. Evans*, 517 US 620, 116 S. Ct. 1996.

<sup>27</sup> Andrew Sullivan, "Virtually Normal," *Same Sex Marriage, the Moral and Legal Debate*, ed. Robert M. Baird and Stuart E. Rosenbaum (Amherst NY, Prometheus Books, 1997) 67.

endorsement of a standard that places a heavy burden of proof on same sex couples. While Sullivan's conservative values may promote his perspective well in the political arena, they hinder any legal argument he makes. By inadvertently endorsing the rational relation standard, Sullivan (a gay man) includes himself among other conservatives who do not endorse same sex marriage. This group includes Justice Antonin Scalia, one of the Supreme Court's most conservative Justices.

In his dissent in *Romer*, Justice Scalia describes his support for Amendment 2, the Colorado Amendment to classify homosexuals as a group not entitled to constitutional protection. Scalia refuses to designate homosexuals as a class because the group itself does not pass the test for suspect classification. Scalia argues that homosexuality is not an immutable characteristic but a lifestyle choice and that the gay rights movement demonstrates that gays have ample (if not disproportionate) access to political power. Failure on two of the three tiers of the test for suspect classification does not warrant the protection of homosexuals as a class, according to Scalia.

Because he does not entitle gay men and lesbians constitutional protection as a suspect class, Scalia's argument supports the application of the rational relation test to questions involving discrimination on the basis of sexual orientation. Indeed, Scalia argues that Colorado had a legitimate interest in "denying special protections to homosexual conduct or to persons with a self-avowed tendency or desire to engage in such conduct."<sup>28</sup> Both Scalia and Sullivan, therefore, argue that sexual orientation is not a characteristic which defines a person as a member of a group deserving protection in the eyes of the law. Sullivan argues for assimilation and acceptance, however, while Scalia advocates ignorance and limited representation. With a more in-depth understanding of

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<sup>28</sup> *Romer v. Evans*. 517 U.S. 643.

how these two arguments relate to the future application of the Equal Protection Clause, both types of rational relation supporters could (indeed, *should*) transform their limited perspectives into arguments which can challenge not only the opposition but one another.

## **Part Two: Arguments for Heightened Scrutiny**

The arguments which support the heightened scrutiny standard of review are equally limited in scope and are difficult to apply to a future same sex marriage decision. The debate over heightened scrutiny in sexual orientation discrimination cases does not result in a clear course of action on the issue of same sex marriage. Paula Ettelbrick's article, "Since when is Marriage a Path to Liberation?" illustrates this point well<sup>29</sup>. Ettelbrick claims that "marriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture and the validation of many forms of relationships." Her argument has two parts; first, that the insistence that gays and lesbians be treated as identical to married couples runs contrary to the drives of the queer movement- to resist the idea that the norm is heterosexuality. Second, Ettelbrick argues that to embrace same sex marriage is, in a sense, to abandon the ideals of equal rights for women. Her argument relies in part on the assumptions that heterosexual marriage is an institution which discriminates against women and that the queer movement, in resisting heterosexual marriage, supports those women who are in oppressive heterosexual relationships. Ettelbrick places the responsibility of protecting all marginal groups (women, people of color and the poor) with the queer movement and gay rights activists.

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<sup>29</sup> Paula Ettelbrick, "Since When is Marriage a Path to Liberation?," OUT/LOOK Autumn 1989: 8-12.



Ettelbrick does not support same sex marriage. However, she *does* indirectly support a standard of scrutiny which could make same sex marriage more likely than, say, the rational relation standard.<sup>30</sup> Ettelbrick makes a connection between homosexuals and women. Because the heightened scrutiny standard is concerned with gender discrimination, this connection could grant homosexuals heightened scrutiny by arguing that the primary goal of the queer movement is to represent marginalized groups (especially women) and that queer opposition to marriage speaks directly on behalf of women in oppressive marriages. That standard would strengthen the burden of proof placed on the state, making the possibility of same sex marriage nearer to a reality. Considering these implications, it is difficult to place the radical feminist and queer argument into a practical legal context, despite the importance of these perspectives.

Diane Miller attempts to contextualize Ettelbricks perspective in her book The Freedom to Differ: the Shaping of the Gay and Lesbian Struggle for Civil Rights. Miller disagrees with Ettelbrick and, consequently and inadvertently, weakens the heightened scrutiny argument. While Miller recognizes that the gay rights movement and radical feminism do intersect in some respects, she claims that “on other occasions, the two groups have worked with a complete disregard for each other or even at cross-purposes.”<sup>31</sup> The claim that the gay rights movement directly relates to women’s rights is therefore one that, at best, can only be applied at certain times and to certain individuals. Such a specific relationship is unlikely to sufficiently warrant a heightened scrutiny claim.

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<sup>30</sup> JoLynn M. Schlichting, “Minnesota’s Proposed Same-Sex Marriage Amendment: A Flamingly Unconstitutional Violation of Full Faith and Credit, Due Process and Equal Protection,” William Mitchell Law Review 31(2005): 10.

<sup>31</sup> Diane Helene Miller, Freedom to Differ: The Shaping of the Gay and Lesbian Struggle for Civil Rights (New York: New York University Press, 1998) 3.

Disagreement over the importance of resistance to assimilation exists within the gay rights movement. According to Miller, there is a “spectrum of possibilities, bounded on one end by absolute separatism and on the other end by the goal of complete assimilation.”<sup>32</sup> Ettlbrick falls on the separatist end of that spectrum. Because of the lack of continuity across the gay rights movement, only a portion of the group supports Ettlbrick’s claim and, consequently, heightened scrutiny. While these inconsistencies are acceptable when applied to the debate in any other context, a strong legal argument requires universal application.

David J. Mayo and Martin Gunderson address the shortcomings of Ettlbrick’s argument in their article, “The Right to Marriage, a Critique of the Leftist Critique,” published in the Journal of Social Philosophy. Mayo and Gunderson describe effectively the radical feminist critique and liberal gay rights critique of same sex marriage. The article dismisses these perspectives for several reasons. First, Mayo and Gunderson assert that same sex marriage may break down gender stereotypes, not strengthen them. Citing Nan Hunter’s “Marriage, Law and Gender: A Feminist Inquiry,” Mayo and Gunderson cite the unlikely possibility that same sex marriages would oppress women specifically, in fact, it would likely be quite the contrary. Next, ironically, the article addresses the queer perspective and dismisses it under a justification of Equal Protection. Mayo and Gunderson claim that civil rights should always trump policy considerations. Ettlbrick’s argument supports the withholding of civil rights from a marginalized group to the benefit of others. While Ettlbrick admits that “when analyzed from the standpoint of

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<sup>32</sup> Miller, 15.

civil rights, certainly lesbians and gay men should have the right to marry,”<sup>33</sup> she places the policy considerations of the queer movement above these civil rights.

The differing perspectives regarding the relationship between the gay rights movement in the women’s movement must be compromised in order to develop a clear argument for heightened scrutiny. While Ettelbrick, Miller, Mayo and Gunderson do not agree on the implications of such a relationship, they acknowledge that the relationship does exist. That relationship could be crucial for a practical legal application of the heightened scrutiny test.

### **Part Three: Suspect Classification, Identity Formation and Strict Scrutiny**

Unlike heightened scrutiny, strict scrutiny places the burden of proof on the shoulders of the state. This standard of review, traditionally applied to race-related cases of discrimination, promises a clear path towards same sex marriage, according to some of its proponents. However, prior to 1993, this standard had never been applied to a case of sexual orientation discrimination.

*Baehr v. Lewin (1993)* marked a change in states application of the Equal Protection Clause to same sex marriage. For the first time, a state supreme court plurality in Hawaii determined that strict scrutiny should be applied to the states denial of marriage to same sex couples. The court did not, however, directly apply the standard. Instead, it remanded the case back to a lower court for further determination of the “compelling interest” (if any) of the state. The lower court could not find a compelling interest of the state and the case was referred back to the state supreme court. There, the decision was finalized. Later, the Hawaii legislature passed laws which trumped the court ruling. Still,

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<sup>33</sup> Ettelbrick, 21.

*Baehr* remains among the few cases addressing same sex marriage in light of the Equal Protection Clause and the strict scrutiny standard.

