An Examination of Same-Sex Marriage in the United States: Where We Have Been and Where We Are Going

Steven D. Mroczkowski

SENIOR HONORS THESIS
Submitted In Partial Fulfillment of Requirements of the College Scholars Program North Central College

June 1, 2007

Approved: ___________________________ Date: ________________

Thomas D. Cavenagh

Approved: ___________________________ Date: ________________

Second Reader Signature

Dr. David Fisher
Table of Contents

Author’s Acknowledgments........................................................................................................Page i

Abstract........................................................................................................................................Page ii

Introduction..................................................................................................................................Page 1

A. What is marriage? Approaches to same-sex marriage.........................................................Page 5
   i. Material Benefits...................................................................................................................Page 5
   ii. Expressive Benefits...............................................................................................................Page 8
   iii. Void, Voidable and Criminal Marriages................................................................................Page 8
   iv. Why is marriage limited? .....................................................................................................Page 11

B. Race and sexual orientation: A striking parallel.................................................................Page 14
   i. Race: a socially constructed phenomenon...........................................................................Page 14
   ii. The purpose of discrimination: maintaining “two kinds”...................................................Page 15
   iii. Why marriage? ....................................................................................................................Page 17

C. Legal Action.............................................................................................................................Page 22
   A note on legal analysis..............................................................................................................Page 23
   i. Tolerance...............................................................................................................................Page 25
   ii. Respect................................................................................................................................Page 33
   iii. Recognition..........................................................................................................................Page 35

D. Philosophy of the matter: Morality and the Law.................................................................Page 41
   i. Is simplicity the answer? ........................................................................................................Page 42
   ii. Devlin, Dworkin and the Support of Morality in the Law.....................................................Page 44
   iii. The Constitution and the Reflexive Legal Paradigm............................................................Page 47
      a. Cohen and the Reflexive Legal Paradigm........................................................................Page 48
      b. Sunstein and the Constitution............................................................................................Page 51

E. Conclusion................................................................................................................................Page 55

Sources........................................................................................................................................Page 59
# Table of Contents

Author’s Acknowledgments .......................................................... Page i

Abstract ........................................................................................... Page ii

Introduction ....................................................................................... Page 1

A. What is marriage? Approaches to same-sex marriage .................. Page 5
   i. Material Benefits .................................................................. Page 5
   ii. Expressive Benefits .......................................................... Page 8
   iii. Void, Voidable and Criminal Marriages ............................. Page 8
   iv. Why is marriage limited? ................................................... Page 11

B. Race and sexual orientation: A striking parallel ......................... Page 14
   i. Race: a socially constructed phenomenon ............................ Page 14
   ii. The purpose of discrimination: maintaining “two kinds” ....... Page 15
   iii. Why marriage? ............................................................... Page 17

C. Legal Action ................................................................................ Page 22
   A note on legal analysis .......................................................... Page 23
   i. Tolerance ............................................................................ Page 25
   ii. Respect .............................................................................. Page 33
   iii. Recognition ...................................................................... Page 35

D. Philosophy of the matter: Morality and the Law .......................... Page 41
   i. Is simplicity the answer? ..................................................... Page 42
   ii. Devlin, Dworkin and the Support of Morality in the Law ...... Page 44
   iii. The Constitution and the Reflexive Legal Paradigm .......... Page 47
      a. Cohen and the Reflexive Legal Paradigm ....................... Page 48
      b. Sunstein and the Constitution ........................................ Page 51

E. Conclusion ..................................................................................... Page 55

Sources ............................................................................................. Page 59
Abstract

Marriage, certainly with an interracial and same-sex focus, is much more than a legal topic. In order to maintain an interdisciplinary approach to this thesis, sources from several fields were used. Scholarly articles were consulted from the disciplines of law and psychology, several philosophical essays were analyzed and applied, books discussing the social phenomena associated with gender identities and the rule of law were used, as were over 15 high court opinions from relevant cases. All works were studied and evaluated as sources that would adequately contribute to the formulation of a multi-faceted social/legal/philosophical analysis of same sex marriage. I wanted to examine how various professions treated the topic of same sex marriage so that I would not be limited to a specific perspective; this essay takes a step back and looks at the big picture, examines why it looks the way it does and hopes to elaborate on what it will and should look like in the future.

Neutrality is an important ideal to strive for but, with a topic as divisive as the one treated in this essay, it is rarely achieved. The language used will be non-partisan, but the message is meant not to be. This work is an appeal to reason for all readers. It promotes thought and expansive reflection, not division. It is merely a presentation of facts that I believe point in a certain direction legally, morally and logically.
Abstract

Marriage, certainly with an interracial and same-sex focus, is much more than a legal topic. In order to maintain an interdisciplinary approach to this thesis, sources from several fields were used. Scholarly articles were consulted from the disciplines of law and psychology, several philosophical essays were analyzed and applied, books discussing the social phenomena associated with gender identities and the rule of law were used, as were over 15 high court opinions from relevant cases. All works were studied and evaluated as sources that would adequately contribute to the formulation of a multi-faceted social/legal/philosophical analysis of same sex marriage. I wanted to examine how various professions treated the topic of same sex marriage so that I would not be limited to a specific perspective; this essay takes a step back and looks at the big picture, examines why it looks the way it does and hopes to elaborate on what it will and should look like in the future.

Neutrality is an important ideal to strive for but, with a topic as divisive as the one treated in this essay, it is rarely achieved. The language used will be non-partisan, but the message is meant not to be. This work is an appeal to reason for all readers. It promotes thought and expansive reflection, not division. It is merely a presentation of facts that I believe point in a certain direction legally, morally and logically.
Acknowledgments

There are so many people whom I would like to thank for their contributions toward the completion of this thesis. First of all, I thank Thomas Cavenagh, my thesis director, for his patient diligence. Without his valuable input and supportive prodding, this work would not have been possible. He helped me craft this text to meet contemporary standards while at the same time guiding me through the application process for law school. Next I would like to thank Dr. David Fisher for all of the stimulating philosophical, legal and sociological conversations that we engaged in throughout my undergraduate career at North Central College. Every time we would set up a meeting I would leave scratching my head; it was not until about an hour or two later that what we discussed clicked and I was able to put it to paper. Thank you for the rigorous mental stimulation and warm conversations. Additionally, I owe every member of my family a huge thank-you. Dad, Mom, Stan, Ed and Sally, you have all supported me so much throughout the years. This work will give you a sample of what I was actually doing while I was away at college. It was not always just fun and games, and while I have a feeling that you all know this, I hope this thesis reinforces it. Finally, I want to thank Ali. She was my rock of stability for the past two years; a time filled with me fretting about the completion of my thesis and you telling me that everything would work out just fine; I guess it did. Thank you all so very much.

Steven D. Mroczkowski
Acknowledgments

There are so many people whom I would like to thank for their contributions toward the completion of this thesis. First of all, I thank Thomas Cavenagh, my thesis director, for his patient diligence. Without his valuable input and supportive prodding, this work would not have been possible. He helped me craft this text to meet contemporary standards while at the same time guiding me through the application process for law school. Next I would like to thank Dr. David Fisher for all of the stimulating philosophical, legal and sociological conversations that we engaged in throughout my undergraduate career at North Central College. Every time we would set up a meeting I would leave scratching my head; it was not until about an hour or two later that what we discussed clicked and I was able to put it to paper. Thank you for the rigorous mental stimulation and warm conversations. Additionally, I owe every member of my family a huge thank-you. Dad, Mom, Stan, Ed and Sally, you have all supported me so much throughout the years. This work will give you a sample of what I was actually doing while I was away at college. It was not always just fun and games, and while I have a feeling that you all know this, I hope this thesis reinforces it. Finally, I want to thank Ali. She was my rock of stability for the past two years; a time filled with me fretting about the completion of my thesis and you telling me that everything would work out just fine; I guess it did. Thank you all so very much.

Steven D. Mroczkowski
An Examination of Same Sex Marriage in the United States: Where We Have Been and Where We are Going

Introduction:

As a vehicle for social change, law is dynamic; as a mirror of culture, it is stagnant. A dynamic legal community has handed down the rulings of Brown, Roe, Loving and Lawrence, while a stagnant one has provided us with Plessy and Bowers. Women and racial and sexual minorities have used law to narrow the gap between themselves and those who are favored by it. In an ideal democracy, these changes would come about gradually as the citizenry so ruled. This is immediately contradicted however, due to the nature of the claims at stake: minority groups seek liberation from and equality with the majority, who, in a constitutional democracy, control not only their own fate under the law, but the fate of those who have not consented due to under-representation. How are laws that discriminate on the basis of race, gender, and sexual orientation typically supported? The answer, as well as the challenge, to such laws lies in the Constitution. Equal Protection and Due Process claims aid minorities while the State Regulatory Powers, offered to uphold the health, safety, welfare and morals of society, allow the majority to justify discriminatory laws. The focus of this work lies in the majority’s summoning of morality as the backing for laws that lead to unequal treatment of minorities, for example, anti-miscegenation laws and other marriage limiting statutes.

The Supreme Court has declared its moral neutrality on such divisive issues and yet seems to contradict itself in some of its recently issued rulings. A court can say that, “Our obligation is to define the liberty of all, not to mandate our own moral code.” Proclaiming that sodomy is a more grievous crime than rape (Bowers) or, on the other hand, stating that when the

---

majority issues an amendment limiting relief sought by homosexuals in discrimination cases, it does this out of nothing more than a bare desire to harm this unpopular group (Romer), is nearly the opposite of the Court's idealistic statement in Casey.

An analysis of precedent relating to race and sexual orientation reveals that the rule of law in the United States embraces selective incorporation of moral standards into legal practice. If a large enough portion of the population deems certain behaviors abhorrent, such acts will be proscribed; but, if a large enough portion of the population deems certain proscriptions unjust, they will be challenged and, with enough support, and more importantly, with the correct application of the Constitution, they will fall. Such was the case with anti-miscegenation statutes and will eventually be the case for marriage-limiting statutes that discriminate on the basis of sexual orientation.

I will describe civil marriage by outlining the tangible and intangible benefits associated with it. Several important rights are bestowed upon married couples by the state and federal government that make it, for some, a desirable alternative to an unmarried lifestyle. Additionally, the expressive benefits accompanying a married relationship have been respected and elevated to a point so high as to render marriage sacred. I argue that the expressive benefits, so revered by society, create tension in the discourse of expanding marriage rights to those who have not traditionally enjoyed them.

Next, I outline the striking parallel that exists between race and sexual orientation as classifications in legal action. It is interesting to note that analogous reasoning supports sexual divides and racial division. This reasoning fell in race cases and will fall (and has already fallen) in sexual orientation cases.
A discussion of legal action and strategic approaches will follow in order to show why it is that race cases fell and how this will apply to cases of same sex marriage. Ideally, decisions about sexual orientation would be reached through legislative measures, but recent cases, such as Lawrence and Goodridge show that some cannot wait. As a result, the courtroom has become a popular arena where litigators fight to either ban or support existing laws constraining homosexuals. There is a three-tiered progression to equality that has been evolving with the debate on same sex marriage: A group is first to be tolerated, then respected and finally recognized. I will present several cases in order to demonstrate how this system has developed and is supported by the courts.

