THE DEFENSE OF MARRIAGE ACT (DOMA) AND CALIFORNIA'S STRUGGLE WITH SAME-SEX MARRIAGE

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This Article sets out a legal framework to examine same-sex marriage rights. As a result of the federal Defense of Marriage Act (DOMA), which puts marriage in the realm of the states, proponents of same-sex marriage were forced to pursue marriage equality state by state. Likewise, opponents of same-sex marriage focused their efforts, even more than they had prior to the passage of DOMA, on legislation and constitutional amendments at the state level. In California, for example, groups both for and against redefining traditional marriage have spent exorbitant sums of money on voter initiatives and judicial challenges to those initiatives trying to resolve the issue. As a result, the state currently has a constitutional amendment banning same-sex marriage—and a judicial challenge to that amendment pending. California, however, is just a microcosm of the entire country. Many states now have constitutional bans on same-sex marriage, while a few others permit it. In the years following the passage of DOMA, the issue has been debated heavily at the state level, but as criticism of the federal law has increased, legal strategies regarding same-sex marriage in the United States have entered a state of flux as the focus shifts from the states back to the federal government. Immediately after California passed its constitutional prohibition of same-sex marriage, proponents of same-sex marriage brought a federal equal protection challenge. After the district court judge issued an opinion declaring the state constitutional amendment to be invalid on federal equal protection and due process grounds, the Proposition 8 Campaign filed an appeal in the Ninth Circuit. With the issue currently moving through the federal courts, it is vital that the courts defer to the political branches of government in order to minimize strife and maintain healthy equal protection jurisprudence.

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I. INTRODUCTION

On May 15, 2008, the California Supreme Court issued a ruling that was sure to have its detractors no matter the result.[1] On that day, the court handed down its ruling for a collection of same-sex marriage cases which had reached the high court. The court's central holding was that the legal distinction state law had drawn between marriage and domestic partnerships violated the equal protection clause of the California Constitution.[2] The reaction on both sides was immediate and emotional. Same-sex couples were ecstatic to be granted the right to marry, while those in opposition immediately began the process to overturn the court.

The legal challenges to the prohibition on same-sex marriage neither began nor ended on that fateful day. In February 2004, the mayor of San Francisco had decided to begin marrying same-sex couples in contravention of state law.[3] In a state challenge to those marriages, the court overturned the validity of the marriages performed at that time, holding that the mayor did not have the power to issue marriage

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1 *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

2 *Id.* at 400–01.

3 *See* Lockyer v. City & Cnty. of San Francisco, 95 P.3d 459, 464 (Cal. 2004).

licenses in spite of state law.[4] This was not the end of the litigation on the matter. After this ruling, the couples that were denied the ability to marry mounted a direct challenge to California's same-sex marriage laws that resulted in the momentous ruling outlined above.[5]

One would think that the California Supreme Court's ruling permitting same-sex couples to marry would have put an end to the issue and all litigation on the matter, but that is only where the story began. In response to the holding of the California Supreme Court, California citizens put on the ballot a constitutional amendment that would restore California's previous definition of marriage as being only between a man and a woman. Despite overwhelming odds,[6] the constitutional amendment passed in November 2008 with a vote of approximately 52%–48%.[7]

In response to the passage of Proposition 8, which produced Article 1, Section 7.5 of the California Constitution,[8] same-sex couples sued the state on the ground that the ballot measure was not really an amendment but actually an invalid constitutional revision.[9] The crux of the argument was that the marriage amendment violated equal protection rights, which is a fundamental part of the Constitution, and

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[4] *Id.* at 463.

[5] *In re Marriage Cases*, 183 P.3d at 398.

[6] It is quite surprising that Proposition 8 passed when one considers the position of the California state government on the issue. When the California Supreme Court validated same-sex unions, the government leaders of the state of California backed the California Supreme Court decision. Michael Rothfeld & Tony Barboza, *Governor Backs Gay Marriage*, L.A. TIMES (Nov. 10, 2008), http://articles.latimes.com/2008/nov/10/local/me-protest10. The state government, many prominent politicians, and other public figures positioned themselves in opposition to Proposition 8, while those supporting the proposition feared being branded as bigots. *See* Jessica Garrison et al., *Voters Approve Proposition 8 Banning Same-Sex Marriages*, L.A. TIMES (Nov. 5, 2008), http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story?page=1. The language on the ballot, which can swing an election, was not favorable to the Proposition 8 side. CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 4, 2008: OFFICIAL VOTER INFORMATION GUIDE 9 (Sec'y of State, Debra Bowen ed., 2008). A portion of the guide written by the attorney general of California declared that Proposition 8 was eliminating rights and that the state could lose revenue over the next couple of years if it passed. *Id.* at 54–55. In spite of these factors, the voters approved Proposition 8, just like they had Proposition 22 a few years before. *See* CALIFORNIA VOTER INFORMATION GUIDE, MARCH 7, 2000: PRIMARY ELECTION 50–51 (Sec'y of State, Bill Jones ed., 2008); *see also infra* note 117.

[7] Jessica Garrison & Maura Dolan, *Brown Asks Justices to Toss Prop. 8; The Attorney General Tells the State High Court that the Measure Barring Gay Marriage Removes Basic Rights*, L.A. TIMES, Dec. 20, 2008, at A1.

[8] CAL. CONST. art. 1, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California.").

[9] Amended Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief; Memorandum of Points and Authorities at 14, Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (No. S168047).

therefore was a constitutional "revision."[10] Although the court heard oral arguments on the issue, it seemed unlikely that the court would overturn this newest ban on same-sex marriage.[11] As suspected, the court upheld the constitutional amendment passed by California voters.[12]

Although California is currently the only state to have overturned the initial ruling by its supreme court, California's struggle to decide the same-sex marriage issue is not unique. The Defense of Marriage Act (DOMA),[13] passed in 1996, effectively took the federal government out of the debate and left the issue in the hands of the individual states. As part of DOMA, Congress not only granted to the states the right to decide who could marry, but also granted the right to decide which marriages were recognized, regardless of where they were performed.[14]

Meanwhile, the people of Canada have also been engaged in the same-sex marriage debate but have charted a different course than the course that led to the United States' DOMA. In 2003, the highest courts of two separate Canadian provinces each reached the conclusion that same-sex couples could not be denied the right to marry.[15] The Canadian Supreme Court, in clarifying the law in this area in 2004, held that it was not within the power of the provinces to change the definition of marriage.[16] That power, according to the court, was vested in the national government.[17] Interestingly, the court did not decide whether same-sex couples should be granted the right to marry, but left that

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[10] *Id.* at 23.

[11] *See* Maura Dolan, *Ruling on Proposition 8: Activists Rally; Justices Hear Arguments; Court Looks Unlikely to Kill Prop. 8*, L.A. TIMES, Mar. 6, 2009, at A1, *available at* http://www.latimes.com/news/local/la-me-prop8-supreme-court6-2009mar06,0,798075.story.

[12] The court published a decision on Proposition 8 in May 2009, *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009), that upheld the validity of Proposition 8 limiting marriage between a man and a woman and found valid the marriages of same-sex couples that had wed prior to the passage of Proposition 8 relying on past Supreme Court precedent.

[13] 1 U.S.C. § 7 (2006) (defining "marriage" to mean "a legal union between one man and one woman as husband and wife" and "spouse" to mean "a person of the opposite sex who is a husband or a wife").

[14] *Id.*; 28 U.S.C. § 1738C (2006).

[15] *See* Barbeau v. B.C., 2003 BCCA 406, paras. 7–8 (Can.); Halpern v. Toronto, [2003] 65 O.R. 3d 161, paras. 154–56 (Can. Ont. C.A.) ("We would reformulate the common law definition of marriage as 'the voluntary union for life of two persons to the exclusion of all others.").

[16] *Re* Same-Sex Marriage, 2004 SCC 79, paras. 18–19, 73, [2004] 3 S.C.R. 698 (Can.).

[17] *Id.*

issue exclusively to the legislature.[18] In 2005, the Canadian Parliament responded, granting the privilege of marriage to same-sex couples.[19]

This Article examines the divergent paths that the United States and Canada have each taken in their attempts to resolve the issue of same-sex marriage. Part II of this Article examines the history and current state of the law concerning marriage in the United States. Because most challenges to same-sex marriage bans rely on the Equal Protection Clause, this section necessarily considers same-sex marriage rights in light of that constitutional ideal. Part III then briefly reviews the Canadian resolution to the issue of marriage. Parts IV through VI explore the benefits and possible pitfalls inherent in comparing the two nations' distinct approaches to marriage legislation. Finally, in examining the two, this Article suggests that the United States should follow the example of its neighbor to the north. This conclusion is predicated upon belief that current equal protection jurisprudence in the United States is being stretched beyond its proper function. The solution is not found in the courts, but, as Canada demonstrates, the solution is found in the national legislature. As long as Congress defaults to DOMA, however, the conflict seen in California and in other states is not likely to end any time soon.

II. THE STORY IN THE UNITED STATES

A. Traditional Marriage and DOMA

Despite present dispute, "marriage" has been traditionally restricted to the union of a heterosexual couple.[20] This is true even as far back as the Roman Empire, which actually had more than one type of marriage, each with varying legal consequences.[21] Interestingly, each of these marriage structures still consisted of a man and a woman,[22] although restrictions remained on who could marry based on the structure of Roman society.[23]

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[18] *Id.*

[19] Civil Marriage Act, S.C. 2005, c. 33 (Can.), *available at* http://laws-lois.justice.gc.ca/PDF/Statute/C/C-31.5.pdf.

[20] *See* GÖRAN LIND, COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION 32–48 (2008). Roman law recognized marital relationships as requiring a man and a woman. *Id.* Laws referred constantly to "husbands" and "wives." *See id.* at 33–34. In addition, the laws of the United States have traditionally only recognized the union of a man and a woman. *See* Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (finding no support in past U.S. Supreme Court decisions for the contention that "restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory."). Hence, litigation surrounding same-sex marriage today is meant to establish, not affirm, that right for those couples.

[21] LIND, *supra* note 20, at 33–34.

[22] *Id.*

[23] *Id.* at 35–36.

Pursuant to its English heritage, the United States has adhered to common law marriage, which can be traced back to Roman times.[24] Throughout the history of common law marriage, marriage was always understood to be the union of a "husband and wife."[25] Although the strictures of how to enter into marriage has changed, such as whether it was to be governed by contractual arrangement or whether some kind of solemnization ceremony was needed,[26] the requirement that marriage consist of a man and a woman has remained constant. Modern debates would therefore be remiss not to acknowledge the historical context in which contemporary efforts to redefine marriage exist.

In the late 1990s, proponents of same-sex marriage became more vocal, and in response to a ruling by the Hawaiian Supreme Court,[27] Congress passed DOMA, a federal statute allowing the states to define marriage. In essence, DOMA did two things: first, it established that, for federal purposes, only marriage between a man and a woman would be recognized;[28] second, it let the states decide for themselves what marriages they would perform and recognize.[29] Since that time the marriage debate has gone from state to state where large amounts of resources have been expended each time the issue has been raised. Meanwhile, the underlying incongruence in federal and state recognition remains unresolved.

The problems confronting each state under the regime created by DOMA are generally the same. First, each state must resolve whether the prohibition on same-sex marriage violates constitutional equal protection principles. Second, courts have yet to resolve whether the Full Faith and Credit Clause of the Constitution requires that same-sex marriages performed in a state where the institution is legal be recognized in states where the institution is banned. Third, there is the discrepancy between federally recognized marriage and the sometimes broader definition of marriage employed by the states.

DOMA is currently under attack in federal courts as same-sex couples seek assurances that their civil unions, held to be valid

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[24] *Id.* at 131. "Common law marriage," according to Lind, is actually a misnomer. Marriage in England was originally administered by ecclesiastical courts who applied canon marital law, which was based on the Roman conception of marriage. *Id.* Nonetheless, this can be said to have become part of the common law heritage.

[25] *Id.* at 32–48, 131.

[26] *Id.* at 139, 149.

[27] David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, N.Y. TIMES, Mar. 6, 1996, at A13. The actual case in Hawaii that raised the alarm of Congress was *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) (holding that same-sex couples do not have a fundamental right to marry, but, if properly raised, they might have an equal protection claim).

[28] 1 U.S.C. § 7 (2000).