Allyson Albert endorses the strict scrutiny standard in her article, “Irreconcilable Differences? A Constitutional Analysis as to Why the United States Should Follow Canada's Lead and Allow Same-Sex Marriage.” Albert seeks to establish that the US Supreme Court should raise the level of judicial review afforded to homosexuals in analysis of the Equal Protection Clause. Albert draws a comparison between the decisions of the Canadian Court to allow same sex marriage in *Halpern v. Toronto*.<sup>34</sup> The Court made the argument that keeping homosexuals from the institution of marriage constituted a violation of the Canadian Charter of Rights and Freedoms. Albert argues that the Canadian Court’s constitutional analysis in *Halpern* can and should inform the decision of the US Court to consider homosexuals as a class to be protected. Part Three of the article provides a background of the Equal Protection Clause and the methods of judicial review used to apply it. This section also provides a relevant discussion of *Romer* and *Lawrence*. In Part Four, Albert supports of the use of strict scrutiny for cases involving discrimination based on sexual orientation and the classification of homosexuals as a suspect class, like race. Albert addresses the history of discrimination, immutability and political powerlessness requirements for suspect classification.

In determining the immutability of homosexuality, Albert outlines an important debate which informs the immutability distinction. It is the debate between acts and identity conceptions of homosexuality.

The immutability of homosexuality depends upon the definition of “homosexuality”, Albert asserts. Homosexuality is not immutable if it is defined in the

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<sup>34</sup> Albert, 11-17.

manner which Justice Antonin Scalia defines it; a manner which is based primarily on the act of homosexual sex, something which is entirely voluntary. In contrast, Albert describes how the Canadian Court recognizes the influence of genetics on homosexuality; making it a non-voluntary, immutable characteristic. Similarly, Brenda Feigen argues in support of same sex marriage and homosexual immutability. She bases her argument primarily on her condemnation of the acts-based perspective, which determines homosexual identity by one's actions first and foremost. Whether or not homosexuality is seen as immutable by the Court greatly affects the level of scrutiny applied.

While Albert and Feigen argue in support of immutability as the path to legalized same sex marriage, Robert Alan Brookey believes otherwise. In Reinventing the Male Homosexual, the Rhetoric and Power of the Gay Gene, Brookey describes the legal and political implications of the "gay gene." Most scholars, like Albert and Feigen, assert that the gay gene would provide uncontested evidence for the immutability of homosexual identity, strengthening the case for strict scrutiny. Indeed, if sexual orientation were immutable, like race, it would be protected as a suspect class. However, Brookey describes how the existence of a gay gene (and other evidence of immutability) could provide more of a weapon for opponents of same sex marriage than has been predicted by such speculators as Albert and Feigen.<sup>35</sup>

Brookey draws an analogy to the classification of homosexuality as a mental disorder to illustrate his point. When homosexuality was so classified, gay rights activists were outraged. Their response to the classification was that their lifestyle was not an illness, but a rational choice. Brookey, in a sense, connects the Scalia "lifestyle choice" argument to gay activists. How, then, will the activist argument proceed if the gay gene is

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<sup>35</sup> Brookey, 140-148.

discovered? Brookey describes how, just as the classification of homosexuality as a mental disorder did, the discovery of a gay gene will likely strengthen attempts to “cure” or “treat” homosexuality- thereby weakening the gay rights movement. At the same time, however, the gay gene will undoubtedly strengthen the immutability aspect of suspect classification.

The gay gene is problematic in the same sex marriage debate because it provides simultaneous support for both sides. Brookey describes the unpredictability of a court decision when the gay gene is involved. Indeed, the classification of homosexuals as a suspect class may not, in fact, support the conclusion that same sex marriage follows. Brookey makes clear that, despite the apparent simplicity of the necessary arguments, the gay gene does not provide the clear and resounding support for suspect classification many have argued. Thus, The Equal Protection Clause does not in fact provide a clear solution to the problem.

The intricacies of the Equal Protection Clause do not provide a clear solution to the legal argument but allow for a workable structure within which the debate can be framed. In presenting the sides of this argument through their implications on a future legal decision, one can see where these perspectives lack practical legal application or consistency. While some argue for the legalization of same sex marriage, they inadvertently support the rational relation standard. On the other hand, by associating the gay rights movement with women’s rights, some anti-same sex marriage perspectives are contradictory. Finally, despite the promise of the gay gene to the pro-same sex marriage side of the immutability debate, this “golden ticket” to suspect classification may be more trouble than it’s worth.

My research seeks to prevent these problems of legal application by, frankly, avoiding them altogether. My argument is based initially on substantive due process and touches on equal protection only after the violation of a fundamental right is established. Effectively, my argument nullifies the acts and identity debate by maintaining a universal approach to identity and conduct through a discussion of liberty, both positive and negative.

My argument separates legal analysis from moral issues like the acts and identity debate. Still, there is one relationship between ethics and legal analysis necessary to my argument. Ethics and law converge at the concept of fundamental rights. The Court uses two standards by which to judge a fundamental right. In order for a liberty interest to be considered fundamental, it must be either “deeply rooted in the Nation’s history and tradition” or “implicit in the concept of ordered liberty.”<sup>36</sup> The legal issues involved in the same sex marriage question, therefore, turn on what constitutes a fundamental right, as does my argument. While my argument is focused primarily on questions that arise after the establishment of a fundamental right, the definition of such rights is a moral as well as historical issue. For this reason, the arguments discussed in this chapter actively contribute to a legal analysis of the same sex marriage question.

With the moral and historical foundation of the legal concepts established, I move to a strictly legal analysis of the issue. As I have demonstrated in this chapter, combining ethical and legal argument produces inconsistent and ineffective legal analysis. My argument presents a less problematic line of reasoning towards the legalization of same sex marriage. This line of reasoning is based on existing case precedent which develops the argument for same sex marriage. These cases are described in the next chapter.

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<sup>36</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720-721, 1997.

## **Chapter Three**

### **Relevant Case Law**

Case law acts as a foundation for every legal argument. In order to construct a solid argument for same sex marriage, I present a review of the case law relevant to my argument. Those cases most relevant to my argument are those that address issues of equal protection and due process, both found in the Fourteenth Amendment. I will apply these cases to my argument in support of gay marriage in the next chapter.

The following cases contribute to my argument in several ways. First, *Meyer*, *Pierce* and *Skinner* establish the fundamental right to marry, and clarify that the Fourteenth Amendment protects this right. Second, *Griswold* establishes an element of negative liberty protected by the Due Process Clause of the Fourteenth Amendment. Third, the cases of *Loving*, *Zablocki* and *Turner* establish an element of positive liberty in the fundamental right to marry. Finally, *Lawrence v. Texas* demonstrates that many of these cases apply to same sex relationships.

This chapter reviews the facts, issues and holdings of eight Supreme Court decisions between 1923 and 2003. I have chosen these cases because they represent the broader body of case law surrounding the question of same sex marriage. The cases are organized chronologically. As time has progressed, the Court's attitude towards the Fourteenth Amendment has evolved. The Court has developed increasingly specific methods and rationales for approaching the Equal Protection Clause and the Due Process Clause.



In the early years of the twentieth century, the focus of Fourteenth Amendment decisions was mainly on the Equal Protection Clause in cases like *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Skinner v. Oklahoma*. In 1965, Supreme Court rulings involving the right to marry changed. With *Griswold v. Connecticut*, the Court's focus moved from equal protection to due process, mainly the right to privacy. The cases which followed *Griswold* also emphasized due process and privacy but moved further towards a more positive role of the state in recognizing certain marriages. With the cases of *Loving v. Virginia*, *Zablocki v. Redhail* and *Turner v. Safley*, the Court has developed a line of precedent which indicates that there is not only a right to marry and to keep one's married life private, but a right to marry whom one chooses, and to have that marriage recognized by the state.

### **Part One: Early Equal Protection Cases: Establishing the Fundamental Right to Marry**

Demonstrating the existence of the fundamental right to marry provides the first step towards an effective Fourteenth Amendment argument for same sex marriage. The following cases were decided early in the history of Supreme Court cases addressing marriage. They articulate that the right to marry is indeed fundamental to the freedom and liberty of U.S. citizens.

