November 8, 2012

Religious Morality and Civil Equality

Sarah L Jordan

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By Sarah Buquid

“Our obligation is to define the liberty of all, not to mandate our own moral code.”

Abstract

With the uncertain future of Proposition 8 in California and the backing of DOMA by Speaker of the House John Boehner and other conservative Legislators, it has become clear that the divide between morality and civil rights is weakening. In a country where the government purports to provide equal protection under the law, a minority growing in strength and support is still woefully discriminated against by law, by statute, and by state constitution. Support of Marriage Equality is at an all-time high, but those who fight it hang on to their ideal family unit mainly because of moral proclivities. By using the law to discriminate against a group of people based on beliefs dictated by a religious background, legislators walk a fine line on the wall separating church and state. This article takes an in depth look at the origins of these moral beliefs, this history behind marriage, and how multiple interpretations of a text can go awry. The article also discusses the marriage and morality cases that have come before courts regarding same-sex couples and their rights to privacy and marriage. This analysis of the arguments presented in these cases purports to show that the courts understand the moral leanings of those who oppose equal rights for gay, lesbian, bisexual, and transgendered persons, and that, generally, morality will not be allowed to rule the court’s judgment.

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1 LL.M. 2012, George Washington University Law School; J.D. 2011, Barry University Andreas School of Law; B.A. 2000, University of Maryland, College Park. The author would like to thank Prof. Judith Koons for all of her help and guidance.

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I. INTRODUCTION

In 2008, an amendment to the Florida Constitution was proposed.\(^3\) This amendment, if passed, would limit the institution of civil marriage in the State of Florida to the union of one man and one woman.\(^4\) Turning the amendment into law would require a majority vote of 60% of the citizens in the State.\(^5\) Florida, historically a red state, has a diverse population and possessed a diverse legislature to reflect that. But on November 2, 2008, the citizens voted and 62% decided to ban same-sex marriage.\(^6\)

Many argue that this is the way our government works. The people had voted and the majority decision must be respected. But in the past, the majority has decided controversial issues that have oppressed the minority without little cause beyond religious morality. Bible scripture can be cited in support of slavery and the oppression of women.\(^7\) There are references in the Bible that support anti-miscegenation and procreation.\(^8\) But with time and societal change the government, most notably the judiciary, has not allowed these moral prejudices to stand.\(^9\) This is the case with marriage equality.\(^10\) For the past fifteen years, the religious right and moral traditionalists have leaned on the idea of moral superiority to oppose civil equality for all citizens, namely the rights of the Lesbian, Gay, Bisexual and Transgendered community (LGBT).

\(^4\) FL CONST. Art. I § 27 (“Marriage Defined”).
\(^5\) FL CONST. Art. XI § 5.
\(^7\) 1 Corinthians 7:21-24 (slavery); 1 Corinthians 14:34 (subordinance of women) (NSRV).
\(^8\) Exodus 34:10-16; Genesis 9:1 (NSRV).
The religious right and marriage traditionalists are not morally superior in their arguments and should not be allowed to oppress a class of citizens for behavior that they personally find reprehensible. To allow this to happen is tantamount to destroying the wall between church and state that is protected by the Constitution’s First Amendment. The evidence put forth by these groups claiming moral superiority is generally history and, more specifically, the Bible. They stand firm in their belief that they are right and they use the massive resources at their disposal to bring about their goals.¹¹

This article will take a closer look at the evidence presented by the religious right and marriage traditionalists to determine whether they have a claim of moral superiority. By examining the history of marriage as well as the pertinent biblical passages that those groups use to uphold their beliefs, this article will show that there claims for “traditional” marriage are weak and that there is no evidence that heterosexual people are morally superior to homosexual people. Next, the article will examine the court cases that have littered the path towards marriage equality and how the language used therein shed a much needed light on the true prejudice behind marriage traditionalists’ defense of traditional marriage. Finally, this article examines the court cases that affect the rights of the LGBT community to live and love in the same way as every other citizen of the United States.

II. HISTORICAL AND RELIGIOUS PERSPECTIVE OF MARRIAGE

The sin of which the religious right and marriage traditionalists speak is homosexuality. While the physical love that exists between two persons of the same gender is not a new phenomenon, the idea of homosexuality is.¹² Physical love between same-sex couples is a state

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¹² Judith E. Koons, “*Just* Married?: Same-Sex Marriage and a History of Family Plurality*, 12 MICH. J. GEN. & L. 1, 19-37 (2005); *Id.* at 14-15.
of being that dates back several millennia. This love has existed alongside marriage, as well as in conjunction with it, throughout history. During that time, marriage has evolved and changed to suit the needs of the population. One example of how same-sex love has never threatened the institution of marriage, as purported by marriage traditionalists, is when King Henry VIII criminalized sexual acts between two people of the same gender and at the same time sought a divorce to better suit his marital needs. The existence of men who loved men was not in any way involved in King Henry’s need for a divorce. And yet today, there are millions of people attempting to maintain their traditional and religious moral values by protecting “traditional” marriage. But traditional marriage as we know it today is a relatively recent invention.

The entire basis for the objection to marriage equality is the idea of “traditional marriage,” a union “naturally-ordained” and consisting of one man and one woman. What does traditional marriage consist of outside of this definition? Marriage traditionalists look to the history of marriage in Western civilization, but the marriage of which they speak has not truly existed before the 20th century. Marriage has been around for millennia, but it hasn’t always been what it is today. Once upon a time, marriage was the result of intention. It didn’t require licenses or solemnizations. To better understand the context of traditional marriage, one must look at the history of marriage.

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13 Id; See also, Boswell, infra note 31.
14 See Koons, supra note 12.
16 Id.
17 See National Legal Fund, supra note #.
19 Koons, supra note 12, at 4-5.
20 Id. at 42-43.
21 Id. at 2.
A. Historical Perspective

Until very recently, historically speaking, the emotion of love has been entirely absent from the institution of marriage. In fact, love would have been detrimental to the institution. Marriage was entered into with the view of consolidating property, political power, or, in the case of peasants, labor and land. Love was still prevalent in society, but most often in Europe it was the best practice to seek love outside of the marriage.

Our earliest ancestors came together for the sake of community and protection. Survival depended upon people coming together. Marriage and procreation were the most important values of the nomadic life, because sons carried on the tribal name and daughters were married off to other tribes to foster relationships. It was important that every woman have only one male partner in order to ensure paternity. Eventually, nomads turned to farmers and agriculture flourished and marriage became necessary to combine farmland and bring in additional labor forces. Marriage has been used to unite kingdoms, to make the wealthy wealthier, and to expand family estates.

In other cultures around the world, love was equally problematic. In China, where a woman was married into an entire family, spousal love made it more difficult for the family to get rid of the wife if she was not living up to their standards. Greek wedding ceremonies were

22 Id. at 15 (“For most of history it was inconceivable that people would choose their mates on the basis of something as fragile and irrational as love....”).
23 Id. at 16 (“In some cultures and times, true love was actually thought to be incompatible with marriage.”); See also Victoria S. Kolakowski, The Concubine and the Eunuch: Queering Up the Breeder’s Bible, found in Our Families, Our Values 35, 37 (Robert E. Goss & Amy Adams Squire Strongheart, Eds. 1997) (“Marriages were primarily political and economic arrangements...”).
24 COONTZ, supra note 18, at 16.
25 Id. at 6.
26 Kolakowski, supra note 23, at 37-38.
27 Id.
28 COONTZ, supra note 18, at 6.
29 Id.
30 Id. at 16.
public rituals and often included sacrifices to the Gods of marriage.\textsuperscript{31} The consummation of a Greek marriage was less important than the symbolic significance of the ceremony.\textsuperscript{32} The purpose was the transfer of the bride from her father’s home into her husband’s, and the entering of the woman into adult society.\textsuperscript{33} It had very little to do with happiness or consummation. At best it could be considered “a union of spirits.”\textsuperscript{34} While these many examples of marriages throughout geography, history, and time are all limited to opposite-sex marriages, it has been thought that same-sex marriage is not a new idea to our culture.\textsuperscript{35}

Though those who would postulate that same-sex marriages have never existed before the most recent instances in Western Europe and North America may be technically correct, the union of same-sex couples is most definitely not a new one.\textsuperscript{36} For centuries men have been pledging brotherhood with each other and women have been leading women through sexual wakening.\textsuperscript{37} While modern interpreters will maintain that this is because it was not marriage as we know it today, when stacked atop the other evidence of ancient marriage, one could argue that this brotherhood meant even more than marriage.\textsuperscript{38} Unlike marriage, brotherhood involved love.\textsuperscript{39} The Romans objected to same-sex unions between men, because they didn’t approve of a

\textsuperscript{31} See John Boswell, Same-Sex Unions in Premodern Europe, 47 (Vintage Books) (1994) (Zeus and Hera were the gods of marriage: they were brother and sister as well as husband and wife, and...hardly constituted apt models of human marital bliss.”).
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} See Glenn T. Stanton & Dr. Bill Maier, Marriage on Trial, 48 (Intervarsity Press) (2004); See also John Boswell, Same-Sex Unions in Premodern Europe, 221 (Vintage Books) (1994).
\textsuperscript{37} See Boswell, supra note 31, at 218 (History of same-sex unions in Europe); See also, Koons, supra note 12, at 24 (2005).
\textsuperscript{38} Boswell, supra note 31 at 229.
\textsuperscript{39} See Coontz, supra note 18, at 16 (Plato believed that love of one man for another was a “wonderful emotion.”).
man taking a subordinate position like that of a woman, while the aggressor, the more dominant male of the two, went without criticism.\textsuperscript{40}

Generally, because women were considered the passive sex, or the subordinate sexual partner, they were condemned as witches or prostitutes for any same-sex relations.\textsuperscript{41} This is a sign that same-sex relationships were not viewed with moral disapproval; rather, they were viewed with an eye to gender stereotyping.\textsuperscript{42} Despite the condemnation women received for engaging in same-sex relationships, there was evidence that women were married to each other in Rome.\textsuperscript{43} A funerary relief dating back to as early as 27 b.c.e. is thought to have depicted two women with right hands clasped.\textsuperscript{44} This was considered the classic position of married persons.\textsuperscript{45} And in ancient Greece, women were oftentimes the leaders of rituals that initiated other women into sexuality.\textsuperscript{46} Through history, much of the information about same-sex unions between women has been lost, as the idea of ancient lesbianism was subsumed with the identity of the other, or the non-heterosexual.\textsuperscript{47}

However, these brotherhoods and clasping of hands between same-sex partners are not the marriage of which marriage traditionalists speak. Their traditional marriage tends to be a Christian construct that relies on Jesus’s teachings in the Bible.\textsuperscript{48} As we will soon learn, there

\begin{thebibliography}{9}
\item \textit{Id.} at 11.
\item Koons, supra note 12, at 33.
\item \textit{Id.} at 33-34.
\item BROOTEN, supra note 43, at 59-60.
\item \textit{Id.}
\item Koons, supra note 12, at 24.
\item \textit{Id.} at 32-33.
\item National Legal Fund, \textit{About Us, available at http://www.nlf.net/About/mission.html} (last visited Jan. 22, 2011) (NLF has been responsible for drafting anti-marriage statutes and representing the state in several marriage and equality cases).
\end{thebibliography}
are passages of the Bible that speak of love, but one must keep in mind that the emotion of love in marriage has often been romanticized in literature throughout history.49

B. Religious Perspective

The Bible is the first source that the religious right and many marriage traditionalists point to when arguing for traditional marriage. First, they reference verses that imply that marriage is between one man and one woman. Next they point to verses that imply that homosexuality a sin. This section will attempt to examine those arguments, give examples of the fluidity and flexibility of marriage throughout time and, through a historical/critical reading, show that the Bible not only doesn’t consider homosexuality to be a sin, but that it supports the idea of marriage equality.