[29] 28 U.S.C. § 1738C (2000).

marriages in some states, will be recognized as marriage in all.[30] DOMA defines marriage, as it relates to federal benefits or acts, as the union of one man and one woman.[31] Couples from Massachusetts who were married under that state's same-sex marriage laws have consequently begun a legal challenge to DOMA.[32] They allege that DOMA unfairly denies them benefits.[33] It seems the litigation on this point is far from over.

There is also a potential problem when couples are married in one state and then move to another. It is foreseeable that same-sex couples might be asked to move for work purposes from a state that recognizes same-sex marriage to a state that does not. Will this affect the distribution of benefits to that couple? If that couple were to attempt to divorce, would the new state recognize the marriage in order to facilitate the divorce?[34] This issue raises questions regarding the Full Faith and Credit Clause of the Constitution. Only one thing is certain under DOMA: lawyers who work on these issues should have excellent job security for years to come.

B. Constitutional Interpretation

Since the judicial revolution of the Warren Court,[35] the United States has been deeply affected by the dispute as to the proper role of the judiciary in interpreting constitutional rights.[36] Those who admire the Warren Court herald its accomplishments as a large step forward for

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[30] *See, e.g.,* Bishop v. Oklahoma, 333 F. App'x. 361, 362 (10th Cir. 2009); Smelt v. County of Orange, 447 F.3d 673, 676–77 (9th Cir. 2006); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010).

[31] 1 U.S.C. § 7 (2000). The Ninth Circuit recently declared this law to be unconstitutional. *In re* Levenson, 560 F.3d 1145, 1151 (9th Cir. 2009). Even so, it is clear that the law is still in a state of flux. DOMA created a non-uniform law that absent Congressional action, currently must be resolved in the courts. The orders of the 9th Circuit have been rejected because of DOMA. *See* Carol J. Williams, *Legally Married Same-sex Spouses File Federal Suit; 12 Couples Claim the Defense of Marriage Act Deprives Them of a Range of Benefits Granted to Others,* L.A. TIMES, Mar. 4, 2009, at A4, *available at* http://www.latimes.com/news/local/la-na-defense-of-marriage-act42009mar04,0,1017651.story

[32] Williams, *supra* note 31, at A4.

[33] *Id.*

[34] *See, e.g.*, Chambers v. Ormiston, 935 A.2d 956 (R.I. 2007).

[35] *See The Law: The Legacy of the Warren Court*, TIME, July 4, 1969, at 62, *available at* http://www.time.com/time/magazine/article/0,9171,840195-1,00.html. Fair or not, Chief Justice Warren has since been associated with the liberal judicial philosophy that conservatives oppose.

[36] Ronald J. Krotoszynski, Jr., *A Remembrance of Things Past?: Reflections on the Warren Court and the Struggle for Civil Rights*, 59 WASH. & LEE L. REV. 1055, 1055–56 (2002). Krotoszynski writes about the great achievements of the Warren Court, but also suggests that the Warren Court sometimes made the ends of judicial decisions more important than the means by which they were accomplished. *Id.*

individual rights guaranteed in the Constitution.[37] Those who view the Warren Court less favorably see Chief Justice Warren's rulings as a judicial usurpation of power, describing his actions as so-called "legislating from the bench."[38] The deep divide between conservative and liberal factions in the United States seems to grow wider as the Warren Court decisions are discussed. The truth, however, may lie somewhere in between, wherein both liberals and conservatives make legitimate points.

The latter half of the 20th century saw substantive due process figure prominently in judicial interpretation of constitutional rights.[39] The essence of substantive due process is that due process guarantees are not only procedural safeguards but also are rights that provide protection against arbitrary governmental action "regardless of the fairness of the procedures used to implement them."[40] Hence, the right to privacy, for example, was found by Supreme Court justices who read between the lines of the constitutional text and arrived at the conclusion that an individual's privacy, or liberty, was really what the Founders were trying to protect, in addition to the rights recognized explicitly in the text. In essence, the Court[41] was given the power to decide whether government intrusion into the privacy of an individual was arbitrary or simply wrong.[42] Because privacy was now deemed to be a right, the

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[37] *Id.* at 1056–57.

[38] *See* Catherine Cook, *Legislating from the Bench*, HARVARD POLITICAL REVIEW (Mar. 3, 2009, 6:45 PM), http://hpronline.org/america-and-the-courts/legislating-from-the-bench/.

[39] *See, e.g.*, Krotoszynski, *supra* note 36, at 1057. Krotoszynski cites *Griswold v. Connecticut*, 381 U.S. 476, 481, 484 (1965) and *Roe v. Wade*, 410 U.S. 113, 152–54, 164 (1973) to illustrate the development of the doctrine of substantive due process.

[40] Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 521 (2008) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

[41] The Court, under the theory of substantive due process, thus becomes the last and supreme arbiter of what rights are important and can therefore limit what Congress can do without any express constitutional provision granting that power. *See, e.g.*, Kevin W. Saunders, *Privacy and Social Contract: A Defense of Judicial Activism in Privacy Cases*, 33 ARIZ. L. REV. 811, 852–53 (1991).

[42] George Carey maintains that the ideas of separation of powers and pluralistic democracy served different purposes. George W. Carey, *Separation of Powers and the Madisonian Model: A Reply to the Critics*, 72 AM. POL. SCI. REV. 151, 154–155 (1978). Separation of powers was meant to prevent the accumulation of powers into one person or branch that would lead to an arbitrary exercise of power, or in other words, a government of men. *Id.* A pluralistic democracy was Madison's idea for protecting against the "tyranny" of the minority by the majority. *Id.* It is the multiplicity of factions that prevents a majority from depriving a minority of fundamental rights, and it is the separation of powers that protects a "government of laws" against a government of "men." *See id.* at 154 (quoting MASS. ANN. LAWS art. XXX, § 31 (LexisNexis 2004)). It is therefore hard to imagine that

government was further limited in its ability to interfere with certain activities that people did in private. By making privacy a constitutional right, the Court became the ultimate decision-maker in deciding whether the government has legitimate interests in taking any action that might impinge on the personal rights to liberty and privacy.[43]

Meanwhile, judicial conservatives adhered to an "originalist" reading of the Constitution.[44] The originalists' argument was that the text of the Constitution was supreme, that the original intent of the document must be discerned,[45] and that judges are capable of unnecessarily reading their own views into the Constitution.[46] For example, some judicial conservatives would say that there is no independent constitutional right to privacy because it would have been included in the Bill of Rights.[47]

In determining what interpretive technique is most beneficial to use, it is necessary to examine the circumstances surrounding the drafting of both the U.S. Constitution and the Bill of Rights. Constitutional "progressives" may object to an interpretive approach that looks backwards rather than forwards in determining the nature and scope of fundamental rights in a modern context. After all, circumstances and technologies have changed dramatically, even in this last century. While this criticism is therefore not entirely without merit, it neglects to consider the tremendous value that a backward-looking interpretive methodology offers, especially in light of the peculiar circumstances in which the Constitution's drafters found themselves.

Madison would have envisioned a court successfully performing the role that he only believed a pluralistic society was equipped to do.

[43] It appears that this is neither more nor less than the judiciary substituting its own view for the majority view. It is arguable that the Court discovers some rights, not through constitutional principle, but rather through the individual Justices' own moral views. For an example of a case that, perhaps, features the discovery of rights through extra-legal means, see *Lawrence v. Texas*, 539 U.S. 558, 562, 573–74 (2003) ("Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

[44] *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 624–29 (1994) (describing modern conservative jurisprudence); *see also*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–38 (Amy Gutmann ed., 1997) [hereinafter A MATTER OF INTERPRETATION].

[45] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989).

[46] *Id.* at 863; *see also* Roe v. Wade, 410 U.S. 113, 171–74 (1973) (Rehnquist, J. dissenting) ("To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment.").

[47] *See* Mark C. Rahdert, *In Search of a Conservative Vision of Constitutional Privacy: Two Case Studies From the Rehnquist Court*, 51 VILL. L. REV. 859, 879 (2006) (stating that there is no "freestanding" right to privacy in the U.S. Constitution).

The Constitution of the United States can be divided into two very different but very important parts. The first part, that part originally ratified as the Constitution, set up a system of government.[48] It essentially dealt with the distribution of power among various government branches and attempted to determine how those branches should interact with one another. The second part actually came after the ratification of the Constitution in the form of the Bill of Rights.[49] Rather than define the relationships among the organs of government, these rights were concerned with defining the proper relationship between the government and the governed. It essentially served to limit government action directed towards its citizens.

In establishing the federal government, the Founders had no real precedent or experience to guide their actions. The United States Constitution established a unique form of government.[50] Each of the thirteen original colonies had become independent states after the Revolutionary War. The Founders attempted to establish a sovereign government over the states while still maintaining the sovereignty of the states.[51] They did this by delegating powers to the federal or national government and reserving all other powers to the states.[52] Empires had risen before to govern wide territories, but never had a republican government based on popular sovereignty survived very long to govern large portions of the earth.[53] What made the Founders' exercise more complicated was that not only was power separated between the national government and state governments, but the Constitution also divided the powers of the national government into three branches, which previously had only theoretical underpinnings. Considering the uniqueness of the separated powers, combined with the representative

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[48] THE FEDERALIST NO. 51, at 285 (Alexander Hamilton) (E.H. Scott ed., 1898); *see also A More Perfect Union: The Creation of the U.S. Constitution*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, http://www.archives.gov/exhibits/charters/constitution_history.html.

[49] THE FEDERALIST NO. 84, at 466 (Alexander Hamilton) (E.H. Scott ed., 1898) (responding to objections that the amended Constitution contained no bill of rights but was merely descriptive of the structure and limitations of the federal government); William J. Brennan, *Why Have a Bill of Rights?*, 9 OXFORD J. OF LEGAL STUD. 425, 428 (1989).

[50] JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 6–11 (2000) [hereinafter FOUNDING BROTHERS].

[51] JOSEPH J. ELLIS, AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC 8–9 (2007) [hereinafter AMERICAN CREATION].

[52] U.S. CONST. amend. X; *see also* William A. Aniskovich, Note, *In Defense of the Framers' Intent: Civic Virtue, the Bill of Rights, and the Framers' Science of Politics*, 75 VA. L. REV. 1311, 1326 (1989) (citing a speech by James Wilson in 1787 that defends the Constitution as one of enumerated powers only).

[53] *See* FOUNDING BROTHERS, *supra* note 50, at 6 ("[No representative government] had ever been tried over a landmass as large as the thirteen colonies. (There was one exception, but it proved the rule: the short-lived Roman Republic of Cicero . . . .).").

nature of the democracy that for the first time in history was governed by a single founding document, one begins to see the enormity of the task that was undertaken by the Founders of the American republic.[54]

The Founders' task was largely theoretical.[55] As a theory, then, implementation of the new government would be tested and necessarily improved as time went on. Because such a government had never existed before, there would need to be an arbiter of last resort that would decide the inevitable disputes that would arise between the multiple power centers in the new republic.[56] That arbiter, pursuant to the Constitution, according to *Marbury*, would be the United States Supreme Court, whose loyalty was to the preservation of the constitutional form of government.[57] By examining the theoretical nature of the formation of our system of government, one can arguably see why the Supreme Court might need greater liberty, perhaps even so far as to read between the lines of the text of the Constitution, in order to preserve the structure of the constitutional, federal, and democratic government that the Founders had created.

The addition of a Bill of Rights, however, was not a theoretical venture into what a government thus created might be able to do.[58] At

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[54] *Id.* at 8–9 (noting the logical "impossibility" of implementing a system of national government that effectively coerced obedience from citizens who themselves possessed an "instinctive aversion" to "coercive political power of any sort"); *see also* AMERICAN CREATION *supra* note 51, at 8–9.

[55] *See* AMERICAN CREATION, *supra* note 51, at 18 (describing the founding of the American republic as an improvisational affair in which the Founders were "making it up" as they went along).

[56] A fledgling Supreme Court squarely addressed this issue in the landmark decision of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Therein it held that

> [i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
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> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law . . . or conformably to the constitution . . . ; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id. at 177–78.

[57] *Id. But cf.* Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2707–08, 2711 (2003) (arguing that despite ensuing interpretations of the case, "the power of judicial review was never understood by proponents and defenders of the Constitution as a power of judicial *supremacy* over the other branches . . . . *[n]othing* in the text of the Constitution supports a claim of judicial supremacy").

