COMMITTING CRIMES ONE BILL AT A TIME; FROM THE WHITE HOUSE TO THE JAIL HOUSE, ENACTING RATIONAL LAWS IN AN IRRATIONAL WORLD

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Lanessa Owens, a self-proclaimed poet, writing from life experience personally affected by bias lawmaking, later ruled unconstitutional; the lingering effects:

**My Birth:**
Disowned by her family, for having this beautiful baby girl, 6 pounds 7ounces,
Innocence entering the world.
There was only one problem; her baby’s skin was darker than hers.
My mother’s story, a single white mother with four black girls,
Forced to live in this legally racist world.

As a child, I could sense my mother’s discomfort in public,
Never understanding why, this happy mother in the house,
Would become so cold and tense outside.
We would walk in sequence, staying on our best behavior.
My mother would say “keep your heads down girls, walk fast, play later.”

**My first sleep over:**
Her father, glared at me, snarled, foaming from the mouth,
My legs were shaking, my lips were quivering, chill’s trickled down my spine
Surrounded by layers of confusion, so much it stunted my cry
Had I encountered a monster, briefly ran through my adolescent mind?
The yelling began; Melissa and I grabbed hands, sought safety under the bed.
The yelling continued “I told you, keep Rose’s half-nigger kids away from here.”
I was confused. Was I dreaming? Was this a nightmare?
I looked at Melissa, in astonishment, “Rose, that’s my mom’s name.”
Melissa says “yes I know, just stay under the bed, I will keep you safe.”
That was the last time I saw my best friend.
And the first time I realized, I was different.

My Classifications:
This horrific duo: A true nightmare for me,
A twosome that creeps into my unconscious mind
Long after I am asleep,
Reminding me of someone,
Someone, who I, will never be,

Check box one if your white, or box two if your black?

Forced to choose one, a simple stroke of a pen, so many do with ease.
But not for me, this horrific duo is an unwelcoming collage of memories.
America never wanted me.
Black is what I am, as determined by others.
Although my blackness came from a man, a man, I never called father.

My moment of truth:
Suddenly, it all became crystal clear,
I am not white, I am not black.
I am not whole, nor am I partial,
I simply,
Do not exist!

America the great,
I was born in spite of your push for inequality,
America, the proud, has triumphed,
In creating a race obsessed world,
I. Introduction

The primary focus of this paper is to demonstrate how Federal and State Legislatures (hereinafter referred to as legislatures) abuse their broad discretion to pass laws that enforce their own bias views.¹ This author will demonstrate how the legislatures apply the extremely low

¹ See Marie-Amelia George, The Modern Mulatto: A Comparative Analysis of the Social and Legal Positions of Mulattoes in the Antebellum South and the Intersex in Contemporary America, 15 Colum. J. Gender &L. 665, 669 ( racial classifications of mulattos, to maintain the racial order of slavery, required by whites to control the labor force in its entirety, a proposition that would be impossible if not for racial hierarchy, by regulating mulattoes as …pure black, creating a superior race, slavery could be maintained.); Katharine T. Bartlett, Comparing Race and Sex Discrimination In Custody Cases, 28 Hofstra L. Rev. 877, 883 (2000) ( discussing the Childs Bests Doctrine, guised behind the best interest of the child, judges use their bias subjective views to determine what’s good for a child including opinions based on sex and race); see also Bowers v. Hardwick 478 U.S. 186 (1986), (criminalizing consensual sex between same-sex partners, later overruled); Lawrence v. Texas 539 U.S. 558.,(overruling Bowers, ruling “moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classification must not be drawn for the purposes of disadvantaging the group burdened”); Bijan Gilanshah, Multiracial Minorities: Erasing the Color Line 12 Law&Ineq. 183, 203 (“State governments developed two legal strategies to control the production of mixed
rational basis test to ignore our constitutionally guaranteed rights and legal precedent.\(^2\) These bias laws result in irreparable harm and a denial of rights to otherwise deserving citizens.\(^3\)

Currently, legislatures have a presumed validity and will be sustained if the classification is rationally related to the legitimate state interest.\(^4\) Legislatures historically enact laws that

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\(^2\) Id; See also, Id; See also United States v. Carolene Products 304 U.S. 144 (1938),(where the court determined “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth…It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious, national, or racial minorities …; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

\(^3\) E.g., Cleburne v Cleburne Living Center, 473 U.S. 432 439 440 (1985) (ruling just 11 years prior to the enactment of DOMA, the court opinioned, “the Equal Protection Clause of the Fourteenth Amendment is essentially a direction that all persons similarly situated should be treated alike, However, for the purpose of review, a rational basis standard will be used, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest”…. “The Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes”, therefore justifying, the legislatures presumed validity when enacting laws”.

\(^4\) Clairborne, 473 U.S at 439
promote bias political motives, despite Supreme Court ruling in direct opposition.\(^5\) This author will suggest a possible solution to the overwhelming problem of legislatures enforcing their own political and traditional agendas to enact laws. It is my contention that Legislatures should be required to apply the Terry v. Ohio test (hereinafter referred to as “Terry test”).\(^6\) The Terry test would simply require that the rational relationship be supported by specific and articulable facts, not merely hunches.\(^7\) Enacting such egregious laws with no supporting articulable facts adversely affect citizens’ fundamental rights and causes irreversible harm, therefore, the Terry test must be completed prior to the enactment of laws.\(^8\)

When legislatures are enacting a law that will affect fundamental rights of individuals, the legislature must show compelling governmental interest that is so narrowly tailored and the means must justify the ends. The Terry test would simply ensure, the rationale behind lawmaking is supported by specific and articulable facts that directly relate to furtherance of the governmental purpose.\(^9\) This can be achieved without violating the separation of powers.\(^10\)

Some westernized countries already follow a similar standard, such as France, who has enacted a Constitutional Counsel to proactively ensure the proposed laws are in line with their

\(^5\) See supra note 1; note 11; note 21; see also Harry D. Krause. Marriage for the New Millennium: Heterosexual, Same Sex-or not at all? 34 FAM.L. Q. 271, 271-290, (discussing critical issues of heterosexual and homosexual marriage)  To show one example of how traditionally legal statues have been used to enforce acceptable behavior is traditional purpose of marriage, children that were born out of wedlock lacked any legal status, in other words, these children lacked recognition by law that they were in fact their “fathers’ child”.  The lack of legal status denied the child his most basic legal rights, such as; child support, inheritance after death or even the fathers last name. The denial of a legal status was created by the Courts’ and legislatures to “punish” or thrust upon their perception of normative values to those that engaged in pre-marital sex, by punishing or denying their children most fundamental basic rights.  Point being, back then, and today, the changes in the legal statuses appear to happen along with, or at least coincide with the current cultural consensus of what is considered normal or acceptable behavior.

\(^6\) Terry v. Ohio 392 U.S. 1, 10 (1968) (demonstrating the importance of balancing the interest of the State against the interest in protecting individuals fourth amendment rights, demonstrating how officers must apply articulable facts to support individual intrusions, and cannot rely on mere hunches (using an objective standard)); Welsh S. White & James J. Tomkovicz, Criminal procedure: constitutional restraints Upon Investigation and Proof, sixth edition 319 (Lexis Nexis ed., 2008) (The balancing approach to Fourth Amendment Reasonableness, Introductory note, Describing the Supreme Court efforts to balance society interest against individual rights).