1. MARRIAGE TRADITIONALISTS’ AND ANTI-GAY ARGUMENTS IN THE BIBLE

As the main source of guidance for the Christian community, the religious right and marriage traditionalists often lean on Bible scripture to support their ideas of traditional marriage and their condemnation of homosexuality.50 When citing the evidence that supports their ideals they first quote the creation story from Genesis.51 After God has created the earth, the heavens and Adam, He says: “It is not good that the man should be alone; I will make him a helper as his partner.”52 Once God has created the animals, he takes a rib from Adam and creates woman.53 The next verse is the most important verse in the traditional marriage argument.54 “Therefore a

49 COONTZ, supra note 18, at 17.
51 STANTON, supra note 36, at 172-73.
52 Genesis 2:18 (NSRV).
53 Id. at 2:21-22
54 See STANTON, supra note 36, at 173.
man leaves his father and his mother and clings to his wife, and they become one flesh." This verse embodies the traditional “one man, one woman” union of which marriage traditionalists speak. Genesis is also home to a chapter that garners the attention of the religious right for its supposedly anti-gay sentiment. The story they refer to is Lot in Sodom.

The story of Sodom gave birth to the word sodomite which traditionally means one who performs anal sex on another male. When two angles arrive in Sodom it is Lot who offers them hospitality, but the Sodomites demand to know the strangers and become violent in their efforts. The people of Sodom were considered wicked and the entire town and all of its inhabitants, except for Lot and his family, were destroyed by God’s fire and brimstone. In their interpretation of the text, the religious right makes the connection from the Sodomites wanting to have sex with men to the destruction of the town to infer that God hates homosexuality.

Another Old Testament chapter that mentions male-male sex is found in Leviticus. The book of Leviticus contains instructions to the Levites on laws and regulations for worship, including ceremonial cleanness, holiness, holy days, the Sabbath year, and the Year of Jubilee. Leviticus is most often cited for a verse that falls under holiness or holy living. In this chapter, God dictates numerous ways in which the Levites are not meant to have sexual relations. The list includes incest, bestiality, and homosexual acts. The word abomination is used to describe

55 Genesis 2:24 (NSRV) (Jesus is quoted in Matthew and Mark repeating this verse).
56 See Stanton, supra note 36, at 173.
57 DANIEL A. HELMINIAK, WHAT THE BIBLE REALLY SAYS ABOUT HOMOSEXUALITY 44 (Millenium Ed. 2000).
58 Genesis 19:1-7 (NSRV).
59 Id. at 19:1-11.
60 See Jesus is Lord: A Worshipping Christian Family Praising Him With Prayer and Thanksgiving, Bible and Homosexuality, available at http://www.worshippingchristian.org/homosexuality.html (last visited Jan. 24, 2011) (“God never singled out and destroyed any other cities in this manner. The sin of homosexuality was so offensive to God that He annihilated both cities and everyone in them”).
63 Id. (“you shall not lie with a male as with a woman; it is an abomination”).
the act of lying with a man as a woman and some interpret that to mean that it “makes God want to vomit.”

The conclusion that could be drawn from this is that homosexuality is a sin.

The book of Romans may also shed light on the idea that homosexuality is a sin. In the first chapter Paul describes the penalty for not acknowledging God.

For this reason God gave them up to degrading passions. Their women exchanged natural intercourse for unnatural, and in the same way also the men, giving up natural intercourse with women, were consumed with passion for one another. Men committed shameless acts with men and received in their own persons the due penalty for their error. And since they did not see fit to acknowledge God, God gave them up to a debased mind and to things that should not be done. They were filled with every kind of wickedness, evil, covetousness, malice. Full of envy, murder, strife, deceit, craftiness, they are gossips, slanderers, God-haters, insolent, haughty, boastful, inventors of evil, rebellious toward parents, foolish, faithless, heartless, ruthless. They know God's decree, that those who practice such things deserve to die—yet they not only do them but even applaud others who practice them.

This passage also includes a condemnation of what could be lesbianism, because it mentions women, whereas past verses have been exclusively about men. Some scholars interpret Paul’s use of certain words in the context of a Stoic philosophy, meaning when he says unnatural that he means against the laws of nature. This would imply that homosexuality is a punishment for those who do not acknowledge God.

Marriage traditionalists also look to 1 Corinthians for their “one man/one woman” definition of marriage. In Paul’s first letter to the Corinthians, he writes encouraging marriage between a man and a woman and expresses the sentiment that they not divorce if they are

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64 HELMIANIKA, supra note 57, at 56.
65 Romans 1:26-32 (NSRV).
66 Id.
67 HELMIANIKA, supra note 57, at 83.
68 See Feeney, supra note 50.
believers. In this chapter, Paul does not encourage marriage between two members of the same-sex.

While 1 Timothy is lesser known it also contains a few passages that seem to promote traditional marriage. Taken out of context, the verses do appear to promote marriage between one man and one woman. But in context we see that the third chapter of 1 Timothy is an instruction to holy men, church leaders (Bishop and Deacon), to take only one wife. These titles are stated specifically and the rest of the chapter contains further instructions for the conduct of a clergyman.

These Bible chapters and verses are held up to promote traditional marriage and anti-gay sentiment within the religious right and marriage traditionalist communities. But there are many more examples of non-traditional marriage throughout the Bible that undercut the arguments made by marriage traditionalists.

2. NON-TRADITIONAL MARRIAGE IN THE BIBLE

There are several examples throughout the Bible of God’s chosen people taking part in traditions that would offend marriage traditionalists’ sensibilities. Most of these take place in the Old Testament. Several generations after the creation in which it was supposedly stated “[f]or this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh,” Abraham, the father of Israel, takes Sarah as his wife and her handmaiden, Hagar, as a surrogate wife as was the common practice at that time.

69 1 Corinthians 7:2-4, 10-12.
70 1 Timothy 3:2, 12 (NSRV).
71 Id.
72 1 Timothy 3 (NSRV).
Jacob, the grandson of Abraham, was later given two sisters to marry.\textsuperscript{74} Rachel, his cousin, was a beauty, and Jacob fell instantly in love with her.\textsuperscript{75} Leah was the elder sister of Rachel, and the girls’ father tricked Jacob into marrying Leah, because the elder had to be married first.\textsuperscript{76} With the sisters came two handmaidens, Zilpah and Bilhah, who were Jacob’s concubines.\textsuperscript{77} This well-known biblical story of the father of Israel contains bigamy, modern-day incest, and infidelity. It also shows that love was a secondary concern with regard to marriage.

It is plain to see that Biblical marriage is often misunderstood and misrepresented by marriage traditionalists. Another story from Genesis illustrates the importance of procreation in maintaining the tribal name and reputation. When a nomadic man died before issuing male offspring, it was the duty of the closest male relative of the deceased to marry the widow and raise sons in the dead man’s name, thereby preserving the name of the tribe.\textsuperscript{78} This practice is best illustrated by the story of Onan.\textsuperscript{79} Er, the first born of Judah, was killed by God for wickedness before he was able to produce male heirs.\textsuperscript{80} Judah told his second son, Onan, to lay with Tamar, the widow, and to “raise up offspring for [his] brother.”\textsuperscript{81} Onan did not want to do this because the children, though biologically his, would not have been considered his by society.\textsuperscript{82} Onan was then killed for the sin of spilling seed, while he would have survived had he fulfilled his filial duties.\textsuperscript{83}

\textsuperscript{74} Genesis 29:10 (NSRV).
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 29:25.
\textsuperscript{77} Id. at 29:24, 29.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Genesis 38:7-10 (NSRV).
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
In order to avoid a necessary societal tradition Onan committed one of the greatest sins of the time. He spilled his semen onto the earth. At a time when obeying your father and procreation were two of the most important things in society, this was a grave sin. It is not, as many have interpreted it, a condemnation of masturbation, but an example of how one man attempted to avoid “a fiction [that] was used to maintain the name of deceased men by having the widows remarry other men of the families.” It is also an excellent example of how “traditional marriage” was modified for the benefit of society.

Another example of Biblical marriage is that of King David. The most common story of David is that of a boy facing a Goliath. Later, after David had become King of Israel, he had two wives and added more concubines and wives including the famous mother of Solomon. King David spied the wife of a soldier bathing and had her brought to him and then had sex with her. When Bathsheba, the soldier’s wife, is impregnated by David, the King arranges for her husband, Uriah, to be killed in battle. After Bathsheba mourns her husband, David marries her. David is lauded as the second greatest King of Israel. While the God of the Old Testament ultimately punished the couple by killing David’s child, which Bathsheba carried as a result of their tryst, they were eventually rewarded with Solomon.

The Old Testament is full of stories of people courting God’s favor and incurring His wrath. The religious right and marriage traditionalists would never point to these types of

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84 See Kolakowski, supra note 23, at 38.
85 Genesis 38:9 (NSRV).
86 HELMINIAK, supra note 57, at 52; Kolakowski, supra note 23, at 37.
87 Id. at 39.
88 Id.
89 1 Samuel 17:14-51 (NSRV).
90 Id. at 25:42-43 (David takes Abigail and Ahinoam as his wives); 2 Samuel 5:13-16 (David takes concubines and wives).
91 2 Samuel 11:1-4 (NSRV).
92 Id. at 11:5-25.
93 Id. at 11:26-7.
95 1 Samuel 17:14-51 (NSRV).
marriages as their example of traditional marriage, but they readily point to stories of God condemning people who are presumed to be sinning through homosexual sex. The following stories are often used to “prove” that God hates homosexuals.96

3. THE REAL SINS OF SODOM

The terrifying story of Lot in Sodom is found in Genesis. In that story, Lot takes two angels in for the night instead of letting them sleep in the square.97 Later that evening, the men of Sodom gather around Lot’s house demanding to know the two strangers.98 Lot goes out to speak to the angry men and asks them not assault his guests.99 He then offers them his two virgin daughters instead, but the Sodomites know that Lot is not a native of Sodom and they are angered by his judgment so they reject his daughters and attempt to assault him instead.100 Many translations’ use of the phrase “to know” implies that the Sodomites want to have sex with Lot’s guests, but it could just as easily imply that they are curious about the new strangers in town.101 But Lot is not a standalone example of this type of commotion. In Judges, there is a story that nearly parallels Lot’s story.

The oft-used example of Lot in Sodom is generally misinterpreted to condemn male-male sex, but when read more closely we see that at the core of the story hospitality is the main sin of the Sodomites.102 This idea is questionable to some, because the men of Sodom reject Lot’s offer of his two virgin daughters and attempt to assault him instead, but the true lesson of the story is the abuse of strangers and inhospitality.103

98 Id.
99 Id.
100 Id.
101 HELMINIAK, supra note 57, 44-45.
102 Id. at 45-46.
103 Id. at 46-47.
The parallel story in Judges tells of a Levite who is travelling from Bethlehem to Ephraim and must break his journey in Gibeah with his concubine and servant. An old man who was the Levite’s countryman living in Gibeah sees the Levite in the town square where no one has taken him in. The old man offers the Levite, his Concubine, and the servant hospitality for the night and they retire to his home. That night, as with Lot, the townspeople go to the house of the old man and demand to have “intercourse” with him. The host offered up his virgin daughter in place of his male guest, just as Lot did, but ultimately the angry mob accepted the guest’s concubine and raped her through the night. The paralleling stories shows that the angry mobs’ demand for sex with the guests is not about homosexual attraction or the desire for male-male sex. It is a desire to assault and rape. In both cases, sexual-orientation has nothing to do with the story. Heinous rape is merely a tool to display wickedness.