#### ***Meyer v. State of Nebraska (1923)***

*Meyer v. Nebraska* articulated the fundamental right to marry first. In 1908, Meyer was a bilingual school teacher interested in sharing his knowledge of the German

language with his students. By teaching one of his students, a ten year old boy, how to speak German Meyer violated a Nebraska state law which forbade the teaching of any language other than English to a child who had not passed the eighth grade. Meyer challenged the law on the grounds that it was an invasion of liberty guaranteed by the Fourteenth Amendment.

The case was argued before the Supreme Court in 1923. In his opinion for the majority, Justice James McReynolds articulated the constitutional question before the Court, "...whether the statute as constructed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment."<sup>37</sup> The Court decided that the statute was unreasonable and ruled in favor of Meyer. In their decision, the majority asserted several important claims about the Fourteenth Amendment which are relevant to the gay marriage question.

McReynolds argued that several of the liberties guaranteed by the Fourteenth Amendment have been definitely stated by the Court. He wrote, "...without a doubt, [the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children..."<sup>38</sup> This statement possibly establishes the right to marry as one of the liberties guaranteed by the Federal Constitution. While it can be argued that McReynolds' comments are mere dicta, the substantial precedent supporting the fundamental right to marry indicates that McReynolds comments play a larger role in the body of case law.

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<sup>37</sup> Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625 (1923).

<sup>38</sup> Meyer, 399.

Furthermore, McReynolds asserts that “this liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose.”<sup>39</sup> This opinion demonstrates that the Constitution and the Court protect the right to marry. It is unclear, however, whether the “right to marry” indicates a right to marry whoever one wishes, including members of the same sex. Indeed, the “common occupations of life” to which McReynolds refers certainly did not include same sex marriage, especially not in 1923. *Meyer* raises more questions than it provides answers. It is a step towards developing a more specific description of the rights protected by of the Fourteenth Amendment.

#### **Pierce v. Society of Sisters; Pierce v. Hill Military Academy (1925)**

In the *Meyer* opinion, McReynolds establishes the foundation of a series of cases which elaborate on his list of liberties. One such case is *Pierce v. Society of Sisters*. In 1922, Oregon passed the Compulsory Education Act which required every student in Oregon to attend public school, with few exceptions. After a rapid decline in enrollment, loss of revenue and several broken contracts with teachers and parents, the Society of Sisters and Hill Military Academy filed a petition to stop the act before the loss of business caused their private schools to close.

The decision of the Court, written by Justice McReynolds, reiterated the *Meyer* decision. The case related to parents’ ability to choose the education of their children, a protected liberty, which *Meyer* established. In addition, the *Society of Sisters* decision articulated some interesting points about the Equal Protection Clause. First, McReynolds established that “a law which increases the uniformity of the application of the law

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<sup>39</sup> Meyer, 400.

cannot by any stretch of the imagination be classed as a law which denies the equal protection of the law.”<sup>40</sup> This means that perfection need not be achieved in order for a law to be constitutional. If it merely attempts to expand equal access to liberty, a statute cannot violate the Equal Protection Clause.

The flexibility of the law becomes clearly applicable to the question of same sex marriage when McReynolds elaborates, “The right to the equal protection of the laws is not denied when it is apparent that the same law or course of procedure is applicable to every other person in the State under similar circumstances and conditions.”<sup>41</sup> In other words, the Equal Protection Clause does not require that each and every person be granted access to the same rights and liberties. Only people “under similar circumstances and conditions” were required to share the same rights. The specification of “similar circumstances and conditions” could easily be interpreted to protect all other people in the State who have the same sexual orientation as the petitioner in question. *Society of Sisters* provides an ambiguous impact on the gay marriage question. On one hand, the *Society of Sisters* decision reinforced the *Meyer* language while, on the other hand, it articulated an exceptional condition in which an equal protection claim can not be made.

### **Skinner v. Oklahoma (1942)**

The Court began to clarify much of the ambiguity surrounding equal protections claims with *Skinner*. *Skinner* challenged an Oklahoma criminal sterilization act. The Oklahoma law required mandatory sterilization of those repeatedly convicted of a “felony

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<sup>40</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571 (1925).

<sup>41</sup> *Society of Sisters*, 513.

involving moral turpitude.”<sup>42</sup> Such felonies, as defined by the act, included theft but excluded embezzlement. Skinner, charged with his third felony theft, claimed that the Oklahoma law was an undue exercise of police power and violated the Due Process Clause of the Fourteenth Amendment. While the Court ruled unanimously in his favor, the opinion written by Justice William Douglas, articulated a different opinion. Douglas argued that the Equal Protection Clause had been violated.

Douglas explained that the crimes of theft and embezzlement are of the same nature and “they are punishable in the same manner,” both as felonies.<sup>43</sup> One violates the Equal Protection Clause when sterilization is imposed inequitably. The Court “does not prevent the legislature from recognizing ‘degrees of evil,’” nor does it constrain the legislature “in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment.”<sup>44</sup> Douglas made clear that the Equal Protection Clause gives the legislature the power and right to impose limitations upon some groups and not others. However, he articulates an important exception which is crucial to the question of same sex marriage.

The Douglas opinion classifies the right to marry as fundamental. Douglas says, “...the instant legislation runs afoul of the Equal Protection Clause, though we give Oklahoma that large deference which the rule of the forgoing cases requires. We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”<sup>45</sup> Douglas explains that, when such an important right is violated, the Equal

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<sup>42</sup> Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110 (1942).

<sup>43</sup> Skinner, 539.

<sup>44</sup> Skinner, 540.

<sup>45</sup> Skinner, 541.

Protection Clause has as much relevance “as if [the law] had selected a particular race or nationality for oppressive treatment.”<sup>46</sup> Despite its deference to the legislature, the Court is obligated to protect the “basic civil rights of man.” Douglas includes marriage among these fundamental rights.

In his *Skinner* opinion, Douglas establishes a loophole of sorts for those seeking equal protection of the law. Where once the clause was reserved solely for claims of racial or ethnic discrimination, it became available for those citizens whose fundamental rights had been violated. *Skinner* established an alternative route to equal protection. If one cannot make a case for suspect classification, there is still opportunity for constitutional protection if the petitioner can demonstrate that a fundamental right has been violated. In order to argue for same sex marriage, then, it is necessary to argue that the fundamental right to marry has been withheld from gay men and lesbians.

## **Part Two: Due Process Cases: A Shift from Privacy to Recognition, Negative to Positive Liberty**

Fourteenth Amendment cases address the Equal Protection Clause and the Due Process Clause. Cases involving the Due Process Clause have evolved alongside equal protection cases. The Court’s definition of “due process” has matured since *Griswold v. Connecticut* in 1965, a case which defined privacy as an important element of due process. Since *Griswold*, due process has grown to mean more than the negative liberty of privacy. The cases of *Loving*, *Turner* and *Zablocki* gradually developed an interpretation of due process which included positive liberties, like state recognition, for such rights as the right to marry.

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<sup>46</sup> *Skinner*, 541.

### **Griswold v. Connecticut (1965)**

In addition to the equal protection of fundamental rights, the right to privacy has an important role to play in the case for same sex marriage. The right to privacy was first significantly clarified in *Griswold v. Connecticut*. *Griswold* involved a Connecticut statute that made use of contraceptive use a criminal offense. The executive and medical directors of Planned Parenthood were charged for providing birth control to several Connecticut married couples. When faced with the decision as to whether or not the statute violated the Constitution, the Court ruled in favor of the Planned Parenthood directors.

The constitutional question before the Court, according to the majority opinion written by Justice Douglas, was whether or not the use of birth control within a marriage was protected under the penumbra of rights referred to as the right to privacy. Douglas demonstrated using support from *Society of Sisters* and *Meyer*, that marriage is included in the right to privacy.

While Douglas and the dissenters, Justice Hugo Black and Justice Potter Stewart, considered the right to privacy at the heart of the constitutional question before the Court, Justice Arthur Goldberg's concurrence focused on the Ninth Amendment. Goldberg described how "the language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from government infringement, which exist alongside those fundamental rights specifically mentioned in the first eight amendments."<sup>47</sup> Among these additional rights is the right to privacy, according to Goldberg.