\(^7\) E.g., Welsh S. White & James J. Tomkovicz, supra note 3, at 327

\(^8\) See supra note 1 and accompanying text.

\(^9\) See supra note 2 and accompany text.

\(^10\) U.S. Const. art. 1, §1 (defining the separation of powers clause).
Constitution. Under our current system, legislatures already have a responsibility to create laws on the basis of some governmental interest; the prescribed test is determined by the law itself. These tests are put in place to further the goals of the equal protection clause. However, legislatures have a broad discretion when applying this rational.

We have laid a foundation that has allowed the Courts to be reactive to the law. Rather than proactively protecting citizens rights. This can be achieved by setting standards that require Legislatures to be held accountable for enacting bias laws guised as governmental interest. This article, will define legal status to give the reader a crisp gage on how important laws are and how they affect our fundamental rights. Part one; demonstrates the over whelming need for

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11 Supreme Tribunal Federal, World Conference on Constitutional Justice, 2nd Congress, Separation of Powers and Independence of Constitutional Courts and Equivalent, http://www.venice.ceo.int/site/main/presentation_E.asp. (Venice Commission's Constitutional counsel's primary task is to give legal advice to individual countries on laws that are important for the democratic functioning of institutions, providing opinions to appoint a working group of rapporteurs which advises national authorities in the preparation of the relevant law. After discussions with the national authorities and stakeholders in the country, the working group prepares a draft opinion on whether the legislative text meets the democratic standards in its field and on how to improve it on the basis of common experience, adopting a non-directive.) Also see, Conseil Constitutionnel, Institutional Act on the Constitutional Council 58-1067 chpt. 11 §§ 17-21 (1958), available at www.conseil-constitutionnel.fr (Constitutional Council of France, main activity is to rule on whether proposed statutes conform with the Constitution, after they have been voted by Parliament and before they are signed into law by the President of the Republic (a priori review)).

12 See supra note 2 Clairborne 473 U.S. 440.(explaining how the rational basis test is applied); see also Romer v. Evan, 517 U.S. 620, 633 (1996) (Colorado, attempted to single out homosexuals and deny them any protections otherwise afforded to them, the Supreme Court applying Strict Scrutiny, ruled it “unconstitutional to single out a class of citizens”); See Craig v. Boren 429 U.S. 190 (1976) ( The Supreme Court applying intermediate scrutiny test ruled, “in order for the law to classify by gender, it must serve important governmental objectives and must be substantially related to (the) achievement of those objectives to be in line with the constitution”); See generally William N. Eskridge, Jr. & Nan D. Hunter, Sexuality, Gender, And The Law Ivi - Ivii (Robert C. Clark ed., Thomas West (2004) (1997). (Explaining the evolution of strict scrutiny and intermediate scrutiny, under the Equal Protection Clause).

13 id

14 See supra note 2 Clairborne at 440

15 Marbury v. Madison, 5 U.S. 137 (1803), (explaining the function of judges to weight the statutes against the constitution).
reform through *Loving v. Virginia*, demonstrating how legislatures have historically pushed their own bias views to promote the blatantly racist anti-miscegenation laws.\(^{16}\)

Part two; will establish legal precedent by analyzing *Palmore v. Sodoti*, ruled just nine years prior to the enactment of The Defense Of Marriage Act (hereinafter referred to as “DOMA”).\(^{17}\)

In *Palmore*, the Supreme Court did away with governmental imposed discrimination. However, this Supreme Court set precedent, seemingly fell on the deaf ears.\(^{18}\) The enactment of DOMA demonstrates how the legislatures ignored legal precedent set in *Palmore* to vigorously

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\(^{16}\) *see generally* Kevin Brown & Jeannine Bell, *The School Desegregation Cases and the Uncertain future of Racial Equality: Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Black at Selective Higher Educational Institutions* 69 Ohio St. L.J. 1229, 1264, (attempting to emphasizing the disconnect of biracial people to the black community, claiming biracial citizens have not experienced a similar struggle of African Americans in history, Thus should not benefit from Affirmative Action); *see also* Heidi W. Durrow, *Mothering Across The Color Line: White Women, “Black” Babies*, 7 Yale J.L. & Feminism 227, 229 (discussing as late as 1976, such laws were on the books to prevent white woman from transmission of property, also white woman who crossed color lines were often subject to fines and legal penalties). *See generally*, Gilanshah, *supra note* 1 at 194); *Loving v. Virginia* 388 U.S. 1, 4 (challenging two statues in Virginia law prohibiting marriage between races). *See Karen Woods Weierman, “For The Better Government of Servants and Slaves”: The Law of Slavery and Miscegenation*, 24 Legal Stud. Forum 133, 134 (“it is no coincidence that the first regulation of interracial sex followed shortly after legal recognition of slavery…the piecemeal nature of Virginia’s laws regulating sex, race, and slavery is clear in the words of the act...to the growing dilemma...should a child of a white (man), (black) mother be a slave, premised”).


push their own ideology.\textsuperscript{19} In part three; I am analyzing my proposed solution the \textit{Terry} test, set in \textit{Terry v. Ohio}.\textsuperscript{20} In part four; I will analyze DOMA examining the legal precedent set in \textit{Palmore} to first demonstrate the blatant abuse by legislatures. Secondly, I will apply my proposed solution the \textit{Terry} test to DOMA, to demonstrate how applying the Terry test would end the abuse and egregious behavior of legislatures.

\section*{II. Defining Legal Statues}

Let’s start by defining the very term which is the underlining purpose of enacting laws: Legal Statues. A legal status is legal recognition under the law.\textsuperscript{21} A legal status is nothing complicated, it is simply a term that describes what place in society you hold such as; citizen, parent, child, spouse, or heir.\textsuperscript{22} To gain governmental recognition by way of legal status, the parties involved must first demonstrate that they represent a sufficiently large social unit.\textsuperscript{23} Legal statuses are generally created to guarantee citizens’ rights.\textsuperscript{24} The problem lies when legislatures’ manipulate legal statues to maintain bias views, of what they perceive to be acceptable behavior.\textsuperscript{25} Because some legal statuses or lack of legal statuses were created with bias and
discriminatory intent, the question remains how do they reconcile with the equal protection clause, and current Legal precedent.  

Going back 30 years prior the enactment of DOMA courts have continuously ruled, for a law to be sustained, the challenged classification must rationally further some legitimate governmental interest. The more important question becomes; what happens when legislatures’ governmental interest is based on bias and personal agendas? Currently there is no standard set in place to proactively ensure these guidelines are being enforced. It is also clear, that prior to the highlight Statute DOMA, law makers have a history of making laws that push their traditional views of morality, despite Supreme Court ruling in direct opposition.

The Courts’ interrupt the laws based on legal statuses. If there is a Federal or State Statute denying someone a legal status, those individuals are banned from ever having their day

Nonbiological Lesbians Coparents, 50 Buffalo L. Rev. 341, 344 (2002) (“to have one parent and one legal stranger, many children like Micah are routinely separated from lesbian coparents, because she is not the legal parent”); Jocelyn J. Osofsky, Baker v. State: Is America Moving Toward Allowing Same-Sex Marriages? 3 J.L. Fam. Stud. 79 (examining the denial of rights of citizens whom are not allowed to marry because their partner is of the same gender); Jennifer Naegger, And Then There Were None: The Repeal Of Sodomy Laws After Lawrence v. Texas And Its Effects on The Custody And The Visitation Rights of Gay And Lesbian Parents, 78 St. Johns L. Rev. 397, 413, 414 (describing current laws, of the best interest of the child doctrine, permissibly subjective, allowing a presumption of unfitness of same-sex parents).