Both the towns of Sodom and Gibeah are guilty of one thing. The oft-used example of Lot in Sodom is generally misinterpreted to condemn male-male sex, but when read more closely we see that at the core of the story hospitality is the main sin of the Sodomites. Hospitality was a cardinal rule in Semitic and Arabic societies and in both stories Lot and the old Levi were the only people in their respective towns who were willing to take the strangers in for the night.

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104 Judges 19: 14-26 (NSRV).
105 Id. at 16-18.
106 Id. at 20.
107 Id. at 19:22.
108 Id. at 19:25.
109 HELMINIAK, supra note 57, at 47.
110 Id.
111 Id.
112 Id.
113 Id. at 45-46.
114 Id.
These examples of God’s wrath are examples of traditions formed and maintained millennia ago and no one would expect the 21st century Christian to perform the rituals and responsibilities laid out by God in these Old Testament examples. And yet, marriage traditionalists and the religious right point to scripture from the New Testament as examples of traditions and responsibilities that should be upheld in modern society.\textsuperscript{115}

4. **THE NEW TESTAMENT AND TRADITIONAL MARRIAGE**

The New Testament offers a few examples of traditional marriage and a few repetitions of the creation story’s command that the man shall leave his father and mother and be united to his wife and become one flesh.\textsuperscript{116} The idea that God made them male and female is central to the argument for gender roles within marriage.\textsuperscript{117} However, there are also a few verses that purportedly condemn homosexuality. In some cases, the arguments against homosexuality and for traditional marriage go hand in hand. In order to prove the natural order of things, one must show that unnaturalness has no place in that order.\textsuperscript{118}

The first New Testament example of anti-homosexual sentiment comes from Paul in his letter to the Romans. As quoted above, Paul writes in the first chapter of Romans that those who turn to idols instead of God will be left to their “degrading passions.”\textsuperscript{119} He refers to the unnatural intercourse of women, and men having passion for men as a punishment.\textsuperscript{120} Many scholars see Romans 1 as an example of God’s wrath.\textsuperscript{121} But another interpretation points to the

\textsuperscript{115} See Feeney, supra note 50.
\textsuperscript{116} \textit{Genesis} 2:24 (NRSV); \textit{Mark} 10:6-8; \textit{Matthew} 19:4-6.
\textsuperscript{117} Fiorenza, infra note 135, at 211.
\textsuperscript{118} See Stanton, supra note 36, at 22-24.
\textsuperscript{119} Romans 1:26 (NSRV).
\textsuperscript{120} Id. at 1:27.
\textsuperscript{121} Brooten, supra note 43, at 204.
idea that the homoeroticism described is a societal problem and avoiding it would allow Christians to define themselves against outside society.\footnote{Id.}

Paul is also thought to condemn homosexuality in 1 Corinthians. In chapter 6, Paul discusses the idea of taking a legal issue to court.\footnote{\textit{1 Corinthians} 6:1-20 (NSRV).} He asks why go to court at all because those who have wronged them will not get into the kingdom of heaven.\footnote{Id. at 6:9-10.} Paul then goes on to list those who are not likely to get into heaven: “Do you not know that wrongdoers will not inherit the kingdom of God? Do not be deceived! Fornicators, idolaters, adulterers, male prostitutes, sodomites, thieves, the greedy, drunkards, revilers, robbers—none of these will inherit the kingdom of God.”\footnote{Id. at 7:3.} Again it seems clear that God does not like homosexuals because, according to this list, those who engage in homoerotic acts will not inherit the kingdom. Flowing out of this supposed condemnation of homosexuality is the next chapter, seven, of Paul’s letter which offers an example of traditional marriage.

Regarding marriage, Paul instructs that a man should give his wife her conjugal rights and a woman should do the same for her husband.\footnote{Id. at 7:3.} This verse and the one following it hint at an equal partnership between men and women.\footnote{Id. at 7:3-4 (for the wife does not have authority over her own body, but the husband does; likewise the husband does not have authority over his own body, but the wife does); \textsc{Brooten}, supra note 43, at 224.} He warns, though, that one should only marry if one lacks self-control or as protection against sexual immorality.\footnote{\textit{Id.}; \textit{1 Corinthians} 7:2, 5 (NSRV).} In this Bible chapter, Paul does not reserve intercourse for the sole purpose of procreation.\footnote{\textsc{Fiorenza}, \textit{infra} note 135, at 223-24.} Nor does he mention love,
which is prized above all in modern day marriage and, in fact, spurs modern couples into marriage.\textsuperscript{130}

Paul does discuss love in a later chapter. This chapter is frequently quoted in wedding ceremonies.\textsuperscript{131} Paul writes:

\begin{quote}
[lo\textsuperscript{ve} is patient; love is kind; love is not envious or boastful or arrogant or rude. \\
It does not insist on its own way; it is not irritable or resentful; it does not rejoice in wrongdoing, but rejoices in the truth. It bears all things, believes all things, hopes all things, endures all things.\textsuperscript{132}
\end{quote}

In context of the entire chapter, Paul believes that regardless of the powers of tongues and prophecies you may possess, they are nothing without love.\textsuperscript{133} The love of which he speaks is unclear from just this chapter. Paul began chapter 7 of 1 Corinthians by preaching abstinence.\textsuperscript{134} He is unmarried and believes that this is the best state for an ascetic.\textsuperscript{135}

As an ascetic, Paul does not elaborate on whether this is the love between a man and a woman or between a man and God. One might infer from his earlier passage on marriage that it is not the former. Considering Paul’s opinions on abstinence as the best practice to serve God, he is most likely referring to the latter love; that between a man and God.

The last example of the anti-gay/traditional marriage dichotomy in the New Testament is in 1 Timothy. The first chapter of 1 Timothy contains a list similar to that found in chapter six of 1 Corinthians. In this chapter, Paul warns Timothy that the law is not laid out for the innocent.\textsuperscript{136} Instead it is laid out for: “[t]he sinful, for the unholy and profane, for those who kill their father or mother, for murderers, fornicators, sodomites, slave traders, liars, perjurers, and whatever else

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\textsuperscript{130} COONTZ, supra note 18, at 15. \\
\textsuperscript{131} Families.com, Bible Quotes for Your Marriage, available at http://marriage.families.com/blog/bible-quotes-for-your-marriage (last visited Jan. 22, 2011). \\
\textsuperscript{132} 1 Corinthians 13:4-7 (NSRV). \\
\textsuperscript{133} Id. at 13:1-3. \\
\textsuperscript{134} 1 Corinthians 7:1 (NRSV). \\
\textsuperscript{135} ELISABETH SCHÜSSLER FIORENZA, IN MEMORY OF HER 231 (Crossroad Publishing Co. 1983). \\
\textsuperscript{136} 1 Timothy 1:9 (NSRV).
\end{flushleft}
is contrary to the sound teaching that conforms to the glorious gospel of the blessed God…”

In this chapter Paul uses the same Greek word which is translated the same in the New Standard Revised Version to mean sodomite. Paul’s letter is meant as an instruction for Timothy to lead the church of Ephesus in his place and he continues with directions about church leadership.

The last chapter purported to support traditional marriage is found in 1 Timothy. Bishops, Paul says, are the keepers of God’s house and should be able to keep their own house as well. In order to be above reproach and Bishop must marry only once. Deacons are also prevailed upon to marry once. Paul does not mention who these leaders should marry (woman or man), but that they should marry only once. The hypothesis taken away from these New Testament books appears to be that God, and apparently Paul, abhors homosexuals and believes that the ideal marriage consists of a man and a woman who are to marry only once.

But this was a mere surface reading. When necessary a reader may take any words they find and twist them to fit their intentions. It is only with a close historical/critical reading that we will see what God may have intended with His Word.

5. THE BIBLE, CIVIL RIGHTS AND MARRIAGE EQUALITY

When a reader digs deeper into the Bible and examines its history and language in its original context, they will often uncover a new or dissonant meaning than the one they took from the literal reading. It is through this deeper reading that the truth about homosexuality and traditional marriage may come to light. For example, while several of the passages discussed

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137 Id. at 1:9-11.
139 See Feeney, supra note ##.
140 1 Timothy 3:1-5 (NSRV).
141 Id. at 3:2.
142 Id. at 3:12.
143 HELMINIAK, supra note 57, at 29-30.
144 Id. at 33-34.
in this section have mentioned what we consider homosexual sex, there was no such concept as homosexuality during the Old Testament or even the New Testament.\textsuperscript{145} The Israelites did not think in terms of sexual orientation.\textsuperscript{146} They were more concerned with gender roles with reference to sex than with attraction.\textsuperscript{147} This section will attempt to shed light on the true meaning of the language used in those chapters of the Bible already discussed in order to show that homosexuality is not considered a sin, nor is marriage confined to the “traditional” status of one man and one woman.

As discussed above, the story of Lot, one of the foremost Biblical stories thought to condemn homosexuality, is in fact condemning inhospitality.\textsuperscript{148} The paralleling of the story of the Levite in Judges 19 shows that gender is not at issue, nor is sexual orientation.\textsuperscript{149} In fact, when looking at the language of Lot’s story it is impossible to know if the author is using the phrase “to know” in the sexual or non-sexual manner.\textsuperscript{150} Even if it is being used in a sexual manner, sex for pleasure was not on the Sodomites minds.\textsuperscript{151} Assault was the point of their behavior.\textsuperscript{152} The true moral of this story can also be seen in Ezekiel.\textsuperscript{153} According to the prophet: “This was the guilt of your sister Sodom: she and her daughters had pride, excess of food, and prosperous ease, but did not aid the poor and needy.”\textsuperscript{154} That is a grave sin according to the Semitic culture.\textsuperscript{155}

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\textsuperscript{145} \textit{Id.} at 39.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.} at 46-47.
\textsuperscript{148} \textit{Id.} at 45.
\textsuperscript{149} \textit{Id.} at 46.
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} HELMINIAK, supra note 57, at 48.
\textsuperscript{154} Ezekiel 16:48-49 (NSRV).
\textsuperscript{155} HELMINIAK, supra note 57, at 46.
\end{flushright}
The next Old Testament chapter cited by the religious right and marriage traditionalists as evidence of the sin of homosexuality is the Holiness chapter of Leviticus. Leviticus contains many instructions for Holy Living. The list includes: killing oxen, lambs, and goats within the Tent of Meeting as an offering to the Lord;\textsuperscript{156} draining the blood from animals before eating; considering fruit forbidden for three years on any tree you’ve planted; not having tattoos; nor cutting your beard nor shaving the sides of your head.\textsuperscript{157} But the chief instruction pointed to by marriage traditionalists is the rule about not lying with a man as a woman.\textsuperscript{158} These laws of God were meant to encourage holiness and have fallen by the wayside in modern society, except for amongst, perhaps, the Jewish Orthodox community.\textsuperscript{159}

The list of prohibited sexual acts is also a list of rituals used by the Caananites for the purpose of fertility, blessing crop production, and blessing the birth of livestock.\textsuperscript{160} Furthermore, if you examine the original language involving lying with a man as you would a woman, it can be literally translated to read “lie the lyings of a woman.”\textsuperscript{161} The lyings of a woman mean acting as the receptor of penetration, because that was the woman’s place during intercourse.\textsuperscript{162} For a man to lie the lyings of a woman was a confusion of gender roles and was considered an abomination according to the original meaning of that word: unclean.\textsuperscript{163} But the idea of male-male sex is not even considered unclean by today’s standards. As evidenced by other instructions in Leviticus such as not sewing two types of seeds in one field and not combining

\textsuperscript{156} Leviticus 17:3-4 (NSRV) (Those who kill the animals outside are guilty of bloodshed).
\textsuperscript{157} Leviticus 17:13; 19:23, 28, 27 (NSRV).
\textsuperscript{158} Leviticus 18:22 (NSRV); See HELMINIAK, supra note 57, at 59-60 (Hebrew literal translation says “With a male you shall not lie the lyings of a woman,” meaning that the abomination, or unholliness, comes from a man taking the subordinate position of a woman during sex).
\textsuperscript{159} HELMINIAK, supra note 57, at 54 (“a main concern of the Holiness Code was to keep Israel different from the Gentiles”).
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 59.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 59, 56.
two types of fabrics, uniformity was considered “clean.” The gender confusion involved in a man receiving penetration during sex confused the Levites sense of uniformity and was considered unclean.