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<sup>47</sup> *Griswold v. Connecticut*, 318 U.S. 479, 85 S. Ct. 1678 (1965).

The influence of Goldberg's concurrence extended beyond the right to privacy, however. He explained that "[the Ninth Amendment] was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the mention of certain rights would be interpreted as a denial that others were protected."<sup>48</sup> Goldberg described how the Founders intended the Ninth Amendment to act as a reminder that not all essential rights are articulated in the Constitution. According to Goldberg, the "rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected"<sup>49</sup> and they are thus protected under the Ninth Amendment.

While this additional protection of the right to marry seems promising to the case for gay marriage, Justice Goldberg added several comments at the end of his concurrence which virtually negate such an application of his words. In reference to the state's interest in discouraging questionable moral behavior in marriage, Goldberg wrote, "adultery, homosexuality and the like are sexual intimacies which the State forbids... but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage... it is one thing when the State exerts its power either to forbid extra-marital sexuality... or to say who may marry, but it is quite another... to regulate... the details of that intimacy."<sup>50</sup>

Even if Goldberg did not intend his discussion of the Ninth Amendment to apply to homosexual relationships, the *Griswold* opinion provides a turning point for cases involving the right to marry. The Court "linked the negative rights of individuals not to

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<sup>48</sup> *Griswold*, 489.

<sup>49</sup> *Griswold*, 495.

<sup>50</sup> *Griswold*, 524.



be interfered with by the state to the existence of the institution of marriage.”<sup>51</sup> *Griswold* effectively shifts the duty of the state from one of equal application of the laws to a duty to respect the privacy of marriage. This shift towards due process and away from equal protection continued after *Griswold* with the cases of *Loving v. Virginia*, *Zablocki v. Redhail* and *Turner v. Safely*.

### **Loving v. Virginia (1967)**

*Loving v. Virginia* involved a Virginia antimiscegenation statute which punished an interracial couple by banishing them from the state. The Lovings challenged the statute on the grounds that it violated the Fourteenth Amendment. The Court ruled in favor of the Lovings.

The *Loving* majority opinion discussed equal application. “*Loving*, however, is also an important due process case because the Court for the first time addressed the significance of the marital relationship from the perspective of due process in the absence of considerations of privacy and the right to be left alone.”<sup>52</sup> Unlike the claimants in *Griswold*, the Lovings did not request that the state of Virginia remove itself from the regulation of marriage. Quite the contrary, the issue in *Loving* was one of recognition. Because the state of Virginia did not recognize the marriage of some couples, the Lovings argued that their fundamental right to marry had been violated.

Virginia argued that the statute did not violate the Equal Protection Clause because both individuals of different races were punished with equal stringency. A similar argument could be made for anti-gay marriage statutes, that both homosexual and

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<sup>51</sup> Carlos A Ball, “The Positive in the Fundamental Right to Marry: Same Sex Marriage in the Aftermath of *Lawrence v. Texas*.” *Minnesota Law Review* 88 (2004): 6.

<sup>52</sup> Ball, 6-7.

heterosexual people are barred from marrying someone of the same gender. However, Justice Warren described that “the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”<sup>53</sup> Therefore, if sexual orientation can be classified alongside race, the argument for equal application falls apart in much the same way it did in *Loving*.

The impact of *Loving v. Virginia* on the case for same sex marriage is three-fold. First, *Loving* demonstrates that equal application no longer justifies inequitable distribution of a fundamental right. Second, *Loving* adds an element of action to the state duties required by the Due Process Clause. “The liberty protected by the due process clause in the context of marriage goes beyond privacy concerns” and towards a focus on recognition by the state.<sup>54</sup> The state is not only obligated to leave private relationships alone, but to recognize some of them as marital. Finally, *Loving* establishes that “the failure of the state to [recognize certain marriages] can constitute a violation of the fundamental right to marry.”<sup>55</sup> *Loving* emphasizes the duty of the state to recognize marriage as an element of due process. *Zablocki v. Redhail* has a similar focus.

### **Zablocki v. Redhail (1978)**

*Zablocki v. Redhail* involved a statute which required certain Wisconsin residents to obtain a court order in order to marry within the state. Under the statute, individuals paying child support could not obtain a marriage license if they owed any of their support. Furthermore, these citizens needed to demonstrate their ability to continue

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<sup>53</sup> *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, (1967).

<sup>54</sup> Ball, 7.

<sup>55</sup> Ball, 7.

paying support regularly. Redhail was responsible for his illegitimate daughter and had not fulfilled his financial obligations to the child's mother for several years. Because the statute denied him the right to marry, Redhail filed a complaint on behalf of himself and the entire class of Wisconsin residents who had been refused a marriage license. He challenged the statute on the grounds that it denied the right to marry guaranteed by the equal protection and due process clauses of the Fourteenth Amendment.

The Court ruled in favor of Redhail. In his majority opinion, Justice Thurgood Marshall elaborated on the fundamental quality of the right to marry. Because a fundamental right was violated, Marshall indicated “critical examination of the state interest is required.”<sup>56</sup> Since *Skinner*, the violation of a fundamental right had been granted strict scrutiny by the Court. Marshall contributed further to this precedent in the *Zablocki* opinion. He described, “When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”<sup>57</sup>

Marshall's opinion makes clear that the Fourteenth Amendment protects the fundamental right to marry. This right is supported by the right to privacy and should be defended with strict scrutiny when threatened. These strong statements, however, leave one important question unanswered in terms of same sex marriage. If anti-gay marriage statutes are passed, do they “significantly interfere” with the fundamental right to marry sufficiently to impose strict scrutiny to the analysis? Considering the future direction of the Courts' due process analysis, the answer could likely be “yes.”

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<sup>56</sup> *Zablocki v. Redhail* 434 U.S. 374, 98 S. Ct. 673 (1977).

<sup>57</sup> *Zablocki*, 388.

Whereas a “significant interference” was traditionally interpreted to mean the state standing between individuals and the rights granted to them by the Constitution, *Loving* marked a new interpretation by shifting the focus of due process from negative liberty to positive liberty. “The constitutional problem in *Zablocki* was not what the state did in terms of actions...but in terms of its omission, that is, its refusal to recognize the plaintiff’s relationship as marital.”<sup>58</sup> The constitutional question was not one of interference, but one of omission. Still, the Court ruled that the state’s impact was “significant” and unconstitutional.

The *Zablocki* ruling strengthens the *Loving* ruling. If *Loving* were merely an equal protection case, the *Zablocki* ruling would not make sense. *Zablocki* indicates that “if we view the right to marry only in terms of negative liberty... we are unable to explain fully the kind of affirmative obligation of recognition that the state is under as a result of the Court’s ruling in *Zablocki*.”<sup>59</sup> Even if the state does not interfere with the private issues of intimate relationships, *Zablocki* ruled that the state is limited in its ability to be indifferent toward at least some relationships. Whether or the state is obligated to recognize same sex relationships is debatable. The imposition of the Due Process Clause on the state to recognize at least some intimate relationships as marital is further established in the case of *Turner v. Safley*.

### **Turner v. Safely (1987)**

*Turner v. Safley* involved a Missouri statute which limited the marriages of inmates in Missouri prisons. The statute allowed only for marriages which had approval

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<sup>58</sup> Ball, 7.

<sup>59</sup> Ball, 7.

by the warden of the prison. Most of the inmates whose marriages were approved had illegitimate children with their future spouse. The state argued that the statute was a necessary regulation to prevent “love triangles” and encourage the rehabilitation of female offenders.<sup>60</sup> The Court questioned whether these objectives were rationally related to the infringement on the fundamental right to marry.

The opinion by Justice Sandra Day O’Connor held that “the Missouri marriage regulation was facially infirm as infringing upon the fundamental constitutional right to marry, because the regulation was not reasonably related to legitimate penological interests.”<sup>61</sup> In other words, the Missouri statute did not pass the test because the infringement of the right to marry was unjustified.

*Turner* advances the precedent towards positive liberty considerations. The case sheds light on the question of same sex marriage because it “is the case that most clearly supports the proposition that the state has a due process obligation to recognize at least some relationships as marital.” Also, *Turner* raises a question of equal application and “whether the state, once it recognizes some relationships as marital, has an equality-based obligation to recognize others in that way.”<sup>62</sup> No questions of equal protection arise in *Turner*, nor are there considerations of privacy. It only requires the state to recognize some relationships as marital.