See supra note 26 Jacobs 50 Buffalo L. Rev. 341 at 346

27 U.S. Dept. of Agr. v. Maren 413 U.S. 528,534 (1973), (examining the requirements of the legislature to enact laws).

28 See supra note 1; note 11; note 21; see also Harry D. Krause. Marriage for the New Millennium: Heterosexual, Same Sex-or not at all? 34 FAM.L. Q. 271, 271-290, (discussing critical issues of heterosexual and homosexual marriage) To show one example of how traditionally legal statues have been used to enforce acceptable behavior is traditional purpose of marriage, children that were born out of wedlock lacked any legal status, in other words, these children lacked recognition by law that they were in fact their “fathers’ child”. The lack of legal status denied the child his most basic legal rights, such as; child support, inheritance after death or even the fathers last name. The denial of a legal status was created by the Courts’ and legislatures to “punish” or thrust upon their perception of normative values to those that engaged in pre-marital sex, by punishing or denying their children most fundamental basic rights. Point being, back then, and today, the changes in the legal statuses appear to happen along with, or at least coincide with the current cultural consensus of what is considered normal or acceptable behavior.

29 Id
in Court.\textsuperscript{30} The methods employed by legislatures are in direct conflict with the equal protection clause.\textsuperscript{31} More importantly, when Courts’ enforce these bias based legal statuses it illegitimatizes our entire legal institution; as quoted, “we need to believe that our Courts are capable of making unbiased decisions that do not reflect private prejudices that perpetuate a cultural consensus of what is considered normal”.\textsuperscript{32}

\section*{III. Part 2: Overwhelming Need For Reform: Loving v. Virginia}

The Anti-miscegenation law, created by legislatures, illustrates how legislatures have historically abused their broad discretion.\textsuperscript{33} Anti-miscegenation laws prohibited the lawful

\textsuperscript{30} \textit{Allison v. Virginia} 77 N.Y. 2d 651 (1991) while the court acknowledged the relationship of petitioner as a co-parent the court claims powerlessness to consider the child’s best interest. Focusing on the legal status alone, this court based its ruling on the Statute Domestic Relations Law §70 “which stated, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court and may award the natural guardianship, charge and such child to either parent” to only apply to biological parents, one who is not the biological or adoptive parent of a child properly in the custody of his biological mother, does not have a standing to seek visitation with the child.

\textsuperscript{31} U.S Const. amend. V (“No person shall be deprived of life, liberty or property without due process of law); see also U.S. Const. amend. XIV §1. (applicable to States” 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”).

\textsuperscript{32} Amy D. Ronner, \textit{When Courts let insane delusions pass the rational basis test: the newest challenge to Florida’s exclusion of homosexuals from adoption}, (explaining the importance of having a sound justice system).

\textsuperscript{33} The Racial Integrity Act( required that a racial description of every person be recorded at birth and divided society into only two classifications: white and colored It defined race by the one-drop rule, defining as colored persons with any African or Indian ancestry. It also expanded the scope of Virginia’s anti-miscegenation law by criminalizing all marriages between white persons and non-white persons); see also \textit{Loving}, 388 U.S.at 1018. (The Court held “that distinctions drawn according to race were generally “odious to a free people” and were subject to “the most rigid scrutiny” under the Equal Protection Clause. The Virginia law, the Court found, had no legitimate purpose “independent of invidious racial discrimination.” The Court rejected the state’s argument that the statute was legitimate because it applied equally to both blacks and whites and found that racial classifications were not subject to a “rational purpose” test under the Fourteenth Amendment. The Court also held that the Virginia law violated the Due Process Clause of the Fourteenth Amendment. “Under our Constitution,” “the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State.”)
marriage of different races, predominately forbidding blacks and whites to marry. The historical intent behind the law was to prevent the mixing of blood. Such laws were created to continue the theme of segregation, support the doctrine of white supremacy, and avoid creating a mongrel breed. The mixing of races was viewed as weakening, and destroying the quality of its citizenships. Anti-miscegenation laws applied in more than half the States.

This statute denied individuals the same legal status as others whom were similarly situated solely based on their race. The statute enacted by legislatures was upheld by bias stereotypes of what predictably will happen if blacks and whites were allowed to marry. By denying them legal status as spouse, racial diverse couples were subsequently being punished for not following the view of acceptable behavior. The Supreme Court finally set legal precedent in Loving, to end anti-miscegenation laws, giving blacks and whites the legal right to marry. The Supreme Court ruled that the Virginia law violated the Due Process Clause of the Fourteenth Amendment. Under our Constitution, the freedom to marry, or not marry, is a fundamental right, and cannot be infringed upon by the State. Therefore, a blatantly racist law enacted by legislatures in more than half the States, was permissibly allowed to be created, enacted, and

34 Id (explaining the underlining purpose of enacting the statute).
35 Id
36 See supra at note 1 Gayle Pollack The Role of Race In Child Custody Decisions between Natural Parents Over Biracial Children (1998) and accompanying text.
37 Brown v. Board of Education 347 U.S. 483, 494 (1954) (explaining, segregation of white and colored children in public schools has a detrimental effect upon the colored children, “The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro, the Supreme Court struck down the notion of inferiority of the black race recognizing the permanent detrimental effects that the implications of being perceived as inferior have on black children, and thus by legally forcing segregation further perpetuated the racist ideology of white supremacy”).
38 Loving v. Virginia, 338 U.S. 1018 at 340
40 Id
41 Id
42 Loving v. Virginia, 388 U.S. 1018 (1967)
43 Id
44 Id
enforced all under the guise of furthering a governmental interest. This governmental interest was never supported by any specific articulable facts. In fact the governmental interest reported was based on what predictably would happen if blacks and whites were to marry.  

The Loving court concludes that when restricting the fundamental right to marry, the law makers must apply a heightened scrutiny in accordance with due process and the equal protection clause. However, this legal precedent remains to go unnoticed by legislatures when enacting DOMA.

Furthermore, despite the Supreme Court ruling that abolished the blatantly racist anti-miscegenation laws. Legislatures continued to push their underlining bias views of keeping the races separate; by creating racial classifications. Under the guise of a governmental interest, racial classifications have successfully upheld the legislatures’ intent of not mixing the races. Applying the infamous one-eight rule, legislatures have manipulated legal statuses to avoid blurring the line of race.

IV. Part two: Palmore v. Sidoti

So what connection does Palmore, ruled by the Supreme Court have with the infamous Loving v. Virginia and DOMA? Legislatures in charge of enacting DOMA were presumably aware that marriage was ruled a fundamental right.

45 id
46 Supra note 1; note 2, note 3 and accompany texts
47 Plessey v. Ferguson 163 U.S. 537, 538 (1896) (Plessey was a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood and he considered himself white and thought he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race). See also note 13 Karen Woods Weinerman, For the Better Government Of Servants and Slaves.
48 Zablocki v. Redhail 434 U.S. 374 (1993), (discussing just a few years prior to DOMA the Supreme Court Rule the State statue violated the fundamental right to marry and was overturned).
In *Palmore v. Sidoti*, The Supreme Court was faced with a question of the highest importance. A duty so important, and so State specific, that until now, it has primarily been left for States to decide. The Supreme Court was confronted with the States rights to protect the interest of a minor child. The Supreme Courts primary concern was for a little girl named Melanie whose mother’s name is Linda.