A philosophical discussion will follow this legal analysis in an effort to determine the legitimacy, or lack thereof, of arguments used. Morality in the law is the foundation of this analysis. Liberty, equality and morality and their places in the law, will be applied to the debate surrounding same sex marriage. J.S. Mill, H.L.A. Hart, Gerald Dworkin and Patrick Devlin have contributed significantly to the discussion of these topics as they relate to law and will be used as foundations from which I will develop a new paradigm to apply to same sex relations. This paradigm will be based on the work of Jean Cohen, supported by Cass Sunstein’s approach to the Constitution.

The final component will be an examination of the options that have been used and that are available for use regarding the equal application of marriage rights. Massachusetts offers marriage to all of its citizens, heterosexual or homosexual, but limits licenses to residents; civil unions grant the material benefits of marriage without expressly calling it so; finally, some states

---

have passed constitutional amendments defining the marriage relationship or have adopted mini-DOMAs to protect the traditional sanctity of the institution.
A. What is marriage? Approaches to same sex marriage

The scope of this thesis will be limited to civil marriage. Civil marriage is the state-created institution that recognizes the union of two people and bestows upon them both material and expressive benefits. The primary reason why there is so much legal and social controversy over marriage and its limits is closely related to these benefits. The material benefits given by the government serve as a legitimating stamp on a couple’s relationship and the same can be said regarding the social acceptance of two separate individuals once they become a marital unit. That is to say, that marriage brings a change not only to the respective couple that joins together as one, but changes how the rest of society views these people as well. It is not necessary to advocate marriage for all couples; some do not desire it. But those who want to validate their relationship publicly, as a bond so enduring, should have the opportunity to do so. There is little to lose and much to gain.

i. Material Benefits

The following outlines some of the material benefits that accompany marriage. It is important to note that none of these benefits are constitutionally guaranteed and can therefore be revoked if the state deems it necessary. Both federal and state-granted benefits will be discussed (While the federal government does not have the power to regulate marriage, per se, it has over time embraced the institution and has thus rewarded those choosing it over an individual lifestyle).

State- Inheritance and other death benefits: Default rules favor husbands and wives of those who die intestate. Under the Uniform Probate Code much is left to the spouse of the deceased. Even if the couple has children, the state writes a will of the partner who dies intestate that favors the spouse; everything will go to the widowed spouse. Further, in wrongful death actions, spouses
automatically qualify for benefits not available to live-in partners not recognized as spouses by
the state.4

State- Ownership benefits: In states with community property laws spouses have automatic rights
to each other’s holdings and there is no way to contract around this. States that have a less
extreme versions of community property laws sometimes assume joint ownership of property.
For the purposes of asset division in divorce, deferred community property law assumes that “all
property acquired by either spouse after the marriage and before a decree of legal separation is
marital property” (Uniform marriage and divorce Act § 307, 1970).5

State- Surrogate decision-making: Decision making rights are granted to spouses in various
instances of incapacitation; for example, in a situation where a spouse is incapacitated in an
automobile accident and doctors need consent to perform a procedure, the opposite spouse could
authorize the physician to operate.6

State- Consortium: In most states, anyone who injures someone who is married is deemed to
have injured that person’s spouse as well. The spouse can sue the tortfeasor for damage to the
marital relationship; this benefit is sometimes extended to the parents or children of the victim.
These claims are usually seen as derivative and must be presented together with the claim made
by the injured spouse. Live-in partners, those merely engaged to be married, and non-married
couples cannot seek consortium benefits for damage done to their relationship due to an injured
partner.7

5 Bernstein, Anita., For and Against Marriage: A Revision. Public Law & Legal Theory Research Paper Series:
6 Infra, note 4.
7 Infra, note 5.
State- Tenancy by the entirety: This unique form of joint ownership adds a fifth element to joint tenancy: unity of marriage is added to unity of time, title, interest and possession. This form of joint tenancy is available only to married couples and renders some property traditionally accessible under joint tenancy non-accessible to creditors. For example, an in-debt spouse’s property held under joint tenancy is accessible, while the same spouse’s property would not be accessible under tenancy by the entirety.⁸

Federal and State- Evidentiary privileges: If called to testify in state or federal court, spouses have the right to keep marital communications confidential and can choose to prevent adverse spousal testimony.⁹

Federal- Tax benefits/penalties: Traditional married couples, those who have one high income earner and one low, receive a bonus from filing a joint tax return. If both earn high-level incomes, however, filing a joint return would result in a tax penalty and they would be better off filing separate returns.¹⁰

Federal- Entitlements: This refers to spouses that have access to their spouse’s benefits. For example, veterans and federal employees can share their employment granted benefits with their spouses and children. More specifically, the Family and Medical Leave Act allows for employees to take time off from work to care for a spouse, children or parents.¹¹

Federal- Immigration benefits: When aliens receive special status due to their employment, their spouses may receive the status as well. For those not yet married, the fiancé visa respects couples’ intentions to marry and thus grants some benefits to the fiancé of an alien with special

---

⁸ Ibid.
⁹ Ibid., note 4.
¹⁰ Ibid.
¹¹ Ibid.
status. However, these benefits do not apply to those who marry or engage merely to gain residency; if this is discovered, they can be deported.\footnote{Infra, note 5.}

\section*{ii. Expressive Benefits}

As displayed by the above-mentioned benefits, there is clearly value to being declared married by the state. While these benefits are tangible, they are not always in the front of the mind of those seeking to marry. More important to most than the few-hundred dollars to be saved on a tax return are the expressive benefits formed over time by society that serve as a public societal validation of a relationship.

- Being married gives formal recognition of a relationship
- Marriage is an institution endorsed by the state
- There exists a particular elevated quality to marital relationships that surpasses single life
- The recognition is public

In order to reap these benefits, a relationship must meet certain qualifications. The traditional definition of marriage in the United States is the union of one man and one woman. Currently, 40 states have passed referenda or amended their constitutions to protect the limits of this definition.\footnote{For a complete list of States’ proscribing same-sex unions and the respective legislation passed to support this ban see Appendix of: Koppelman, Andrew M.M., Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges. University of Pennsylvania Law Review, Vol. 153 Available at SSRN: http://ssrn.com/abstract=665701.}

\section*{iii. Void, Voidable, Criminal Marriages}

The couples legally joined in the five states allowing recognition of homosexual relationships face serious consequences should they decide to travel outside of the boundaries of their home state. The gravity of these consequences depends on how other states have referred to same sex unions in marriage limiting legislation; they can be deemed void, voidable or
criminal. A marriage that is criminalized is punishable under criminal law. Incestuous, polygamous and interracial marriages are some examples of marriages that have been and still are criminalized. No state has gone so far as to criminalize same sex marriages up to this point; neither has any state declared same sex marriages voidable. Marriages conducted under fraud, duress or coercion, or those entered into by parties not legally able to consent, are voidable. This protects those who might have been victims of a marriage and does not add significantly to the same sex marriage debate. Almost all states banning same sex unions refer to them as void in marriage defining laws. Void marriages are those declared invalid from inception, usually with no regard for the laws of the state in which the ceremony was performed. Some states have included caveats in their prohibitions against same sex unions that refuse to recognize the rights bestowed upon couples in their home state. It is from this blanket non-recognition that serious legal complications arise.

When two states have different laws on the books, and legal decisions must occur in a foreign state, a conflict of laws exists. In the case of marriage, on a broad level, the tendency is to validate marriages in conflict cases, but courts have sometimes relied on an exception that allows for non-recognition if recognizing the marriage would violate the strong public policy of the forum state.\(^{14}\) By proscribing same sex marriage, either by statute or by constitutional amendment, forty states have indicated that such unions contradict public policy. Left alone and kept in vague language, this is not a terrible harm. It would be up to local judges to determine


"The prevailing position in American law is that the mere fact of migration cannot void an originally valid marriage. Most states follow the first or second Restatement of Conflict of Laws. The Restatement (First) holds that a marriage 'which is against the law of the state of domicile of either party, thought the requirements of the law of the state of celebration have been complied with, will be invalid everywhere' in cases of polygamy, incest as defined by the domicile, 'marriage between persons of different races where such marriages are at the domicile regarded as odious,' or other marriages governed by evasion statutes." Internal quotations from Restatement of Conflict of Laws, sec. 132 (1934).
whether or not, in various situations, recognizing foreign marriage rights for homosexuals would contravene the public policy as determined by the citizens of a jurisdiction. According to Koppelman, however, some states have gone too far: “Under the blanket non-recognition rule, a state’s courts would never recognize any same-sex union for any purpose whatsoever. Those who have proposed this rule do not seem to have understood just how unprecedented a measure they are proposing.”

Even in anti-miscegenation cases, where some states had criminalized, not merely rendered void, interracial marriages, courts had the ability and did in fact legitimate interracial marriages, if the situation called for it. Non-recognition would not allow this. Now, this might not seem serious, so an example, albeit a morbid one, is necessary.

It is known that to visit someone seriously injured while in the hospital, a familial relationship must exist. It is also known, and highlighted above that married couples are granted surrogate decision making power for their spouses, and by extension, their children. Given this, and this example comes from Koppelman, say that a lesbian, married couple is traveling with their adopted daughter across the country and, by some twist of fate, one of the women and the daughter are seriously injured in a car accident occurring in a foreign state, say Arkansas. Arkansas has deemed same-sex marriages void and will not embrace any rights extended to such couples; imagine the psychological turmoil that would occur at the hospital. The uninjured spouse, merely seeking to see her partner and child would be unable to do so because under Arkansas law she is not related to either of them. It is one thing to be morally opposed to same sex marriage and quite another to allow a law to survive that nullifies every benefit stemming from an out-of-state marriage.

---

15 Ibid.
16 Ibid.
iv. Why is marriage limited?

Marriage remains a limited-access institution because it is largely based on convention. Therefore, it is obvious why, although it seems quite arbitrary, unconventional couples are barred from realizing a married relationship. But, upholding marriage on conventional grounds is a constitutionally weak argument, because many classifications and divisions ruled unconstitutional have been based on convention.  

"There are countless conventions, and their legal legitimacy depends on whether they fit the Constitution; their status as conventions cannot resolve that question." Critics of same sex marriage claim that they are merely protecting the traditional sanctity of the marriage relationship, as it has been known for centuries. Over time traditions, just like conventions, change:

Since the earlier times noted in Goodridge, ‘marriage has undergone many changes, from Old Testament times when King David had multiple wives and concubines to today’s monogamy, from arranged marriages to romance-based marriages, and from banning to accepting interracial marriages.’ Somewhere along the way, ‘love conquered marriage...[in order to] make marriage more secure by getting rid of the cynicism that accompanied mercenary marriage and encouraging couples to place each other first in their affections and loyalties.’