More so than any other case, *Turner* is concerned with recognition of relationships, not restrictions on the regulation of relationships. O’Connor notes that many important aspect of the marital relationship are unaffected by incarceration. “Inmate marriages, like others, are expressions of emotional support and public

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<sup>60</sup> *Turner v. Safley*, 482 U.S. 78, 102 S. Ct. 2254, (1987).

<sup>61</sup> *Turner*, 78.

<sup>62</sup> *Ball*, 8.

commitment. These elements are an important and significant aspect of the marital relationship.”<sup>63</sup> *Turner* solidifies the obligation of the state to play a role in these elements of marriage, if only because “civil marriage... cannot exist in the absence of state recognition.”<sup>64</sup>

An analysis of *Turner* within the body of case law brings one to the question, “Are same sex relationships included under these liberties protected by the Court?” O’Connor’s comments on the importance of emotional support and public commitment to intimate relationships demonstrate a historical progression of the Court. At least several justices are beginning to see intimate relationships in terms of emotional bonds and commitment. *Lawrence v. Texas* demonstrates that this newly developing attitude considers same sex relationships.

### **Lawrence v. Texas (1997)**

*Lawrence* involved the conviction of two men for “consensual sexual intimacy” under a Texas statute which made “deviant sexual intercourse” a crime.<sup>65</sup> While *Bowers v. Hardwick* ruled that such statutes were constitutional in 1986, the Court held that the statute violated the Due Process Clause and overruled *Bowers* in 2003 with *Lawrence v. Texas*.

*Lawrence* involved a Texas statute that made sexual conduct between people of the same sex illegal. Two men, Lawrence and Garner, violated the statute. The Court held that “the statute... sought to control a personal relationship that was within the liberty of persons to choose without being punished as criminals,” and that “the statute furthered no

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<sup>63</sup> Turner, 94.

<sup>64</sup> Ball, 10.

<sup>65</sup> *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003).

legitimate state interest which could justify the statute's intrusion into the personal and private life of the individual."<sup>66</sup> The ruling emphasized the right to choose one's private, sexual conduct in the privacy of the home, emphasizing the prior rulings on privacy in *Society of Sisters*, *Meyer* and *Griswold*.

The *Lawrence* opinion contributes to the emerging focus on due process, instead of equal protection, in cases involving the right to privacy and same sex conduct. In his opinion for the majority, Justice Anthony Kennedy describes how cases like *Baird v. Eisenstadt* and *Roe v. Wade* have demonstrated that the protection of sexual privacy found in *Griswold* is not limited to married adults.<sup>67</sup> Kennedy emphasizes that the question at hand is not whether "the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy"<sup>68</sup> but whether the right to privacy established by such cases as *Griswold* is violated when such behavior is criminalized.<sup>69</sup>

While Kennedy applied an expansive and forceful interpretation of the Due Process Clause, Justice O'Connor argued that the case involved a question of equal protection in her concurrence. O'Connor saw the Texas statute as unconstitutional because it targeted homosexuals, as opposed to the statute in question in *Bowers*, which was universally intended.<sup>70</sup> O'Connor agreed with Kennedy's holding, but disagreed with his reasoning and argued that *Bowers* should not have been overturned.

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<sup>66</sup> *Lawrence*, 509.

<sup>67</sup> *Eisenstadt* and *Roe* dealt respectively with the distribution of contraceptives to unmarried individuals and the provision of abortion services to married and unmarried individuals. In addition, *Carey v. Population Services* the Court invalidated a law which prohibited the sale of contraceptives to minors.

<sup>68</sup> *Bowers*, 190.

<sup>69</sup> *Lawrence*, 568.

<sup>70</sup> *Lawrence*, 585. "That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between homosexuals and heterosexuals would similarly fail under rational basis review."

Justice O'Connor applied strict scrutiny in her concurring opinion in *Lawrence*. O'Connor's concurrence exemplifies the use of strict scrutiny analysis in a case involving same sex relationships. The Equal Protection Clause is extensively discussed by Justice O'Connor not just in light of *Bowers* but with an eye to the future for same sex marriage. While the decision itself is based on due process, *Lawrence v. Texas* contains explicit language about the relationship between same sex marriage and the Equal Protection Clause. O'Connor describes the applicability of the Equal Protection Clause, hinting at an outlet for expanding the rights of homosexuals through the strict scrutiny standard of review. While it may seem fairly obvious that suspect classification is the most clear legal path to the legalization of same sex marriage, never before had that sentiment been expressed explicitly in the legal precedent of the Supreme Court. While O'Connor practically describes a point-by-point support of suspect classification of homosexuals, she stops short of endorsing same sex marriage. In fact, she notes that a prohibition on same sex marriage could be legitimized by the Court if a state put forth an effective reason. Despite these confusing "hints," *Lawrence* is far more significant for its same sex marriage implications than for its fairly predictable response to *Bowers*.<sup>71</sup> O'Connor's concurrence is the most blatant support for suspect classification of homosexuals in legal history.

Scalia's dissent in *Lawrence* is equally forceful in its dismissal of suspect classification of homosexuals. In his dissent in both *Romer* and *Lawrence*, Justice Scalia provided an argument regarding the three-tiered test for suspect classification and its lack of support for homosexuality as such a class. Scalia does not designate homosexuals as a

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<sup>71</sup> David M. Wagner, "Hints Not Holding, The Use of Precedent in *Lawrence v. Texas*," Brigham-Young University Journal of Public Law 18 (2004): 681.



class because he believes that homosexuality is not an immutable characteristic but a lifestyle choice. Scalia argues that the gay rights movement demonstrates that gays have ample (if not disproportionate) access to political power. Failure on two of the three tiers of the test for suspect classification does not warrant the protection of homosexuals as a class, according to Scalia.

While Kennedy and O'Connor disagree on the method of reasoning, their opinions distinguish between the criminalization of sexual conduct and the recognition of the relationship in which it takes place. Justice Scalia makes no such distinction in his dissent. Scalia argues that the *Lawrence* opinion "dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."<sup>72</sup> While Scalia exaggerates, he touches on an interesting point which is essential to this thesis. Scalia sees the right to privacy and negative liberty as fundamentally interconnected to the recognition of a relationship by the state. He argues that, after *Lawrence* eliminates the right of the state to interfere in sexual conduct, there is no justification for denying recognition of homosexual relationships. I wholly agree. While Scalia and I seek opposite conclusions, our methods are similar.

In *Lawrence*, the Court held that the Texas statute violated the right to privacy protected by the Due Process Clause of the Constitution. Kennedy stated that "the petitioners are entitled to their private lives... Their right to liberty under the Due Process Clause gives them full right to engage in their conduct without intervention of the government."<sup>73</sup> The implications of this holding on the question of same sex marriage are

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<sup>72</sup> *Lawrence*, 586.

<sup>73</sup> *Lawrence*, 579.

complicated. The *Lawrence* decision solidified homosexuals' privacy protection by the Court. With privacy linked so closely to marriage in cases like *Meyer*, *Skinner*, *Loving*, and *Griswold*, I build on Scalia's *Lawrence* dissent. I argue that case precedent articulates the fundamental right for a homosexual to marry- and for the private aspects of that marriage to be protected and the public recognition of it acknowledged by the state. The following chapter describes this argument.

## **Chapter Four**

### **In Support of Same Sex Marriage**

The existing case law regarding issues of marriage, privacy and same sex relationships demonstrates important aspects of the same sex marriage question. First, cases like *Meyer*, *Skinner*, and *Pierce* demonstrate the fundamental right to marry. Second, as Carlos Ball argues, there are both positive and negative liberties involved in this fundamental right. Third, the Due Process Clause has been used to protect the liberty of privacy for a long time, and the emerging protection of recognition is well established in case precedent. Finally, the Court articulated in *Lawrence v. Texas* that the right to privacy applies to intimate homosexual relationships. While these three points are crucial to the case for same sex marriage, more is needed to complete my argument. This chapter will expand on the argument that began in the previous section. I first describe the importance of the fundamental right to marry to my argument, and by demonstrate briefly that this right exists. Next, I address the due process considerations of the argument. This section includes a discussion of positive and negative liberties involved in exercising the right to marry, in terms of privacy and recognition. Finally, I discuss the contributions of equal protection to the argument and several problems which arise when one considers questions of equal application. What results is a demonstration that the Fourteenth Amendment, with support of case precedent, protects the right for same sex couples to marry.