In 1980 Melanie’s parents were divorced; Linda was awarded permanent custody of three year old Melanie. One year later, the father’s resentment towards Linda’s choice to love and marry Clarence Palmore, a black man, sued for custody. The father argued in front of the court that Linda has chosen for herself, and for her child, an unacceptable lifestyle to him and to society. The Florida court astonishingly agreed with the father. The Florida Court did not focus on Linda’s exceedingly qualified parental skills or her husband parental skills, but instead focused on their difference of race. The Florida court was very candid to point out; that both Clarence and Linda had no issues of inadequacy to be good parents. However, using his extremely broad discretionary power applying what may predictably happen if Melanie was to grow up in a bi-racial home, awarded the father full custody. Melanie was ripped out of her Linda’s arms and given to her father. The Florida Court did not stop there, they also allowed the father to move Melonie approximately one thousand two hundred and ninety four (1,294.00) miles away, from her mother.

The Florida Court ruled that the child would be more vulnerable to social stigmatization in a racially mixed household. No evidence was introduced that indicated Linda as unfit. To

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49 *Supra* note 15 Palmore 472 so. 2d at 845
50 *Id*
51 *Id* at 473, the lower Florida Court allowed Melanie’s father to move her from Florida to Texas, *see* MapQuest, <http://www.mapquest.com/directions> (last visited Apr. 11, 2011).
52 *Id*
53 *Supra* note 15
the contrary, the initial grant of custody upon the decree of divorce deemed Linda fit, therefore giving her full custody of Melanie. The Florida court reasoned that, “Although the fathers [bias] resentment at Linda’s choice to marry a black man was insufficient to deprive her of custody, the Florida court insisted there may be a damaging impact on the child if she remained in a racially mixed household.” Although, no evidence was ever introduced to support such predictability, the Florida judge snatched custody away from Linda.

Linda looked to the Supreme Court for justice in to rightfully regain custody of her daughter, Melanie. The Supreme Court, although reluctant to intrude on State powers, had to step in. The Supreme Court ruled, “A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination. Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category”. “Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, [classifications] must be justified by a compelling governmental interest and must be necessary to the accomplishment of their legitimate purpose.”

The Supreme Court went on to argue, the State has a duty of the highest order to protect the interests of minor children. Florida law mandates that custody determinations must be

54 Id
55 Supra note 15 Palmore 466 U.S. at 433
56 Mc Laughlin v. Florida, 379 U.S. 184, 196 (1964) ruling, classifications based on race our subject to strict scrutiny.
57 In State ex rel v. Hermesmann, the court held, the States interest in requiring minor parents to support their children overrides the States compelling interest in protecting juveniles from improvident acts, even when such acts may include criminal activity on the part of the other parent, referring to a statutory rape case, where the court held the father responsible for child support despite being a minor at the time of conception.
made in the best interests of the children involved.\textsuperscript{58} However, such goal is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.\textsuperscript{59}

Secondly, the Supreme Court asserted that, “it would ignore reality to suggest that racial and ethnic prejudices do not exist, or that all manifestations of those prejudices have been eliminated.” The Supreme Court recognized that there is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures. However, the Supreme Court emphasized, “Public officials sworn to uphold the Constitution may not avoid [their] constitutional duty by bowing to the hypothetical effects of private racial prejudice, which they assume to be both widely and deeply held.”\textsuperscript{60} The effects of racial prejudice, however real, cannot justify removing an infant child from the custody of its natural mother otherwise found to be an appropriate person to have such custody.\textsuperscript{61}

Therefore, taking together \textit{Loving} and \textit{Palmore}, The Supreme Court is essentially setting case precedent that legislatures cannot enact laws based on what predictably may happen, or their own bias views they believe to be widely and deeply held. So how it is that legislature are able to continuously ignore Supreme Court precedent and the U.S Constitution and enact laws under the rubber stamp of furthering some governmental interest.

V. \textbf{Part : Terry Balancing Test}

A. Introduction:

\textsuperscript{58} See \textit{supra} note Melanie B. Jacobs, \textit{Micah has one mommy and one legal stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents}, at 370 (explaining that the purpose of the UPA is to provide substantive equality for children).

\textsuperscript{59} See \textit{supra} note 15 Eileen Blackwood, \textit{Race As A Factor In Custody And Adoption Disputes: Palmore v. Sidoti}

\textsuperscript{60} \textit{Supra} note 15 and accompanying text

\textsuperscript{61} \textit{Supra} note 15 and accompanying text
This writer would like the reader to switch your legal mind to Criminal Law. *Terry v. Ohio* is a case rooted in an effort to balance the government’s interest to protect citizens against the individuals’ right to be free from governmental intrusion. The Supreme Court addressed the constitutionality of law enforcement to stop individuals on the street and frisk them for weapons on less than probable cause. One of the most important questions answered by the Supreme Court in this case is; when is it reasonable to intrude on an individual’s rights guaranteed to them by the Constitution for the purposes of a governmental interest. Considering legislatures enact laws that inevitable intrude on individuals rights based on governmental interest this *Terry* test in essence is applicable to legislatures and police officers alike.

However, *Terry* has expanded to the normative state action rather than the exception. It is my contention that there is a valuable balancing act afforded to the citizens. Legislatures’ on the other hand, enact laws requiring no such balancing test. Courts can permissibly assume a governmental interest under the extremely low rubber stamp, rational test. If legislatures’ neglect to state a governmental interest, the Courts may insert an assumed governmental interest, no matter how farfetched or obscure that interest may be. *Terry* has shifted the power of the police to a balancing act, the balancing act determines if the governmental interest out weight the

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63 id

64 id

65 Adrina Scwartz, *Just Take Their Guns Away: The Hidden Racism of Terry v. Ohio*, 23 Fordham Urb. L.J. 317, 331 (“Terry did more than weaken the rights of criminal defendants, Because Terry established that stops and frisks were exempt from the traditional probable cause requirement and an official’s evidence of criminality would henceforth have to rise only to the level of reasonable suspicion, Terry increased the likelihood that innocent people would be stopped and frisked. In the years since 1968, the Terry exception has virtually swallowed up the rule that probable cause is required for searches and seizures”).

66 See supra note 2 (discussing the legislative presumed legitimate interest).
rights of the citizens. The operative word is shift; the current scheme of lawmaking lacks any shift in favor of its citizens. Legislatures are free to enforce bias laws.

While some may argue the Terry test is unworkable in the area of criminal law. It is this authors contention the Terry test, should be imported into constitutional law. Under the Terry test, a law is no good if the rational basis is not supported by articulable facts. Lawmakers should be required to apply articulable facts, based on more than mere hunches prior to creating, enacting, and enforcing laws. So let’s consider the facts in Terry that derived such a balancing act.

Brief synopsis of facts:

Terry was convicted of carrying a concealed weapon after a search and seizure by an Officer on less than probable cause. Officer Mc. Fadden was patrolling the Cleveland area and spotted John W. Terry and Richard Chilton, (hereinafter referred to as “terry” and “Chilton”) standing on a street corner acting suspicious. Officer McFadden observed the men make nearly a dozen trips in a synchronized fashion back and forth past a jewelry store. Terry and Chilton proceed along an identical route, pausing to stare in the same store window. Each completion of the route was followed by a meeting between the two guys on the corner. They were joined by a third man (Katz) who left swiftly after a brief conversation. Officer McFadden suspected the men were preparing for a “stick-up”.