Thus, it seems clear that the institution of marriage is not as rock-solid and unchanging as some conservatives believe it to be. What once was conventional will not always be; to ignore this is to ignore American culture; as a norm, the law ought to respond positively to social change. In the United States there is one document that maintains its impartiality throughout the decades:

---

18 See cases from note 1.
19 Infra, note 4.
the Constitution. Those striving for equal marriage rights have invoked its support in two ways: some call on the due process clause, while others rely on the equal protection clause.²¹ And, ever since Lawrence v. Texas, relying on both is a possibility as well.

Favoring the due process approach to homosexual intimacy and marriage allows for independence. This claim centers on the inherent value of an act or participation in an institution rather than treating two different groups similarly. This approach “does not allow heterosexuals to set the standard by which gay intimacy will or can be judged because it focuses on preserving the dignity of gays as individuals.”²² Concerning intimacy, several cases are relied on for precedent that supports an expansive realm of sexual privacy.²³ Supporters of same sex marriage tout marriage’s fundamental right status as reason to allow all individuals, regardless of sexual orientation, to choose whom they would like to marry.²⁴

Equal protection grounds itself in fair treatment of individuals similarly situated as opposed to addressing the sanctity of one group’s beliefs about behavior over the beliefs of other groups. This approach, albeit one that seems to assimilate homosexuals and heterosexuals (the

²¹ The relevant section of the 14th Amendment reads as follows: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (U.S. Const. Am. 14, § 1).
²³ Griswold v. Connecticut, 381 U.S. 479 (1965), is cited for its proclamation that marital privacy is rooted in the Bill of Rights. Roe v. Wade, 410 U.S. 113 (1973), found that the state could not compromise a woman’s right to choose to pursue an abortion, protecting the 14th Amendment’s right to privacy from state intrusion. Roe also took the privacy right implicated in Griswold to unmarried individuals. In Carey v. Population Services International, 431 U.S. 678 (1977), the Court furthered the scope of privacy to apply to minors. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), resurfaced concerning a majority’s moral condemnation of certain conduct: “Our obligation is to define the liberty of all, not to mandate our own moral code,” at 850.
²⁴ It is important to distinguish my argument from that of Justice Scalia. He claims that the ruling in Lawrence is a prime example of the Supreme Court’s signing on to the so-called homosexual agenda (Lawrence). The Court’s ruling will open the floodgates to attacks on a myriad of morals-based legislation, including, but not limited to, bigamy, polygamy, and pornography. I want to briefly address his argument that polygamists will successfully be able to challenge legislation using the foundation established in Lawrence. This foundation, albeit one that is important “in matters pertaining to sex” (Lawrence, 11), relates to private conduct. While sex and intimate conduct is a part of the marital relationship, it is no longer necessary to be married to legally participate in such conduct. Lawrence promotes rights of those wishing to be intimate with one another in a private, consensual setting. It does not directly relate to state sponsored conduct that confers benefits on participants and is not linked to the public validation of a relationship, i.e. marriage.
granting of rights because one group is similar to another), is more reasonable and legally sound than relying solely on due process. Marriage limiting legislation can be challenged on the grounds that it discriminates on the basis of sex, thus raising judicial scrutiny and the chances that a prohibition will be struck down.25

No matter what Constitutional approach is taken when challenging marriage-limiting legislation, it is imperative to correctly apply the strongest precedent possible in order to present a persuasive argument. Race and sexual orientation litigation is so similar in structure and development that the race/sexual orientation parallel requires examination.26

25 See section C: A Note on Legal Analysis.
26 Infra. Analysis of federal case law appears in section C Starting on p. 22.
B. Race and Sexual Orientation: A Striking Parallel

The comparison between race and sexual orientation will be carried throughout the remainder of this thesis, so it is important to clearly define the scope of the parallel to be drawn. Sexual orientation refers to how one defines oneself regarding sexual activity and desires; race is the social categorization based on the physical manifestation of one’s ancestry. While race has been deemed an immutable characteristic, there has not been a unanimous conclusion concerning the immutability of homosexuality. If research shows that orientation of sexual desire immutable, there is even more strength to the comparison of race and sexual orientation. If sexual orientation is a mutable characteristic, the normative arguments attached to recognition grow more complex because, by extending the reasoning to cover all choices, heterosexuality would be considered a choice. Who then would have the authority to say which sexual orientation was the “correct” one? Nevertheless, even if this were the case, it is hard to imagine one sexual preference taking precedence over another after the Court’s ruling in Lawrence v. Texas.

i. Race: a socially constructed phenomenon

Stigma or superiority associated with one race or another is created by society. “Neither biologists, nor anthropologists, nor physiologists, nor geneticists, nor any of the other scientists who have studied physical race have ever identified any general racial characteristics shared by all members of any particular race. There are no genes or other hereditary factors shared by every member of any of the main racial groups.”27 Rather, race is a “social overlay on actual

---

physical traits." Even though the sciences have no use for race in a broad sense, the naturalness of racial divisions is seldom questioned.

While this is now known, primary reasons for creating racial divisions were anything but arbitrary. In the past, hierarchies were presented that ranked the races, always placing Caucasians at the pinnacle. This abstract concept of race attributed race as the cause of certain characteristics and was used to justify discriminatory behavior. "Beliefs in human differences based on natural divisions of race were thus a convenient basis on which to rationalize unjust treatment that had motives of self-interest which could not otherwise be admitted or defended." 29

ii. The purpose of discrimination: maintaining "two kinds."

The purpose of discrimination, whether it is racially motivated or sexually motivated, is to maintain divisions. Discrimination based on race maintains racial divisions, taking the form of white supremacy in the United States. Disparate treatment based on sexual orientation serves to maintain gender divisions, and some argue this takes the form of male supremacy in the United States. 30 Proponents of discriminating based on sexual orientation claim that it is equal because it applies to all people in the same way, i.e. males and females, heterosexuals and homosexuals alike. While this formal equality might sound fair, the Supreme Court and many state high courts have rejected it. Punishing blacks and whites equally for the same crime was found unconstitutional in Loving and equally prohibiting males and females from entering the institution of marriage was ruled unconstitutional in Hawaii. 31

---

28 Ibid.
29 Ibid.
No matter what the discrimination is/was, it is usually an effort to preserve an uneven status quo. By fixing members of society into certain groups, a caste system is created that clearly divides people on the basis of (usually) uncontrollable characteristics. Anti-miscegenation statutes prohibited racial intermixing that would have blurred the boundaries between the levels of separation in the racial caste that dominated, and to a certain extent still dominates, the United States. It would then be harder to tell who was black and who was white. While these statutes existed as early as 1660, their popularity began to grow only in times of need. Early examples of race-related cases can be seen most commonly after the civil war.32

Similarly, outward opposition to same sex marriage and homosexual rights is of a recent vintage.33 Cass Sunstein considers the possibility that like race, the division of humanity into two kinds, men and women, is a socially created phenomenon: “Whatever we may say about genes and colors, that particular division is the construction of a distinctive state of social affairs. It is tempting to think that the same cannot be said for the separation of humanity into two kinds, women and men.”34 Same sex marriages have the same blurring effect on gender divisions that interracial marriages have on racial divisions. Men are turned into women and vice versa, as sexual activity (predominantly associated with males) and passivity (predominantly associated with females) are reassigned. This is unsettling to many because it directly challenges the sexual caste that promotes patriarchy. Examples of this go further than sexual acts, however.

Consider active, working women and the stay-at-home father. The legitimacy of a woman working or taking an active role in sexual relations might be questioned; some might go as far as calling her a lesbian. It is not because she openly claims to have participated in sexual

33 Am Cur. Brief for Pet., ABA 6, claiming that “laws singling out same-sex conduct are of only recent vintage,” from Lawrence v. Texas.
34 Infra, note 30.
acts with another woman, but is because she openly displays traditionally male characteristics that have allowed her to become a successful businessperson. The man might be criticized for taking on a traditionally female role, that of homemaker. Either way, in same sex marriages, there is always at least one person who tends to depart from scripted gender norms: one female partner might have a great business career; one male partner might not work, instead keeping the home for his family.

This insistence of two kinds in turn undergirds the system of caste based on gender; it is also part and parcel of practice of discrimination against same sex relations. For this reason, the prohibition on such relations is a form of discrimination on the basis of sex, just as the prohibition on miscegenation was a form of discrimination on the basis of race.

Both prohibitions are invalid under the equal protection clause.

Indeed, there exists a severe break with the status quo that has been established by the sexual caste system prevalent in the United States. Is it as catastrophic as some make it out to be?

Probably not.

iii. Why marriage?

Why not marriage? It is the ultimate validation of intimacy, is it not? Thus, those wishing to express their love and commitment for one another should seek no other bond.

Marriage is not an institution set in stone. Originally a way to secure wealth, property rights and power, it was not until the ninth century that it transformed into an institution based on romantic

---

35 Ibid.
36 Ibid.
love. Since that time several changes to the conventions of marriage have occurred. It will be more useful, though, to concentrate on developments in the past half-century.

As individualism becomes more and more prominent, securing social validation for emotional intimacy becomes a more important aspect of marriage. In the 1950s and 60s clear gender roles defined relationships. Women stayed home and men were providers for the family. The coming of the sexual revolution started to blur those definitions. The supposed “ideal marriage” was not a natural occurrence. Economic and social conditions post-World War II provided an environment conducive to assigning these clear gender roles. It was, in fact, a short-lived period as divorce became easier and more women were participating in the labor force around the 1970s. Marital satisfaction shifted from the couple to the individual. It was more important to achieve, or at least strive for, self-fulfillment and self-expression that to perform socially prescribed spousal roles. This more liberal and individualistic view of the marriage relationship is embraced by homosexuals today who are not concerned with assimilation, but are concerned with their own self-expression.

Opposition is strong due to the deep ties some people feel with what has been deemed as the traditional married couple. According to these critics, the institution of marriage is under attack and is in need of protection and preservation. Opponents of gay marriage cite three main arguments for the preservation of traditional marriage limits. First, some claim that homosexuals have never enjoyed access to marriage and that allowing gays to marry would contradict the

39 Infra, note 36.
40 Ibid.
41 Ibid.
definition of marriage itself. Others claim that were gay couples to marry and raise a family, they could not care for children as well as a heterosexual couple. Finally, some critics predict that were homosexual couples allowed to marry the institution itself would become ruined forever because homosexuals would overrun it. Each will be discussed in turn.

The definitional argument is tautological. Anything will change according the definition that one offers. By defining marriage as the union of one man and one woman, it is obvious that gays will be barred from it. If one defines marriage as the union of two people of the same race, interracial marriages are banned and the argument is taken back to the 1960s. \(^42\) Start with the conclusion that is to be justified and merely work backward to find a definition that will suit it. This type of logic cannot withstand constitutional muster.