[58] *See, e.g.,* THE DECLARATION OF RIGHTS (Eng. 1689); Brennan, *supra* note 49 at 425 (stating that the need for a bill of rights arises from the unique history and problems of a particular community). The Thirteenth and Fourteenth Amendments to the U.S. Constitution, for example, were not passed until after the Civil War and more than a century of time in which the evils of slavery had become fully apparent and caused great

very worst, the new government could turn into a tyranny governed by a despot. The Founders of the republic were not naive about what this would mean for their individual freedoms. They had personal experience and the experience of history to see what unlimited governments could do to their citizens.[59] The Bill of Rights, then, became a practical document that was clearly understood on the basis of experience. Because of the Founders' knowledge of and experience with tyrannical governments, they put in the Constitution only those rights that they deemed most endangered by an overreaching government.[60] Accordingly, when the Supreme Court became an arbiter of last resort[61] for governmental disputes, it also became the arbiter of last resort for disputes regarding the government's abuse of its citizens. Because the Founders were not acting on theory but experience, the interpretation of rights clauses in the Constitution should require close adherence to the text of the Constitution, because the text reflects better than anything else what the Founders ultimately concluded were rights that warranted explicit protection.[62] Therefore, when a court adds substantive constitutional rights in judicial rulings, it usurps the legislative prerogative.

It is important to note that constitutional rights are not the only type of rights that are available to individuals. Making a right constitutionally protected does not create it in the first instance. The right to enter into a contract,[63] for example, although fundamental[64] to

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suffering to those who had been oppressed. *See* John P. Frank and Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 133 (1950) (describing the end of slavery and the passage of the Civil War amendments).

[59] In the Declaration of Independence, the colonists cited numerous grievances ranging from the suspension of representation in the Legislature to the corruption of the judiciary. THE DECLARATION OF INDEPENDENCE paras. 5, 7, 11 (U.S. 1776).

[60] For example, see the DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776), in which the Continental Congress outlines many of the grievances that the Colonies had against the British Crown, which included the quartering of troops among the populace, the deprivation of a jury trial, and transportation to foreign shores for trial. Rights protecting against such injustices were thereafter protected in the Third and Sixth Amendments of the U.S. Constitution, respectively.

[61] This is true only barring a constitutional amendment, of course.

[62] *See* A MATTER OF INTERPRETATION, *supra* note 44, at 38.

[63] *See* Lochner v. New York, 198 U.S. 45, 64 (1905) (declaring freedom of contract a constitutional right), *abrogated by* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 394–95 (1937).

[64] There is a theory of rights called "fundamental rights theory." David B. Anders, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia Over Unenumerated Fundamental Rights*, 61 FORDHAM L. REV. 895, 895, 899–900 (1993) ("[T]here are certain rights that are so fundamental to liberty and equality that they must constrain the legislative process."). This theory formed the underpinnings of the argument made by the California Attorney General in his argument against the implementation of California's Proposition 8. It basically meant that some rights, such as

our system, should not be considered a constitutional right.[65] To do so would be to take out of the hands of the legislature the ultimate decision of who can contract and what constitutes a contract.[66] Such final decisions are necessarily policy decisions that are better decided through legislative debates. This does not mean that a court, through stare decisis, cannot fashion the body of contract law; it merely means that the ultimate authority to fashion that body of law rests with the elected representatives of the people. This is an important distinction to make. What is explicitly addressed in the Constitution ultimately made it into the document by a supermajority, demonstrating both a common value and a concern about government abuse, and comes within the final purview of the Court to interpret its meaning.[67] What is not stated in the Constitution has not yet obtained a supermajority status, either because it has not become a widely shared value or because Americans feel comfortable that the government will not be tempted to abuse its power relating to that issue, and thus comes within the final review of the legislature elected by the people.[68]

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life, liberty, or property, are so fundamental that the people cannot alter them. The Attorney General argued that marriage was one such right. *See* Nicholas Goldberg, *Gay Marriage on Trial*, L.A. TIMES, Mar. 1, 2009, at A27, *available at* http://www.latimes.com/news/opinion/commentary/la-oe-goldberg1-2009mar01,0,2867679.story?page=1. The difficulties of adherence to such a theory are innumerable, but perhaps the most important difficulty is the question of who decides, and by what criteria, the definition of a fundamental right. Another is that the model rights for the fundamental rights argument—life, liberty, property—can be and are restricted in every government, but subject to due process and equal protection in our own system according to our Constitution. The difficulty in articulating and defending this argument was readily apparent in the oral arguments before the California Supreme Court. Oral Argument, Strauss v. Horton, 207 P.3d 48 (No. S168047), *available at* http://www.calchannel.com/images/sc_030509.html (note the segments at 19:13–23:50 and 33:31–37:30).

[65] U.S. CONST. art. I, § 10 does have a contracts clause. It prohibits the states from "impairing the Obligations of Contracts." The idea of contract is also fundamental to Locke's theory on political government. *See* Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, U. PA. J. CONST. L. 609, 616–23 (2000) (discussing how individuals initially possess all rights but cede power to a government that is formed by a social contract).

[66] *West Coast Hotel Co.* signaled the demise of substantive due process right to contract expounded in *Lochner*. *West Coast Hotel Co.*, 300 U.S. at 394–95 (quoting Holden v. Hardy, 169 U.S. 366, 397 (1898) and Muller v. Oregon, 208 U.S. 412, 422 (1908)).

[67] This is true unless there is a constitutional amendment, of course.

[68] It is important to note that James Madison, the father of the United States Constitution, did not initially believe that a bill of rights was necessary or effective to protect the rights of minorities under the system that he had created. Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 308–12 (1990). It was his belief that the diffusion of power among people having different ideologies would do more to protect the rights of individuals than any court was capable of doing. *Id.* at 312. As an example, one can look to the *Dred Scott* decision of the United States Supreme Court. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856). In that case, the Supreme Court decided that slaves were non-citizens and not subject to the same

Judicial restraint in interpreting constitutional rights thus becomes a vital component of democratic government. Governments are not created, at least in the democratic theory, for their own sakes; they are created to govern and enforce the realm of individual interactions among their citizenry. When the judiciary begins to expand the realm of constitutional rights, it necessarily aggrandizes its own power at the expense of those who are supposed to govern and regulate the affairs of the citizens: the people and their representatives. The people are the ultimate judge of what is acceptable or not acceptable in a representative democracy. The power given to the judge, therefore, is not to decide what is ultimately moral or immoral, acceptable or unacceptable; rather, it is to decide disputes based on what the people have told the judiciary is acceptable. It is therefore ultimately the people, and not the judiciary, that decide how they will be governed and regulated.[69] How this applies to equal protection analysis will be examined later in this Article.[70]

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protections as citizens. *Id.* at 421. Approximately a century later, the Court issued a new ruling in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), that said the government could no longer discriminate against non-white students by segregating them. The drastic change was not because the court had suddenly become enlightened and was choosing to protect the downtrodden individual. The Court was not granting a new right, but enforcing a constitutional amendment passed by the people decades before, an amendment that mandated equal protection under the laws of the United States for all individuals. U.S. CONST. amend. XIII, § 1 The Court finally saw segregation for what it was: a system of unlawful discrimination that had effectively created second-class citizens.

In addition, Franklin Roosevelt's court-packing scheme is a representation of what a determined majority can do. Many of President Roosevelt's New Deal proposals were being overturned by the Supreme Court as unconstitutional. Roosevelt's solution was to appoint more justices to the Court that would be amenable to his policies. *See* Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-packing Plan*, 81 AM. POL. SCI. REV. 1139, 1140–42 (1987). This threat seemed to make the Supreme Court more compliant with Roosevelt's policies and the addition of Justices to the Court was unnecessary. *Id.* The point of that story is to demonstrate that a determined majority can eventually have what it wants even when the Supreme Court initially resists. Thus, the greatest protection for individual rights is not a court, but a pluralistic society as James Madison envisioned.

[69] It is interesting to note on this point that the common law system of stare decisis which the United States inherited from England functions fundamentally different from our own system. The British parliamentary system is not governed by one constitutional document as the United States is. Many of the individual rights enjoyed by its citizens, which are substantial, were created through the common law decisions of its judges. For example, the protection against double jeopardy, a constitutional right in the United States, was a common law right in England. Therefore, in the United States the protection against double jeopardy has largely become the realm of lawyers and judges interpreting the Constitution. In England, however, the legislature still retains the ultimate authority to define the protection even after the judges have had their say. The British have recently exercised that prerogative in adopting two reforms to double jeopardy protections during the 1990s, which provide for a second prosecution of an acquitted defendant if his previous acquittal was tainted or if new and compelling evidence of guilt is obtained after the first prosecution. *See* Criminal Justice Act, (2003), §§ 75–79 (Eng.). The people of England can thus overturn a common law decision of the court by an act of the legislature, but when the

C. Marriage Today and Privacy

It is important to state clearly what the issue that underlies the debate concerning same-sex marriage truly is. What same-sex couples are arguing is not that their relationships are being criminalized or that they are being deprived of their liberty to associate and maintain a relationship with someone of their choosing;[71] rather, the issue is whether the government must recognize that relationship as equally valuable to society as traditionally-defined marriage.[72] The fundamental issue in the current marriage debate is whether the marriage of a homosexual couple and the marriage of a heterosexual couple are institutions of equal value to society, such that government must recognize them as equal.

Therefore, the argument that there is a right to privacy or substantive due process right to same-sex marriage cannot be successful because the debate is not about the government entering the home and regulating the affairs therein. The government need not enter the home to recognize a marriage. Rather, people ask that the state provide certain benefits and protections based on their relationship status. The state, if it so desires, can get out of the marriage business entirely without denying any person substantive due process. The issue, then, is whether the government, which has officially sanctioned heterosexual marriage by granting legally enforceable rights and privileges specific to the institution, must also do so for homosexual relations. This is essentially an equal protection issue.

The Supreme Court, in regard to marriage, has also perhaps erred in stating that marriage is a fundamental *constitutional* right.[73] Marriage is a fundamental component of society, which is a reason why the debate concerning marriage is such a contentious issue. Some argue that because marriage is so fundamental, it must be protected from influences that weaken or change it.[74] Others argue that because

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United States courts decide a constitutional issue, it requires a supermajority to change. Such lopsided power should be wielded sparingly and conservatively.

[70] *See infra* Part II.D.

[71] *Loving v. Virginia*, 388 U.S. 1, 12 (1967), the Supreme Court case that declared interracial restrictions on marriage to be unconstitutional focused on due process and equal protection. It is important to distinguish the issues at stake in that case from the present controversy. The couple in *Loving* was not simply denied government recognition, but their relationship was criminalized. For this reason, the court expounded a substantive due process rationale in addition to its substantial equal protection analysis to support the couple's right to marry.

[72] Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1877–78 (1997).

[73] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

[74] Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1371–72 (2007); *see also The Divine Institution of Marriage*, THE

marriage is fundamental it should be granted to every person.[75] While both arguments can be persuasive, that still does not make marriage a constitutional right. The fact that marriage is never once mentioned in the Constitution supports the notion that it cannot be considered a constitutional right.[76]

Perhaps, the only constitutional right that possibly *is* implicated in the marriage debate is liberty.[77] People have the liberty right to associate with other people of their choosing. They have the liberty right to form relationships of their choosing. They have the right not to be impeded in the exercise of the liberty right, subject only to due process and equal protection. Because the current debate is not focused on outlawing same-sex relationships, no due process analysis is needed. There is, however, an equal protection analysis that may be required when the government has taken affirmative steps to protect one institution or class while leaving others out in the cold.

D. Equal Protection

The Equal Protection Clause of the United States Constitution is, textually, quite simple.[78] It says that no state may "deny to any person within its jurisdiction the equal protection of the laws."[79] The fundamental assumption in that statement is that every *individual* is of equal value in the eyes of the law. As a nation, the United States has

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CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS NEWSROOM (Aug. 13, 2008), http://beta-newsroom.lds.org/article/the-divine-institution-of-marriage.

[75] *See, e.g.*, Matthew S. Pinix, *The Unconstitutionality of DOMA + INA: How Immigration Law Provides a Forum for Attacking DOMA*, 18 GEO. MASON U. C.R. L.J. 455, 473 (2008); *The Conservative Case for Gay Marriage*, NEWSWEEK (Jan. 9, 2010), http://www.newsweek.com/2010/01/08/the-conservative-case-for-gay-marriage.html [hereinafter *Conservative Case*].

[76] *But cf. Zablocki*, 434 U.S. at 384 ("the right to marry is of fundamental importance for all individuals").