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67 Id at 360 (quoting “There exists a seething resentment of police practices-including stops and frisks-in minority communities. Blacks are more likely to be stopped and frisked than whites”).

68 Id; see generally note 6(discussing the authority of police, under the Terry exception).

69 Supra note 6 and accompanying text
Officer McFadden with less than probable cause approached the three men. Fearing they may have guns, he decided to pat down the outer layer of their clothing. Officer McFadden felt a pistol in Terry’s overcoat pocket. He removed Terry’s overcoat, took out a revolver, and ordered the three to face the wall with their hands raised. He also seized a revolver from Chilton’s outside overcoat pocket. He did not put his hands under the outer clothing of Katz because he discovered nothing in his pat-down to suspect kats had a weapon.

Terry appealed the trial court’s decision, claiming the search and seizure was a violation of his Fourth Amendment rights. The Supreme Court stated unquestionably Terry was entitled to the protection of the Fourth Amendment “it would be sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his body…is anything else but a search.” The Supreme Court viewed this type of action to fall squarely within the meaning and intent of The Fourth Amendment. Therefore, granting Terry protection under the Constitution.

Terry test: The balancing act

The governmental interest; the State argued that officers should be allowed to stop and detain a person briefly if they suspect the person may be connected with some criminal activity. During that brief detainment if officers suspects the person is armed, the officer should have the power to frisk him for weapons. The justification is that officers require certain flexibility in dealing with quickly evolving and potentially dangerous situations that arise during routine

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70 U.S. Const.amend. IV (“which protects ‘people, not places’, against ‘unreasonable searches and seizures’) 71 Supra note 6 Terry v. Ohio 392 U.S. 1 at 9 72 Id
patrol. Thus, the State’s argument creates an exception under the Fourth Amendment, only for on the spot perceivably dangerous situations between police officers and citizens.

The individual interest; Terry argued the authority of the police to search and seize and individual must strictly comply with the heart of the Fourth Amendment.\textsuperscript{73} To ensure the police do not abuse their authority by asserting their broad investigatory power over citizens without specific justifications.\textsuperscript{74} Thus, in essence Terry is arguing in order for his rights not to be violated the police officers must strictly comply with the constitution.\textsuperscript{75}

So why is this balancing act important? The underlining issue in this case is the exclusionary rule; the concept is based on the admissibility of evidence. The Court will exclude evidence that was seized in violation of the Fourth Amendment.\textsuperscript{76} The principle behind this rule is to discourage lawless police conduct.\textsuperscript{77} However, experience has taught The Supreme Court, “that the exclusionary rule is only an effective deterrent to police misconduct if the officer intends to prosecute the evidence sought.” The Supreme Court emphasized, “courts which sit under the constitution cannot and will not be made a party to lawless invasions of constitutional rights of citizens by permitting unhindered governmental intrusion.”\textsuperscript{78} In essence the exclusionary rule is set up to approve conduct that complies with our constitutional guarantees and deter conduct that does not.

In Terry, the Supreme Court concludes, for a governmental interest to justify official intrusion it must be balanced against the individuals’ rights.\textsuperscript{79} The encounter must be a result of

\begin{itemize}
\item \textsuperscript{73} Terry v. Ohio 392 U.S. 1 at 9
\item \textsuperscript{74} Terry v. Ohio 392 U.S. 1 at 10
\item \textsuperscript{75} See note 6 and accompanying text
\item \textsuperscript{76} Id
\item \textsuperscript{77} Id
\item \textsuperscript{78} See note 6 and accompanying text
\item \textsuperscript{79} Id
\end{itemize}
exigent circumstances, where swift action is necessary.\(^{80}\) In justifying an intrusion the officer must be able to point to specific facts which reasonable warrant the suspicion.\(^{81}\) The Supreme Court applied an objective reasonable man standard; “would the facts available to the officer at the moment of the seizure cause a reasonable man to believe that such action was appropriate, anything less would invite intrusion upon constitutional guaranteed rights.” \(^{82}\) However, the court goes to great lengths to point out, the officer must be able to point to particular articulable facts involving that particular individual.\(^{83}\)

In *Terry*, the Court was dealing with a circumstance that required swift action predicted by on-the-spot observations of the officer, and limited in scope only to the nature of what he observed. This line of reasoning under The Fourth Amendment is reasonable only when there are exigent circumstances that criminal activity may be afoot and the persons whom the officers are dealing with may be armed and dangerous.\(^{84}\) This action is justified only if supported by articulable facts and is limited in scope.\(^{85}\) In conclusion, the Supreme Court does not retreat from the holding that police must follow the guidelines set in the Fourth Amendment, but rather carve out an exception for exigent circumstances.\(^{86}\)

\(^{80}\) *id*
\(^{81}\) *id*
\(^{82}\) Supra note 6 and accompanying text
\(^{84}\) *id*
\(^{85}\) *id*
\(^{86}\) *id*
Applying the *Terry* test to legislatures would promote compliance with our constitutional guarantees. Legislatures would be required to apply articulable facts and specific justifications to their proposed laws or face the proposed law being shot down. This requirement would deter lawless law making based on bias or ulterior motives. Distinguishable from the Supreme Court’s fear in *Terry* that the exclusionary rule is only an effective deterrent to police misconduct if the officer intends to prosecute the evidence, in Constitutional law, this will be an effective deterrent because the only purpose of proposing laws are to enact the proposed law. So now that you have put on your Criminal Law thinking cap, let’s consider how the *Terry* test would work in the Legislative world, by analyzing the creation, enactment, and enforcement of DOMA.

VI. **Part four: Enacting DOMA: Applying Palmore & Terry**

Although *Terry*, is criminal in nature, the relationship between *Terry* and lawmaking are comparable to say the least. In essence, the *Terry* test and law making process both require a balancing of constitutional rights guaranteed to citizens against the governmental interest of protecting citizens.\(^87\) Both involve individuals acting on behalf of the State, and both are designed to protect the fundamental rights guaranteed to citizens. I will apply the *Terry* test and Legal Precedent set in *Palmore*, to the inception DOMA. This paper will demonstrate through DOMA, how legislatures abused their broad discretion and the extremely low rational test, thus, manipulating their power.

**Applying Legal Precedent and the *Terry* test:**

\(^87\) *See supra note 6*
1. Section A and B combined, of the DOMA act states, the governmental interest is, defending and nurturing the institution of traditional heterosexual marriage, and defending the notion of morality. 

Section A, to defend the institution of traditional heterosexual marriage; the Committee used language such as “we are each born from man and woman, our endangered existence,… and it is hard to detach marriage from namely the inescapable fact that two people, only a man and woman can beget a child.”

Legislatures rationalize a traditional definition of marriage by pointing out; “…no State now or at any time in American history has permitted same-sex couples to enter into the institutions of marriage.” Consider the ruling in, Palmore, which stated, public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private [prejudice] that they assume to be both widely and deeply held. The Supreme Court ruled that although tradition is a legitimate governmental interest, it is not enough to save it from constitutional attack. Congress admittedly initiated DOMA; based on Hawaii predictably permitting same-sex marriage.