Another claim that opponents of equal marriage access use to justify prevention of same sex marriage is that sexual minority couples do not make good parents. While research in this area is in its early stages, there already exists much evidence to contradict this claim. Homophobes are concerned that children raised by gay couples will themselves grow up to be homosexuals. However, “the relevance of this question to policy is dubious because homosexuality is neither an illness nor a disability, and the mental health professions do not regard a homosexual or bisexual orientation as harmful, undesirable, or requiring intervention or prevention.”\(^43\) Nevertheless, studies have been conducted and show that almost all children raised by gay couples grow up to be heterosexual.\(^44\) Concerning the psychological well being of

\(^{42}\) Strasser, Mark. \textit{Legally Wed: Same-Sex Marriage and the Constitution.}, Cornell University: 1997.
\(^{43}\) Herek, Gregory M. \textit{Legal Recognition of Same-Sex Relationships in the United States.}, American Psychologist, Sept. 2006: vol. 61, 6.
\(^{44}\) Studies: Bailey, Bobrow, Wolfe, & Mikach, 1995; Patterson, 2000, 2004; Tasker & Golombok, 1997.
children, “empirical research today has consistently failed to find linkages between children’s well-being and the sexual orientation of their parents.” Therefore:

If gay, lesbian, or bisexual parents were inherently less capable than otherwise comparable heterosexual parents, their children would evidence problems regardless of the type of sample. This pattern clearly has not been observed. Given the consistent failures in this research literature to disprove the null hypothesis, the burden of empirical proof is on those who argue that the children of sexual minority parents fare worse than the children of heterosexual parents.

The final opposition to same sex marriage, which claims that gays will overrun and dominate the institution of marriage, if granted equal marriage rights, is an extreme one. It is not well founded and does not warrant lengthy discussion. There is no doubt that homophobes and bigots exist. But to say that their views dominate American culture is insulting to the majority of citizens who do not share their beliefs. In fact, polls have indicated “most U.S. adults now favor giving those couples [same sex] many of the legal rights and privileges bestowed by marriage.” It is important to note, however, that calling committed same sex relationships “marriage” is still not favored by the majority of citizens, but the number opposing equal marriage access has gotten smaller in the past few years. Not all gay couples would choose to marry either. Just as some heterosexual couples choose to cohabit and not marry, be it for commitment issues or unwillingness to sexual exclusivity, a similar pattern would probably arise with homosexual couples. Additionally, the shear numbers describing the population of the United States do not

46 Ibid.
47 Ibid.
48 Ibid.
comport with a new domination of marriage by homosexuals, if it were legal for this group to enter into such relationships.

It was once feared that interracial couples would force on society a "mongrel breed of citizens."\footnote{49 See Loving v. Virginia, note 1.} This was obviously an irrational fear stemming from the doctrine of white supremacy. Similar fears about homosexuals who would choose to marry if given the choice and their destined-to-be gay children overrunning society are just as irrational. Barring homosexuals from marriage works to maintain the sexual caste system dominating society just as racial discrimination in marriage sought to maintain the racial inequities in all aspects of life.
C. Legal Action

Both the court system and the legislature have been used as instruments for social change. Courts tend to lead the way in progressive thinking in the United States while legislatures are typically employed to limit the liberal evolution of the status quo. Legislating to meet the demands sought by the majority is a fundamental pillar of the democratic system on which this country is founded and, while it is slower than court rulings it is more well-received by the public as it represents, idealistically, the will of the majority. Unfortunately, sometimes the rights of minorities are the cost of legislative will due to a lack of representation. It is in this scenario that the courts flex their muscle. Court rulings are faster than legislation and force change on all citizens. This abrupt method of change can be viewed as anti-democratic, however, because it might contradict the will of a vast majority of citizens. Usually, it is safe to leave the fate of minorities up to the majority of citizens; in some cases though, it is necessary for the courts to push the populace along the continuum of tolerance. Racial and sexual divides are two areas requiring this legal action, albeit in different doses.

The legal enhancement of racial and sexual agendas followed similar paths through the court system. Therefore, it is possible to take a handful of analogous cases and compare them across similar lines. There is significantly more history available about racial cases than there is about sexual orientation cases. This set of cases and the history surrounding civil rights establishes a solid foundation from which reasoning by analogy can occur. Pace, Plessy, Brown, McLaughlin and Loving serve as this foundation and are compared to Bowers, Romer, Lawrence, Baehr and Goodridge in order to show how each set of cases follow a similar
development sequence. The groups are tolerated first; that is, group conduct is decriminalized. Next, the groups are respected; a general consensus concerning basic equality is reached. Finally, the groups are recognized; the groups are granted access to a status that has both intrinsic and extrinsic meaning.

A Note on Legal Analysis

Before delving into a complex legal examination of racial and sexual classifications, it is necessary to clarify some integral terms and concepts. It is important to note as well, that the Federal Constitution serves as the ultimate authority in all cases in every jurisdiction in the United States. There are three very important constitutional clauses implicated by race and sex cases: the due process clause of the fifth and fourteenth amendments and the equal protection clause of the fourteenth amendment. Typically, the equal protection clause is invoked in cases involving some form of classification. The struggle for those attacking the classification lies in reconciling their classification with previously established classifications that have been deemed suspect; suspect classifications bear no relationship to societal contribution, such as race, sex, national origin, or alienage. Thus, classifications that are not suspect are in some way related to the societal contribution of the institution or individual doing the classifying; two such examples could be, but are not limited to, physical ability or intelligence. Discrimination based

---

52 The relevant clauses of the Constitution read as follows: Amendment V-nor shall any person...[nor] be deprived of life liberty or property, without due process of law...; Amendment XIV (Section I)-...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
53 The Jim Crow laws used to disadvantage African Americans and Loving v. Virginia (Infra at note 1) are examples of impermissible classification; Sex was declared a suspect class in Frontiero v. Richardson, 411 U.S. 677 (1973).
54 For example: having hiring standards in a warehouse requiring that employees are able to routinely life 50 pounds might discriminate against people who cannot do such lifting. This would, per se, not be in opposition to the equal
on suspect classifications is said to be invidious and is an affront to the Constitution.\textsuperscript{55}

Proponents of gay-marriage use logic similar to that used by proponents of interracial marriage: but for this one un-mutable characteristic, in the former cases sex, in the latter race, those discriminated against would be able to partake in the institution of marriage. If an equal protection argument seems untenable, lawyers then reach for due process.

The application of due process of law to race and sex cases is multifaceted. Before discussing the application to such cases, it will be beneficial to deconstruct the concept of due process of law into its two main sub concepts: procedural due process and substantive due process. Procedural due process protects rights of individuals throughout their navigation of the legal system; the fifth, sixth and fourteenth amendments serve to protect procedural due process. What is of more concern in the discussion at hand is substantive due process, a relatively new concept, in terms of legal history, that serves to protect certain rights that have been deemed fundamental and citizens' actions in relation to governmental regulation on the basis of classification.\textsuperscript{57} This system of protection is based on a three-tiered level of constitutional review.

\textsuperscript{55} Infra, note 49.

\textsuperscript{56} The fifth amendment reads in its entirety: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. The sixth amendment reads: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence. Amendment fourteen, section I reads: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The most stringent standard of review is strict scrutiny, followed by intermediate scrutiny, and, the most deferential, rational basis review. Under strict scrutiny review, a classification or governmental action must serve a compelling need and must be narrowly tailored to achieve that need.\(^{58}\) By narrowly tailored is meant that the same action cannot be achieved by less restrictive means. If a classification or action is based on sex, the level of review used is intermediate scrutiny\(^ {59}\); the classification or action must serve an important governmental objective and must be substantially related to the achievement of that objective.\(^ {60}\)

The final and most deferential level of review is rational basis review. The classification or governmental action must merely bear a rational relation to a legitimate purpose.\(^ {61}\) Statutes protecting the public health, safety, welfare and morals often pass constitutional muster under rational basis review.\(^ {62}\) These amendments, concepts and levels of review are all important in the battle for same-sex marriage because they have a direct impact on the power invested in the judiciary when reviewing cases. Now that they have been explained, an analysis of their use in sex and race cases can follow.

i. Tolerance

The first step toward recognition is tolerance. Tolerating a group is directly related to conduct, which, for both race and sexual orientation, was regulated to a certain extent before court mandated liberation. The private conduct of homosexuals was legally regulated prior to Lawrence v. Texas. The domination of African Americans by the institution of slavery goes

---

\(^{58}\) Ibid.


\(^{60}\) Ibid., note 53.

\(^{61}\) Ibid.

without saying but it is the post-liberation (post 14th Amendment) Supreme Court rulings that are most relevant to this analysis. Cases such as Pace and Plessy had limited behavior and legally reinforced discrimination; Bowers did this as well. Lawrence eventually overruled Bowers and while it is traditional to discuss Brown in relation to Plessy, the conduct-specific case of McLaughlin v. Florida will be used instead. 63

Plessy and Bowers were cases in which the minorities lost. The cases share the same purpose in this analysis, but there are differences in them that should be recognized. A short discussion of each case will suffice.

Plessy challenged the Louisiana statute requiring separate but equal railroad accommodations for intrastate passengers. Plessy, an African American citizen of LA was traveling on a railroad within the boundaries of the state. He attempted to take a seat in the white coach but was confronted by rail personnel and asked to relocate himself to the care designated for colored citizens. Plessy refused, claiming that he should have access to the white coach because of his white ancestry. 64 He was refused access to the white coach, removed from the train and imprisoned in the parish jail of New Orleans. Plessy charged that the statute in question was unconstitutional because it violated the 13th and 14th Amendments of the United States Constitution. 65 The Court quickly dismissed the 13th Amendment challenges:

That it does not conflict with the thirteenth amendment, which abolished slavery and involuntary servitude, except a punishment for crime, is too clear for argument. Slavery implies involuntary servitude,- a state of bondage; the ownership of mankind as chattel.

---

63 An analysis of Brown will accompany Romer in the next section.
64 He was deemed 1/8th black and was similar in appearance to white citizens; see Plessy.
65 See notes 50 and 54.
or, at least, the control of the labor and services of one man for the benefit of another, and
the absence of a legal right to the disposal of his own person, property, and services.\textsuperscript{66}

The Court went on by addressing the 14\textsuperscript{th} Amendment challenges next. Precedent was cited,
some of which dated before the abolition of slavery, that justified the separation of the races in
public. This was used to uphold the LA statute. The reasoning of the opinion can be captured in
an excerpt where the Court tried to discuss the purpose of the 14\textsuperscript{th} Amendment:

The object of the amendment was undoubtedly to enforce the absolute equality of the two
races before the law, but, in the nature of things, it could not have been intended to
abolish distinctions based upon color, or to enforce social, as distinguished from political,
equality, or a commingling of the two races upon terms unsatisfactory to either.\textsuperscript{67}

Justice Harlan dissented, questioning this reasoning. He wondered how the Federal
Constitution could support a statute that rendered one race so inferior to another that they could
not occupy the same railcar at the same time. He embraced an interpretation of the Constitution
that was broad and all encompassing. All citizens of the United States were protected by it, no
matter what race. Homosexuals experienced a similar loss in the case of Bowers v. Hardwick,
when the majority acted like the majority in \textit{Plessy}. An issue was narrowly framed, resulting in
a short opinion that validated the criminalization of conduct without regard for the debilitating
affect it had on a group.