[77] In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court centered the debate on a determination of "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty . . . ." *Id.* at 564. In this case, the Court held that a homosexual couple does have a liberty right to engage in private and consensual intercourse. *Id.* at 578. Interestingly, in this case, Justice O'Connor joined in the judgment but wrote her own concurring opinion. *Id.* at 579 (O'Connor, J., concurring). She believed that the liberty interest that Court used to validate the conduct was not the proper foundation for the ruling, instead relying on equal protection principles. *Id.* She believed that the Texas statute violated equal protection because it first described the illegal sexual conduct, but only made it criminal if two persons of the same sex engaged in the act and found that to be a violation of equal protection. *Id.* at 579, 581.

[78] This Article examines equal protection from a federal point of view, i.e. using the 14th Amendment as a guide, because most state constitutions simply mirror this clause in their own constitutions. As such, the analysis should essentially be the same whether it is applied by federal courts applying federal law or state courts applying state law.

[79] U.S. CONST. amend. XIV, § 1.

declared that each person, each individual, has inherent worth and that the government must treat each person equally. The Equal Protection Clause does not state that every action or ability of every individual is of equal worth, but it implies that simply *being* puts humans on an equal footing.[80] The fundamental unit of analysis for equal protection purposes, then, becomes the individual.[81]

One can argue that equal protection should be applied to protect minorities wherever they may be. There is always a danger that an overreaching majority will seek to secure its own interests at the expense of those that lack the political voice to protect themselves.[82] James Madison himself proposed a structural solution to this problem. He wanted a national legislature of a broad republic to have veto power over state laws that infringed on minority rights.[83] Although Madison's proposed view of a broad republic was accepted, his national veto of state laws was not.[84]

When the Equal Protection Clause was later passed after the Civil War, it still did not reach every minority class that Madison might have envisioned. Often called the United States' Second Constitution,[85] the Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth) put an end to slavery and promoted the equal protection of the laws. Although largely understood to protect freed African Americans, they were more broadly construed to protect anyone from being legally discriminated against based on race (and, as an extension, descent).[86] The Reconstruction Amendments were not construed to protect any possible minority classification.

Interpreting the Equal Protection Clause broadly will cause many conflicts with the legislature, because the act of legislating necessarily

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[80] *Cf.* Universal Declaration of Human Rights, G.A. Res. 217 A (III) , U.N. Doc. A/RES/217(III) (Dec. 10, 1948), *available at* http://www.un-documents.net/a3r217.htm. Article 1 of the Universal Declaration of Human Rights states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." The focus on birth is an important point. Arbitrary distinctions lacking any rational basis are extremely suspect. Distinctions based on parentage, for example, are suspect because they do not even focus on the individual; therefore, a distinction drawn on that ground stands on very loose footing.

[81] *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). A class of one person can bring an equal protection challenge. *Id.* The Court stated that there must be a rational basis for any distinction. *Id.* at 564–65.

[82] James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 842–43 (2004).

[83] *Id.* at 844.

[84] *Id.*

[85] *See, e.g.*, *id.* at 919; Frank & Munro, *supra* note 58, at 134.

[86] *See* Frank & Munro, *supra* note 58, at 143.

involves line-drawing and distinction-making. Congress, for example, has drawn distinctions on political expenditures for various corporations and individuals.[87] It has drawn distinctions based on age and sex,[88] inter alia.[89] One cannot speak of congressional action without acknowledging that Congress's primary purpose is to draw distinctions.

The Supreme Court has struggled to define exactly what equal protection requires. For example, the right to appellate counsel is one area in which an equality rationale has been used to justify the use of appointed counsel for indigent defendants.[90] The Court acknowledged

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[87] *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010). Although not explicitly stating so, the Supreme Court overruled certain restrictions on speech using some equal protection language. Justice Kennedy wrote for the majority:

> Media corporations are now exempt from § 441b's ban on corporate expenditures. . . . Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have "immense aggregations of wealth," and the views expressed by media corporations often "have little or no correlation to the public's support" for those views. . . . Thus, under the Government's reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities. There is no precedent for permitting this under the First Amendment.

Id. at 905 (citations omitted).

From that passage, it is clear that Congress tried to distinguish between media corporations, which perhaps could be considered free from regulation under a freedom-of-the-press rationale, from those corporations that were not media corporations. Among other things, the Court did not like this distinction drawn by Congress and precluded it from drawing such lines in the future.

[88] When analyzing equal protection, courts often look at the immutability of a trait to determine the level of scrutiny that should be applied. *See, e.g.*, Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989). Following cues from the Supreme Court, the Ninth Circuit examined three factors in their totality for determining when to invoke strict scrutiny: a history of discrimination against the group, whether the discrimination embodies gross unfairness, and trait immutability. *Id.* at 724–26.

[89] As an example, all males eighteen years of age and older must register with the selective service. Women, however, are not required to register with the selective service. This is a distinction that is not seriously challenged in mainstream society, even though the relevant statute discriminates both on the basis of age and sex:

> Except as otherwise provided in this title [sections 451 to 471a of this Appendix] it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101), for so long as he continues to maintain a lawful nonimmigrant status in the United States.

50 U.S.C. app. § 453(a) (2006).

[90] Douglas v. California, 372 U.S. 353, 355–57 (1963). Even in this case strongly supporting the equality principle, Justice Douglas discussed fairness of procedure. That

that because the states are under no obligation to provide an appeal, they have struggled to identify the specific justification for requiring the appointment of counsel.[91] Initially, the Court relied on the principles of equality and equal protection. Later decisions, although overtly relying on equal protection, actually use language more appropriate for discussing due process.[92]

The purpose of the Fourteenth Amendment was to eliminate distinctions based on race, ethnicity, descent, and other similar factors.[93] The Fourteenth Amendment is much easier to apply when applying equal protection to those classes. The amendment was meant to prevent society from separating into classes based upon the vagary of birth.[94]

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language is due process language, not equality language. Justice Harlan's dissent argues that the case should have been decided under a due process rationale. *Id.* at 361 (Harlan, J., dissenting).

[91] *See id.* at 360–61 (Harlan, J., dissenting) ("In holding that an indigent has an absolute right to appointed counsel on appeal . . . the Court appears to rely both on the Equal Protection Clause and on the guarantees of fair procedure . . . ."). *See also* Griffin v. Illinois, 351 U.S. 12, 18 (1956).

[92] *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 612 (1974). The Court, per Justice Rehnquist, declared that equal protection "does not require absolute equality or precisely equal advantages." *Id.* (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973)). The obligation of the state is to give a defendant "an adequate opportunity to present their claims fairly." *Id.*; *accord* Yale Kamisar, *Poverty, Equality, and Criminal Procedure: From* Griffin v. Illinois *and* Douglas v. California *to* Ross v. Moffitt, *in* National College of District Attorneys, *Constitutional Law Deskbook* 1-101, 1-101 to 1-108 (1978). The difficulty the court encountered here is trying to decide exactly what equality is required for equal protection analysis. It is no easy task for a court to engage in, especially the farther it moves from the amendment's original purpose. It has had to rely more on due process fairness principles rather than equal protection.

[93] The Supreme Court has discussed the connection between discrimination based on race and ancestry. In *Rice v. Cayetano*, 528 U.S. 495 (2000), Justice Kennedy explained why race is a forbidden classification:

> The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name. One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.

Id. at 517.

[94] *See, e.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 95 (1873) (The Fourteenth Amendment "recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth . . . and not upon . . . *the condition of their ancestry*.") (emphasis added); *see also* Gerald D. Berreman, *Caste in India and the United States*, 66 AM. J. OF SOC. 120, 120–21 (1960) (stating that the segregation laws prevalent in the United States were easily defined as a caste system). As Justice Kennedy stated in *Rice v. Cayetano*, racial discrimination is discrimination that implicates distinctions based on ancestry and not based on one's own merit or qualities. *Rice*, 528 U.S. at 517; *see also* Frank & Munro, *supra* note 58, at 133–34

After all, racial discrimination was nothing more than an easy way to classify someone based upon ancestry and birth.[95] That is why equal protection is so vital to a democratic society. It was meant to prevent the invidious discrimination that led to the formation of hereditary classes, or castes.[96]

In order to draw distinctions based on race or ancestry, the legislature must have a compelling justification, subject to strict scrutiny.[97] Unfortunately, in a democratic society, strict scrutiny analysis gives the judicial branch greater power than the political branches. This means that it should only be used sparingly and applied to those classifications—such as race and ancestry—that can lead to the formation of hereditary classes. The trend, as in California however, has been to extend strict scrutiny analysis to any class of people that the court believes has been historically discriminated against or to persons who are discriminated against based on an immutable characteristic.[98]

Difficulties arise when courts try to stretch equal protection beyond hereditary classifications. The current debate over sexual orientation and same-sex marriage is a good example of these problems. Many

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(stating that the Thirteenth Amendment only freed the slaves, but did not secure for them rights that put them in the same class as whites).

[95] The French Revolutionary Constitution stated: "Men are *born* and continue free and equal in their rights." Frank & Munro, *supra* note 58, at 137 (emphasis added). Equality was meant to strike at the heart of hereditary privilege, not every law a legislature might ever make.

[96] In using the term "hereditary," it is not meant as a bar to any discrimination based upon a trait inherited from a parent. Rather, it is meant to distinguish those discriminations or distinctions that limit the descendents based on the station or trait of the ancestor. For example, racial segregation laws in the United States created an inherited caste system in many parts of the United States, in which a black person's class was determined by the parents to whom she was born. The civil rights movement, therefore, was a direct attack upon the inherited caste/class system that had developed in the United States through segregation laws. For more on this topic, see Berreman, *supra* note 94, at 120, in which Berreman defines caste as a "hierarchy of endogamous divisions in which membership is hereditary and permanent."

[97] Johnson v. California, 543 U.S. 499, 505 (2005); Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . . [C]ourts must subject them to the most rigid scrutiny. Pressing public necessity [i.e., compelling governmental interests] may sometimes justify the existence of such restrictions . . . .").

[98] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008). California's test for a suspect classification is that the discriminating characteristic must be 1) based on an immutable trait, 2) bear no relation to a person's ability to perform or contribute to society, and 3) be associated with a stigma of inferiority and second class citizenship. *Id.* at 442. For a gay rights activist's response to the immutability argument in sexual orientation issues, see generally Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (arguing for pro-gay legal strategists to avoid what she perceives to be an unnecessary and divisive immutability argument).

courts have examined the issue, with different courts reaching drastically different conclusions, partly because scientific evidence to prove that sexual orientation is an immutable trait like race is inconclusive.[99] What makes traits such as race so distinctive is that they require no scientific evidence to prove their immutability. Even if a scientist were come into court and say that he could turn off a race gene so that it is not an immutable trait, it would not change the invidious nature of the discrimination. Race is a suspect distinction because it judges and limits children based upon their parents. It is more difficult to argue that sexual orientation is an immutable trait inherited at birth.

Due to the much more controversial and difficult nature of extending equal protection beyond those hereditary classifications of which race is representative, the level of judicial scrutiny applied should be lower. The principles of democracy are needed just as much when the issue to be decided upon is controversial, if not more so. The United States Supreme Court still can apply equal protection scrutiny, however, because it uses multiple levels of scrutiny in applying the Equal Protection Clause.[100] This means that because discriminating on the basis of sexual orientation does not lead to the formation of a hereditary class, an intermediate or rational basis level of scrutiny should be applied.[101] But regardless of the level of scrutiny applied, the restriction

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[99] *Cf. Conservative Case*, *supra* note 75 ("Science has taught us, even if history has not, that gays and lesbians do not choose to be homosexual any more than the rest of us choose to be heterosexual."). See Maura Dolan, *Federal Judge Who Ruled Prop. 8 Unconstitutional Plans to Step Down*, L.A. TIMES, Sept. 29, 2010, http://latimesblogs.latimes.com/lanow/2010/09/federal-judge-who-ruled-proposition-8-was-unconstitutional-announces-he-will-step-down.html, in which the author discusses the trial and how the question regarding immutability was raised. See also the findings of fact in Perry v. Schwarzenegger, no. C09-2292VRW, 74–75 (2010), *available at* https://ecf.cand.uscourts.gov/cand/09cv2292/files/09cv2292-ORDER.pdf. It would be immaterial to have findings of fact regarding the ability to change sexual orientation if it were not meant to argue that sexual orientation were immutable.

[100] *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988) (applying an intermediate level of scrutiny to statutes of limitations in paternity actions in Pennsylvania).