Leviticus instructs that if two people violate these rules, they must both be burned in an effort to cleanse the community. In fact, Leviticus lacks one thing very highly prized by modern society: the idea of consent. In order to maintain “holiness” amongst the Levites, both offenders had to be burned regardless of whether both parties consented. This is a concept that modern American society would not be able to tolerate. But what about the supposed anti-homosexual/traditional marriage evidence in the New Testament? After hundreds of years and the birth of Jesus Christ, the church’s teachings changed shape and became the source of solace and guidance for today’s Christians.

The New Testament is often just as misread or mistranslated as the Old Testament. The first example given was Paul’s letter to the Romans and his punishment of unnatural intercourse. There are several things to consider when reading Romans. First there is the original Greek vocabulary Paul uses, then the structure of the book, and finally the overall plan of the book.

In this first chapter, Paul discusses the punishment for knowing God but turning to idols anyway and that it would result in women exchanging “natural” intercourse for “unnatural” and that men giving up “natural intercourse with women,” were consumed with passion for each other. First, we must examine the use of the word natural. The original Greek used by Paul

\[\text{164 Id. at 57.}\]
\[\text{165 Id.}\]
\[\text{166 Id. at 53.}\]
\[\text{167 BROOTEN, supra note 43, at 291-92.}\]
\[\text{168 Id.}\]
\[\text{169 HELMINIAK, supra note 57, at 77.}\]
\[\text{170 Romans 1:26-27.}\]
was physin/para physin.\textsuperscript{171} These words could be interpreted many ways, but taking into account Paul’s position and the context of his time he was most likely using natural to mean common and unnatural to mean atypical. When read in this light, it is surely not a condemnation of gay or lesbian sex.

The structure of the book implies that Paul is hoping to reconcile the Jews and the Gentiles so as to mend the Christian community. The first chapter is a condemnation of Jews who are sticking to the old ways when they need only believe in God and Jesus Christ. Ultimately, Paul does not say that homosexuality is wrong; merely that it is not socially accepted or “nice.”\textsuperscript{172} Another example from Romans that breaks down the argument of traditional marriage is the chapter of Greetings.

The Commendations and Greetings of Romans\textsuperscript{173} are often seen as an attempt by Paul to lift up feminists, the poor, and non-typical gender roles.\textsuperscript{174} Some scholars have interpreted the original Greek and Hebrew to mean house or household as opposed to family, which many had thought to be the traditional nuclear family we know today.\textsuperscript{175} What it most likely referred to were house churches in Rome.\textsuperscript{176}

In both the Commendation and the Greetings, Paul refers to twenty-nine people, ten women and nineteen men.\textsuperscript{177} Some of those greeted consisted of a few “traditionally” married couples, one of which holds the woman up to be the dominant partner and one whose male half is known as talkative (supposedly a female trait), unmarried men who lived together (one of

\begin{flushleft}
\textsuperscript{171} HELMINIAK, supra note 57, at 76.
\textsuperscript{172} Id. at 91.
\textsuperscript{173} Romans 16
\textsuperscript{174} Thomas Hanks, A Family Friend: Paul’s Letter to the Romans as a Source of Affirmation for Queers and their Families, found in OUR FAMILIES, OUR VALUES: SNAPSHOT OF QUEER KINSHIP 137, 140 (Robert E. Goss & Amy Adams Squire Strongheart, eds. 1997).
\textsuperscript{175} Id. at 138.
\textsuperscript{176} Id. at 140.
\textsuperscript{177} Id. at 141.
\end{flushleft}
them is referred to as “beloved” by Paul), two women living together (referred to as “co-workers” of Paul’s), and a household of 5 single men. He finishes his greetings by ordering them to greet one another with a holy kiss. It is clear by the diverse list of persons to whom Paul has sent his letter that he was most likely liberal in his thinking with regards to relationships between the sexes. This idea is also evident in 1 Corinthians.

The equality between the sexes is not one held up only by Paul, but is also thought to be a central idea in Jesus’ teachings. When Jesus says that a man shall leave his father and mother and join his wife it is sometimes interpreted to mean that the old patriarchy is dead and that the man and his wife become partners. But Paul teaches us that if one cannot curb one’s sexual desires, then they should be married. He states that it better to marry than to be “aflame with passion.” While Paul holds up the idea of marriage between a man and a woman, he does not posit any sort of reasoning beyond sating sexual desire. He mentions children in the context that they are the traditional outcome of intercourse and only when he is discussing the mixed marriage of a believer and a non-believer. The rationalizations of procreation and promoting the stability of marriage, which have been presented in modern day society as the basis for traditional marriage, are not found in Paul’s letter. They are, however, found in the Old Testament, which is rife with non-traditional marriages.

Finally, we have the lists from 1 Corinthians 6 and 1 Timothy 1. Both are lists of people who Paul considers wrongdoers. In the case of 1 Corinthians they are people who will be judged

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178 Id. at 143; See also Fiorenza, supra note ##, at 178.
179 Romans 16:16 (NSRV).
180 Hanks, supra note 174, at 144.
181 Mark 10:7-8 (NSRV); Fiorenza, supra note 135, at 211 (“patriarchal marriage – and sexual relationships between male and female – is no longer constitutive of the new community of Chris”).
182 1 Corinthians 7:9 (NSRV).
183 Id.
184 Id. 7:14.
185 Genesis 9:1 (God blessed Noah and his sons, and said to them, "Be fruitful and multiply, and fill the earth").
by God and in 1 Timothy they are people who are subject to the laws of the land.\textsuperscript{186} While the New Standard Revised Version translates the first list to include male prostitutes and sodomites, the original Greek used for those two things can be translated many different ways. The words \textit{malakoi} and \textit{arsenokoitai} have changed meaning over the years.\textsuperscript{187} Generally, they are translated in the Bible to reflect whatever the church opposed at the time.\textsuperscript{188} For example, \textit{malakoi} has been thought to mean effeminate, self-indulgent, or masturbator depending on the time period and current prejudice.\textsuperscript{189}

The word \textit{arsenokoitai}, which appears in both 1 Corinthians and 1 Timothy, is more difficult to figure out. It is unclear whether it refers to men having sex with people or men having sex with men.\textsuperscript{190} Either way, the general argument is that it is a form of abuse or exploitation which was forbidden at the time.\textsuperscript{191} None of the passages used to support the religious right’s and marriage traditionalists’ arguments actively condemn homosexual acts when read in light of the historical context.\textsuperscript{192} Further, none of the passages hold the marriage of one man and one woman as socially superior. It is only in the context of serving the New Testament God as a religious leader that marrying once is favored and even then it is not clear what the gender of that spouse should be.

Scholars have disproved the basic argument that God abhors gays, and most biblical traditions with regards to gender stereotype, sexuality, and marriage have fallen by the wayside. Despite that, many states will not allow two people who love each other to express this love before friends and family and have all states acknowledge that love, because it would “change

\begin{itemize}
\item \textsuperscript{186} 1 Corinthians 6:9-10; 1 Timothy 1:9-11 (NSRV).
\item \textsuperscript{187} HELMINIAK, supra note 57, at 106.
\item \textsuperscript{188} Id.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Id. at 109.
\item \textsuperscript{191} Id. at 107.
\item \textsuperscript{192} Id. at 131.
\end{itemize}
the definition of marriage.” But as we have seen, historical marriage and Biblical marriage are ever-changing and evolving along with society.

The definition of traditional marriage handed to us by the marriage traditionalists is the union of a man and a woman. But as seen previously, there are other factors to take into consideration. Post-World War II in the United States was the peak of this traditional marriage. With soldiers returning home from war and the Great Depression over, male breadwinning families were on the rise and a person who didn’t marry, or even desire to marry, was considered “deviant.” For the first time in history people could court the mate of their choosing for love and marry him or her at will, as opposed to having it arranged or marrying into a family. But this revolutionary new marriage, which had been evolving over the past century, turned almost immediately and has been going downhill ever since.

It is this downhill spiral that marriage equality has been blamed for since the first case of same-sex marriage arose in Hawaii. In response to that case, Congress enacted the Defense of Marriage Act (DOMA) and several states have either ruled same-sex marriages legal or declared them illegal. It is these cases that have set the stage for marriage equality and its future in the United States. Over the past eleven years, numerous battles have been waged in most states to

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195 See STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE, 229 (Viking Press 2005).
196 Id. at 230.
197 Id. at 229.
198 Id. at 5 (“From the moment of its inception, this revolutionary new marriage system already showed signs of the instability that was to plague it at the end of the twentieth century.”).
200 Defense of Marriage Act 1 U.S.C. § 7 (2010); Baker v. State, 744 A.2d 864 (Ver. 1999); Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Fla. Con. art. I § 27 (LexisNexis 2010) (Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized); Right Wing Watch, Arlington Group, available at http://www.rightwingwatch.org/content/arlington-group (last visited Jan. 24, 2011) (Arlington Group is credited with putting constitutional marriage amendments on 11 ballots in the 2004 election).
determine whether they would allow marriage equality or not. The marriage equality losses have come from overwhelming support of Constitutional amendments and state statutes.201 The victories have come, primarily, through the court system. In order to understand the battle, one must take a closer look at the arguments.

III. MARRIAGE CASES

Marriage in the United States is a civil institution first and a religious institution second.202 Most couples choose to have their unions solemnized in the church of their choice, but none of them are required to unless a particular state has required it by statute.203 In the past, the Supreme Court has declared that marriage should be considered a fundamental right and that it is not the province of the government to determine what should take place inside of a marriage.204 In recent years many couples in the LGBT community have sought marriage licenses and have been denied based on their same-sex orientations. Some couples have taken this issue to court and have won, others have not won the right to marry, but have received a different status, and some continue to exist in limbo.205 This section will examine the judicial history of marriage equality, discuss cases out of Massachusetts, Goodridge v. Department of Public Health,206 and Iowa, Varnum v. Brien,207 and examine the States’ arguments against marriage equality and how the courts have responded.

202 Goodridge, 798 N.E.2d at 954.
204 Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship").
207 763 N.W.2d 862 (Iowa 2009).
The judicial history of marriage equality began in 1991 in Hawaii when three same-sex couples filed suit against the Director of Public Health at that time, John C. Lewin. During the litigation process in which the Supreme Court reversed and remanded the lower courts’ dismissal, and ultimately ruled that the case deserved strict scrutiny, the Hawaii Legislature enacted a statute in 1994 that defined marriage as between one man and one woman for the purpose of obtaining a license. The case remained in court for five more years, until 1998 when the electorate voted in Constitutional Amendment 2. When the case returned to the Supreme Court of Hawaii in 1999, the Court decided in favor of the Department of Public Health due to the Constitutional Amendment that had so recently occurred. Unfortunately, the three couples in this case lost the right to marry, but ultimately Hawaii enacted the Reciprocal Beneficiaries statute which allotted some benefits to couples unable to marry under the marriage statute.

However, something much worse resulted from Baehr v. Miike in 1996. When it seemed as though the Hawaii Supreme Court was going to rule in favor of same-sex marriage, Congress responded to states’ fears of having to recognize those same-sex couples under the Full Faith and Credit Clause of the Constitution by enacting the Defense of Marriage Act (DOMA). The act was written by Bob Barr, then Republican Representative from Georgia’s 7th District, and it states: [m]arriage means the legal union between one man and one woman and spouse refers to

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213 U.S. CONST. Art. 4 § 1.
a person of the opposite sex who is a husband or wife. This definition was to apply to federal writings, but left the issue of allowing same-sex marriage to the individual states.