In 1986 the Supreme Court upheld a Georgia statute that criminalized sodomy. The case
facts are as follows: two consenting adults participated in homosexual conduct and were
discovered at home. After an initial hearing, the District Attorney decided not to pursue the
convictions; the result was no penalty for the defendants. Michael Hardwick, however, thought

\textsuperscript{66} \textit{Plessy v. Ferguson}.
\textsuperscript{67} Ibid.
that the statute was unsupportable and clearly a violation of the Federal Constitution, namely the 9th and 14th Amendments, and therefore brought an action to invalidate the statute in federal district court. The district court granted the State’s (Georgia’s) motion to dismiss for failure to state a claim, Hardwick appealed. At the appellate level, the Georgia statute was declared unconstitutional because it “violated respondent’s fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation.” The Court of Appeals for the Eleventh Circuit adopted Hardwick’s argument, citing the 9th and 14th Amendments of the U.S. Constitution as authority. The United States Supreme Court granted a writ of certiorari to review the lower court’s decision and due to the manner in which the Court framed the issue the opinion was not a lengthy one.

According to the majority, the equal protection clause was not relevant in this case. The statute was facially valid under this clause because it applied to both males and females, heterosexuals and homosexuals. Ironically, the way in which the petitioner, the attorney general of Georgia, discussed the statute was in conflict with equal protection under the law, mirroring the application and definition of the 14th Amendment in Plessy. Petitioner focused only on homosexual sodomy, as if to suggest that the statute in question only applied to homosexuals. The Court took this view as well, which provided for an opinion conflicting with equal protection. It transformed a neutral statute and applied it to homosexual conduct only.

Relating to substantive due process, the Court denied the presence of a fundamental right at stake and thus reversed the Court of Appeals decision that the statute was unconstitutional. The Supreme Court’s narrow interpretation of the claim at stake led to the decree that the Constitution does not confer on homosexuals the right to commit sodomy. After reading the statute, one might say that a more accurate question for the Court to ask was whether the

\*\* Bowers v. Hardwick.\*\*
constitution gives *anyone* the right to commit sodomy in the confines of their private home. Before validating this statute, the Court would have had to decide if it were willing to say "no" to the second issue framed here. It is highly unlikely that the Court would be so quick in declaring all sodomy unconstitutional using the logic employed in *Bowers*. There, the Court said that homosexual sodomy has never been part of the Nation’s history and tradition and that for hundreds of years, such conduct was criminalized. In *Bowers*, expanding the Court’s view to the rights of all people, regardless of sexual orientation, broadens the issue to what the dissenters purported was really at stake: the right to be left alone.

In both *Bowers* and *Plessy* legislative will was deemed more valuable than individual rights. Separation was maintained in the simplest sense: the presence of racial minorities and the conduct of homosexuals were not tolerated. Statutes limiting both were deemed good law. Intimacy rights of homosexuals were reduced to the presence of a fundamental right to commit sodomy and equality was reduced to property rights in *Plessy*. Tolerance of these groups would progress with time but to validate social change, a new Court ruling was necessary. Enter *McLaughlin* and *Lawrence*.

The 1964 Supreme Court opinion of *McLaughlin v. Florida* is cited more often in reference to its failure to invalidate interracial marriage bans than for its gains concerning interracial, private conduct. *McLaughlin* was charged with violating section 798.05 of Florida’s criminal law, which made it illegal for interracial couples to cohabit, unless married. *McLaughlin* was discovered to be illicitly cohabiting with a white woman in a Miami apartment. He countered the charges with the claim that they were married under the doctrine of common law marriage. This claim carried no weight, however, because under Florida law miscegenation was illegal.

---

69 Ibid.
At the state level, McLaughlin suffered defeat. McLaughlin appealed; the case was brought to the United States Supreme Court where the first victory for sexual intimacy outside of the marital relationship was won. The state of Florida tried to support section 798.05 with the arguments that it supported standards of decency and morality and that it was ancillary to the statute that prohibited interracial marriage. The Court disagreed with both arguments and struck down the statute on equal protection grounds. Both decency and the interracial marriage ban could survive by themselves; interracial, non-married couples did not need to be targeted to meet the ends sought by the state. The result of this opinion was twofold: The Supreme Court decriminalized group-specific conduct and at the same time, did not rule on interracial marriage. While separation could be maintained in the institution of marriage society was forced, in this case, to group interracial conduct with intraracial conduct. The group had to be tolerated and this was achieved by way of assimilation.

Conduct was decriminalized in *Lawrence v. Texas*, but the Court was much more direct in its opinion. The Court did not merely overrule a statute it deemed repugnant to the Constitution; it attacked it. Police officers of the Harris County Police Department responded to a reported weapons disturbance in Houston, Texas. They entered the apartment of John Geddes Lawrence and saw Lawrence and Tyrone Garner engaging in a sexual act. The two men were arrested, held in custody over night, and charged and convicted before a Justice of the Peace for violating the Texas Penal Code by participating in “deviate sexual intercourse.” Both men were adults and were participating in consensual, private activity.

The Supreme Court of the United States granted certiorari to consider the petitioners’ Constitutional challenges to the statute and their challenge to *Bowers v. Hardwick*. Petitioners’ claims were:
1.) The statute criminalizes sexual conduct by same sex couples but opposite sex couples are not punished for the same conduct. This violates the 14th Amendment’s equal protection clause.

2.) Petitioners’ conduct was private and consensual and took place in the home. This violates liberty and privacy protected by the 14th Amendment’s due process clause.

3.) Bowers v. Hardwick should be overruled.

The majority opinion focused on substantive due process. It relied on statements that Justice Stevens made in his Bowers dissent, which criticized the majority for demeaning such an important personal aspect of an individual’s life. He argued that a majority’s moral condemnation of a minority’s behavior was not cause enough to criminalize that minority’s conduct. Additionally, he opined that personal decisions regarding physical intimacy are a liberty protected by the due process clause of the 14th Amendment, granted to both married and unmarried individuals. The majority concluded, “Justice Stevens’ analysis...should have been controlling in Bowers and should control here.”

The majority also claimed that the issue was framed incorrectly in Bowers. Statutes such as those under examination in Bowers and Lawrence “seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals,” (Lawrence). It followed with the conclusion that “this...should counsel against attempts by the State or a court, to define the meaning of a relationship or to set its boundaries.” The ruling in Bowers and the Texas statute in Lawrence limited the conduct of homosexuals by effectively making it illegal to sexually display affection for a partner in a same sex relationship in the privacy of one’s home.

---

70 Lawrence v. Texas.
71 Ibid.
After careful perusal of the reasoning in Bowers, the majority in Lawrence also found the use of the history of anti-sodomy laws erroneous. The majority in Lawrence argued that the majority in Bowers misused the fact that antisodomy laws existed for hundreds of years to their advantage. In reality, the laws that existed long ago were implemented to protect minors, women and those who could not protect themselves. Anti-homosexual legislation, the Lawrence majority argues, is a creature of the latter portion of the 20th century, the Texas statute at question dating from the 1970s. Therefore, no longstanding history or tradition of banning homosexual sodomy existed, so it could not be used as support for anti-sodomy statutes.

In her concurring opinion, Justice O’Connor refused to join the majority in overruling Bowers, but she claimed that the Texas statute was in violation with the equal protection clause of the 14th Amendment because it did not apply equally to heterosexuals. O’Connor embraced the reasoning used in McLaughlin and argued that while respondent claimed that the statute was targeted at conduct and not homosexuals as a class, the conduct it targeted was inextricably linked to homosexuals as a group. She left open, however, those statutes that equally target heterosexual as well as homosexual sodomy to be subject to legislative repeal.

While the opinions differed in degree and language, both struck down legislative attempts at non-tolerance. This was achieved through assimilation in McLaughlin and was derived from recognizing individual autonomy in Lawrence. Separation, in a broad sense, was destroyed because society had to tolerate conduct of groups that they had marginalized. The next step after tolerance is respect, which will lead to equality. It is interesting to note that in both instances, racial and homosexual, tolerance of conducted succeeded respect. Logically, this does not seem to make sense; but legally, it does. Equality is a very broad topic, and even though it is possible for court-mandated equality, there is much leeway for legislative action against the rulings.

72 See note 31.
handed down. Thus, as was the case for both Brown and Romer, the majority can be told that certain groups are their equals, but in spite of this, it might still be possible maintain socially (legislatively) created inequities.

ii. Respect

Tolerance will eventually lead to respect. The focus is broadened from conduct to general group equality. The courts promulgate equality by striking down laws that undergird a system of hierarchical inequity. The Supreme Court handed down rulings in Brown and Romer that attempted to do just that. But, while these cases tried to render minority groups equal to their majority counterparts, success did not come immediately. There was legislative backlash against Brown and legislative silence following Romer. Southern states attempted to maintain segregation and several states still criminalized homosexual conduct. These cases are important, however, because each one struck down a discriminatory classification.

The doctrine of Separate but Equal, upheld in Plessy, was directly challenged in Brown v. Board of Education, 347 U.S. 483. In this class action suit the Court decided that this doctrine was inherently unequal. The Court rejected the reasoning from Plessy that was used to justify unequal treatment across racial lines. Previous cases had already rejected inequality in education at the graduate level and the Supreme Court relied on these cases, along with developing trends concerning the 14th Amendment\textsuperscript{73}, as support for its ruling:

Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.\textsuperscript{74}

\textsuperscript{73} See note 21.
\textsuperscript{74} Brown v. Board of Education.
Separate schools for separate races were ruled unconstitutional as a violation of the equal protection clause of the 14th Amendment. This declaration of equality did not eliminate stigma associated with being a racial minority because conduct was still criminalized and many states maintained their disapproval of the Court’s ruling through legislative measures. The Court knew that it was on thin ice. With this in mind:

The Court in Brown II sought to accommodate Southern white sensibilities and concerns by refusing either to call for immediate desegregation or to establish a precise timetable for such. The result was that ten years after Brown I, only 1.2 percent of black children in the eleven states that made up the old Confederacy attended schools with whites. 75

Ten years after Brown I, McLaughlin was decided and a mere three years after that, so was Loving. So in order to validate equality deemed fundamental in Brown, legislating according to race was taken completely out of the political process by decriminalizing racial conduct and then recognizing interracial marriages as valid. What Brown did for African Americans, Romer attempted to do for homosexuals.