[101] The current test for strict scrutiny, for example, could still be an effective test for invoking intermediate scrutiny. Under intermediate scrutiny, a legislative distinction must bear a substantial relation to the important government interest. *See id.* Changing the test for equal protection would undoubtedly call into question the legal authority examining discrimination based on religion, and perhaps even alienage. State discrimination based on religion, however, would run afoul of the Free Exercise Clause, and maybe even the Establishment Clause. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring). State discrimination against aliens runs afoul of the Supremacy Clause and Congress's ability to regulate aliens and their admission to the United States. *See* Graham v. Richardson, 403 U.S. 365, 376–80 (1971). Although the Court went into a lengthy equal protection analysis to decide *Graham*, it acknowledged that the same result could have been reached under the Supremacy Clause and the requirement of uniformity in the treatment of aliens. *Id.*

on same-sex marriage does not violate the Equal Protection Clause, as the following sections of this Article will establish.

1. Purpose for Which Marriage Was Recognized

In *Loving v. Virginia*, the Court made sweeping statements about the value of marriage and its fundamental nature to our society:

> 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 classification embodied in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law.[102]

The issue in *Loving* was not simply state recognition, but state *criminalization* of interracial marriage.[103] On that issue, the courts must engage in a due process analysis, an issue not addressed by this Article.

Loving stated perfectly why marriage had been afforded such a prominent role in our society: it is "fundamental to our very existence and survival."[104] Marriage was recognized as a special institution because it was deemed most appropriate to propagate the human race and nurture the rising generation.[105] Such is the essential and fundamental role that marriage occupies in our society. Society has said that traditional heterosexual marriage is the ideal that works the best at accomplishing these goals and therefore has given it special recognition.[106] Although this has been emphasized less at various times

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[102] Loving v. Virginia, 388 U.S. 1, 12 (1967) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

[103] The married couple in *Loving* actually wed in the District of Columbia and returned to Virginia to live. While there, they were charged with violating the ban on interracial marriage and sentenced to one year in prison. The judge then commuted the sentence on condition that the individuals involved agreed to leave the state and not return together for a period of twenty-five years. *Id.* at 2–3.

[104] *Id.* at 12.

[105] This language used by the court is also found in many religions. For example, the Canon of the Catholic Church on marriage states:

> The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament between the baptized.

1983 CODE c.1055, § 1, *available at* http://www.vatican.va/archive/ENG1104/_P3V.HTM.

The Muslim faith also has similar concerns with regard to marriage. Islam finds especially important "the primacy of the heterosexual relationship; and the importance to the children of life within a stable family setting." In Islam, and indeed in most civilizations, the family is seen as the fundamental unit for social stability and well-being. Mohammad Al-Moqatei, *The Philosophy of Marriage in Islam*, 7 WARWICK LAW WORKING PAPERS 5 (1985).

[106] *See* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 29–32 (1996) (reviewing the status of marriage in U.S. history).

throughout history, it remains part of the essential nature of marriage to promote the survival and well-being of the human race. This connection between marriage and children was understood as far back as Roman times.[107] Although it was not always a point of emphasis, it took on a greater emphasis at times when Roman birthrates began to dwindle.[108]

This emphasis on the reproduction potential is also present in the law's traditional distinction between annulment and divorce. Traditionally, a marriage could be annulled for failure to consummate.[109] California's family code, although not explicitly granting the right of annulment based on failure to consummate,[110] presupposes consent and consummation in order for a marriage to be valid.[111] Additionally, when the California Supreme Court in *In re Marriage Cases* declared same-sex marriage legal in California, it quoted previous precedent by the court declaring that marriage was a fundamental right of man.[112] What the court in did not quote, however, was that marriage was fundamental because "[m]arriage and procreation are fundamental to the very existence and survival of the race."[113] This necessarily implies an emphasis on heterosexual reproduction.

Opponents sometimes argue that children have nothing to do with marriage for various reasons. First, perhaps, is that the government does not ask whether people seeking to marry are able to have children. Others choose simply not to have children, while others have children without being married. The criticisms may be many, but they all neglect to see that the government is permitted to promote an ideal. For example, the economy of the United States is based on an ideal market model, and the government tries to encourage market economics.[114] Unfortunately, the market is not always perfect or ideal in real life, and

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[107] LIND, *supra* note 20, at 32–33.

[108] *Id.*

[109] Consummation has to do with the act of sexual coupling between a man and woman. Recognizing the potential discrepancy in the law as it relates to same-sex marriage, which would allow annulment of a marriage that had not been consummated, the Canadian Parliament deemed it important to clarify that a marriage was "not void or voidable by reason only that the spouses are of the same sex." Civil Marriage Act, S.C. 2005, c. 33, art. 4 (Can.), *available at* http://laws-lois.justice.gc.ca/PDF/Statute/C/C-31.5.pdf. Such a legislative re-definition of an institution is on much firmer ground than a constitutional re-definition engaged in by various state supreme courts.

[110] CAL. FAM. CODE § 2210 (West 2004).

[111] *Id.* § 301.

[112] *In re* Marriage Cases, 183 P.3d 384, 399 (Cal. 2008).

[113] Perez v. Lippold, 198 P.2d 17, 19 (Cal. 1948).

[114] *U.S. Market Economy*, ECONOMYWATCH, http://www.economywatch.com/market-economy/us-market-economy.html (last visited Nov. 1, 2010). *See also* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911) (applying anti-trust laws that were designed to restrict restraints of trade and monopolies that hinder the functioning of a competitive market).

the government must then step in and deal with what are called "market failures." This action, however, does not mean that government must cease having as a societal goal a perfectly functioning market economy. Similarly, the possible "failures" of a traditional marriage should not be interpreted as a reason to abandon the ideal.

The California Supreme Court in *In re Marriage Cases* appears to have used the "failures" of traditional marriage as justification for declaring that same-sex marriage is equal to traditional marriage, but that was not its only innovation. The truly great innovation was not that it allowed same-sex relationships, but that it declared that *official recognition* of any such relationship was a fundamental right.[115] In doing so, the court fundamentally altered what marriage had been defined as by both legislative and judicial precedent. And in using the legislatively created domestic partnership laws to force recognition of same-sex marriage,[116] the court declared legislative enactments supreme to voter referenda, in that it ignored the greater than sixty percent of the California population that had voted to retain the traditional distinctions of marriage fewer than ten years before.[117]

2. Lawful vs. Unlawful Discrimination

Having briefly examined why marriage was distinguished as a fundamental institution, it is now possible to proceed to the second part of the analysis to determine what kind of discriminations are lawful or unlawful. It is important to emphasize that discrimination is not per se illegal. There are legitimate uses of discrimination to further societal ends. Look, for instance, at the limited liability partnership. In many states, the ability to enter into such a partnership is limited to certain professional classes. The government appears to have created this entity because it thought that it would further certain societal goals. The

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[115] *In re Marriage Cases*, 183 P.3d at 399. What makes this even more troubling was the line of questioning that the California Supreme Court engaged in during the oral arguments over the validity of Proposition 8, now CAL. CONST. art. I, § 7.5. The Court asked if the legal right to marry were denied to gay couples, whether heterosexual couples should be permitted to marry. In essence, it asked if it should create a separate institution not called "marriage" in which all people could engage regardless of whether the relation was homosexual or heterosexual, not permitting anyone to use the moniker of marriage. Such a line of questioning, however, seems to fly in the face of the court's rhetoric in its own Opinion declaring state recognition of marriage to be a fundamental right of the individual.

[116] *In re Marriage Cases*, 183 P.3d at 397–98.

[117] Evelyn Nieves, *Those Opposed to 2 Initiatives Had Little Chance from Start*, N.Y. TIMES, Mar. 9, 2000, at A27, *available at* http://www.nytimes.com/2000/03/09/us/2000-campaign-california-those-opposed-2-initiatives-had-little-chance-start.html (reporting that California's Proposition 22 passed by a margin of 61.4 percent to 38.6 percent).

ability to form such a partnership, however, is limited to certain individuals named by statute.[118]

Limiting marriage to opposite-sex couples does not violate the Equal Protection Clause because it is both rationally and substantially related to "the very existence and survival of the race."[119] The Equal Protection Clause does not determine whether same-sex couples can love each other and is silent as to whether they will remain faithful to each other.[120] The distinction is based on encouraging the continuing survival and well-being of the human race. Heterosexual relations are the only way to perpetuate the human race, and encouraging lasting unions between the biological parents of children so that they might effectively raise those children is a compelling justification for governmental action.

Discrimination based on *ability* is permitted by law, while discrimination based on *being* is not. The California Supreme Court in *Perez v. Lippold* understood this as it examined the prohibition on interracial marriage then in effect.[121] Justice Traynor wrote, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. . . . [T]he state clearly cannot base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups."[122] In declaring interracial marriage bans unconstitutional, the court was saying that the discrimination was unlawful because it was based on ancestry and being, rather than ability.[123]

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[118] *See, e.g.*, CAL. CORP. CODE § 16101(8).

[119] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[120] *In re Marriage Cases*, 183 P.3d at 400. The Supreme Court of California defined marriage as a lasting union between two people who loved each other. But marriage had traditionally required the ability to consummate and procreate. *See supra* Part II.D.1. In actuality, the domestic partnership laws of California acknowledged the ability of homosexual couples to love each other and unite in a lasting relationship—why else would the institution have been created in the first instance? It appears that the voters of California, however, wanted to retain the traditional aspect of marriage that not only required love and ability to form a lasting union, but also consummation and child bearing.

[121] Perez v. Lippold, 198 P.2d 17, 21 (Cal. 1948).

[122] *Id.* at 19–20. In addition, Justice Traynor astutely observed that the right of equal protection was not the right of any group, racial or otherwise, but belonged to the *individual*. He wrote, "The right to marry is the right of individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals."

It would appear from that statement that the heightened scrutiny that the court affords to some *groups* over others when examining equal protection claims is both unnecessary and unconstitutional.

[123] *See id.* at 19–21. The court uses race and ancestry almost interchangeably in this passage regarding discrimination.

The court later reasoned that the government could discriminate in marriage based on ability. For example, the ability to transmit infectious disease to spouse or offspring was declared in dicta as a possibly valid prohibition to marriage.[124] The ability to marry has been at the core of most judicial decisions upholding traditional marriage.[125] When the California Supreme Court declared the prohibition on same-sex marriage unconstitutional, it focused on whether those individuals had been given the opportunity to enter into a recognized lasting relationship, and not on whether they could fulfill the obligations of marriage as they were defined.[126] Unlike the ban on interracial marriage, in which interracial couples were fully capable of fulfilling all obligations relating to marriage as it had been defined,[127] the court in *In re Marriage Cases* simply redefined marriage so that homosexual couples could be included.[128]

Comparing the restriction on same-sex marriage to former restrictions on interracial marriage is actually a red herring. The restriction on interracial marriage was so invidious because it was based strictly on a person's ancestry and appearance.[129] In this way, racial

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[124] *Id.* at 21.

[125] *In re Marriage Cases*, 183 P.3d 384, 385 (Cal. 2008), *rev'd*, 49 Cal. Rptr. 3d 675, 746 (Cal. App. 1 Dist. 2006). The court cites other cases supporting its reasoning, which was perhaps most clearly stated by a Kentucky appellate court in *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973) ("[A]ppellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk . . . to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.").

[126] *Compare In re Marriage Cases*, 183 P.3d at 400 (rejecting the traditional notion that one's legal right to marry may be restricted by sexual orientation and the ability to reproduce), *with Perez*, 198 P.2d at 18–19 (reasoning that the state may reasonably regulate marriage to accomplish important social objectives, such as procreation).

[127] *Perez*, 198 P.2d at 21 (citing Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)). The arguments in *Perez* as to why the state should limit marriage to the same race did not have to do with a capacity to enter marriage. Instead, counsel for the state argued that the underlying concern was the public health. Under the court's reasoning, non-white people were more susceptible to disease and risked spreading contagious disease to their white spouse and possibly children. Their argument never complained that other races lacked capacity to enter marriage, but only that the public health would be jeopardized. The court in California saw that making generalized assumptions about a particular racial class is an especially invidious form of discrimination. The court determined that if the state wanted to discriminate towards marriage in that manner, it would have to individualize and not base the discrimination on generalized assumptions. *Id.*

[128] The court essentially re-defined marriage as the ability to "establish a loving and long-term committed relationship with another person and responsibly to care for and raise children." The special concern that marriage was essential to the very survival and perpetuation of the race never entered into the reworking of the marriage definition. *In re Marriage Cases*, 183 P.3d at 400.