DOMA was a major roadblock to nationwide equality, but shortly after that, in 1997, three same-sex couples in Vermont were denied marriage licenses and took their case to the courts. The court acknowledged that the question before it was one “that the Court well knows arouses deeply-felt religious, moral, and political beliefs.” However, it recognized that their decision must be considered in light of the legal merits as a part of their constitutional responsibility. The court found that none of the interests the State put forward provided a reasonable and just basis for denying civil marriage benefits to same-sex couples.

Unfortunately, though the court sympathized, marriage equality was not to be. Instead, the decision ordered that same-sex couples be provided with a protected status, such as domestic partnership, in order to receive the same benefits and protections as married couples.

With two cases producing civil unions or domestic partnerships and a Federal Statute declaring marriage between one man and one woman, the courts were silent on the subject for a few years. It wasn’t long, however, before another set of couples sought marriage licenses in a new state and were denied. That case was in Massachusetts and had dramatically different results.

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216 Id.
217 Id.
219 Id. at 867.
220 Id.
221 Id. at 886.
222 Id. at 889.
A. Goodridge v. Department of Public Health

In 2001, seven couples in Massachusetts went to the Department of Public Health for the purpose of obtaining marriage licenses. They were denied those licenses by the town or city clerk on the grounds that Massachusetts did not recognize same-sex marriage. Ultimately, the court found that barring a person from the rights and protections of civil marriage violated the Massachusetts Constitution. The judgment was stayed for 180 days to allow the legislature time to put the decision into action. Marriage equality was now a real thing in the State of Massachusetts.

1. THE STATE’S ARGUMENT

The Department of Public Health put forth three legislative rationales to support the prohibition of same-sex marriage. First, they argued that prohibiting same-sex couples from marrying would “provide a favorable setting for procreation.” Second, they suggested that the prohibition would ensure the “optimal setting for child rearing.” Lastly, they state that the prohibition would preserve scarce State and private financial resources.

The court had decided, and the Department had suggested, that a rational basis test would be correct when analyzing the question before it. The Department argued that no fundamental right was at issue and that the couples in question were not a “suspect class.” In order to promote their legitimate public purpose, the Department argues marriage’s primary purpose,

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223 Goodridge, 798 N.E.2d at 949.
224 Id. at 950.
225 Id. at 969.
226 Id. at 970.
227 Id. at 961.
228 Id.
229 Id.
230 Id.
231 Goodridge, 798 N.E.2d at 961.
which is procreation.\textsuperscript{232} The dissenting opinion agrees, citing \textit{Skinner v. Oklahoma}\textsuperscript{233} in which the Court ruled that “marriage and procreation are fundamental to the very existence of the race.”\textsuperscript{234} That case ultimately decided against a sterilization law, declaring procreation a “basic liberty.”\textsuperscript{235} Unfortunately, the Department offered no evidence to show that forbidding same-sex couples to marry would somehow promote procreation amongst married opposite-sex couples.

Next, the Department posits that the optimal child-rearing situation is in a household with a mother and father.\textsuperscript{236} The Department does admit that the people in same-sex couples may be “excellent” parents. The dissent once again supports this idea by noting the uncertainty and unforeseeability of allowing and even sanctioning these types of households.\textsuperscript{237} Justice Cordy would ask for time to see the outcome of these same-sex households and allow the legislature to decide how to handle the rights of those families.\textsuperscript{238}

Finally, the Department cites the conservation of scarce State and private financial resources as a rationale for prohibiting same-sex marriage.\textsuperscript{239} To support this supposition the Department states that it could be logically inferred that “same-sex couples are more financially independent than married couples.”\textsuperscript{240} Because of this, those couples do not need the benefits of tax advantages or employer-financed health plans.\textsuperscript{241} The last attempt to rationalize the prohibition of marriage equality stated that same-sex couples are not as financially dependent on each other as opposite-sex couples are. The court disagreed and the following section highlights its reasoning for doing so.

\textsuperscript{232} \textit{Id.}
\textsuperscript{233} 316 U.S. 535 (1942).
\textsuperscript{234} \textit{Id.; Goodridge}, 798 N.E.2d at 985 (Cordy, J. dissenting).
\textsuperscript{235} \textit{Skinner}, 316 U.S. at 541.
\textsuperscript{236} \textit{Goodridge}, 798 N.E.2d at 963.
\textsuperscript{237} \textit{Id.} at 1003 (Cordy, J. dissenting).
\textsuperscript{238} \textit{Id.}
\textsuperscript{239} \textit{Id.} at 964.
\textsuperscript{240} \textit{Id.}
\textsuperscript{241} \textit{Id.}
2. THE COURT’S REASONING

The court had decided that a rational basis test of an equal protection challenge would be the best way to proceed with the decision.\(^{242}\) For such challenges the rational basis test requires an impartial lawmaker to logically believe that the classification serves a legitimate public purpose that transcends the harm to members of that class.\(^{243}\) With this in mind the court proceeds to analyze each rationale posed by the Department.

The court disagreed with the idea that the primary purpose of marriage is procreation.\(^{244}\) It cited the fact that Massachusetts’ civil law does not favor intercourse between two married people for the purpose of procreating over any other kind of intercourse.\(^{245}\) It goes on to elaborate that Fertility is not a condition of marriage and that consummation is not a prerequisite to a valid marriage.\(^{246}\) It is only the commitment of two people to each other, exclusive to all others, that is the indispensable part of civil marriage.\(^{247}\) Even further, the State has always helped bring children into a family regardless of whether the parent is married or not, whether the child is adopted, whether some sort of technology was used to assist with the pregnancy, and regardless of the sexual orientation of the partner.\(^{248}\) The court finally states that this rationale “impermissibly ‘identifies persons by a single trait and then denies them protection across the board.’”\(^{249}\)

The Department’s next rationale, the optimal child-rearing situation, is a moot point because a lower court had already ruled that the “best interest of the child” standard did not turn

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\(^{242}\) Id. at 961.  
\(^{244}\) Id. at 961.  
\(^{245}\) Id.  
\(^{246}\) Id.  
\(^{247}\) Id.  
\(^{248}\) Id. at 962.  
\(^{249}\) Id. at 962 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).
on a parent’s sexual orientation.\textsuperscript{250} Aside from providing no evidence to support this rationale, the Department conceded that same-sex parents “may be” excellent parents.\textsuperscript{251} The court states that it is in the best interest of children of same-sex couples that their parents be allowed to marry because it will offer them the benefits of tax advantages which will help to create stability, it would allow couples to establish parentage without a lengthy legal process, and it would protect the child in the event that the couple divorces.\textsuperscript{252} The court could not rationalize penalizing an entire class of children based solely on their parents’ sexual orientation.\textsuperscript{253}

The final rationale presented by the Department is that of conserving financial resources, both public and private.\textsuperscript{254} The Department presents its logical assumption that same-sex couples are more often financially independent and have less need of those financial benefits provided to married couples.\textsuperscript{255} The court determined that this was a conclusory generalization and that it grossly ignored the fact that many same-sex couples are also parents and have other dependents.\textsuperscript{256} The court continued by pointing out that the State does not give or deny benefits to married couples based on whether they mingle their finances or even depend on each other financially.\textsuperscript{257} This rationale also failed the rational basis test and the court deemed the statute unconstitutional.

The court does mention and discard one rationale presented by amici, but not put forward by the Department. The amici suggest that prohibiting same-sex marriage will reflect the community standard that homosexual conduct is immoral.\textsuperscript{258} To this the court replies by quoting

\begin{flushleft}
\textsuperscript{250} Goodridge, 798 N.E.2d at 963 (citing Doe v. Doe, 452 N.E.2d 293 (Mass. App. Ct. 1983)).
\textsuperscript{251} Id.
\textsuperscript{252} Id.
\textsuperscript{253} Id. at 964.
\textsuperscript{254} Id.
\textsuperscript{255} Id.
\textsuperscript{256} Goodridge, 798 N.E.2d at 964.
\textsuperscript{257} Id.
\textsuperscript{258} Id. at 967.
\end{flushleft}
Palmer v. Sidoti\textsuperscript{259} stating “The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”\textsuperscript{260}

The Massachusetts Supreme Court declared that civil marriage is the voluntary union of two persons as spouses, to the exclusion of all others.\textsuperscript{261} This made Massachusetts the first state to allow marriage equality, but it would not be the last. The case of Varnum v. Brien\textsuperscript{262} would be the next court case to allow same-sex marriage and this court addressed in great detail the concern that the State was attempting to prevent marriage for moral or religious reasons.\textsuperscript{263} In order to properly address that section of the Iowa Supreme Court decision, the next section will also look at the Establishment Clause of the United States Constitution. The Iowa Court does an excellent job of shining a light on the religious right’s attempt to infringe on a civil institution. The court is extremely clear on the reasons for its decision and addresses that attempt in great detail.

B. Varnum v. Brien

The Constitution states: “Congress shall make no law respecting an establishment of religion...”\textsuperscript{264} This clause is known as the Establishment Clause and has been the driving force behind many cases in which church and state have become entwined.\textsuperscript{265} In Goodridge, the idea of opposing marriage equality for moral reasons is touched on lightly, but it is the most recent marriage case, Varnum v. Brien, in which the judge sheds light on the judicial responsibility to

\begin{flushleft} \textsuperscript{259} 466 U.S. 429, 433 (1984).  
\textsuperscript{260} Goodridge, 798 N.E.2d at 968.  
\textsuperscript{261} Id. at 969.  
\textsuperscript{262} 763 N.W.2d 862 (Iowa 2009).  
\textsuperscript{263} Id. at 904.  
\textsuperscript{264} U.S. CONST. amend. 1.  
honor the Establishment Clause when deciding whether same-sex couples may partake of civil marriage.\textsuperscript{266}

The Iowa Supreme Court is not the first to recognize the attempt to impose religious morals on a civil institution.\textsuperscript{267} In 2006, the Maryland Legislature considered the idea of marriage equality.\textsuperscript{268} The proposal before the Legislature was to prohibit same-sex marriage and the Legislature enacted a committee to research the matter. During a committee hearing, at which American University Constitutional Law Professor Jamin Raskin was testifying, Senator Nancy Jacobs spoke of her belief system.\textsuperscript{269} “‘[M]arriage is intended, ordained and started by God – that is my belief...’”\textsuperscript{270} Professor Raskin spoke about “the Bible hav[ing] been used through history to oppress groups of people,” specifically citing scripture that supported interracial marriage bans.\textsuperscript{271} Raskin then said, “People place their hand on the Bible and swear to uphold the Constitution, they don’t put their hand on the Constitution and swear to uphold the Bible.”\textsuperscript{272}

The Iowa Court was not even the first majority opinion to speak openly about the real reason for opposing marriage equality.\textsuperscript{273} It was, however, the first to devote a large portion of its opinion to the topic.\textsuperscript{274}

\textsuperscript{266} Varnum, 763 N.W.2d at 904.
\textsuperscript{267} Americans United, Maryland Marriage Law Not Based on Bible, Says Professor, Americans United for Separation of Church and State, April 2006 available at http://www.au.org/media/church-and-state/archives/2006/04/maryland-marriage.html (last visited Jan. 18, 2010) (Professor Raskin of American University to MD State Sen. Nancy Jacobs on why it is important not to uphold an idea based solely on religious principles).
\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{270} Id.
\textsuperscript{271} Id.
\textsuperscript{272} Id.
\textsuperscript{273} Baker, 744 A.2d at 867 (court has a “constitutional responsibility” to consider the issue of marriage equality on its merits and not the moral or religious debate).
\textsuperscript{274} Varnum, 763 N.W.2d at 904.
In 2009, six couples in six different communities went to the Polk County recorder, Timothy Brien, to get marriage licenses. The couples were turned away because of the State statute that states “[o]nly a marriage between a male and a female is valid.” Those couples challenged the amended marriage statute that barred marriage between same-sex couples and they won the right to marry in the state of Iowa.