Romer v. Evans, 517 U.S. 620 (1996), brought before the Supreme Court an amendment to the Colorado constitution that removed sexual orientation from a list of those who could benefit from anti-discrimination laws. A majority ruled that this was in violation of the equal protection clause and affirmed the Colorado Supreme Court’s decision to invalidate the amendment. The United States Supreme Court rested its logic on the singling out of homosexuals as a class, which resulted in disfavored legal status. In order to sustain an amendment or law that applies only to a specific group, the state must show a legitimate

governmental interest in doing so. This justification lacking, the amendment did not survive the reaches of the equal protection clause of the 14th Amendment of the U.S. Constitution.

The Court declared that the amendment rendered homosexuals unequal to everyone else because it denied them their only remedy to discriminatory treatment in certain exchanges. It was not providing special treatment for homosexuals by ruling this way; the majority of the population is not discriminated against like the targeted group and so they do not need protection.  

Romer was a gateway to Lawrence just as Brown was a gateway to McLaughlin and Loving. The bottom line of both cases is quite clear: The equal protection clause does not permit classification based on race or sexual orientation to serve the purpose of disadvantaging either group. Similarly situated people must be treated equally and division by race or sexual orientation is unconstitutional.

iii. Recognition

The final step toward equality on all levels is recognition of the marginalized group. For racial and sexual minorities this occurred through full access to the institution of marriage. Marriage provides a recognized legal and social status to all who are able, and choose, to participate in it. For African Americans, full access to marriage was granted in the Supreme Court opinion Loving v. Virginia (388 U.S. 1). For homosexuals there have been only two high court rulings, both occurring at the state levels, which have granted access to marriage. Loving shares similarities with Baehr and Goodridge, but differences, mainly in social attitude toward the disparaged group, exist. At the time Loving was decided, only 16 states had anti-miscegenation statutes on the books; contrast that with 40 states, the present number outlawing

---

76 Romer v. Evans.
same sex unions in one way or another. Loving was decided at a time when the country was ready for change. The same cannot be said of Baehr and Goodridge.

In 1958 Richard Loving married Mildred Jeter in the District of Columbia and then returned to their home in Virginia. After their marriage was discovered, they were indicted by a grand jury and a year later were sentenced to one year in jail. The trial judge suspended the sentence for 25 years though, on the condition that the Lovings leave Virginia and not return together for 25 years. The Lovings complied, fleeing to the District of Columbia once again; there, they took legal action.

Eventually their case landed back in Virginia courts. The Supreme Court of Appeals of Virginia upheld the convictions in 1965. The decision was appealed and the United States Supreme Court took the case. The Court overruled the lower court’s decision, branding the statutes at hand77 “...an endorsement of White Supremacy.”78 When the state of Virginia attempted to justify its racist regulation of marriage, citing the 10th Amendment as authority, the Supreme Court made its position clear:

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State’s police power,...the State does not contain in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment...Instead, the State argues...that state penal laws containing an interracial element as part of the definition of the offence must apply

---

77 Sec. 20-58 and 20-59 of the Virginia Code. 20-58: Leaving State to evade law. If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage. 20-59: Punishment for marriage. If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years. Also at issue were 20-57: automatically voids marriages between races; 20-54 and 1-14: defining colored persons, white persons and Indians for the purpose of statutory prohibitions.

78 Loving v. Virginia.
equally to whites and Negroes in the sense that members of each race are punished to the same degree.\textsuperscript{79}

The equal-application argument was rejected as well. The opinion closed with remarks providing that the statutes Virginia offered not only violated equal protection, but were a violation of due process as well. Recent decisions involving homosexuals and the right to marry have adopted the same equal protection reasoning employed in \textit{Loving}.

The Hawaii Supreme Court was the first court to proclaim marriage laws denying equal marriage access unconstitutional. \textit{Baehr v. Lewin} was decided in 1993. Plaintiffs in this case challenged Hawaii’s marriage laws on both equal protection and due process grounds. The court rejected the due process arguments because in the courts view of the constitution, there existed no right to marry stemming from the right to privacy. Instead, the court claimed that proscribing gay marriage is a form of invidious discrimination based on sex that runs afoul to the Hawaii constitution. But, the Hawaii court explicitly stated that its state constitution offers a more encompassing equal protection clause than does the federal Constitution:

The equal protection clause of the United States and Hawaii Constitutions are not mirror images of one another. The fourteenth amendment to the United States Constitution...provides that a state may not “deny to any person within its jurisdiction the equal protection of the laws.” Hawaii’s counterpart is more elaborate... “[n]o person shall...be denied the equal protection of the laws, \textit{nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry}” (emphasis added). Thus, by its plain language, the Hawaii

\textsuperscript{79} Ibid.
Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex.\(^{80}\)

It was not similarity with the federal Constitution that allowed the court to strike down gay marriage bans; the court needed to distinguish the degrees of protection offered by both state and federal constitutions in order to solidify the opinion against overrule. The state tried to use the equal application argument to counter the alleged discrimination based on sex. Males and females were punished equally and thus, the statutes pass constitutional muster. The court rejected this reasoning however, citing Loving as authority. Equal application coupled with a classification is not a constitutionally sound form of legislation. Similar arguments were used in the Goodridge opinion that came ten years later.

From the outset of the opinion, it was again made explicit that the Massachusetts constitution was stricter than the United States Constitution: “The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protections for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.”\(^{81}\) The court relied on Loving and Perez (see Perez v. Sharp (Oct. 1, 1948) 32 Cal.2d 711, 198 P.2d 17) to support its reasoning. Massachusetts’ civil marriage has always been a secular, state-created institution. As was the case in Perez and Loving, the marriage statutes here identify one characteristic (previously race, here sexual orientation) and then deny marriage across the board to all.

Opponents of same-sex marriage in Goodridge also cited the devaluation of marriage as a negative consequence of same sex marriage licensing. The court did not embrace this argument either. Homosexual couples seek to marry for many reasons, including but not limited to: public

---

\(^{80}\) Baehr v. Lewin.

\(^{81}\) Goodridge v. Dep’t of Public Health.
validation of a relationship, access to state benefits, access to legal benefits, custody rights, etc.

Again the court relied on anti-miscegenation cases for support:

Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.82

The negative consequences predicted by some were not realistic in the court’s eyes. The result of the ruling was a declaration that in Massachusetts, marriage will mean the voluntary union of two people as spouses. The court neutralized the state’s marriage laws concerning sexual orientation.

As was alluded to earlier, it does not seem that the country is ready to adopt same-sex marriage access as policy. Rulings regarding the legal recognition of a group tend to be the most polar, potentially causing a backlash against a court’s ruling. While sodomy proscriptions began to fall even after a loss in Bowers, the same has not been true for same-sex marriage bans. Six years after Hawaii’s famous case, Baehr v. Lewin, the state constitution was amended to provide the legislature the power to limit marriage to opposite sex couples, which it subsequently has done, rendering the State Supreme Court’s opinion null. As a defense against recent court action, other states have done the same. Nearly 80% of states comprising the Union have proscribed homosexual unions. Perhaps it is too soon for legal action. Maybe it would be wiser to call on academics to shed light on this divisive issue. In an attempt to clarify opposing

82 Ibid.
viewpoints, I will explore several philosophical approaches to what is at the core of many contentious legal debates: laws based on morality.
D. Philosophy of the matter: Morality and the Law

In a democratic political system, how should morality be regulated? For the most part, it is safe to rely on legislative measures that mirror the most widely accepted moral pillars accepted by society. But, in such a system, it is inevitable that the certain minority interests will be extinguished because they contrast with these pillars. Various degrees of morality exist, some more revered than others. As the social fabric of America evolves, it is often the courts that do the leading. They are the great equalizers.

Perhaps simplicity is the answer to complex questions. I will first touch on the tenets championed by John Stuart Mill to establish a minimal liberal baseline of regulation. As more and more conditions surface, though, Millian analysis becomes complicated and it is necessary to turn to a more expansive approach to morals legislation. In addition to Mill’s perspective on individual liberty, the work of Patrick Devlin, H.L.A Hart and Gerald Dworkin on relationships between law and morality will be analyzed. In order for progress to be made, the legal paradigm must shift from its current embrace of the status quo to a forward-looking, reflexive model. Cass Sunstein and Jean Cohen have much to offer on this area of thought. According to Sunstein, the Constitution must remain the baseline for sound legislation, but the assumption that the status quo is an un-coerced good must be challenged. Cohen argues for the reflexive legal paradigm (to be explained later). In spite of democratic precepts, the minority and majority must be seen as moral and political equals. Distribution of rights and acknowledgment of moral thought requires a more tempered public approach to regulating morality.
i. Is Simplicity the Answer?

John Stuart Mill supported a liberal, hands-off policy concerning government regulation of acts, both public and private. His philosophy boils down to this simple approach: conduct is acceptable as long as it does not harm anyone else. Mill’s definition of liberty is as follows:

1.) the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, more or theological.

2.) the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character, of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse or wrong. (Emphasis added).

3.) from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others; the persons combining being supposed to be of full age, and not forced or deceived.83

The only justification for regulatory law from this perspective is to prevent harm to others. The law that limits speed of automobiles in residential areas is justified because it requires drivers to go a lower speed so as to increase reaction time and prevent potential accidents that could occur in a densely populated area. Criminalizing sexual conduct on the grounds that the majority finds it immoral would be insupportable to Mill. The parties participating in such conduct are of age, and consent to the conduct. Given that it takes place in private, there is no harm to society and thus it evades regulation. What about those who are

morally outraged by certain conduct that (while it takes place in private) is still regarded as a just cause for social concern? For these individuals, Mill provides little consolation. Those who wish to act in ways that do not harm others have the right to do so; those who wish to believe certain things and adhere to certain moral standards also have the right to do so. Those who condemn an act that they believe to be immoral (but not physically harmful) may reason with those who perform it in an effort to convince them to cease. That is, however, the furthest extent to which they can go. It would be an affront to Mill's concept of human liberty to go any further. The basis of Mill's argument regarding morality in the law is that it does more harm than good. It infringes on the moral premise of a right (of all adult individuals of sound mind) to autonomy and self-regarding conduct. No society is free without a guarantee of individual liberties, whether they are manifested in harmless conduct or opinions. Regulating such things on moral grounds suppresses an individual's freedom of expression, making them not a free member of a society, but a prisoner of the majority's morals, forever to be judged by the majority's standards. Mill establishes a very broad baseline that can quickly become complicated when applied to conduct that could be justified on similar grounds. Why criminalize polygamy and bestiality and not gay-marriage? To distinguish between degrees of morality we must turn to H.L.A Hart.