## **Part One: Suspect Classification - A Dead End Road to Strict Scrutiny**

The degree of protection provided by the Court varies depending on the groups and interests at stake. Strict scrutiny has traditionally been reserved solely for cases involving discrimination against a *suspect class* of people, discrimination based on race. A group qualifies as a suspect class if its defining characteristic is immutable, if there is a history of discrimination against the group, and if access to legislative means of representation is limited by discrimination. This three-tiered test is a difficult one to pass. While to date only racial and ethnic groups have received the protection of strict scrutiny, scholars like Albert and Feigen argue that sexual orientation is also a suspect classification.

If sexual orientation were determined to be a suspect classification, it would place a heavy burden of proof on the state to justify any discrimination against homosexuals, including restricting their access to marriage. While strict scrutiny is a clear “goal” for the case for same sex marriage, I do not believe that suspect classification is the best way to achieve that goal.

The ambiguous and particular qualities of homosexuality render suspect classification extremely problematic. First, it is difficult to say that sexual orientation is an immutable characteristic. In other words, some people may be gay or lesbian by choice and others because they feel it is a quality with which they were born. Whether or not anyone is born with their sexual orientation pre-determined is yet to be determined.<sup>74</sup> The possibility of a gay gene contributes more questions than answers to the issue of immutability at this time.

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<sup>74</sup> Brookey, 147.

Furthermore, it is difficult to resolve even what constitutes homosexuality. Many believe homosexual behavior, or gay sex, is what defines a person as homosexual. This is exemplified in Justice Scalia's *Romer* dissent. Others believe one's sexual preferences are part of their identity, either expressed or not.<sup>75</sup> The disparity between the acts and identity debate over homosexuality renders a conclusion about immutability virtually impossible.

Still, sexual orientation could be considered a suspect classification if the other two tiers of the three tiered test can be demonstrated. The second, a history of discrimination, needs little explanation. While there are individuals, like the makers of the Report series of videos, who believe that homosexuals are not victims of discrimination, most do. The frequent occurrence of hate crimes against gays like Matthew Sheppard has made the case for a history of discrimination against gays and lesbians.

While it is possible to demonstrate a history of discrimination, the final tier of the three tiered test is a difficult hurdle to jump. In order to demonstrate that gay, lesbian and bisexual people have limited access to legislative resources, it is necessary to argue against the efficacy of powerful political action organizations like the Human Rights Campaign and even homosexual political leaders like New Jersey's former Governor James McGreevy. Justice Scalia commented in *Romer*, "Because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable incomes and, of course, care about homosexual rights issues much more ardently than the public at large, they possess political power greater than their numbers."<sup>76</sup> While Scalia's comments are sweeping generalizations, it is true that there

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<sup>75</sup> Eskridge and Hunter, 246.

<sup>76</sup> *Romer*, 646.

are many means by which gay and lesbian causes can be promoted at the legislative level. While it could be argued that African Americans also have powerful legislative advocacy, the case for racial immutability is arguably much stronger than is the case for homosexual immutability. As a result, I cannot safely demonstrate that sexual orientation qualifies for suspect classification to the same degree as race, securing strict scrutiny analysis.

## **Part Two: The Road Less Traveled – The Fundamental Right to Marry**

Luckily, since *Skinner*, another path to strict scrutiny exists. The fundamental nature of the right to marry has been demonstrated in the cases of *Meyer*, *Pierce* and *Skinner*. Over time, the Court has asserted the difference between those rights that are *fundamental* and other rights. Until *Skinner*, the importance of this qualification of rights was ambiguous. In *Skinner*, Justice Douglas explained that the Court was “dealing... with legislation which involves one of the basic civil rights of man.”<sup>77</sup> Because the right to marry was fundamental, the Court applied a high level of scrutiny to the legislation, strict scrutiny. Strict scrutiny placed a heavy burden of proof on the state to demonstrate that the legislation was directly related to a legitimate government interest.

Following *Skinner*, the violation of fundamental rights was consistently granted strict scrutiny by the Court. “The Court has continuously held that marriage is a fundamental right that may be deprived only if the government has a compelling purpose.”<sup>78</sup> Such a compelling purpose has never been demonstrated. Indeed, the Court has reaffirmed the precedent of *Meyer*, *Pierce* and *Skinner* in many Fourteenth

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<sup>77</sup> *Skinner*, 541.

<sup>78</sup> Lisa M. Polk, “Montana’s Marriage Amendment: Unconstitutionally Denying a Fundamental Right,” *Montana Law Review* 66 (2005): 410.

Amendment cases, including *Loving*, *Zablocki* and *Turner*. The fundamental right to marry is firmly rooted in case precedent.

The precedent described in the previous chapter does more than validate the fundamental right to marry, however. Cases like *Griswold*, *Loving* and *Turner* demonstrate the nature of this right. The fundamental right to marry is composed of different liberties, both positive and negative.

### **Part Three: The Liberties Involved in the Right to Marry**

The right to marry is unique because it involves both privacy and recognition. The right to marital privacy has accompanied the right to marry since *Meyer*. *Skinner* is the first significant case which hinged on the right to marital privacy. Following *Skinner* was *Griswold*, which also affirmed the right to marital privacy. These cases “which are primarily (and necessarily) focused on the negative obligations of the state, [depended], if only implicitly, on the prior positive steps taken by the state to recognize certain relationships as marital.”<sup>79</sup> An attempt to separate the positive and negative liberties involved in the right to marry is therefore difficult. Privacy, in the cases of *Skinner* and *Griswold*, would be irrelevant if the state refused to recognize the relationship in which the private behavior took place. And so, in marital privacy cases, the negative liberty relies on the positive liberty. There is marital privacy because there is marriage, not the other way around.

Marital privacy was extended to homosexual couples in *Lawrence*. Observing the connection between positive and negative liberties of marriage, therefore, an interesting argument arises. It is necessary to grant state recognition of same sex relationships

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<sup>79</sup> Ball, 6.

because the privacy practiced therein is dependent upon state recognition. In recognizing privacy rights, the state must grant recognition. While this argument may seem complicated and slightly illogical, there is a significant body of case law to support the idea that positive and negative liberties in the right to marry are interconnected.

Beginning with the case of *Eisenstadt v. Baird* (1972), the right to privacy has been extended beyond the marital bedroom.<sup>80</sup> Cases like *Eisenstadt* and *Lawrence* demonstrate that the right to privacy in an intimate relationship extends beyond marriage into heterosexual and homosexual relationships, protecting the right to intimate conduct without being penalized. These cases use *Meyer*, *Skinner* and *Griswold* as support for the right to intimate privacy. Not until 2003 was that right extended to homosexual couples in *Lawrence*.

*Lawrence* was especially significant for its contributions to the connection between negative and positive liberty. Justice Kennedy “distinguished between the ability of the state, consistent with the Constitution, to criminalize same-gender sexual conduct, and the obligation of the state to recognize same-sex relationships.”<sup>81</sup> In making such a distinction, Kennedy alludes to the two part liberty associated with marriage. However, Kennedy does not recognize the significant evidence which connects the positive and negative liberties involved in the right to marry. “Justice Kennedy was incorrect when he implied in his majority opinion in *Lawrence* that there is (always) an important distinction between state interference with intimate relationships on the one hand and

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<sup>80</sup> This case involved the distribution of contraceptives to unmarried individuals. It was determined that making contraceptives available only to married couples was an unjustified unequal distribution of privacy liberties.

<sup>81</sup> Ball, 1.



state recognition of those relationships on the other.”<sup>82</sup> While Kennedy’s distinction may be correct for many private decision (like the decision to end a pregnancy), marriage stands as an important exception.