Legislatures Attempted to justify this rational by stating that citizens in Hawaii would never agree to same sex marriages. This statement is in direct conflict with legal precedent set in Palmore. The fact that there is a wide spread belief that same-sex marriage is wrong is not enough. Palmore identified that, “[it] would ignore reality to suggest…prejudices do not exist or

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88 Supra note 17 H.R. Rep. 104-664
89 Id
90 See supra note 15 and accompanying text
91 See Lawrence 539 U.S. at 559 and accompanying text
93 id
that all manifestations of those prejudices have been eliminated”. However, courts cannot give such prejudice legal effect.

Furthermore, the Supreme Court has consistently held, desires to harm a politically unpopular group cannot be a legitimate State interest under the Equal Protection Clause. Gay and Lesbian groups at the creation of DOMA, were proven to be a politically unpopular group. Legal precedent stated, classifications must not be drawn for the purposes of disadvantaging a burdened group. Similar reasoning was used to rationalize to the Anti-Miscegenation laws which were shot down by the Supreme Court in Loving. Yet, as evident in the enactment of DOMA, because legislation have a presumed legitimate interest in enacting laws, no such application of legal precedent was required.

If legislatures were required to apply the terry test, would the governmental interest to defend the traditional definition of marriage be supported by specific articulable facts? Consider the rational to support traditional marriage; “the inescapable fact that two people, only a man and woman can beget a child,” logically to mean the legitimate governmental interest is to promote procreation.

The implication would be if same-sex couples are allowed to marry, they will end procreation, as if being gay is “contagious” or a “disease”. Specific articulable facts were

\[\text{\footnotesize 94 See supra note 15} \]
\[\text{\footnotesize 95 id} \]
\[\text{\footnotesize 96 id} \]
\[\text{\footnotesize 97 See supra note 26; see also Rowland v Madriver 470 U.S. 1009, 1110 (1985) (“homosexuals constitute a significant and insular minority of the country’s population, because of the immediate and severe opprobrium often manifested particular powerless to pursue their rights openly in the public arena”).} \]
\[\text{\footnotesize 98 Supra note 15 and accompany text.} \]
\[\text{\footnotesize 99 See supra note 26} \]
available at the time to disprove this theory. Homosexuality is not contagious, but wholly viewed as an immutable trait. The other rational the committee used to defend the traditional definition of marriage, was “our endangered existence” implicating the governmental interest was to sustain the human population. At the time the act was proposed approximately two hundred and sixty five million, one hundred and eighty nine thousand, and seven hundred and ninety four (265,189,794) people resided in America. Clearly, one could infer our population was not in fact endangered.

In addition legislatures used language to support traditional marriage; such as “one must understand the orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups and lawyers, then, can the motives of this bill be fully understood….” There were no justified articulable facts offered to support this statement that gays were attacking heterosexual marriages. To the contrary, evidence submitted by the creators of DOMA, state it was not the intention to wage war against heterosexuals’ marriages, but instead be placed on equal footing as heterosexuals.

Under the Terry analysis the above statements would fail, and reeks more of bias hunches. The rational to support the definition of marriage and morality lack any justified articulable facts and were obviously based on bias traditional views that were widely and deeply held by legislatures. However, this illogical rational in spite of existing evidence to the contrary

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100 A. Dean Byrd & Stoney Olsen, *Homosexuality: Innate And Immutable*, 14 Rgnts L.Rev 513, 515 (Discussing the shift in views, from homosexual practices being behavioral in nature, to an immutable trait).
101 id
102 Historical population, growth NPG facts and figures, U.S census population division, as of July 1, 1996, available at www.census.gov/ipc/prod/ib96_03.pdf.
was pushed forward to enact DOMA. Legislatures’ extremely low threshold of rational required to pass laws are not required to be supported by anything other than hypothetical guesses.

The legislative committees, attempt to promote morality, states “it simply defines marriage as a relationship within the community that is socially acceptable and encourages sexual intercourse by promoting heterosexuality.”

The Supreme Court in Palmore, solidified, that the Equal protection clause was created in part to do away with governmental discrimination; when discrimination is present it must pass the strict scrutiny test: [the government] must show a compelling interest and the intended purpose must be necessary to accomplish and narrowly tailored to justify the means.

The government is clearly demoting homosexuality, which the Supreme Court has ruled is a violation of Due process. During opening statements of DOMA, house of Representative Chairman Charles T. Canady stated, “gay rights activist and their lawyers intend to wage a concerted battle to force recognition of same sex marriage; such transformation would be disastrous to marriage and profoundly undemocratic, I am grateful to learn...[that] the bill would be consistent with President Clintons personally-stated view... of opposing same-sex marriage”. Legal precedent in Palmore ruled, Private biases...are impermissible, the Courts cannot control them but neither can the Court tolerate them by giving them legal effect, [prejudice], however real, cannot justify a denial of Constitutional rights. Legal precedent in Palmore, made it crystal clear you cannot base law on what will predictably happen, Mr. Chairman Charles T. Canady stated, such transformation would be disastrous to marriage and

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105 Brown v. Board of Ed. 347 U.S. 483 (1954), (the Supreme Court struck down the notion of inferiority of the black race and set precedent that imposing legal statuses that made blacks inferior was a direct violation of the Due Process clause).

106 See supra note 14 H.R. 3396 at Part 1B
profoundly undemocratic, this statement is based on no facts, just a bunch of bias predictabilities.\footnote{McLaughlin v. Florida 379 U. S. 184, 196 (1964); See supra note 13 Loving.}

Furthermore in \textit{Palmore}, the Supreme Court has consistently held, moral disapproval of a group cannot be a legitimate interest under Equal Protection Clause.\footnote{See supra note 15} Congress ignoring all legal precedent marched on with the enactment of DOMA.

The Supreme Court ruled having a standard less than an objective one, would mean the Court would tolerate invasions of citizens’ rights. The Court cannot tolerate such an injustice. President Clinton support against same-sex marriage would clearly fail because it is a subjective belief, therefore, to apply Clintons support as a justified rational alone would be a great injustice to the Equal Protection Clause.

Would promoting moral pass the \textit{Terry} test? In \textit{Terry} the court was balancing the governmental interest of protecting citizens’ against the citizens’ constitutional right to stay free from governmental intrusion.\footnote{id} One of the main issues was whether the exclusionary rule, was an appropriate deterrent to prevent governmental intrusions. Applying the \textit{Terry} test, the question is not whether the denial of federal acknowledgment of marriage is proper by itself, but whether the denial is appropriate to promote morality and is so limited in scope only to achieve that goal.

In \textit{Terry}, the court emphasized, police conduct that is overbearing, harassing, or trenches upon personal security, without some objective evidentiary justifications is not allowed under the Constitution. Balancing the legislative interest, in promoting moral, against the citizens’ fundamental right to marry, is not so limited in scope. An abundance of objective

\footnotesize{\textsuperscript{108} McLaughlin v. Florida 379 U. S. 184, 196 (1964); See supra note 13 Loving. \textsuperscript{109} See supra note 15 \textsuperscript{110} id}
evidence has proven that defining marriage to promote moral or heterosexuality will be futile because sexual behaviors are not linked to marriage in today’s society.\textsuperscript{111}

This federal definition of marriage is a rigid application of law, solely for purposes of frustrating same-sex couple’s marital rights.\textsuperscript{112} This rigid application of the federal definition to promote of moral has resulted in a high toll of human injury and frustrated the efforts of Equal Protection Clause.\textsuperscript{113} In example, if a State determines same-sex marriage is a socially acceptable hence, legalizing same-sex marriage, those couples will be denied the same federal benefits others similarly situated would receive based on the gender of their spouse.\textsuperscript{114} This rigid application goes far beyond the alleged governmental interest of promoting moral, trenching upon citizens fundamental right to marry. If Legislature were required to apply this terry balancing test, defending moral would fail because its application is too rigid, overreaching, and harassing upon the gay and lesbian community. However, because legislatures have a presumed legitimate governmental interest, no such test is required and DOMA marched on.