Hart's approach does not completely eliminate morality from all aspects of the law. Hart argues that one cannot group all immorality together. A societal consensus can proscribe murder, but not so-called sexual immorality because the conduct of one is in no way related to the conduct of the other. How can a society regulate sex for the same reasons that it regulates murder? It cannot, according to Hart, and, "...there is no evidence to support, and much to refute, the theory that those who deviate from conventional sexual morality are in other ways
hostile to society." 84 Those who do not comply with popular morality in one way are by no means more prone to deviate from popular morality in other, more harmful ways. To call someone a sodomite is not the same thing as to call him a murderer. The two should not be similarly judged either. This argument is bolstered by Hart’s explanation of the composition of societal morals.

To claim that all morality forms “a seamless web” is irrational. 85 Varying degrees of immorality exist and it is only the most grievous that deserve proscription by statute. It is, not coincidentally, that these serious moral grievances are those that cause the most harm (murder, rape, robbery, assault). This is the bridge point of Mill and Hart. Harmful conduct is criminalized; other conduct is not.

ii. Devlin, Dworkin and the Support of Morality in the Law

Devlin’s support of morality in the law is rooted in what he considers to be the cement of society. According to Devlin, a society is dependent upon the overlapping of individuals’ morals and ideals. Without a consensus of what is basically right and wrong, no society can survive. However, the majority disapproval of an act does not necessarily make the act a matter of society as a whole. The law does not punish some immorality, but none is condoned by it. 86 That being said, there is a certain standard to which all individuals in a society are held and it is their duty to meet that standard. This is the great price paid by the individual who wishes to benefit from a society: one must follow the established rules. The collection of morals and standards are what make a group of individuals a society. What about private, consensual acts then? If no one knows of their occurrence, why should they be prevented? Because, Devlin says, such is the

---


85 Ibid.

nature of the criminal law. Crimes are not acts that only affect specific individuals. A crime is an act committed that goes against an entire society. It is this aspect of the criminal law that not only permits, but also requires the criminalization of acts thought to be immoral.

What is immorality in societal terms? It is what every “right-minded” member of society believes to be immoral. It is important to distinguish Devlin’s “right minded” person from the reasonable, or even rational, person. Immorality is defined by the masses, not by a ruling elite. One does not have to be cognizant of a greater good; one just has to have a stance that is not too far distanced from all others to be considered “right minded.” This provides the groundwork for the public nature of morality that is so often in conflict with privacy. The affront to public morals must be weighed against the value of the private acts committed and the costs of regulation of the act. It is when regulating private morality becomes too costly or discriminatory that Devlin supports moderation in the enforcement of morality. Devlin does not say that the law should be limitless. Some crimes are much more harmful than others, and it is these serious offenses that should be regulated indefinitely. A combination of the harm against an individual and the distance from the public morality are what puts a private, immoral act within the scope of the law.

Gerald Dworkin supports Devlin in advocating the presence of morality in the law. One must recognize the importance of the word “presence” in this context. “Presence” does not imply “use.” While Dworkin does not side with liberals in proclaiming that the law cannot regulate immorality, he does not go so far as to say that the law is an all-encompassing, omnipresent tool for the maintenance of a regulated society. But, according to Dworkin, the social consensus regarding immorality is a strong deterrent in itself that can possibly lead to legal

87 Ibid.
88 Ibid.
action. If there is a general consensus that an action is wrong, this provides enough reason not to do it. This in turn is reason enough to discourage the action. Legal proscription of conduct is just a strong method of discouragement. 89 This is the purpose of the criminal law:

The criminal law is an institution whose central rationales include making it less likely that acts that ought no to be done are not done and serving as a vehicle for condemning those who do what ought not to be done. The existence of principled reasons for ruling out (in advance) the criminal process as a means of discouragement therefore seems quite implausible. 90

Like Devlin, Dworkin support excluding certain immoral acts from regulation. These acts only include basic rights so fundamental to a free society that true liberty would not exist if they were absent. The example Dworkin provides is free speech. The threshold for criminalizing speech is too blurry and the dangers associated with enforcing the criminalization of immoral speech far outweigh its benefits. The risk of broad discretion and vague legislation that might damper perfectly legal expression is but one example of this danger.

Dworkin’s final point is a strong one. He suggests that embracing the popular belief that there exists a realm of individual autonomy into which the law may not penetrate is policy rather than principle. 91 The principle governing the criminal law is that there are certain acts that are collectively viewed as wrong and are therefore outlawed. The fact that a society allows certain private immorality to occur does not grant its citizens a right to do wrong. It is merely a protection against tyranny that all democracy must support. An act can be harmful to the moral blanket that covers society, but its occurrence might not be strong enough to warrant

90 Ibid.
91 Ibid.
criminalization; or enforcement might be next to impossible, such as some statutes that target homosexual sex.

It is important to note that none of the four scholars analyzed, Mill, Hart, Devlin, or Dworkin, supports an extreme thesis. The solution to the debate regarding the place of morality in the law is one of moderation. It is a give and take balance of majority rule and minority protection. Morality is a changing concept. In order to achieve some balance in a society, this realization must be made. Immorality can be criminalized, but it must be controlled accordingly, depending on the seriousness of the offense, the harm produced, and the distance from the average moral consensus present in the respective society.

iii. The Constitution and the Reflexive Legal Paradigm

The solution to problems ultimately related to differing morals is twofold (and here I believe that this has applications to the ongoing debate concerning same sex marriage). First, and here I turn to the work of Cohen; a new legal paradigm must be adopted. This does not entail turning the entire legal framework of the United States upside down; rather, it is a reintroduction of fundamental principles of an ideal democracy. The reflexive legal paradigm works to ameliorate the current position of oppressed minorities with as little change to fundamental majority baseline beliefs. To solidify these changes, I turn to Sunstein, who champions belief in a Madisonian approach to Constitutional interpretation. A large part of this school of thought is the rejection of status quo neutrality. Baseline liberal principles are universally dominant, as proffered by the Constitution; they are to be preserved for all, no matter what the costs to the current status quo because, Sunstein argues, there is no legitimate reason that supports preservation of the current state of affairs if it discriminates unfairly against minority groups. This will of course be qualified in the next few paragraphs.
a. Cohen and the Reflexive Legal Paradigm

The individual must be allowed to be his/her own master. This claim requires qualification, however, in order to become a workable principle in a democratic society. And this is where privacy comes into play. When it comes to the morals that glue a society together, as Devlin suggests, one must try to comply with the status quo whenever an act takes place in the public sphere. This is because, whether the harm of grievously immoral conduct is measurable or not, in public the chance for harm is much greater than in private. The mere knowledge of an occurrence of an act is not harmful enough to warrant proscription; the sight of it by many people is. As a result, individuals are afforded a right of decisional privacy. The individual is the center of the decision making process, regardless of the conduct’s moral value, and what is done does not have to be justified in terms of the majority’s ethical beliefs. This takes care of private conduct, which is a step in the right direction, but it does little to explain the measures necessary for dealing with public morals. Equality in the private sphere is necessary in order to promote equality in public.

Going from public to private entails the shift from permitting certain acts to respecting them on a level that does not demean the actor. Permitting only private acts labels participants as moral deviants because the participants are still publicly condemned. Those who commit the act are still stigmatized. Cohen provides the following concerning respect and equality:

...the respect conception proceeds from the presumption that the minority and the majority are moral and political equals meriting equal political and legal status.

Decisions regarding the distribution of fundamental rights and resources are to be guided

---

by norms that all parties can accept as fair or just, despite strong ethical differences about
the good.\textsuperscript{93}

The challenge lies in determining the norms that all parties can accept as fair. It cannot
be suggested that all people simply abandon their own moral beliefs and embrace an amoral
society so all can choose to participate in any conduct they wish. Rather, the success of respect
and equality requires reasonableness and rationality to be included in the thinking of what Devlin
refers to as the “right minded citizen.” Majority sentiment cannot suffice. While it is above and
beyond what is normally asked of a democratic society based on majority rule to ask that citizens
actually reason, it is of paramount importance if all are to benefit from an equal society. Cohen’s
new paradigm offers a new approach to regulation in order to break apart many of the old,
stigmatizing dichotomies that leave certain groups in a position of inferiority or moral
condemnation. Take for example, homosexuals. For a very long time conduct that was
associated with being a homosexual was prevented by criminal law. This brands all
homosexuals as criminals. The contemporary solution, as proclaimed by the Supreme Court,
was to acknowledge that homosexual conduct is protected by the Constitution’s right to privacy.
The Court supports this by reconciling cases concerning homosexual intimacy with a long line of
past cases concerning various cases dealing with private conduct.\textsuperscript{94} This, however, does almost
nothing to bolster the public rights of homosexuals. It privatizes their conduct and as a result the
relationship value of all homosexuals. The reflexive legal paradigm would deal with
homosexual right much differently. There would be no judgment based on something like
contraception. Instead, Cohen argues, homosexual rights must be based on the most parallel
example available: heterosexual rights. It must be admitted that no one looses their humanity no

\textsuperscript{93} Ibid.
\textsuperscript{94} Ranging from contraception to abortion; see notes 1 and 23.
matter what sexual orientation they choose. Looking at the similarities only among similarly situated individuals (in this case, a homosexual or a heterosexual person in an intimate relationship) leads the law to regulate both on equal grounds, not in light of one or the other. There would be no such thing as heteronormative or homonormative standards. Rather a common morality regarding relationships and intimate decisions in general would lead to the fairest regulation of such conduct. This paradigm “enables one to acknowledge contextual differences and ethical multiplicity in modes of intimacy, as well as the plurality of possible legal approaches.”\(^9\) The whole point of this new paradigm is to allow for the greatest amount of flexibility in regulation as possible. It must be understood that while certain parallels may be drawn between, say, abortion and same-sex marriage, neither cause is furthered by using the same legal approach to regulating these differing aspects of autonomy; one is regarded as strictly private while the other is inevitably linked to public respect and recognition.

The final piece of the solution is a new form of regulation regarding morality and the law. By eliminating standardized bias (weighing certain acts in terms of other acts, even though they may be totally unrelated) the reflexive legal paradigm, while still enforcing a collective morality, albeit an advanced one, promotes expansive thinking. The promotion of this so-called elevated thinking is exactly what I was referring to earlier in the solution. In order to benefit from the ideal society in which there is no large deviance from accepted norms, norms must be redefined and citizens must make the effort to move from a narrow personal perspective to one of much breadth; in doing so, morals become less individualistic and become more communitarian. This new regulation protects security for personal imaginative experimentation, difference, and civic equality; it fosters responsible ethical choice and public reflection on what an ethical choice is.

\(^9\) Infra. note 92.
and how to determine it.\textsuperscript{96} What are present now are every individual’s private notions of morality. These aggregates of morality are pooled together to form majority moral opinion. Public reflection encourages less stringent moral regulation of an individual’s life, whether it takes place in private or in public. While this may seem like moral disintegration, it is not that. It is merely a more tolerant and understanding society that encourages morality but does not force or support one set of values over everyone else’s. Those who choose to live by stricter morals than the societal standard requires are free to do so. For they have no threat of being prosecuted for this because the street runs in both directions. They cannot punish those who they might personally find reprehensible and vice versa.