[129] *Perez*, 198 P.2d at 19 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

discrimination laws were a type of bill of attainder[130] in which a person's ancestry had effected a "corruption of blood."[131] This denial of rights or discrimination based on ancestry struck at the heart of a free and democratic society.[132] Thus, the restriction on interracial marriage directly violated the Equal Protection Clause. As explained above, the purpose of the amendment was to prevent discrimination based on race and descent that served to perpetuate hereditary classes. It cannot logically be argued that racial segregation and discriminatory laws did anything other than produce a class of persons that were singled out for denial of rights based only on their place of birth.

The restriction on same-sex marriage, on the other hand, has nothing to do with a person's ancestry but focuses rather on the consenting parties and their capacity to fulfill the purposes for which marriage was recognized. A homosexual union is fundamentally different than a heterosexual union in its capacity to perpetuate the race; a homosexual union has no innate ability to perpetuate the race without the assistance of technology and at least one member of the opposite sex.

Proponents of same-sex marriage argue that the denial of the legal right to marry does the exact same thing that racial discrimination did: it creates a category of second-class citizens.[133] This is a legitimate concern. The government has offered benefits to some persons and denied those benefits to others based on sexual orientation. There is no doubt that the voters have stated that they value one institution more than the other. This line drawing, however, is a proper function of the

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[130] JACK STARK, PROHIBITED GOVERNMENT ACTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 54–56 (2002). It is true that these laws are not necessarily easily classified as bills of attainder, but what makes these laws even worse than bills of attainder is that they discriminated based on ancestry, even though the ancestors were innocent of any wrongdoing.

[131] *Id*. at 55. Additionally, bills of attainder "offend the notion of fundamental fairness held by many citizens of this country." *Id*. at 53. It is interesting that many of the Founders spoke about equality when, under the British system, they were locked out of certain circles because of their status at birth. Alexander Hamilton was illegitimate, for instance, and would have never attained the status that he did under the British system that valued birth so heavily. George Washington also could have never reached the heights that he did under the British system. Ironically, the Founding Fathers would establish a hybrid system that awarded merit for some individuals but perpetuated the distinctions based on birth that they themselves were adamantly opposed to.

[132] William Baker, *William Wilberforce on the Idea of Negro Inferiority*, 31 J. HIST. OF IDEAS 433, 433 (1970) (describing how Englishmen in the sixteenth century believed that the dark color of Negroes and their lower station in society could be traced back to Noah's curse on Ham).

[133] *See In re Marriage Cases*, 183 P.3d at 436–37; Sherri L. Toussaint, Comment, *Defense of Marriage Act: Isn't It Ironic . . . Don't You Think? A Little Too Ironic?*, 76 NEB. L. REV. 924, 935 (1997); *Conservative Case*, *supra* note 75.

legislative process. But the question remains whether this particular line that was drawn violates the Equal Protection Clause.

The distinctions between heterosexual and homosexual marriage do not violate the Equal Protection Clause because they do not discriminate based on race or other hereditary classifications. The law does not perpetuate a hereditary class. A heterosexual couple can give birth to someone that later declares herself to be homosexual, and a homosexual couple, if they are assisted in having children, can give birth to heterosexual children. There is no hereditary privilege or discrimination that is being passed down from generation to generation. Unlike racial segregation laws, a homosexual's standing in society is not determined by the standing of his or her parent. The distinction in marriage is actually a distinction based on the individual's ability to perform the same requirements that marriage has traditionally been held to require.

Same-sex marriage is not an equal institution with traditional marriage because same-sex couples do not have the same ability to procreate as heterosexual couples do.[134] Having previously established that the ability to procreate was part of the fundamental understanding of what marriage entailed, it is surprising that courts validating same-sex marriage gloss over this requirement by saying that every individual has a right to form a "marriage with the person of one's choice."[135] The ability to form a family with children requires heterosexual reproduction. That some people adopt or otherwise decide not to have children does not negate the fact that society may want to encourage children to be born to their biological parents who are committed to each other and to raising those children. For a court to get involved in policy-making and to decide that same-sex marriage is just as moral, healthy, and efficient for society as traditional marriage is irresponsible at best. Because of the benefits that traditional marriage brought to society, society in turn recognized and incentivized the traditional marital union. Such discrimination is lawful, reasonable, and necessarily outside the competence of a court to overrule.

The argument that the Supreme Court has already held that conduct cannot significantly alter the right to marry is disingenuous.[136] A prison inmate's right to marry could not be infringed based on his

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[134] This is different than saying that someone cannot marry because of their sexual orientation. A homosexual still has the ability to procreate—it just requires another person of the opposite sex. The difference arises in that homosexual unions will never be able to naturally produce offspring. The ability of two individuals of the same-sex to produce offspring is impossible and not just an assumption.

[135] *In re Marriage Cases*, 183 P.3d at 420.

[136] Toussaint, *supra* note 133, at 959.

criminal conduct, according to the Court in *Turner v. Safley*.[137] The convict's conduct in that case, however, had nothing to do with his ability to fulfill the marital obligations as legally defined. The convict was still able to form a lasting and loving relationship, creating offspring with the opposite-sex spouse, and caring for the offspring. In contrast, the conduct of a homosexual relationship stands in direct conflict with the reasons for which marriage was initially recognized by government: to promote "the very existence and survival of the race."[138]

Additionally, using the definitional argument to support traditional marriage is not an unlawful discrimination based on sex,[139] but a reflection of a societal value that is "fundamental to our very existence and survival."[140] It is true that looking at statutes that describe marriage to be between only one man and one woman appear on their face to be discriminating on the basis of sex. But this lawful "discrimination" reflects the reason that marriage was recognized by government in the first place. The survival of the human race depends on heterosexual reproduction, and no argument for changing the definition of marriage to include same-sex marriage will do anything to change that fact. Such legislative discrimination, or line-drawing, is commonplace. How a court could fault the government for wanting to encourage and incentivize the union of man and woman to perpetuate the human race and to provide for rearing of the next generation is almost beyond belief.

Even those states that have equal rights amendments for the sexes have not interpreted them to mandate recognition of same-sex marriage. The Supreme Court of Illinois has held that its equal rights amendment was meant to secure rights for females equal to males.[141] With that understanding, a restriction equally applicable to both sexes, such as a restriction against marrying someone of the same sex, would pass constitutional muster. The Colorado Supreme Court likewise has held that equal rights amendments do not prohibit treatment that is "reasonably and genuinely based on physical characteristics unique to just one sex."[142] Colorado courts later declared that a decision to change

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[137] Turner v. Safley, 482 U.S. 78, 95–96 (1987). The Court found that the inmates were capable of forming a lasting relationship and that eventually, upon release, they would be able to consummate the marriage. The Court left in place the legality of marriage bans for inmates of lifetime sentences. *Id.* at 96.

[138] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[139] *See* Toussaint, *supra* note 133, at 941 ("[A] definitional justification to an equal protection or due process challenge offers no support for denying same-gender marriages because the definition of marriage itself is being challenged.").

[140] Loving v. Virginia, 388 U.S. 1, 12 (1967) (citing *Skinner*, 316 U.S. at 541).

[141] *See* Paul Benjamin Linton, *Same-Sex "Marriage" Under State Equal Rights Amendments*, 46 ST. LOUIS U. L.J. 909, 918 (2002) (citing People v. Ellis, 311 N.E.2d 98, 100 (Ill. 1974)).

[142] People v. Salinas, 551 P.2d 703, 706 (Colo. 1976).

the state's marriage laws was a matter for the legislature and not the courts.[143]

The argument that the government is unlawfully discriminating against homosexuals because of their sexual orientation also lacks merit. Some critics claim that it is not fair to discriminate against the wants and desires of homosexuals because they are acting on the same feelings and drives that heterosexual individuals have towards others of the opposite sex.[144] This argument, however, does nothing more than force the government to recognize all physical appetites as equal. Using physical appetite as a condition that invokes the Equal Protection Clause is a misapplication of the clause. Most human actions can be traced back to some form of physical appetite. Declaring that all actions must be equally protected based upon personal appetite or desire conflicts with the rule of law.[145] Carried to its fullest extent, the government would be left virtually powerless to regulate the affairs of its citizens or to encourage certain behavior because of a newly enshrined physical appetite exception.

Critics of limiting marriage to its traditional meaning also argue that the majority is simply imposing its morality on the rest of society. The argument that many have proposed, even some on the Supreme Court, is that moral disapproval does not validate a legislature prohibiting certain activities.[146] What those espousing this view fail to see are that many laws that have been written have contained the moral values of the majority. Law is a collection of moral judgments. Because laws in a representative democracy are passed by a majority, the law is a reflection of the majoritarian morality.[147] A judge who declares that moral approval or disapproval is an insufficient ground for the legislature to act does not understand what law-making is. An obvious example of the majoritarian morality prohibiting an act is the prohibition on murder. The moral impetus for the restriction is easy to see here because murder harms others in a very real way. On the other

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[143] Ross v. Denver Dep't of Health & Hosps., 883 P.2d 516, 520 (Colo. App. 1994).

[144] Toussaint, *supra* note 133, at 942.

[145] *See*, *e.g.*, The Queen v. Dudley & Stephens, [1884] 14 Q.B.D. 273 at 287–88 (Eng.). This is the famous case involving shipmates who were stranded at sea. On the verge of death, they cannibalized the weakest among them so that they would not die on the open sea. No instinct could be stronger than the will to survive as manifested in that case. It was, in the sailors' estimation, a surety that they would die if they did not have something to eat. In rejecting their defense, the court responded famously that the temptation to kill could not be held a defense. As Lord Coleridge put it, "[T]he absolute divorce of law from morality would be of fatal consequence . . . ." *Id.* at 287. If mercy were warranted, it would have to be meted out by the sovereign. *Id.* at 288.

[146] Lawrence v. Texas, 539 U.S. 558, 577–78 (2003) (citing Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

[147] *See id.* at 589–90 (Scalia, J., dissenting).

hand, many laws are not so clear cut, especially those that concern consensual acts.

The majority has the ability under the American system to regulate consensual acts of individuals. Never was this more apparent than when Congress and the states prohibited the practice of polygamy. In the 19th century, members of the Church of Jesus Christ of Latter-day Saints engaged in the consensual practice of polygamy as a part of their faith. With the rising Republican Party declaring polygamy to be one of the "relics of barbarism,"[148] the federal government enacted heavy-handed statutes to end the practice in the territories of the United States. At the height of this legislation, Congress criminalized polygamy and disenfranchised both polygamists and their sympathizers.[149] In addition, the church corporation was dissolved and much of its property confiscated.[150] In *Reynolds v. United States*, the Supreme Court, in upholding anti-polygamy laws, declared that the Constitution does not protect religious practices that are deemed by society to be immoral.[151] If

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[148] Laura Elizabeth Brown, Comment, *Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act*, 39 MCGEORGE L. REV. 267, 273 (2008).

[149] *Id.* at 273–74 (discussing The Morrill Act, ch. 126, § 1, 12 Stat. 501 (1862) (repealed 1910)).

[150] *Id.* at 275–76.

[151] 98 U.S. 145 (1878). In circumscribing the freedom of religion, the Court declared, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. Polygamy has always been odious . . . ." *Id.* at 164. The court did not care if the social ills that were believed to spring from polygamy were actually existing at the time, as it quoted Chancellor Kent:

> An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

Id. at 166. Later, the Court asks:

> Can a man excuse his practices . . . because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto *himself. Government could exist only in name under such circumstances.*

Id. at 166–67 (emphasis added). Whether the belief in effect is religious or otherwise, it cannot become an excuse for actions that society has deemed inappropriate. Footnote 52 of the California Supreme Court's decision in *In re Marriage Cases*, 183 P.3d 384, 434 (Cal. 2008), tries to distinguish polygamy from same-sex marriage based on the ills that polygamy would cause to the institution of marriage itself. There are two problems with this reasoning by the court. First, to say that same-sex marriage does not diminish the traditional form of marriage is simply a moral judgment of the court overruling a moral judgment of the people. The *Reynolds* case, on the other hand, deferred to the moral judgment of the people. *Reynolds*, 98 U.S. at 166. Second, the Court in *Reynolds* did not care if polygamy was currently bringing the ills upon society that some people thought it

Congress has the ability to *criminalize* certain acts based on moral judgment, then it can decide which marriages will be *recognized* solely on the morality of the majority. Law simply cannot be separated from moral judgments.