Legal precedent and objective facts have shown quite the contrary. The rational claimed in Section A, and Section B, have been proven to be founded upon ulterior motives and biased law making. Congress should have had actual or constructive knowledge that an enhanced

\textsuperscript{111}See supra note 1 at 341 Jacobs, Micah has one mommy and one legal stranger: Adjudicating Maternity for non biological Lesbian Co-parents, 50 Buffalo L.Rev. 341 (2002) (approximately 10 million children currently live in same-sex households, and approximately 38% of all children being born are born out of wedlock).
\textsuperscript{112} Gill v. Office of Pers. Mngmt. 699 F.Supp. 2d 374, 379 (“DOMA drastically amended the eligibility criteria for a vast number of different federal benefits, rights, and privileges that depend on marital status (referencing same-sex couples), the relevant committee did not engage in a meaningful examination of the scope of this law”).
\textsuperscript{113} Supra note 1 Jacobs supra at 341, (explaining how children are being denied the same basic child support rights by denying custody and visitation rights to same-sex parents, courts are subsequently denying the child’s basic right to child support. Because same-sex couples have no legal status, they are not considered legal parents of a child born into the same family like union as heterosexuals); see also, Tripp v. Hinckley, 290 N.Y.S 767 (2002), (State ruling, when paternity has been established by clear and convincing evidence, the order of visitation, support, and custody is within the discretion of the court).
\textsuperscript{114} See supra note 94
heightened scrutiny should have applied to laws concerning gay and lesbian citizens.\footnote{Rowland v. Mad river School District 470 U.S. 1009 (1985)("Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is likely to reflect deep-seated prejudice rather than rationality).} Congress ignoring all legal precedent, and constitutionally guaranteed rights, persisted on pushing forward to enact DOMA, unstopped by anyone.

The fact that DOMA was founded on ulterior motives did not go unnoticed on the committee floor. Quote by Nancy Mc Donald, “I do not believe we would be here today if our society did not have a deep bias against gay and lesbian persons...this bill is yet another piece of legislation that tells the American people in no uncertain terms that we do not value the contributions of gay and lesbians.” Applying the \textit{Terry} test to this statement, however, was supported by articulable facts. In 1996, there were no federal laws to protect gays and lesbians, nor any basic protections in place, despite the desperate treatment so heavily burdened in the gay and lesbian community.\footnote{See supra note 23; see also Di Stefano v. Di Stefano 401 N.Y.S.2d 636 (1978) (Determining sexual orientation is a privacy protected by the equal protection clause of the constitution).} If the Terry test was required Section A and B should have been shot down.

2. Section C. Advances the Government interest in protecting State Sovereignty and democratic self governance.

The governmental interest by congress stated; by taking the full faith and credit clause out of the legal equation, congress will protect the ability of the elected officials in each State, to deliberate on same sex marriage, free from the threat of federal compulsion.\footnote{U.S Const. art. IV §1 (Full Faith and Credit shall be given to each State to the public acts, records, and judicial proceedings of every other State. And the Congress may be general laws prescribe the manner in which such acts, records and proceedings shall be provided, and the effect thereof).} Congress goes
on to state, “if inaction runs the risk that a single judge in Hawaii can redefine marriage based on their fundamentally flawed interpretation of their State Constitution, failure to act is a dereliction of the responsibility we are vested with by the voters.”\textsuperscript{118} By stating the inaction of congress would create a great injustice upon which has been vested upon them, In essence, congress is claiming exigent circumstances, The committee endorsing the Bill stated “it is surely a legitimate purpose of government to take steps to protect the right of the people…to retain democratic control over the manner in which the states will define the institution of marriage.”\textsuperscript{119} Demonstrating the legislature’s belief that swift action is required because the “immediate threat upon marriage is before us”.

In \textit{Palmore v. Sidoti}, The Supreme Court was faced with a question primarily left for the States to decide. The interest of minor children and how to reconcile such interest with the core purpose of the Fourteenth Amendment. The lower court, in \textit{Palmore}, candidly pointed out its decision was based solely on what may predictably happen if a child was to grow up in a bi-racial home. No evidence was introduced that indicated Linda was unfit parent.

Applying \textit{Palmore} to legislatures’ interest in protecting the states is clearly distinguishable, the Supreme Court in \textit{Palmore}, was faced with a child being ripped out her Mother’s arms as a result of a prejudice and bias court system. In DOMA there were no such exigency circumstances, because no State legalized same-sex marriages.\textsuperscript{120}

The enactment of DOMA proved \textit{Palmore}, correct, classifications are more likely to demonstrate prejudice than any legitimate public concern. Applying legal precedent in \textit{Palmore}, classifying marriage as between a man and woman far exceeds the rational of public concern of compulsory compliance. Defining a fundamental right, such as marriage should have been forced

\textsuperscript{118} Supra note 14 H.R. 3396 at Part 2
\textsuperscript{119} id
\textsuperscript{120} Supra Palmore at 432
to pass constitutional muster, as set in *Palmore*. “Such classifications are subject to the most
exacting scrutiny; to pass constitutional muster, they must be justified by a compelling
governmental interest and must be necessary to the accomplishment of their legitimate purpose
However, this personal assault against gay and lesbians by legislature ignores legal precedent
and constitutional rights to march forward to burden an already burden group.

Would protecting States from federal compulsion pass the *terry* test? In *terry*, the scope
of the search must be justified by the exigent circumstances that led the officer to undertake such
an intrusion in the first place. In justifying such intrusion the officer must be able to point to
articulable facts, not mere hunches. Otherwise such an intrusion would violate the Fourth
Amendment by virtue of its intolerable intensity and scope.

Let’s consider the nature and extent of the governmental interests involved, the
governmental interest is protecting States who do not wish to honor the full faith and credit
clause. The legislatures admittedly were inconclusive if such exceptions already existed within
the full faith and credit clause. On a mere hunch congress assumed the public policy exception
would not protect sister States from recognizing same-sex marriages. In addition claiming
exigent circumstances to stop the compulsory compliance of a law that did not exist would
negate the exigency factor, thus limiting the intrusion to the nature and extent.

121 Rabbi David Saperstein stated ("there is a recognized exception to this choice of law rule: a
court will refuse to recognize a valid foreign marriage if the recognition of that marriage would
violate a strongly held public policy of the forum state- Restatement (second) Conflict of Laws
Sec. 283 (1971). States have the right to invoke this power against recognizing same-sex
marriages if such recognition would violate such public policy, the U.S Supreme Court has never
ruled on whether a State must provide full faith and credit to another state, it is well settled that
all judgments, including those to divorce must be accorded with full faith and credit, however
many States resolved the issue of such matters by applying the conflict of interest laws analysis
and using the public policy exception").