1. THE STATE’S ARGUMENT

The County Recorder (the County), as Defendant-Appellant, puts forth five arguments in favor of prohibiting same-sex marriage. First, it proposes that the prohibition will maintain traditional marriage. Next, it asserts that the prohibition will promote the optimal environment in which to raise children. Then it states that the prohibition will promote procreation. Next it suggests that banning same-sex marriage will promote stability in opposite-sex relationships. Finally it sights conservation of resources as an objective in the banning of same-sex marriage. The question put forth by the court is whether exclusion of gays and lesbians from the institute of civil marriage is substantially related to any important governmental objective. The court adopted, as the County suggested, an intermediate level of scrutiny.

First, the County argues that it has the important governmental objective of maintaining traditional marriage. It purports that by banning same-sex marriage it is “promot[ing] the

275 Iowa Code § 595.2(1).
276 Varnum, 763 N.W.2d at 906.
277 Id. at 898.
278 Id. at 899.
279 Id. at 901.
280 Id. at 902
281 Id.
282 Id. at 897.
283 Varnum, 763 N.W.2d at 898.
‘integrity of traditional marriage’ by ‘maintaining the historical and traditional marriage norm’ ([as] one between a man and a woman).”²⁸⁴ However, in order to offer a tradition as justifiable means of preserving a statutory scheme the court “must determine whether the reasons underlying the tradition are sufficient to satisfy constitutional requirements.”²⁸⁵

Secondly, the County offers the promotion of child rearing by a father and a mother in a marital relationship.²⁸⁶ The County claims that research shows this situation to be the optimal one for raising a child.²⁸⁷ This argument also encompasses the very important governmental interest of determining the best interest of the child.²⁸⁸ The County further argues that the same-sex marriage ban will ensure that children will be raised only in the optimal situation mentioned above.²⁸⁹ The County, unfortunately, fails to realize that regardless of marital state, gays and lesbians will raise children, thereby defeating the purpose of this governmental objective.

Next, the County suggests that the government “endorsement” of traditional marriage will promote procreation.²⁹⁰ Procreation is necessary to the continuation of the human race and occurs naturally for opposite-sex couples, which promotes this objective.²⁹¹ Conversely, same-sex couples require some form of technological assistance in order to procreate and other same-sex couples choose not to procreate at all.²⁹² The County maintains that the classification offered in the ban will achieve the objective of promoting procreation.

²⁸⁴ Id.
²⁸⁵ Id. (quoting Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 478-79 (Conn. 2007)).
²⁸⁶ Id. 899.
²⁸⁷ Id.
²⁸⁸ Id.
²⁸⁹ Id. at 900.
²⁹⁰ Id. at 901.
²⁹¹ Varnum, 763 N.W.2d. at 901
²⁹² Id.
The next rationale proposed is that the marriage statute will promote stability in opposite-sex couples. While the court concedes that this is an important government objective, the County offers no evidence that the exclusion of gays and lesbians will further that objective. Finally, the County’s last rationale, conservation of resources, is discussed. The County argues that restricting access to marriage will lighten the state’s fiscal budget by barring access to those governmental benefits allotted to married couples. Unfortunately, the court did not agree that maintaining the tax revenue by barring individuals from the institution of marriage was an objective worth promoting.

The rationales for banning same-sex marriage which the County presented did not succeed under the intermediate level of scrutiny. The court, writing unanimously, presented thoughtful and thought-provoking arguments against each rationale and then wrote exclusively on what it felt the real reason for the ban was, before finally declaring the statute unconstitutional.

2. THE COURT’S REASONING

The court decides to examine the case under the intermediate level of scrutiny not because the County asked for it, but because it had determined that Iowa’s same-sex marriage statute could not survive the intermediate level of scrutiny. The court then addresses the first rationale presented by the County, that of promoting traditional marriage, with the idea that the government is merely attempting to restrict marriage to opposite-sex couples in order to

293 Id. at 902.
294 Id.
295 Id.
296 Id.
297 Id. at 902-03.
298 Id. at 896.
accomplish the governmental objective of maintaining opposite-sex marriage. This reasoning is empty and allows a classification to be maintained for its own sake.

The court’s assessment of the second rational is much broader than with the first, because it involves the important government interest of doing what’s best for the child. The County asserts that by banning same-sex marriage it hopes to also keep children from being raised in same-sex households. The court finds this rationale to be under-inclusive because it does not exclude from marriage other groups of parents that are less than optimal parents, regardless of sexual orientation. If this were truly an important government objective, then many other types of parents would be excluded from marriage as well. The rationale is also over-inclusive because it denies marriage to all gay and lesbian couples, many of whom do not have children. Because of the over- and under-inclusive nature of the statute, the same-sex marriage ban does not appear to advance the legislative goal.

Next, the court addresses the idea that banning same-sex marriage will somehow promote procreation among opposite-sex married couples. In response to this idea, the court asks whether exclusion of gays and lesbians from marriage will result in more procreation. Furthermore, the procreation objective would be promoted by including gays and lesbians in civil marriage,

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299 Id. at 898.
300 Id. (quoting Kerrigan, 957 A.2d at 478).
301 Id. at 899.
302 Id. at 900.
303 Varnum, 763 N.W.2d at 900.
304 Id.
305 Id.
306 Id. at 901.
307 Id.
because gays and lesbians have the ability to procreate. If this were a true objective, then all classes of people that do not procreate should also be banned from civil marriage.

Finally, the court addresses the last two rationales offered by the County. It dismisses the first one, promoting stability in opposite-sex couples, almost immediately citing the County’s lack of evidence and the fact that the exclusion of gays and lesbians from civil marriage probably won’t promote that stability. The last issue is Conservation of resources in which the County puts forth an argument that the state will lose tax revenue and be financially burdened by the benefits same-sex couples would be receiving. The court suggests it would be “rational” to exclude any group from the institution of marriage for the purpose of conservation, but that it would offend society’s sense of equality to do so.

After having rejected the interests advanced by the County in justification of the statute, the court addresses what it calls “the reason for the exclusion of gay and lesbian couples from civil marriage left unspoken by the county.” The reason, the court states, is religious opposition to same-sex marriage. With the understanding that religious sentiment motivates most opponents of same-sex marriages, the court addresses this undercurrent to explain its rationale for rejecting the opposite-sex requirement of the statute.

While many religious organizations oppose same-sex marriage, there are also religious organizations that support them. It is this division that explains a lack of “religion-based

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308 Id. at 902.
309 Id.
310 Id.
311 Varnum, 763 N.W.2d at 902.
312 Id. at 903
313 Id. at 904.
314 Id.
315 Varnum, 763 N.W.2d at 904.
316 Id. at 904-05.
rationale to test the constitutionality of Iowa’s same-sex marriage ban.”

In fact, the court admits that it is the judiciary’s job to ensure that the government avoids religion-based laws.

Just as the United States Constitution has the Establishment Clause in the First Amendment, so too does the Iowa Constitution state: “The general assembly shall make no law respecting an establishment of religion…” The court has “a constitutional mandate to protect the free exercise of religion in Iowa, which includes the freedom of a religious organization to define marriages it solemnizes as unions between a man and a woman.” This is in line with the US Constitution’s First Amendment which goes on to include the government’s inability to prohibit any citizen from practicing the religion of their choice, better known as freedom of religion.

One of the major arguments of marriage traditionalists who oppose marriage equality also encompasses the destruction of the wall between church and state. The fear lies in the idea that their religious institutions would be forced to solemnize same-sex marriages. However, forcing a religious institution to perform a marriage would be a clear violation of the Constitution. The court recognizes this fact and addresses it in his opinion.

Protecting religious freedoms goes hand in hand with preventing the government from endorsing any one religious view.

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317 Id. at 905.
318 Id.
319 Iowa Const. art. I, § 3.
320 Varnum, 763 N.W.2d at 905.
321 U.S. CONST. amend.1
324 Id.
not denigrate any religious views of Iowans. Ultimately, the court held that the civil marriage statute failed to provide equal protection of the law under the Iowa Constitution. The court ordered that the statutory language limiting civil marriage to one man and one woman be stricken from the statute and that the remaining language be interpreted and applied in a manner that allowed gays and lesbians access to marriage.

While the decision handed down by the Iowa Supreme court does change the definition of civil marriage, they make it clear that religious freedoms are still intact. Religious organizations may continue to allow or deny same-sex solemnizations. By admitting the LGBT community into the institution of marriage, the Court is not forcing any religions to solemnize marriages of same-sex couples. The Iowa decision does an excellent job of addressing the possible violation of the Establishment Clause and bringing that issue into the spotlight.

Baehr, Baker, Goodridge, and Varnum are examples of civil equality overcoming the imposition of a religious morality. But to better understand Goodridge and Varnum one must first closely examine their predecessors. In Romer v. Evans, equality had finally found its way into the political world and the Supreme Court of the United States could not conceive of maintaining an inequality on one issue, but equality in all others. In order to understand the

325 Id.
326 Id. at 906.
327 Id. at 907.
328 Id. at 906.
330 ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA: VOL. 1 & 2 UNABRIDGED 47(1840) (“it is impossible to believe that equality will not eventually find its way into the political world, as it does everywhere else. To conceive of men remaining forever unequal upon a single point, yet equal on all others, is impossible; they must come in the end to be equal upon all”).
judicial stance on marriage equality we must first look at Romer v. Evans, Bowers v. Hardwick, 478 U.S. 186 (1986), and Lawrence v. Texas 539 U.S. 558 (2003) to learn the Court’s stance on morality and sexuality.

IV. MORALITY AND SEXUALITY CASES

Romer v. Evans 517 U.S. 620 (1996) originated in Colorado and was the result of a Constitutional Amendment that effectively stripped Colorado’s LGBT community of any protection from discrimination. Amendment 2 was a response from the Religious Right to ensure that members of the LGBT community would not be afforded protections in the areas of housing, employment, education, public accommodations, and health and welfare services. 334 The majority and minority opinions in Romer showcase the moral views of their authors and are a preview of how they would vote in future cases involving LGBT issues.

Romer was followed closely by Lawrence v. Texas 539 U.S. 558 (2003) which overturned Bowers v. Hardwick. Lawrence was the seminal case in which homosexuality was decriminalized and any state statutes which sought to make sodomy a law were invalidated. Throughout Lawrence the Supreme Court avoids the discussion of marriage equality, but the opinions of these three cases discuss the morality and sexuality of United States LGBT citizens as it pertains to statutory law. While Justice Scalia feared that Lawrence v. Texas would open the door for marriage equality, it was really Romer that created the most movement on the marriage equality front

331 478 U.S. 186 (1986).
because it spurred the religious right into action.\textsuperscript{337} \textit{Romer} was a major decision in favor of equal rights and illuminates the battle between preserving one side’s moral view and bestowing equal rights on the other side. This section will show the battle waged between the need for civil equality for the LGBT community and the moral values that restrict that equality. It begins with the most recent touchstone case of \textit{Romer} and moves on to the different moral battles waged in \textit{Bowers} and \textit{Lawrence}. By examining these cases, it is easy to see in what direction the arc of justice bends.