III. CANADA'S RESOLUTION

A. The Provincial Courts

Canada's Charter of Rights and Freedoms contains an equal protection provision somewhat similar to that of the United States, although it goes into more detail.[152] It was this equal protection provision that led the provinces of British Columbia[153] and Ontario[154] to declare the restriction on same-sex marriage to be unconstitutional. In announcing that marriage should be extended to same-sex couples, the Ontario high court recognized a belief of those in favor of legalizing same-sex marriage: "Denying same-sex couples the right to marry perpetuates the . . . view . . . that same-sex couples are not capable of forming loving and lasting relationships . . . ."[155] While two provinces had granted the right of same-sex couples to wed, the province of Quebec had created an institution similar to domestic partnerships in California.[156] The legal institution of marriage in Canada in early 2005 was therefore largely in the same predicament as it is currently in the United States.[157]

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would. *Id*. The Court acknowledged that there could be situations when polygamy would not disturb the social condition of the people. *Id*. Nevertheless, it held that it was within the authority of Congress to decide that issue. *Reynolds* has not been overturned.

[152] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, sec. 15, 1982, *being* Schedule B to the Canada Act, 1982, c.11 (U.K.).

[153] Barbeau v. British Columbia, 2003 BCCA 406, paras. 7–8 (Can. B.C.).

[154] Halpern v. Toronto (2003), 65 O.R. 3d 161, 170 (Can. Ont. C.A.).

[155] *Id*. at para. 94. This is, interestingly, the same rationale that the California Supreme Court used when legalizing same-sex unions in California, where Chief Justice George recognized that "an individual's capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual's sexual orientation . . . ." *In re Marriage Cases*, 183 P.3d at 400. What each of these statements demonstrates is that the courts were either not sure what the definition of marriage was in its entirety or that they were seeking to change the definition. Marriage, as stated previously in this Article, recognized three things: a loving, lasting, and consensual relationship that was capable of procreation and the raising and caring for the fruits of the marital union, i.e., children.

[156] *Marriage and Legal Recognition of Same-Sex Unions: A Discussion Paper*, CAN. DEP'T OF JUSTICE (Nov. 2002), http://www.justice.gc.ca/eng/dept-min/pub/mar/3.html.

[157] By 2005, at least two provinces had declared that same-sex marriage was required by their constitution in Barbeau v. British Columbia, 2003 BCCA 406 (Can. B.C.) and Halpern v. Toronto (2003), 65 O.R. 3d 161 (Can. Ont. C.A.). Similarly, courts in various states of the United States have declared same-sex marriage constitutionally required. On the other hand, there is no federal legislation pending on marriage as was the case in Canada in 2005. *See Re* Same-Sex Marriage, 2004 SCC 79, para. 1, [2004] 3 S.C.R. 698 (Can.).

B. The Canadian Supreme Court

In 2003, the Supreme Court of Canada was asked to give its opinion on the Canadian Parliament's proposed legislation concerning same-sex marriage.[158] The first question was whether the Canadian Parliament had the authority to define the institution of marriage; the second was whether extending marriage to same-sex couples would violate the Canadian Charter of Rights and Freedoms; the third was whether religious clergy could be compelled to perform such unions; and the fourth was whether the opposite-sex requirement for traditional marriage was consistent with the Charter of Rights and Freedoms.[159] The second and third questions asked of the court were subsidiary to the more important first and fourth questions. The first question was whether the national legislature had the authority to legislate with respect to marriage, and the fourth question was essentially an equal protection question that courts in the United States are currently struggling to answer.

Deciding whether the Canadian Parliament had exclusive authority to legislate in regard to marriage required a different analysis than what would be required in the United States. The Canadian Constitution (Constitution Act, 1867) contains a detailed list of powers for both the national and provincial governments.[160] In the case of marriage, the national legislature was given authority over marriage and divorce, while the provinces were granted authority over solemnization of marriage at the local level.[161] The Canadian Supreme Court went through a two-part analysis to determine, first, the "substance" of the law, and second, which government had authority over that substantive law.[162]

In *Re Same-Sex Marriage*, the court concluded that the power to define the capacity to marry was vested in the national legislature.[163] The high court first determined that allowing same-sex individuals the right to marry pertained to the legal capacity to enter into marriage.[164] Second, the court found that legal precedent in Canada had traditionally recognized the power of Parliament to define the capacity to marry while

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[158] *Re* Same-Sex Marriage, 2004 SCC 79, para. 1, [2004] 3 S.C.R. 698 (Can.).

[159] *Id.* at paras. 2–3. (The fourth question was added to the request in January of 2004.)

[160] *See, e.g., id.* at para. 17. The United States Constitution, by contrast, only lists delegated powers to the national government (or by contrast, those forbidden to the states), while reserving to the states all other powers not delegated to the federal government. U.S. CONST. amend. X. The powers reserved to the states are never actually enumerated.

[161] *Re Same-Sex Marriage*, 2004 SCC 79 at para. 17.

[162] *Id.* at para. 13.

[163] *Id.* at para. 18.

[164] *Id.* at para. 16.

leaving to the provinces the performance of such marriages once that capacity had been recognized.[165] Thus, the Canadian Supreme Court held that Parliament had exclusive authority to define the capacity to marry to include same-sex couples.[166]

The court ultimately declined to answer the question whether denying same-sex couples the right to marry violated the Constitution's guarantee of equal protection.[167] In the court's view, it would be unwise to delve into this inquiry because the government had already taken a positive, affirmative stance on same-sex marriage and because so many individuals were already relying on lower court decisions endorsing same-sex marriage.[168] Regardless of those reasons, the court had already declared that Parliament had the authority to determine the capacity to marry. In light of that ruling, the court declined to insert itself into an issue that the legislature was committed to act upon. A decision on this point, the court feared, could needlessly put into question the uniformity of law that the Parliament was attempting to address.[169] Not long after the court's decision in *Re Same-Sex Marriage*, the Canadian Parliament passed a bill legalizing same-sex marriage throughout Canada.[170]

IV. THE DIFFICULTIES AND ADVANTAGES OF A COMPARISON

Comparing legal regimes to form recommendations for reform in one of them is never an easy task. Each nation undoubtedly has its own legal history and precedents to follow. Each country's structure of government is different, and the political factions also cater to different concerns in each country. Nevertheless, if comparative analysis were ever appropriate in the context of United States law, then it is most fitting to compare it with Canada. Canada is similarly situated, both politically and economically, to the United States, and has a similar federal structure. As such, it is perhaps the most useful comparison to make.

A. Difference in the Federal Structure

Although both Canada and the United States are federal systems, there are fundamental differences between the two. The Canadian Constitution sought clarity in defining the roles of the federal government vis-à-vis the provincial governments. The Constitution Act

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[165] *Id.* at para. 18.

[166] *Id.*

[167] *Id.* at para. 64.

[168] *Id.* at paras. 65–66.

[169] *Id.* at para. 69.

[170] Civil Marriage Act, S.C. 2005, c. 33 (Can.), *available at* http://laws-lois.justice.gc.ca/PDF/Statute/C/C-31.5.pdf.

of 1867 actually lists powers given to both the federal government and the provincial governments.[171] With these clearly delineated powers, the Supreme Court of Canada is forced to examine, whenever an issue of federalism arises, whether the act in question most resembles a power given to the federal or provincial governments. The provinces exercise broad authority. This is most aptly demonstrated by a provision of the Canadian Charter of Rights and Freedoms that permits a province to opt out of application of a federal law if a strong social consensus to the contrary exists in the province.[172] Canada, to say the least, is a strong federal system.[173]

The United States, on the other hand, has a weaker federal system. The Constitution of the United States only lists powers delegated to the federal government; all other powers are reserved to the states.[174] The Supreme Court of the United States is not forced by the Constitution to ask the question whether an act is more like a power given to the federal government or the states, but rather, it is forced only to consider whether the act relates to a power given to the federal government. In this way, the federal government can wield immense power in comparison with the states. This is not to say that the states have no role; it simply means that the national government of the United States has broad authority to regulate the affairs of its citizens.

The differences in the federal structures would suggest that the United States Congress could define marriage with less concern about judicial and state interference than in Canada.[175] In interpreting the Canadian Constitution, the Supreme Court of Canada has to decide whether an act of Parliament is more like a power delegated to the states or to the national government.[176] The United States would not face such an obstacle. The United States Congress would simply have to

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[171] Constitution Act, 1867, 30 & 31 Vict., c. 3, §§ 91-92 (U.K.).

[172] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 33 (U.K.).

[173] "Strong federal system" is used here to denote a system in which the states/provinces are able to exercise greater power in relation to the national government. In contrast, a weaker federal system would be one in which the national government would be able to exercise greater power than the local governments. *See, e.g.*, Katherine C. Healy, *Reading First, Federalism Second? How a Billion Dollar NCLB Program Disrupts Federalism*, 41 COLUM. J.L. & SOC. PROBS. 147, 164 (2007) (describing a "strong federal system" as a system of governance in which states are given great latitude in developing policy).

[174] *Compare* U.S. CONST. art. I, § 8, *with* U.S. CONST. amend. X.

[175] Despite the U.S. federal structure, U.S. Supreme Court precedent seems to hold sacred the states' ability to regulate in that area. *See* United States v. Lopez, 514 U.S. 549, 564 (1995) (rejection of the federal government's theory of the commerce power that would give federal government power akin to the states' police power).

[176] *Re* Same-Sex Marriage, 2004 SCC 79, para. 13, [2004] 3 S.C.R. 698 (Can.).

prove that its exercise of power was "necessary and proper"[177] to carrying out one of its delegated functions. Not only can the United States legislate what is necessary and proper, but those acts then become the supreme law of the land under the Supremacy Clause of the Constitution.[178]

When it chooses not to act, Congress essentially allows a few states to legislate for the entire country. It is possible that the Supreme Court would eventually find DOMA unconstitutional because the Act attempts to circumvent the Full Faith and Credit Clause of the Constitution.[179] States have to deal constantly with the various property laws of married couples that move across state lines, but to disregard an established legal entity altogether is something different. By failing to act, Congress's fear in passing DOMA will be realized: one state could effectively legislate for all other states.[180] By forcing a state that has not yet legalized same-sex marriage (or perhaps even declared it unconstitutional) to recognize it would effectively establish a national same-sex marriage law. This would run contrary to our ideal of representative democracy.

A possible hurdle for Congress in defining the capacity to marry is posed by some Supreme Court decisions that have suggested that family law is strictly a matter for the states.[181] The Full Faith and Credit Clause of the United States Constitution, however, is not a one-edged sword. After declaring that each state should recognize the acts of another, the clause continues: "and the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, *and the Effect thereof*."[182] In effect, does DOMA declare that same-sex marriages performed in some states are void or voidable in states that do not recognize them? DOMA appears to give states the authority to declare void same-sex marriages performed in other states.[183] That could have very undesirable effects on long-established, legally-recognized relationships formed in other states.

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[177] U.S. CONST. art. I, § 8, cl. 18.

[178] U.S. CONST. art. VI, § 1, cl. 2.

[179] U.S. CONST. art. IV, § 1.

[180] *See* David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, N.Y. TIMES, Mar. 6, 1996, at A13.

[181] *See e.g.*, United States v. Lopez, 514 U.S. 549, 564 (1995).

[182] U.S. CONST. art. IV, §1 (emphasis added).

[183] DOMA's provisions are codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C. *See In re* Gregorson's Estate, 116 P. 60, 61–62 (Cal. 1911), for a discussion on the difference between void and voidable marriage. Void marriages can be attacked in any proceeding and declared a nullity from the beginning. A voidable marriage can only be deemed a nullity in specific proceedings for annulment, but is otherwise valid to parties outside the marriage.