122 Aukenbrandt v. Richards 112 U.S. 2206 (1992) (stated, "at no time has marriage been defined
by federal law, without exceptions domestic relations have been a matter of the State, not
federal concern or control").
In *Terry*, the Supreme Court ruled, Officer McFadden had reasonable grounds to believe that *Terry* was armed and dangerous and swift action was necessary to protect himself and others. However, Officer McFadden’s facts were articulable, justified by objective evidence, and limited in nature and extent by searching for weapons only. Hypothetically let’s concede to Legislatures actually did have exigent circumstances. The federal definition of marriage would still be unreasonable, because it would fail to be so limited in nature and extent only to promote federal compulsion. This definition is an outright denial of federal marital benefits. Because such a definition would reach farther than necessary to protect the States right to decide who marries, the government definition is not justified by its nature and extent.

Legislatures’ lacking any exigency and not being so limited in scope to justify the means, reaching much further than protecting the states from compulsory compliance would have failed under *Terry’s* balancing test.

3. D H.R. Advances the Governments Interest in Preserving Scarce Government Resources.

Pretty straight forward, Legislatures admittedly conducted no research to demonstrate how much governmental resources will actual be preserved.\(^{123}\) Seemingly counter intuitive to the government’s earlier argument of promoting heterosexual marriages.

As held in *Palmore*, laws cannot be based on predictability of what may happen. In addition an abundance of Supreme Court case prior to the enactment of DOMA indicated that laws that directly affect a fundamental right should have been forced to pass constitutional muster. Of course no such requirement was presented.

\(^{123}\) *See supra* note 13 H.R. 3396 at Part 3
How would this admittedly vague rational hold up if the *Terry* test was applied. The government frames this argument around presumptions that same-sex marriage will be legalized in at least one state. The committee’s rational was as follows: “absent some legislative response, if states were to allow gays to marry, homosexual couples and surviving spouses of homosexual marriages would be entitled to marital benefits, thus limiting the definition of marriage will surely preserve scarce governmental resources.

The *Terry* court stated, Good faith on the part of the arresting officer is never enough... If good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police. Ration used to preserve governmental resources, assuming was made under good faith is not enough. Such a belief must be based on objective independent articulable facts. To have it any other way would subject citizens’ protections against governmental intrusion to the discretions of the legislatures’ belief.

VII. **Conclusion:**

Legislatures already have a responsibility prior to making laws to base laws on the basis of some governmental interest. Applying articulable justified facts will reduce the law making hysteria of enacting laws based on bias and political motives.

However, legislatures’ currently have substantial broad discretion when enacting laws. We have laid a foundation that has allowed the Courts to be re-active to the law forced upon citizens by legislatures. Rather than affording the rights of citizens pro-actively, by demanding some set standard in law making. In example DOMA, according to current legal precedent would be considered a facially discriminating statute, because it was enacted to burden, hinder
and deny individual’s right to marry, based on the sex of their partner. The act itself was an inception of hysteria by congress in response to what they thought may occur in Hawaii.

Since the enactment of DOMA, many States have adopted similar language in their State constitutions. Case after case without standing or support same sex partners who are legally married in recognizing states have been denied federal benefits. The damage has already been done. The effect of this bill has already caused irreparable harm to those of the same-sex community. If this bill was to be repealed today, it cannot take away the damage that has been done to those individuals. There is no recourse for individuals seeking benefits rightfully owed. It is evident by the mere need for the equal protection clause, that it was the intent of the framers to avoid such intrusion to people’s equal rights under the law. It is inconceivable that the intent of the framers were to allow laws to be made in direct conflict with the constitution, cause irreparable harm, and presumably wait a decade to be corrected by the Courts.

In Marbury v. Madison 5 U.S. 137 (1803), the court states “it is not that the judges posses some unique license to strike down acts of legislation; it is the fact that the judges are obliged to weigh any statute against the basic law of the constitution”. It is the Judges, and Justices job to protect the constitution and ensure that the rights guaranteed under the constitution are being

124 Supra note 1 and accompany text.
125 John M. Yardwood, Breaking Up Is Hard To Do: Mini DOMA States, Migratory, Divorce, And a Practical solution To Property Division 1356 Bos. L. Rev. 89, 1359 (discussing how approximately twenty States have defined marriage using similar language as the federal act DOMA).
126 Supra note 23; See note 26; see also Bishop v. U.S., No. 04-848 (N.D. Okla. filed Aug. 10, 2009) (pending case, alleging DOMA, is unconstitutional, two female plaintiffs allege, after performing a civil marriage in accordance with Oklahoma law, non-recognition by the State is a violation of their fundamental right to get married); See e.g. Commonwealth of Massachusetts v. U.S.Dep’t of Health and Human Serv., et al No. 09-11156 (D.Mass), on appeal, No.10-2204(challenging the constitutionality of section 3 of DOMA. The suit claims that Congress ‘overstepped its authority, undermined states’ efforts to recognize marriages between same-sex couples, and codified an animus towards gay and lesbian people”).
127 See Supra note 13 H.R. Rep. 104-664
128 Supra note 23 and accompanying text.
129 id
secured.\textsuperscript{130} It is not the job of the Judge’s and Justices to correct the ulterior motives behind biases based law making that is currently going on in Legislation.

This solution will create a proactive government in hopes of avoiding rights being trampled on. Legislatures should be required to apply the \textit{Terry} test and legal precedent before making a law. \textperiodcentered The suggested way to complete this would not be something daunting or undoable, but rather a simple system in place to ensure that new laws are supported by articulable justified facts. Legislatures should be required to articulate how the new law is rationally related to the governmental interest, not by way of hypothetical guesses. In addition Legislatures should be able to articulate how this new law rationally relates to the governmental interest by pointing to specific articulable facts. Legislatures should be able to articulate if persons affected by this new law are in a suspect class. Once a discriminated group has been identified legislatures should ensure that there is a compelling governmental interest, not to be confused by their own interest and commit to the balancing act, applying the \textit{Terry} test.

If DOMA would have been required to pass the stated above tests, the likely hood of being enacted is nonexistent. The mere fact that a law can be passed that has such a devastating impact on such a large group of people is frightening. Our country has seen this occur in a repetitive nature time and time again in history with no near end in sight. This author stresses to make clear I am not suggesting that everything will easily pass or fail the muster, some things inevitably and rightfully so, need to be litigated in the court through the eyes of the gatekeeper of the constitution.\textsuperscript{131} Simply put, when determining someone’s legal status in society or denying citizens’ rights, legislation should have to balance governmental interest against those interest of citizens tailored in a way that shows how this law will further the governmental interest.

\textsuperscript{130} \textit{id}
\textsuperscript{131} \textit{See Supra} note 12 Marbury at 19

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I have demonstrated how the proposed test would work to help end hysterical law making and how legal precedent should be applied to new laws. The Supreme Court has spoken by setting legal precedent, the Constitution has spoken and demanded equal protection, it is time for legislatures to abide by the laws. Legislatures should be required to follow Legal precedent before enacting and enforcing laws that are blindly written without legitimating their actual interest. My poem tells a story of my experience as a bi-racial woman born in spite of legislatures’ lawless enactment of Anti- miscegenation laws that once considered me a “mongrel breed.” Approximately (50) years later I am still experiencing the lingering effects of bias laws. If Legislatures are not held to a higher standard the same bias laws that were enforced on me and are now being forced upon undeserving citizens, will continue fifty (50) years from today.