\textbf{A. \textit{Romer} v. Evans}

In response to municipal ordinances enacted in various counties around Colorado which prohibited discrimination against lesbians, gays, and bisexuals, an amendment to article II was presented to the electorate as Amendment 2.\textsuperscript{338} The Amendment stated:

\begin{quote}
No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.\textsuperscript{339}
\end{quote}

Opponents to the amendment alleged that enforcement of it “would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation.”\textsuperscript{340} The amendment was stayed and the injunction was affirmed by the Supreme Court of Colorado on the basis that it would infringe the rights of gays, lesbians,

\textsuperscript{338} \textit{Romer} v. Evans, 854 P.2d 1270 (Colo. 1993).
\textsuperscript{339} \textit{Romer}, 517 U.S. at 624.
\textsuperscript{340} Id. at 625
and bisexuals “fundamental right to participate equally in the political process.” The United States Supreme Court affirmed the Colorado Supreme Court’s decision and declared the amendment unconstitutional.

1. STATE’S ARGUMENT

The State’s main argument in defense of Amendment 2 was that the Amendment puts gays and lesbians in the same position as all other persons. The measure did no more than deny special rights to gays and lesbians. The State’s primary rationale for promoting Amendment 2 is “respect for other citizens’ freedom of association.” Specifically, the State feels that landlords or employers who have personal or religious objections to homosexuality have a right to uphold those beliefs. The State does not have any further reasoning for supporting the amendment, but Justice Scalia’s dissenting opinion makes the argument for them.

Justice Scalia’s dissent also serves to shed light on the issue of morality. He leads off by criticizing the majority for turning the reasonable amendment into a fit of spite. He then attempts to justify the amendment as a “modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.” Justice Scalia paints a picture of a group attempting to revise the sexual morals of the religious right, who are simply doing their best to protect their traditional values. He continues by citing Bowers

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341 Romer, 854 P.2d at 1276.
342 Romer, 517 U.S. at 626
343 Id.
344 Id. at 635.
345 Id.
346 Id. at 636 (Scalia, J. dissenting) (refers to ordinances as “Kulturkampf”).
347 Id.
v. Hardwick\textsuperscript{348} in which the majority opinion refused to find that homosexual’s had a fundamental right to engage in acts of casual sodomy.\textsuperscript{349} Justice Scalia claims that it “places the prestige of [the Court] behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.”\textsuperscript{350}

Justice Scalia also discusses the rights gays, lesbians, and bisexuals will continue to enjoy alongside their heterosexual co-workers, such as pensions, health care, and insurance.\textsuperscript{351} However, he shows us that he believes that same-sex partners are akin to “long-time roommate[s]” of their heterosexual counterparts.\textsuperscript{352} This, of course, misses the point that a same-sex life partner hopes someday to be considered a spouse.

Justice Scalia also points to the majority’s subtext that Coloradans are wrong to have animosity towards homosexuals.\textsuperscript{353} He admits that it is “our moral heritage that one should not hate any human being or class of human beings,”\textsuperscript{354} but continues that all citizens have the right to consider certain conduct reprehensible – “murder, for example, or polygamy, or cruelty to animals…” and that we can exhibit an animus to those who are guilty of such offenses.\textsuperscript{355} He admits that the animus in this case is a moral disapproval of homosexual conduct and claims it is the very same moral disapproval exhibited towards criminals.\textsuperscript{356} Justice Scalia’s dissenting opinion is an excellent example of the moral bias that is hoping to effect law, thereby destroying the wall between church and state.

\textsuperscript{348} 478 U.S. 186 (1986).
\textsuperscript{349} Bowers, 478 U.S. at 192.
\textsuperscript{350} Romer, 517 U.S. at 636.
\textsuperscript{351} Romer, 517 U.S. at 638.
\textsuperscript{352} Id.
\textsuperscript{353} Id. at 644.
\textsuperscript{354} Id.
\textsuperscript{355} Id.
\textsuperscript{356} Id.
2. COURTS’ REASONING

The Court addresses the State’s defense of Amendment 2 by stating that the change rendered by the amendment was “sweeping and comprehensive.”\textsuperscript{357} The amendment withdraws legal protections from the injuries caused by discrimination from the LGBT community and no others.\textsuperscript{358} The Court decides to review the amendment with an intermediate level of scrutiny by requiring that the classification created by the amendment have a rational relationship to an independent and legitimate legislative end.\textsuperscript{359}

The Court notes that Amendment 2 may not apply only to laws passed for the benefit of gays and lesbians.\textsuperscript{360} It could be fairly inferred that the amendment also deprives gays and lesbians of the general laws that prohibit arbitrary discrimination in both governmental and private settings.\textsuperscript{361}

The Court cannot accept the argument that the amendment merely deprives gays and lesbians of special rights.\textsuperscript{362} Conversely, the amendment creates a disability upon gays and lesbians.\textsuperscript{363} In order to find a safe-harbor from discrimination, the LGBT community would need to enlist the citizens of Colorado in amending the constitution.\textsuperscript{364} No other class of citizens is required to do this to be protected from arbitrary discrimination.\textsuperscript{365}

The amendment fails the rational basis test for two reasons.\textsuperscript{366} First, it imposes a broad and undifferentiated disability on a single named group.\textsuperscript{367} Second, the breadth of the

\textsuperscript{357} Romer, 517 U.S. at 627.
\textsuperscript{358} Id.
\textsuperscript{359} Id. at 633.
\textsuperscript{360} Id. at 630.
\textsuperscript{361} Id.
\textsuperscript{362} Id. at 631.
\textsuperscript{363} Id.
\textsuperscript{364} Id.
\textsuperscript{365} Romer, 517 U.S. at 631.
\textsuperscript{366} Id. at 632.
\textsuperscript{367} Id.
amendment is discontinuous with the reasons offered by the State and speaks solely of animus towards the class it affects. Finally, the Court notes that Amendment 2 makes a general announcement that gays and lesbians shall not have any protections from the law which inflicts immediate, continuing, and real injuries. Those injuries far outweigh any legitimate justifications that may be claimed for it.

Finally, the Court addresses the rationale put forth by the State regarding the respect for citizens’ beliefs. However, it finds that the breadth of that argument is so far removed from that particular justification that it could not credit them. The Supreme Court found that a State cannot make a class of citizens into strangers to its laws and declared Amendment 2 unconstitutional.

The Court recognized the moral beliefs behind the enactment of Amendment 2 and recognized that the moral opinions of a majority could not so wholly and injuriously affect the well-being of a minority. In the Romer dissent, Justice Scalia references Bowers v. Hardwick, a case that discusses the moral persuasions of the law with unflinching support, which would come to be reconsidered in a few years when the Court was called upon to decide Lawrence v. Texas. These cases address a person’s right to privacy in the face of a law driven solely by moral beliefs.

B. Bowers v. Hardwick and Lawrence v. Texas

Two cases have come before the United States Supreme Court regarding homosexual conduct. In both cases, a Police Officer entered the homes of the Defendants and found them

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368 Id.
369 Id. at 635
370 Id.
371 Id.
372 Romer, 517 U.S. at 635.
373 Id.
engaged in intimate sexual conduct with another adult male.\footnote{Lawrence, 539 U.S. at 566.} Both instances violated a State statute that made it illegal to partake in acts of sodomy.\footnote{Id.} The moral character of the sitting Justices for the two different cases would result in two very different decisions. This section discusses those decisions handed down by the Supreme Court sitting in 1986 and the Supreme Court sitting in 2003.


In August of 1982, Hardwick and another adult man were arrested for engaging in what the State of Georgia defined as sodomy.\footnote{Id. at 187.} According to the Georgia Statute \textquotedblleft[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another…\textquotedblright\footnote{Georgia Code Ann. § 16-6-2 (1984).} After a preliminary hearing, the case was not presented to a grand jury for lack of evidence.\footnote{Bowers, 478 U.S. at 188.}

Hardwick, however, chose to file suit in the Federal District Court to challenge the constitutionality of the statute.\footnote{Id.} Incidentally, an opposite-sex couple, friends of Hardwick, attempted to join the suit because they wanted to engage in the acts described by the statute, but had been chilled by Hardwick’s arrest.\footnote{Id. at fn 2.} The District Court dismissed their claim for lack of standing and the Court of Appeals affirmed it because they had not sustained, and were not in danger of sustaining, injuries from enforcement of the statute.\footnote{Id.} The District Court granted the State’s motion to dismiss, and the Eleventh Circuit Court of Appeals reversed that decision.\footnote{Id. at 188-89.}

Ultimately, the Supreme Court decided the question of whether the Federal Constitution confers...
a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of
the many States that still make such conduct illegal.\textsuperscript{385} The Court decided that it did not and
found that the sodomy laws currently on the books in 25 states were valid.

a. DEFENDANT’S ARGUMENT

Hardwick’s assertion before the Supreme Court was that the right to homosexual conduct
should be able to overcome the Courts unwillingness to hand down judge-made constitutional
law.\textsuperscript{386} Hardwick relied on the Court’s decision in \textit{Stanley v. Georgia}\textsuperscript{387} where the Court held
that the First Amendment prevents conviction for possessing and reading obscene material in the
privacy of one’s home.\textsuperscript{388}

Hardwick also asserted that the State must have a rational basis for the law.\textsuperscript{389} He points
out that the only basis for the law in this case is the presumed belief of a majority of the
electorate in Georgia that homosexual sodomy is immoral and unacceptable.\textsuperscript{390} Hardwick
believed that majority sentiments about the morality of homosexuality should be declared
inadequate.\textsuperscript{391} The dissenting opinion of Justice Blackmun furthers the arguments laid out by the
Defendant.

Justice Blackmun begins by quoting Justice Holmes that it is revolting to have no better
reason to maintain a law other than that it has been a law for a very long time.\textsuperscript{392} Justice
Blackmun also pointed out the significance of Hardwick’s standing while the heterosexual

\textsuperscript{385} Id. at 190.
\textsuperscript{386} Id. at 195.
\textsuperscript{387} 394 U.S. 557 (1969).
\textsuperscript{388} Id. at 565.
\textsuperscript{389} Bowers, 478 U.S. at 196.
\textsuperscript{390} Id.
\textsuperscript{391} Id.
\textsuperscript{392} Id. at 199 (Blackmun, J. dissenting) (quoting Oliver Wendell Holmes, \textit{The Path of the Law}, 10 HARV. L. REV. 457, 469 (1897)).
couple was dismissed for lack of standing. It shows the State’s willingness to enforce a law against homosexuals that it doesn’t care to enforce with heterosexual couples, despite the fact that the broadness of the language includes both gay and straight people. Justice Blackmun finishes his long and detailed dissent by pointing out the difference between laws that purport to protect public sensibilities and those that enforce private morality. Although the dissent supports the Defendant’s argument, it was the majority opinion that counted and the Court did not agree with Hardwick’s assertion that he had a right to privacy.

b. COURT’S RESPONSE

As stated before, the question before the Court is “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy….” The Court begins by disagreeing with the Eleventh Circuit Court of Appeals that the prior cases decided by the Court have construed that the Constitution should confer a right of privacy that extends to homosexual sodomy. The Court construes that the cases cited by the lower court are all regarding the decision to bear or beget a child and therefore bear no resemblance to the case at bar. The Court cannot find any connection between family, marriage, and procreation on the one hand and homosexual activity on the other.

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393 Id. at 201.
394 Id.
395 Id. at 212.
396 Id. at 196 (White, J. majority).
397 Bowers, 478 U.S. at 190.
398 Id.
400 Bower, 478 U.S. at 191.
The Court then directs the opinion to history. It mentions that proscriptions against homosexual conduct have “ancient roots.” Sodomy was a criminal offense at common law and was forbidden in the original 13 states when the Bill of Rights was ratified. Until as recently as 1961 all 50 states had outlawed sodomy and at the time the Bowers decision was handed down, 24 states and the District of Columbia still had criminal penalties for sodomy performed in private. The Court accuses the Defendant of being facetious when he claims that the right to engage in homosexual conduct is a right deeply rooted in the Nation’s history.