\textbf{b. Sunstein and the Constitution}

The Constitution is the central pillar to democracy in the United States. As currently interpreted, however, it strays from its ideological foundations and becomes a partial document.\textsuperscript{97} This is due in large part to status quo neutrality; the Constitution is used to justify current distributions, social and legal, as natural and un-coerced. When this occurs, discrimination and inequality, deemed normal due to its seemingly unforced appearance in society, persist even though it contradicts Constitutional principals. The result: unjust classifications and regulations. Sunstein summarizes the problem:

\begin{quote}
The problem arises when the status quo is used without adequate justification or merely by reflex. In constitutional law, the status quo is indeed used in this way. It is treated as part of the state of nature, when it is not; it is treated as neutral and just, when it is neither. Often the legal rules that produce existing distributions or opportunities and even
\end{quote}

\textsuperscript{96} Ibid.
preferences are not recognized as law at all. We have seen this problem in numerous areas.98

Two such areas are racial and sexual inequality. In both of these areas, as it has been made clear thus far in this work, Constitutional principles have been used to support unequal distributions through a caste system. This is an unfounded source of distinction because it favors certain groups above others on the basis of arbitrary characteristics. “Discrimination on the basis of race, gender, and disability would raise a concern, not because it involves irrational distinctions between people who are really the same, but because the law should not translate differences into a source of social disadvantage...”99

Critics claim that yes, perhaps mistakes were made concerning the treatment of different races, specifically, the black/white racial dichotomy.100 They counter the argument of equal marriage rights for homosexuals by distinguishing it from race. Divisions based on race are Constitutionally infirm, and have, historically speaking, recently been so dubbed. No such distinction has been made for discrimination based on sexual orientation, the classification used to deny marriage rights to homosexuals. They reject the but-for argument used to classify same-sex marriage bans as sex-based discrimination. Because women and men are both denied equally, no sex-discrimination occurs. This claim arouses constitutional conflicts.

First, arguing that formal equality, i.e. treating men and women equally, has shaky foundations in precedent at best, especially when classifications are the central constitutional issue. This reasoning was rejected by the Supreme Court in Loving, when racial intermarriage was proscribed by the state. Even before that, the Court had ruled against separate but equal,
read as formal equality, in *Brown*. Thus it seems that this type of reasoning is generally unacceptable.

Second, the challenge lies in linking this to the Constitution, which Sunstein ultimately does. He reasons by analogy, comparing racial and sexual inequality and how each was/is used to maintain stark divisions that support a hierarchical system of legislation that does not treat all people as equals. Because of these similarities, Sunstein believes that the fate of marriage limiting statues will match that of anti-miscegenation statues:

It [using race and sex to maintain racial and gender categorization] suggests that, like the ban on racial intermarriage, the ban on same-sex marriages is doomed by a constitutionally illegitimate purpose. The ban has everything to do with constitutionally unacceptable stereotypes about the appropriate role of men and women.¹⁰¹

This brings Sunstein full circle. He started by stating that the Constitution cannot support arbitrary legislation based on assumptions of non-existent neutrality and then showed how race and same-sex marriage bans are ultimately constitutionally impermissible. But, he warns that an early ruling on same-sex issues might be a mistake. Instead, Sunstein champions the reintroduction of the Constitution on a broader social stage. It is up to legislatures and executives, democratically elected bodies, to adhere to constitutional principle as much as courts do. The Constitution was written by the people and for the people and should be so employed. While legislative measures are slower than court rulings, they can be less divisive. For those seeking instant gratification in the form of expanded marriage rights, this might be viewed as a weak support of principle:

This course may well disappoint people who are firmly committed to the basic principle and who conflate caution with ambivalence. The conflation is unnecessary and

¹⁰¹ *Infra*, note 30.
misleading. If we are to dismantle the system of caste based on gender—a system that goes so deep into both law and life—we should sometimes be cautious about implementation even as we stand firm on principle.\textsuperscript{102}

It took over one hundred years from the abolition of slavery for anti-miscegenation to be declared unconstitutional. When marriage is concerned, change takes time. A tempered approach will be best in order to minimize backlash and maximize social acceptance (because legislative measures require a majority in one way or another).

\textsuperscript{102} Ibid.
E. Conclusion

The results of the ongoing debate of same-sex marriage are felt in every state of the Union. "The polarization of attitudes toward relationships between people of the same sex has led to a legal patchwork across the nation of recognition and non-recognition for couples in same-sex relationships." This patchwork depends, state by state, on the legislative and court action taken to either protect or reject same-sex couples. Some extremists propose the abolition of state-sponsored marriage completely. While this is not entirely infeasible, the massive overhaul of the current social order required to achieve it is unlikely; therefore I will not cover abolition in detail.104 There are three other courses of action that have been taken concerning the protection or expansion of marriage.

First is the option of granting equal marriage access to same-sex couples. As of the completion date of this work only Massachusetts offers this option to homosexuals. In 2003 the Massachusetts Supreme Court ruled, by a vote of 4 to 3, that denying same-sex couples the access to the institution of marriage violated that state's constitution. The court's solution was to "refine the common-law concept of marriage: whereas marriage used to be the union of one man and one woman, the court held that marriage in Massachusetts was, henceforth, a union of two people." The state legislature was given 180 days to implement the necessary changes in marriage law that would entitle same-sex couples the right to marry. All needed changes were in place by May 17, 2004. Couples cannot flock to Massachusetts, however, because a 1913 law

---


104 For more reading about the abolition of marriage consult: Bernstein, Anita. For and Against Marriage: A Revision, pp. 70-82. (See note 5 for full citation); and Sunstein, Cass. The Right to Marry, pp. 11, 16-17, 41. (See note 4 for full citation).

105 Infra, note 103.
prohibits non-residents from marrying if they are barred from marriage in their home state.\textsuperscript{106} This type of recognition forces a position taken by courts on a state’s populace. While it has worked so far in Massachusetts, it can be followed by a negative backlash, as was the case after the Hawaii Supreme Court ruled gay marriage bans unconstitutional. The state legislature subsequently passed an amendment to the Hawaii state constitution limiting marriage to one man and one woman.\textsuperscript{107}

The second option available to states is the purportedly less divisive granting of civil union or domestic partnership benefits. As of 2006, six states (MA not included) offered some sort of benefits or recognition to gay couples; Vermont, New Jersey and Connecticut offer civil union benefits to same-sex couples while California, Maine and the District of Columbia offer domestic partnership benefits. What can be offered to same-sex couples in the name of a civil union or domestic partnership varies, ranging from nearly full marriage benefits to a mere public title. Regardless, legal actions remain in many of the aforementioned states.\textsuperscript{108} Opponents of civil unions claim that they maintain inequality between heterosexuals and homosexuals because even though these titles carry marital benefits, they lack the sacred title of marriage itself.

The third and final option available is the most popular, and perhaps, the most damaging. Forty states have passed laws or constitutional amendments that explicitly restrict marriage in that state to those between one man and one woman; forty-two states have enacted either a law or a constitutional amendment that denies recognition to same-sex marriages from other jurisdictions.\textsuperscript{109} Following the 1996 federal Defense of Marriage Act, a piece of legislation that

\textsuperscript{108} Infra, note 103.
\textsuperscript{109} Ibid.
some have dubbed a “Full Fait and Credit disaster,” states took the initiative in their own hands. They were quick to constitutionalize the debate about gay marriage, an issue, according to Justice Harvie Wilkinson III (Judge on the U.S. Court of Appeals for the 4th Circuit), that should remain in ordinary legislation. He spares no one in a September 2006 article appearing in the Washington Post entitled, *Hands off Constitutions: This Isn’t the Way to Ban Same-Sex Marriage.* Judges, legislators, citizens, all are to blame for rallying to put marriage laws into constitutions. Wilkinson goes so far as to call out conservatives who back the amendments:

Let’s look in the mirror. Conservatives who eloquently challenged the Equal Rights Amendment and *Roe v. Wade* for federalizing core areas of state law now support and amendment that invites federal courts to frame a federal definition of marriage and the legal incidents thereof.

Wilkinson sides with Sunstein concerning the regulation of marriage: temperance in the legislative process. According to Wilkinson: “the more passionate an issue, the less justification there often is for constitutionalizing it. Constitutions tempt those who are way too sure that they are right.”

These three options describe the present state of affairs, but what is in store for the future? Debate on this topic centers around the concept of equality. Dubbed “the sovereign virtue” by Ronald Dworkin, equality seems to be a principle worth preserving. The breadth of its preservation, however, is what is and will continue to be the subject of ongoing discussion. What equality is, beyond formal, legal equality already discussed in this work, is a multifaceted

---

111 September 5, 2006.
112 Ibid.
113 Ibid.
concept that affects law, political science, sociology, psychology, philosophy, etc. Whether or not trust in majoritarianism is an effective means to a just, principled end is debatable.

Majorities have the ability to ignore minority rights, thus at least as a practical matter, perhaps appealing to a court is the only sensible way for minorities to seek rights. When stacked up against majority will, i.e. the large number of votes necessary to gain a democratic majority at any level of government in the United States, the choice of venue for minority interest battles is simple. At any rate, it seems as if courts are paving the way for same-sex marriage just as they did for interracial marriage. Racial minorities defended and expanded rights in the courtroom and it seems likely that homosexuals will do the same. Whether or not judges want to admit it, they write both law and history in this country. Dworkin provides valuable insight into this: "Law as integrity asks a judge deciding a common-law case...to think of himself as an author in the chain of common law."115 For same-sex marriage, the pen is on the table; what remains to be seen is an author.

115 Ibid.
References

Cases:


Commonwealth of Kentucky v. Wasson, Supreme Court of Kentucky 842 S.W.2d 487, September 24, 1992.

Craig v. Boren, 429 U.S. 190 (1976)

Frontiero v. Richardson, 411 U.S. 677 (1973)

Griswold v. Connecticut, 381 U.S. 479 (1965)

Hillary Goodridge & others vs. DEPARTMENT OF PUBLIC HEALTH & another, SJC-08860 March 4, 2003- November 18, 2003


Loving v. Virginia, 388 U.S. 1 (1967)

Marbury v. Madison, 5 U.S. 137, 2 L.Ed. 60 (1803)


Pace v. Alabama 106 U.S. 583 (1882)


Plessy v. Ferguson, 163 U.S. 537 (1896)

Roe v. Wade, 410 U.S. 113 (1973)

**Codes:**


Constitution of the United States of America


Virginia Codes (Loving v. Virginia, 1967)

**Books:**


**Articles, etc.**

Am Cur. Brief for Pet., ABA 6, claiming that “laws singling out same-sex conduct are of only recent vintage,” from Lawrence v. Texas.