While the privacy of intimate conduct and the recognition of the intimate relationship in which it takes place are different, these two liberties are linked in the case of marriage. Kennedy’s opinion states that sodomy statutes “seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”<sup>83</sup> Kennedy acknowledges that same sex relationships may be entitled to state recognition, as are marital relationships. By connecting the privacy of non-marital conduct to the recognition guaranteed to married, heterosexual relationships, the *Lawrence* majority directly confronts the question of same sex marriage. While he does not advocate for this recognition, the *Lawrence* opinion discusses liberty in a way that contributes to an argument for the state recognition of same sex relationships.

*Lawrence v. Texas* could have been decided with a more specific and less controversial opinion. The statute in question prohibited same sex intimate conduct, specifically targeting homosexuals. The Court had merely to acknowledge that the right to privacy extended beyond marital relationships and deem the statute unconstitutional. However, “the Court was unwilling to limit its understanding of the liberty interests at issue in the case to considerations of special privacy.”<sup>84</sup> Kennedy’s opinion presents a conception of liberty that is composed of negative and positive elements. Kennedy

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<sup>82</sup> Ball, 9.

<sup>83</sup> Lawrence, 558.

<sup>84</sup> Ball, 12.

presets this expansive understanding of liberty when discussing the constitutionality of *Bowers v. Hardwick*.

The *Bowers* Court determined that the constitutional issue in question was “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”<sup>85</sup> In response to this assertion, Kennedy describes the complexity of the real constitutional question:

[The *Bowers* Court] discloses its own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim of the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse<sup>86</sup>.

The liberty interests at stake in *Lawrence*, therefore, extended beyond the right to privacy and into the realm of respect and acceptance. Kennedy went beyond the necessary ruling to elaborate on the importance of respecting same sex relationships. Liberties like respect and acceptance cannot be placed in either the negative or positive camp. The willingness of the Court to recognize them, however, alerts us to several important points.

First, the Court is moving away from a limited understanding of the nature of same sex relationships. Second, *Lawrence* serves as precedent promoting respect and acceptance of same sex relationships. This acceptance may extend beyond mere tolerance of the intimate conduct involved in such relationships. Finally, the Court has again contributed to the precedent which blurs the line between negative and positive liberties, adding same sex relationships to the discussion. These are important considerations in the case for same sex marriage, but there are still some unanswered questions.

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<sup>85</sup> *Bowers v. Hardwick*, 478 U.S. 186, US S. Ct. 1986.

<sup>86</sup> *Lawrence*, 567.

In this section, I have demonstrated the connectedness of the positive and negative liberties in the right to marry. I have explained that the recognition of marriages precedes and necessarily establishes the right to marital privacy. Since *Lawrence*, same sex relationships are entitled to the same privacy as marital relationships. Because of the dependence of marital privacy on acknowledgement by the state, privacy rights are not entirely separate from the right to state recognition. *Lawrence* connected homosexual couples to the right to marry by granting them the right to marital privacy.

Is it necessary to recognize same sex relationships simply because they share the same negative liberties as married relationships? No. But it is unconstitutional to keep the right to recognition from same sex couples. The reasoning in this claim is two fold and involves the Due Process and Equal Protection clauses of the Fourteenth Amendment. In the following two sections, several questions are posed. First, “Are positive liberties protected by the Constitution in the case of marriage?” Next, “Do these positive liberties of the fundamental right to marry apply to same sex couples?” Finally, “Are there any compelling reasons not to recognize some homosexual relationships as marital?” I argue that the Fourteenth Amendment requires the recognition of some same sex relationships as marital.

#### **Part Four: Due Process and the Protection of Liberty**

The Constitution protects the recognition of marriages as a liberty under the Due Process Clause of the Fourteenth Amendment. The positive liberty of recognition has emerged alongside privacy rights in the body of case law surrounding same sex marriage. In *Loving v. Virginia*, the Court asserted that “Marriage is one of the ‘basic civil rights of

man,' fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes... is surely to deprive all the States' citizens of liberty without due process of law."<sup>87</sup> While the *Loving* opinion responded to racial classifications, not sexual orientation classifications, a parallel can be drawn between the Lovings and homosexual couples wishing to marry.

In the *Loving* opinion, the Court acknowledged the role recognition plays in the fundamental right to marry. If recognition were not a part of the fundamental right to marry, the case for the Lovings would not have been as powerful. For the first time, with the *Loving* decision, the Court recognized the importance of the marital relationship beyond considerations of privacy. The Court concluded that "the denial of [recognition], that is, the failure of the state to act, violated the claimants' fundamental right to marry."<sup>88</sup> *Loving* is, therefore, powerful precedent demonstrating that the fundamental right to marry is incomplete without state recognition.

*Zablocki* strengthened this precedent. Similar to *Loving*, the *Zablocki* decision focused primarily on equal protection, not due process. However, the Court indicated that the state violated the rights of the petitioners in keeping the right to marry from them solely because of their financial status. This decision further confirms that the fundamental right to marry involves more than negative liberties. It involves an element of recognition. When that recognition is kept from citizens without legitimate reason, the state violates the right to marry. *Zablocki* expands the precedent set with *Loving*, granting

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<sup>87</sup> *Loving*, 12.

<sup>88</sup> *Ball*, 7.

Court protection of the right to marry to non-minority groups. After *Zablocki*, one need not be a racial minority in order to command Court protection.

Still, *Zablocki* and *Loving* were both equal protection cases and do not focus solely on the liberty interests involved in the right to marry. “It could be argued that whatever positive obligation on the state to recognize marriage that can be gleaned from [these cases] is primarily based on equal protection considerations rather than on substantive due process grounds.”<sup>89</sup> However, the *Turner* decision was based entirely on due process grounds. The Equal Protection Clause had no role in the decision. Importantly, nor did the right to privacy. Because the inmates in *Turner* had little to no private lives and were not an established minority, the Court found reason to protect the right to marry exclusive of negative liberties and equal protection considerations. Justice O’Connor explained that the state was obligated to recognize the “important attributes of marriage [that] remain... after taking into account the limitations imposed by prison life.” Among these important attributes are “expressions of emotional support and public commitment... spiritual significance,” all of which are elements of the fundamental right to marry.<sup>90</sup>

The cases of *Loving*, *Zablocki* and *Turner* provide evidence with which to answer the first question required by my argument: Is the liberty of recognition protected by the Constitution? Yes, it is. Indeed, the right to marry exists beyond and exclusive from the right to sexual privacy and is protected by the Constitution in cases like *Loving*, *Zablocki* and *Turner*.

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<sup>89</sup> Ball, 8.

<sup>90</sup> Turner, 94.

## **Part Five: Equal Protection - Liberty and Justice *for All***

Given the right to recognition of one's marriage exists, the case for same sex marriage develops. However, more questions remain. Does this protected liberty of recognition apply to same sex couples? In order to answer this question, I turn to the Equal Protection Clause.

The Equal Protection Clause requires a level of scrutiny by the Court dependent upon the discrimination in question. *Skinner* established that the violation of a fundamental right warrants the strictest scrutiny on the part of the Court. Because marriage is a fundamental right and the positive liberty element of that right is violated when homosexuals are not granted state recognized marriage, discrimination against them requires strict scrutiny analysis.

Such an analysis demands that the statute in question be *substantially related* and necessary for the accomplishment of a state objective, or a *compelling state interest*. It follows that the protected liberty of recognition in the right to marry must be granted to homosexual couples unless a compelling reason not to can be demonstrated by the state. According to Justice O'Connor, "Unlike the moral disapproval of same-sex relations-the asserted state interest in [*Lawrence*] - other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."<sup>91</sup>

What, then, constitutes a compelling reason to violate a fundamental right? What legitimate reasons might there be to grant equal protection of positive liberty to homosexual couples? A frequently argued reason to keep marriage from same sex

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<sup>91</sup> Lawrence, 585.

couples is that marriage, by definition, is reserved for heterosexual unions only.<sup>92</sup> This claim addresses two important elements of those arguments against same sex marriage. First, this claim inspires the perception of an articulated definition of marriage and second, the belief that marriage is founded in a historical tradition greater and more powerful than the principles of law upon which the United States was founded.