The Court declined to take a more expansive view of its authority to find the fundamental right the Defendant spoke of in the Constitution. The Court closes its argument by stating that the law is constantly based on notions of morality. It suggests that if all laws representing what are essentially moral choices were invalidated under Due Process, that the courts would be inundated by claims. As a result of this decision, the sodomy laws of those 25 states were upheld until another same-sex couple from Texas found themselves in the exact same situation, but with a slightly different statute and slightly different set of Justices sitting on the Supreme Court. With the subsequent decision of Romer as stare decisis, the chance that the sodomy laws would finally be invalidated was good.

2. Lawrence v. Texas

In 2001, police entered the home of John Geddes Lawrence in response to a reported weapons disturbance and found him engaging in homosexual activity with another man. The

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401 Id. at 192.
402 Id.
403 Id. at 193.
404 Id. at 194.
405 Id.
406 Id. at 196.
407 Id.
409 Lawrence, 539 U.S. at 562-63.
men were arrested and tried under a Texas law which prohibits “deviate sexual intercourse with another individual of the same-sex.” The appellate court of Texas upheld the conviction under *Bowers*, but the Supreme Court of the United States found that there was a compelling reason to overturn the *Bowers* decision. The cases were distinguished by the note of anti-gay discrimination. The Court justifies the *Bowers* decision in part because the Georgia statute involved prohibited those activities regardless of gender, while the Texas statute was specific to same-sex conduct. The result of this majority opinion overturned the *Bowers* opinion and stated that “The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.” Homosexuality was effectively decriminalized.

b. STATE’S ARGUMENT

When Lawrence and Garner were arrested they went before the Harris County Criminal Court and challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment. The Criminal Court rejected their arguments, so they appealed to the Court of Appeals for the Texas Fourteenth District. A divided court considered the constitutional argument, but ultimately affirmed the conviction. The majority opinion from the Court of Appeals indicated that they considered the decision from *Bowers v. Hardwick* to be the controlling law on federal due process at the time.

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410 Id. at 563.
411 Id. at 566.
412 Id.
413 Id.
414 Id. at 578.
415 Id. at 563.
416 Id.
417 Lawrence, 539 U.S. at 563.
418 Id.
a. COURT’S RESPONSE

The Court concluded the issue of Lawrence and Garner’s conviction by determining that both men were free as adults to engage in the private conduct of their relationship under the Due Process of Law.\textsuperscript{419} In order to make this conclusion it was necessary for the Court to reconsider the holding in \textit{Bowers}.\textsuperscript{420} The Court declares that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”\textsuperscript{421} In support of this ideal, it cites decades’ worth of decisions that invoke the constitutional right to privacy for all citizens.\textsuperscript{422}

The Court cites the failure of its predecessors to recognize that the issue in \textit{Bowers} was more than simply the right to engage in certain sexual conduct.\textsuperscript{423} It would be the equivalent of declaring that marriage was simply the right to have sexual intercourse.\textsuperscript{424} The Court recognizes that the statutes purport to do no more than prohibit a specific sex act, but that the implications of that restriction are much more far-reaching.\textsuperscript{425} By regulating the most private human contact these statutes seek to control a personal relationship which each person is free to choose without being punished as a criminal.\textsuperscript{426}

The liberty protected by the Constitution allows homosexuals to make the choice to enter upon a relationship in the confines of their own home and still retain their dignity as free persons.\textsuperscript{427} The Court allows that, as was stated in the \textit{Bowers} opinion, there are historical

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\item \textsuperscript{419} \textit{Id.} at 564.
\item \textsuperscript{420} \textit{Id.}
\item \textsuperscript{421} \textit{Id.} at 562.
\item \textsuperscript{423} \textit{Lawrence}, 539 U.S. at 567.
\item \textsuperscript{424} \textit{Id.}
\item \textsuperscript{425} \textit{Id.}
\item \textsuperscript{426} \textit{Id.}
\item \textsuperscript{427} \textit{Id.}
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grounds for this type of statute, but that they are more complex than the Bowers court indicated, are overstated, and contain an element of doubt.\textsuperscript{428} It also acknowledges that the Bowers Court was giving voice to the broader point that there have been condemnations of homosexual conduct as immoral for centuries.\textsuperscript{429} The Court also recognizes that for some this is not a mere concern, but a deeply seeded conviction on an ethical and moral principle.\textsuperscript{430} But those considerations do not answer the question before the Court, which is “whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”\textsuperscript{431}

The Court also considered post-Bowers decisions in making its own decision. They quote Planned Parenthood of Southeaster Pa. v. Casey\textsuperscript{432} to state that at the center of the liberty protected by the Fourteenth Amendment are the choices a person makes which are in turn central to personal dignity and autonomy.\textsuperscript{433} The LGBT community may seek autonomy, just as heterosexual persons do, for those reasons.\textsuperscript{434} The Court finally states that Bowers was not correct when it was decided, and it is not correct today.\textsuperscript{435} It should be and is now overruled.\textsuperscript{436}

Lawrence and Garner were not minors.\textsuperscript{437} No one was injured or coerced, nor was anyone situated in a relationship where consent might not easily be refused.\textsuperscript{438} There was no public conduct or prostitution involved.\textsuperscript{439} The State could not demean them or control their destiny by

\textsuperscript{428} Id. at 571.
\textsuperscript{429} Id.
\textsuperscript{430} Id.
\textsuperscript{431} Lawrence, 539 U.S. at 571.
\textsuperscript{432} 505 U.S. 833 (1992).
\textsuperscript{433} Id. at 851.
\textsuperscript{434} Lawrence, 539 U.S. at 574.
\textsuperscript{435} Id. at 578.
\textsuperscript{436} Id.
\textsuperscript{437} Id.
\textsuperscript{438} Id.
\textsuperscript{439} Id.
making their private sexual conduct a crime.\textsuperscript{440} The Court overturned the Texas Court of Appeals affirmation of the conviction and essentially struck down any remaining state statutes that purported to make homosexual sex a crime. Though the majority opinion touches very briefly on the moral implications of the \textit{Bowers} decision, Justice O’Connor’s concurring opinion sheds a bit more light on that aspect of the \textit{Lawrence} case.

Justice O’Connor points out that “Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality.”\textsuperscript{441} Justice Kennedy agrees with this supposition because he quotes \textit{Planned Parenthood of Southeast Pennsylvania}\textsuperscript{442} in his majority opinion: “‘[o]ur obligation is to define the liberty of all, not to mandate our own moral code.’”\textsuperscript{443} Justice O’Connor repeatedly takes the Texas statute to task for promoting specific morals to the disadvantage of a minority group.

Justice O’Connor reminds us that “[i]ndeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.”\textsuperscript{444} To uphold the morals of one group to the detriment of another is in essence destroying down the wall between church and state, because as we have seen many of these morals are based in religion. Justice O’Connor’s opinion, while only concurring, is important because it sheds much needed light on the veil that disguises the moral and religious leanings of those who oppose equal rights for gays, lesbians, and bisexual and transgendered people.

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\item[440] Id.
\item[441] \textit{Lawrence}, 539 U.S. at 582.
\item[443] \textit{Lawrence}, 539 U.S. at 571.
\item[444] Id. at 582
\end{footnotes}
V. ANALYSIS AND CONCLUSION

A. Analysis

The United States of America has a long history of using the government to further the agendas of the majority which causes, or results in, the oppression of minorities.\textsuperscript{445} As time has moved on, society has changed, and technology has advanced it has often fallen on the Supreme Court of the United States to ensure that those minorities’ rights are equally represented under the law.\textsuperscript{446} Today, the imposition of the majority’s Christian morals, represented by the religious right and marriage traditionalists, has ensured that the government is furthering their agenda while oppressing the rights of the minority, the LGBT community. The government is essentially upholding religious morality over civil equality.

The religious right and marriage traditionalists cite the deep roots of traditional marriage and its moral superiority by pointing backwards without looking backwards. The true history of marriage is one of an ever-changing and fluid institution that adapts to societal needs over time.\textsuperscript{447} Nor can the moral superiority of traditional marriage be reasonably supported by the Bible when read in the light of its actual history and intention.\textsuperscript{448} By allowing the majority to further its agenda of traditional marriage based on these tenuous claims, the government is taking a dangerous step toward destroying the wall built between church and state under the United States Constitution.\textsuperscript{449}

The role of courts in this heated debate between religious morality and civil equality has been to declare the prohibition of same-sex marriage unconstitutional. Because of the Defense


\textsuperscript{446} Id.

\textsuperscript{447} See generally COONTZ, supra note 18.

\textsuperscript{448} See generally HELMINIAT, supra note 57.

\textsuperscript{449} U.S. CONST. amend. 1 (congress shall make no law respecting an establishment of religion).
of Marriage Act, it is up to the state courts to determine whether their state’s statutes promote a legitimate government interest. While this is not the only means by which states have enacted marriage equality, the opinions handed down by these courts serve to illuminate the necessity of defending the rights of the LGBT community from the religious moral prejudices that stand behind the opposition to marriage equality. But these marriage cases were borne of a greater injustice to the LGBT community which consisted of outright discrimination and unwarranted criminalization.

Even when the government was working to lift up the minority by protecting the LGBT community in Colorado from discrimination, the majority sought to oppress them by enacting a constitutional amendment that essentially stopped the government from making any laws in favor of the minority. Religious morality was the key factor as the State argued that those who were morally offended by homosexuality should be allowed to discriminate on that basis. But civil equality was victorious as both the Colorado and the United States Supreme Court decided that this form of oppression was a step too far.

With regard to homosexual conduct and the government’s attempt to criminalize certain sexual proclivities, the Court came to two different decisions. First, the religious morality of the Supreme Court in 1986 overcame the idea of civil equality for all citizens when a Georgia statute penalizing sodomy was upheld. But with the support of later opinions and a gradual shift in the sensibilities of the general public, civil equality won out and that original decision

\footnotesize{451} Romer, 517 U.S. 620; Lawrence, 539 U.S. 558.
\footnotesize{452} See Religious Tolerance, supra note 334; see also Colorado for Family Values, supra note 334; see also National Legal Fund, supra note 334.
\footnotesize{453} Romer, 517 U.S. at 635.
\footnotesize{454} Bowers, 478 U.S. 186; Lawrence, 539 U.S. 558.
\footnotesize{455} Bowers, 478 U.S. at 196.
was overturned. In a major victory for the minority, all state statutes purporting to criminalize the private sexual conduct of homosexuals were invalidated.456

B. Conclusion

The idea of discriminating against someone because your own personal moral beliefs is not a new one. One of the major points made by Paul in his letter to the Romans was to show the Jews and Gentiles their own personal moral prejudices and to get them to set those prejudices aside to create a more effective Christian church.457 Having religious convictions and morals is not inherently wrong, but to use those personal beliefs to justify the oppression of a class of citizens who happen to be in the minority is wrong.

Throughout history those who use religion to feel morally superior have oppressed classes of citizens, denigrated those of whom they disapproved, and even propagated genocide in the name of that religion. The United States has the luxury of religious freedom, but also freedom from religion and yet the government continues to allow religious morality to control civil equality. What must be recognized is that the United States is a nation of great diversity and its citizens should take pride in that diversity. What is happening instead is the majority suppressing the minority out of some misplaced sense of shame or, worse, hatred. The legislature’s job is to represent its citizens and so there is no guarantee that the executive and legislative branches of any government, state or Federal, will recognize the need to protect the minority’s equality interest.

But the Judicial branch has a responsibility to uphold the Constitution and so long as they have the Establishment Clause, as well as the Due Process and Equal Protection Clauses, justice

456 Lawrence, 539 U.S. at 578-79.
457 HELMINIAK, supra note 57, at 100.
will prevail for those who would be oppressed. Ultimately, religious morality cannot be allowed to succeed over civil equality.