Congress should exercise power over the capacity for marriage under the Commerce Clause.[184] Congress' power under the Commerce Clause, however, is not terribly clear following *Gonzales v. Raich*.[185] Marital status presently confers considerable economic benefits to the couple involved. Most, if not all, rights conferred upon married individuals are economic in nature and have substantial property ramifications. Federal, state, and employment benefits are affected by marital status, as are property rights. Not only are benefits like social security payments affected by marriage laws, but so are the employment benefits of thousands upon thousands of federal employees spread throughout the nation. Currently, a heterosexual couple can be married in practically any state of their choosing, and it is not uncommon for a couple to travel to wed in their ideal spot. When that couple returns to their home state, legal and economic benefits are recognized fairly easily. One economic transaction (the wedding or contract signing) in one state can end up having economic ramifications across multiple states in which the couple may have property or may be incurring benefits. Congressional regulation therefore would be a direct regulation of interstate commerce.[186] It also would substantially affect interstate commerce because numerous benefits conferred by employers, the federal government, and state governments would be affected. Such benefits are economic in nature and can include health benefits, retirement benefits, sick leave, etc. Failure to provide for those benefits under DOMA has been a significant catalyst for federal lawsuits being instituted across the nation.[187]

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[184] U.S. CONST. art. I, § 8, cl. 3.

[185] Gonzales v. Raich, 545 U.S. 1 (2005). At issue in *Gonzales* was the regulation of marijuana in California after the state passed the Compassionate Use Act of 1996. *Id.* at 5. Federal law still prohibited the cultivation and possession of marijuana, and Congress was granted the authority to regulate matters substantially affecting interstate commerce. *Id.* at 9. Recent Supreme Court case law had tried to limit such regulation of matters substantially affecting interstate commerce to those only economic in nature. *Id.* at 36. Therefore, matters that were not in their very nature economic, even if they qualified under the "substantially affecting interstate commerce" line of commerce clause jurisprudence, could not be regulated by the federal government. *Id.* Justice Scalia, in his concurrence, tried to salvage the "economic or non-economic" line of reasoning supporting Congress's power to regulate interstate commerce. *Id.* at 33–36 (Scalia, J., concurring). It is not entirely clear, as the dissent points out, that such a distinction can be amply maintained. *Id.* at 42–43 (O'Connor, J., dissenting).

[186] *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 491 (1917) (holding that "[t]he transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution . . .").

[187] *See, e.g.*, Abby Goodnough, *State Suit Challenges U.S. Defense of Marriage Act*, N.Y. TIMES, July 9, 2009, at A20 (stating that thousands of couples have been married in states like Massachusetts but are subsequently denied benefits).

B. Political Differences

The political debate in Canada over same-sex marriage had reached its zenith when the Supreme Court of Canada handed down its decision defining the capacity for marriage under the authority of the Canadian Parliament. The Canadian Parliament had already expressed its intentions to proceed with legalizing same-sex marriage regardless of the court's decision.[188] With the majority of Parliament having declared its intentions to legalize same-sex marriage, the court did not deem it necessary to decide the equal protection argument that had been placed before it.

On the other hand, the issue has not yet become ripe on the national level in the United States, partly because of DOMA. There is no consensus in Congress on how to resolve the same-sex marriage issue, or whether they should act at all. In addition, the Constitution of the United States does not give Congress an explicit role in marriage in the same way the Canadian Constitution gives Parliament an explicit role. These differences all raise the question as to whether the courts in the United States should leave the issue to the legislatures and, specifically, the United States Congress.

V. RECOMMENDATIONS

Governments are instituted to regulate the affairs of their private citizens. With that understanding, the democratic ideal is best suited to the task. Democratic societies are based on the idea that giving more people a voice produces better results for the society as a whole. Putting power in the hands of the few often leads to non-optimal results. On the other hand, will the people as a whole always make the correct choice? No. But democratic theory is based on the principle that the people as a whole are correct more often than a few self-interested people who have been entrusted with great power.

Courts in the United States should leave the issue to the Congress regardless of how far in the political process recognition of same-sex marriage may be. Some may argue that the Canadian Supreme Court did not rule on the equal protection issue because it was moot based on Parliament's declared intentions. But the Canadian Court did acknowledge that defining the capacity for marriage was the province of the national Parliament. Those who argue that the Court did not rule on the equal protection issue chiefly because Parliament was already going to act no matter what the Court would have decided, make a mockery of

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[188] *Re* Same-Sex Marriage, 2004 SCC 79, para. 65, [2004] 3 S.C.R. 698 (Can.).

democratic ideals.[189] The courts in the United States should abstain from making any constitutional rulings on same-sex marriage and let the democratic process work to define marriage.

Today, some argue that the courts should protect minorities from the tyranny of the majority. As the argument goes, the majority will continue to suppress minorities because they can. Majoritarian government is inherently dangerous to minority groups that hold no power. Unless the courts intercede, minority groups will never be treated fairly or get a proper hearing of their viewpoint. This argument ignores the fact that courts have traditionally been poorly suited to this goal. The same Court that produced *Brown v. Board of Education*[190] and *Loving v. Virginia*[191] also produced the *Dred Scott*[192] decision and *Plessy v. Ferguson*.[193] The real driver of social change has always been the people—not the courts. The English slave trade was not ended by judicial decree.[194] Slavery was not ended in the United States by the courts.[195] Equal protection became a constitutional principle because of constitutional amendment, not constitutional decision.[196] The right to vote was given to minorities by recourse to the political process.[197] Those

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[189] *Id.* at paras. 61–71. The Canadian Supreme Court itself stated that this was not the only reason that it declined to answer the question, but that a number of considerations led to its silence on the issue.

[190] 347 U.S. 483, 493–95 (1954). This case overruled *Plessy v. Ferguson*, 163 U.S. 537, 548–52 (1896) and all separate-but-equal statutes applying to race.

[191] 388 U.S. 1, 12 (1967). This decision struck down state laws that prevented interracial marriages as a violation of the U.S. Constitution.

[192] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). This notorious decision denied slaves the ability to bring a suit for a violation of their constitutional rights because the Court reasoned that they were not citizens and thus not protected by the Constitution. *Id.* at 421–22.

[193] *Plessy*, 163 U.S. at 548–52. This is the infamous case that upheld the "separate but equal" statutes that permitted discrimination against individuals based on race. The case involved a man of mixed descent (7/8 Caucasian and 1/8 African-American) who was denied passage in the white compartment of a passenger railcar. *Id.* at 538. It is perhaps easy to see in *Plessy* what Justice Traynor decried as discrimination based on ancestry in *Perez v. Lippold*, 198 P.2d 17, 19 (Cal. 1948). The man involved appeared to be white but his black ancestry prevented him from enjoying the same rights as other white people. *Id.* at 18. There is a clear difference between the discrimination in *Plessy* and the current marriage laws in the United States. The author is unaware of any discrimination today based on ancestry.

[194] Louis Taylor Merrill, *The English Campaign for Abolition of the Slave Trade,* 30 J. NEGRO HIST. 382 (1945).

[195] The Civil War, Lincoln's Emancipation Proclamation, and the Thirteenth Amendment to the Constitution accomplished that.

[196] U.S. CONST. amend. XIV, § 1. This amendment was passed in 1868. *See* The Library of Congress, *Reconstruction (1866–1877)*, http://www.americaslibrary.gov/jb/recon/jb_recon_subj.html (last visited Sept. 6, 2010).

[197] U.S. CONST. amend. XV, § 1; *see also* U.S. CONST. amend. XIX (women's suffrage).

who cried that they must be protected from the majority were assured of their political voice by the majority.[198]

When courts view themselves as the protectors of minorities, they necessarily impede the democratic function, becoming governors themselves. Courts exist to enforce the rule of law, not to protect minorities. The view that courts must intercede to recognize same-sex marriage because they otherwise would not be recognized is an affront to democratic government. Those of homosexual orientation are free to express their ideas and frustrations. Such expression is protected by the Constitution;[199] it is protected so that the democratic process can work more efficiently and so that minorities will always have a chance to be heard in order to challenge the status quo of the majority.

The courts are ill-equipped to deal with the issue of same-sex marriage because legislatures have already acted on the issue, and there is no constitutional issue to decide. Most states have enacted either constitutional or statutory bans on same-sex marriage.[200] In the presence of affirmative legislative action, the courts cannot overturn such action unless it is a violation of a constitutional mandate. The issue of same-sex marriage, as discussed above, does not implicate the Equal Protection Clause of the Constitution, nor does recognition of marriage involve a due process issue. The only recourse, then, lies in the legislative process. The only truly legitimate form of same-sex marriage thus far has occurred in those states in which the legislative process has approved the union.[201]

Of the political branches in the United States, the Congress is best situated to deal with the issue of same-sex marriage. Like the Canadian Parliament, the United States Congress should define the capacity to marry. If Congress were to define the capacity to marry, it would prevent problems with the Full Faith and Credit Clause of the United States Constitution. It would also ensure that all U.S. citizens would be represented in the resolution of the issue, rather than allowing one state to legislate new social policy for the rest of the country.

The role of the states would be preserved because they would retain the power to solemnize marriage and to affix property rights. The Canadian system recognizes that this distinction is both logical and

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[198] Such was the manifestation of the genius of Madison's plan creating multiple power centers in a pluralistic society.

[199] U.S. CONST. amend. I.

[200] NATIONAL CONFERENCE OF STATE LEGISLATURES, SAME SEX MARRIAGE, CIVIL UNIONS AND DOMESTIC PARTNERSHIPS, DEFENSE OF MARRIAGE ACTS (DOMA), http://www.ncsl.org/default.aspx?tabid=16430 (last updated Apr. 2010). As of April 2010, forty-one states have enacted Defense of Marriage Acts.

[201] *See, e.g.*, VT. STAT. ANN. tit. 15, § 8 (2010); N.H. REV. STAT. ANN. § 457:1-a (2010).

feasible.[202] If the United States Congress were to define the capacity to marry in the United States, each state would retain its own set of rights and obligations that attach to the marital union and when such a union became valid. This practice would ensure the proper role of the states in regulating the institution of marriage in their respective jurisdictions.

Not only would the states retain control over the incidents of marriage, but they would also retain exclusive control over all other conjugal but non-marital relations.[203] Nothing would prevent the states from creating civil unions or domestic partnerships as they now exist; this power would extend to both same-sex and opposite-sex couples.

A Congressional attempt to define marriage would not be entirely without precedent because Congress has already constructively done so in regard to polygamy. When Congress banned polygamy in the territories of the United States, the United States was only half its current size. By making monogamous marriage a prerequisite to admission to the Union, Congress had effectively legislated a national definition of marriage. Any attempt to legalize polygamy within a state after admission to the Union would have been met with stiff federal opposition. With the current understanding of federal power and past Congressional action, congressional power to act in this realm is not unimaginable.

Nonetheless, even if the Congress does not act, the resolution must still lie in the *political* branches of government, at whatever level. California's attempted judicial resolution did nothing more than force a very strained election contest that was essentially a referendum on the state's own popular decision. Judicial overreach, especially in constitutional decision-making, does not lead to passive acceptance; rather, it appears to cause more strife in the long run. *Roe v. Wade* is an example of such a case, and that decision, from more than thirty years ago, is still just as hotly debated today, especially in Supreme Court nominations. In effect, such overreach circumvents the genius of the republic the Founding Father's created. It removes certain issues from debate, when debate is critical to the very survival of our governmental institutions.[204] Removing issues from the debate of the political branches

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[202] *See Re* Same-Sex Marriage, 2004 SCC 79, paras. 32–33, [2004] 3 S.C.R. 698 (Can.).

[203] The Canadian Supreme Court points out that, even with Parliament having exclusive authority over defining the capacity for marriage, the provinces retained their power over other non-marital, but still conjugal, relations. *Id.* at para. 33.

[204] FOUNDING BROTHERS, *supra* note 50, at 15–16. Professor Ellis states that the genius of the revolutionary generation is that one side never completely won in interpreting the meaning of the revolution. In other words, the revolutionary generation found a way to contain the debate that raged amongst themselves by creating institutions that could perpetuate the debate in an ongoing and safe manner.

serves only to anger and alienate those who lost the debate. The increasing tension of Supreme Court nominations is an example of that anger.

VI. CONCLUSION

Deciding whether same-sex couples have the legal right to marry is properly a decision for the legislature, not the courts. Equal protection analysis does not mandate recognition of same-sex marriage, and current decisions to the contrary manifest judicial overreaching into the legislative prerogative. Courts should therefore refrain from recognizing same-sex marriage when to do so would require a constitutional decision overturning a legislative enactment.

Congress currently stands in the best position to resolve the current debate over same-sex marriage. The Commerce Clause would permit a Congressional definition of marriage. Congress has done this in the past as it concerns polygamy and it could do it again as it relates to same-sex marriage. The Canadian experience shows that this would be a reasonable act for Congress to undertake without upsetting the balance of federalism in the United States. But even if Congressional action is not forthcoming, the courts should not decide the issue. The answer must come from the political branches—at the state or federal level.