The idea that marriage is defined as a union between one man and one woman is unsupported by legislative history. Congress has recognized the flexibility of the term when “during the codification of the ban on gays in the military, it included a provision excluding people in homosexual marriages.”<sup>93</sup> The perceived necessity of this provision demonstrates that there is ambiguity about the definition of marriage. Furthermore, fifteen states have amended their constitutions to clarify the definition of marriage as a heterosexual union, revealing the absence of a foundational definition of “marriage.”

If semantics may not be a compelling reason to violate the fundamental right to marry, so many argue that a historical tradition of heterosexual marriage acts as reason enough to limit this right. Many critics of same sex marriage fail to recognize that “marriage is an evolving institution, and like many institutions, generational changes result in new interpretations.”<sup>94</sup> Among these new interpretations include the recognition that wives are not property, that individuals of different races are capable of loving one another, and that marital relationships constitute much more than an opportunity to reproduce.

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<sup>92</sup> William N. Eskridge, Jr., The Case for Same Sex Marriage: From Sexual Liberty to Civilized Commitment, (The Free Press 1996): 128.

<sup>93</sup> Polk, 8.

<sup>94</sup> Polk, 9.

The inability to recognize the fluid notion of marriage leads to the claim that marriage is the foundation of the human race, that procreation is the primary goal of marital unions, and that homosexual relationships have no way of achieving this goal.<sup>95</sup> If these were compelling reasons to keep the right to marry from homosexuals, it must be kept from the impotent, sterile and aged members of our society as well.<sup>96</sup> Clearly, procreation is not a compelling reason to outlaw same sex marriage.

Definitions, history and procreation are not legitimate reasons to limit the fundamental right to marry. Thus, moral disapproval and fear constitute the remaining argument. The Court established in *Lawrence* that “moral disapproval [is not] a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy.”<sup>97</sup> The Court, therefore, should not recognize disapproval as a legitimate reason to limit the fundamental right to marry. Without the criminalization of homosexual conduct upon which to fall back, opponents of same sex marriage, Justice Scalia comments on the lack of any legitimate reason to limit the right to marry only to heterosexuals. He states,

[*Lawrence*] dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexuals is ‘no legitimate state interest’... what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘the liberty protected by the Constitution?’<sup>98</sup>

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<sup>95</sup> The Report, The Gay Agenda.

<sup>96</sup> Polk, 9.

<sup>97</sup> *Lawrence*, 582.

<sup>98</sup> *Lawrence*, 604-605.



No compelling reasons exist to keep the recognition of marital relationships from homosexual couples. The promotion of a definition which does not exist is not a sufficient reason to limit fundamental rights. A bare desire to harm homosexuals or the adherence to a history remembered incorrectly do not constitute adequate arguments. Finally, moral disapproval does not suffice to legitimize discrimination of any kind. The state, therefore, must recognize same sex relationships as marital.

## **Chapter Five**

### **Conclusion**

This thesis has made a case for same sex marriage. My argument depends upon the development of case precedent which demonstrates a fundamental right to marriage, the emergence of positive and negative liberties associated with that right, and the inclusion of homosexuals under the protection of the Fourteenth Amendment. The fundamental right to marry has been violated. Fundamental rights are granted strict scrutiny protection under the law and so, the right to marry requires strict scrutiny protection by the Court. Following such an analysis, it is clear that there are no legitimate reasons to keep state recognition of marriages from homosexual unions. The Fourteenth Amendment of the Constitution does indeed protect the right of same sex couples to marry.

This argument takes a place within a great body of scholarship devoted to the topic of same sex marriage. While many have argued in support, I have found that most of these arguments focus on either the Due Process Clause or the Equal Protection Clause, rarely both. My argument is unique because it presents a comprehensive approach to the Fourteenth Amendment. I believe that mine is the clearest, safest path towards legalizing same sex marriage. My argument brings advocates of same sex marriage one step further towards achieving their full right to marriage.

While my argument is unique, the line of reasoning I have presented is not the only method of argument available. Suspect classification and undue burden are other approaches to the Fourteenth Amendment that could arguably defend same sex marriage.

My objections to the use of suspect classification, primarily the unreliability of the immutability standard, have been outlined in the thesis. A brief analysis of the undue burden test is necessary.

The undue burden test, like the strict scrutiny standard, aids the Court in deciding whether or not a right has been violated. The standard was first presented in a joint opinion by Justices O'Connor, Kennedy and Souter in *Planned Parenthood v. Casey*.<sup>99</sup> *Casey* challenged the constitutionality of a Pennsylvania abortion statute which placed several restrictions on abortions in the state. The Court was asked to rule on five of these provisions. Among them was the requirement of married women to inform their husbands of their choice to abort. In a joint opinion written by Justices O'Connor, Kennedy and Souter, the Court affirmed the constitutionality of several of the provisions but determined that "the provision requiring spousal notice violated the due process clause by imposing an undue burden on a woman's abortion rights."<sup>100</sup>

In effect, the "undue burden" standard allowed the Court to carefully dissect the statute based on questions beyond concepts like fundamental rights. Much of the opinion focused on the nature of choice, a woman's liberty in terms of abortion. The result was the simultaneous affirmation of *Roe v. Wade*, rejection of certain anti-abortion provisions, and the limiting of other reproductive freedom. The nuance of this standard renders it much more flexible than other standards of constitutional review, namely that of strict scrutiny. This flexibility presents the undue burden test as an interesting and promising path for the legalization of same sex marriage. My choice to focus on the strict scrutiny standard of review, therefore, requires a defense.

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<sup>99</sup> *Planned Parenthood of Pennsylvania v. Robert P. Casey*, 505 U.S. 833; 112 S. Ct. 2791, 1992.

<sup>100</sup> *Casey*, 833.

By comparing the undue burden and strict scrutiny standards, their relative advantages become clear. It has been said that, where the undue burden test acts as a scalpel, strict scrutiny is a sledgehammer.<sup>101</sup> The former allows for precision and restraint and the latter demands sweeping application. It follows that any court with an interest in judicial restraint would prefer to apply the standard of undue burden to test the constitutionality of a statute. However, I believe any counsel with an interest in securing the most powerful decision to their client's favor would surely request strict scrutiny review of their case. In constructing this thesis, I wore the hat of counsel, not jurist. I chose to argue for strict scrutiny over undue burden because of the power of the precedent it sets.

Abortion cases, currently in the spotlight for the undue burden test, demonstrate the failures of the standard. The Court, in *Casey*, pointed out that their decision marked the sixth time in a decade that *Roe* had been challenged. Because of the controversial nature of the abortion question, endless attacks on *Roe v. Wade* have been presented to the Court. Many have succeeded. Since *Roe*, the right to choose has been dissected into state-by-state statutes. Today, it is illegal for a rape victim to seek an abortion in South Dakota and women in Minnesota are required to read several pamphlets about the lives of the unborn before the procedure. When such statutes are continuously created and challenged, the Court becomes the battlefield for a never-ending political and social controversy. I believe that, were the undue burden test applied to anti-same sex marriage statutes, a similar situation would result.

Despite the current chaos that is abortion legislation, however, it is the foundation of a powerful and sweeping Court decision which has kept the right to abortion fairly safe

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<sup>101</sup> Professor Kati Mohammad-Zadeh, April 20, 2006.

for over thirty years. While *Roe* has been challenged repeatedly, it has been upheld consistently. Without the powerful precedent set by *Roe*, I argue that the situation for abortion rights would be worse than it is today. The same is true for the same sex marriage question. As an advocate for same sex marriage, I find that the undue burden test is acceptable only when it is preceded by a stronger standard. Because legal same sex marriage would attract challenges and attacks, a strong standard must be set in order to limit political manipulation of the Court.

The right to same sex marriage will continue to be violated and attacked. Some are convinced that the prospect of legalized same sex marriage will remain a figment in the imaginations of civil rights advocates and legal scholars like me for years to come. Without a commitment to the letter of the law on the parts of the justices of the United States Supreme Court, it may be that there is little hope for the future of same sex marriage. Such objectivity becomes increasingly difficult in the today's political atmosphere.

I remain, however, an optimist. There are many avenues of legal reasoning which end at same sex marriage. Mine is merely one such argument. I intend it to stand strong in the face of imposing challenge. While the future of liberal politics is arguably grim, and the insufficient justifications for limiting fundamental rights remain popular rhetoric, I will forever be a lover of the Constitution and its promise of equality and justice for all.

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