

Creating an American Underclass: the Federal Government's Refusal to Recognize Gay  
Americans' Fundamental Right to Marry  
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## **I. INTRODUCTION**

On November 18, 2003, gay people in Massachusetts rejoiced. Finally, they had validation that they were not, as they had been told by society for years, “second class citizens.”<sup>1</sup> Massachusetts was the first state to “affirm the dignity and equality of all individuals” with respect to civil marriage, but it was not the last.<sup>2</sup> Connecticut in 2008<sup>3</sup>, Iowa in 2009<sup>4</sup>, Vermont in 2009<sup>5</sup>, and New Hampshire in 2010<sup>6</sup> legalized same-sex marriage. History has proven to be a virtual Goliath in the battle to legalize same-sex marriage, and gay marriage opponents often cite the historical justification in asserting their stance. There has been a “long-standing statutory understanding, derived from the common law, that ‘marriage’ means the lawful union of a woman and a man.”<sup>7</sup> However, “constitutional jurisprudence is clear that neither longevity nor tradition alone can justify the continuation of a discriminatory rule.”<sup>8</sup> “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”<sup>9</sup> Agreeing with Justice Holmes, Justice Blackmun in 1986 “believe[d] that ‘[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds

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<sup>1</sup> Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003)

<sup>2</sup> Id.

<sup>3</sup> Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407 (Conn. 2008)

<sup>4</sup> Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

<sup>5</sup> Vt. Stat. Ann. tit. 15, § 8 (2009)

<sup>6</sup> N.H. Rev. Stat. § 457:1-a (2010)

<sup>7</sup> Goodridge, 798 N.E. at 953

<sup>8</sup> Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 CONN. L. REV. 1397, 1397 (2009)

<sup>9</sup> Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))

upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>10</sup>

This paper provides background and analysis of how the federal government’s refusal to recognize gay Americans’ fundamental right to marry a person of his or her choice has created an underclass in the United States. In declining to rectify the denial of this right to homosexuals, the federal government is, in effect, endorsing the view that in the case of homosexuals, “separate but equal” is constitutionally permissible. Section II of this paper provides a historical overview and current standards with respect to homosexuality, marriage, and homosexual marriage. Section III details the standards used to support the constitutional arguments in favor of homosexual marriage: the Fourteenth Amendment’s Due Process, Equal Protection, and Privileges or Immunities Clauses.

## **II. HOMOSEXUALITY, MARRIAGE, AND HOMOSEXUAL MARRIAGE: PAST AND PRESENT**

Although the United States Supreme Court has remained silent on the question of whether laws prohibiting same-sex marriage are constitutional, the Court has recognized the value marriage holds in our society. “Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”<sup>11</sup> The Massachusetts Supreme Court, in its landmark decision recognizing there is no constitutional protection for laws discriminating against homosexuals in their choice to marry, found that “[b]ecause it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous

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<sup>10</sup> Bowers v. Hardwick, 478 U.S. 186, 199 (Blackmun, J., dissenting) (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897))

<sup>11</sup> Loving v. Virginia, 388 U.S. 1, 12 (1967) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942))

acts of self-definition.”<sup>12</sup> In order to fully understand the significance of the legalization of gay marriage in Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire (and to understand how many battles are yet to be won in the remaining states and under the federal constitution), it is helpful to trace the roots of marriage and homosexuality.

## **A. THE STRUGGLE FOR HOMOSEXUAL ACCEPTANCE**

### **1. Historical Roots**

“Lesbians and gay males have been the object of some of the deepest prejudice and hatred in American society.”<sup>13</sup> Gay people throughout history have been “despised more for what they are than for what they do,”<sup>14</sup> and “[d]epending on the country and century,” homosexuals “have been whipped, imprisoned, hanged, banished, lobotomized, ostracized, burned at the stake, or ignored to the point of virtual extinction.”<sup>15</sup> “[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.”<sup>16</sup>

Evidence of homosexuality dates back to the times of Plato, who promoted love and sex between men, and the Greek poet Sappho (of the isle of Lesbos), who wrote a multitude of poems “about her passionate love for women.”<sup>17</sup> At that time, Greeks did not look favorably upon “freeborn, adult men taking the ‘passive’ role in any sexual relationship, either with a woman or with another man.”<sup>18</sup> During the fourteenth and fifteenth centuries, Italian religious officials heavily objected to any type of sex other than that done for procreation because a plague

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<sup>12</sup> Goodridge, 798 N.E.2d at 955

<sup>13</sup> Gary B. Melton, *Public Policy and Private Prejudice*, 44 AM. PSYCHOLOGIST 933, 934 (1989)

<sup>14</sup> Richard Posner, *Sex and Reason* 346 (1992)

<sup>15</sup> Lisa Keen & Suzanne B. Goldberg, *Strangers to the Law Gay People on Trial 1* (Martha Minow, Elaine Scarry, Austin Sarat, eds., The University of Michigan Press 2001) (1998)

<sup>16</sup> Lawrence v. Texas, 539 U.S. 558, 571 (2003)

<sup>17</sup> Lisa Keen & Suzanne B. Goldberg, supra, at 76

<sup>18</sup> Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L. J. 1073, 1087 n. 77 (1988)

had radically reduced the population in Florence.<sup>19</sup> Thus, one scholar opined that it was not necessarily that homosexuality was deemed wrong, but that it was feared that if men were fornicating with each other (instead of procreating with women), they were “wasting their ‘seed.’”<sup>20</sup> Similarly, in the early days of Christianity, “hostility was directed to all sexual experiences not intended to lead to procreation within marriage – homosexual or heterosexual.”<sup>21</sup> The Mbuti Pygmy tribe in Africa subscribed to the same belief: the Mbuti were not “rejecting homosexuality so much as favoring procreation very strongly.”<sup>22</sup>

Religious beliefs are often cited as justification for adherence to the centuries old notion that homosexuality is somehow wrong or immoral.<sup>23</sup> Several books in the Bible discuss homosexuality, and none provide any acceptance for it. Speaking of “shameful lusts,” the Book of Romans describes how men “abandoned natural relations with women and were inflamed with lust for one another. Men committed indecent acts with other men, and received in themselves the due penalty for their perversion.”<sup>24</sup> The Book of Leviticus is no more forgiving of homosexuality: “You shall not lie with a man as one lies with a woman; it is an abomination. . . . If there is a man who lies with a man as those who lie with a woman, both of them have committed a detestable act; they shall surely be put to death, their blood is upon them.”<sup>25</sup>

## **2. Current Attitudes**

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<sup>19</sup> Lisa Keen & Suzanne B. Goldberg, *supra*, at 77

<sup>20</sup> *Id.* (quoting Jonathon Ned Katz, *The Invention of Heterosexuality* 38 (Dutton 1995))

<sup>21</sup> David F. Greenberg, *The Construction of Homosexuality* 227 (University of Chicago Press 1990) (1988)

<sup>22</sup> David F. Greenberg, *supra*, at 87 (citing Colin M. Turnbull, *Wayward Servants: The Two Worlds of the African Pygmies* (Natural History Press 1965))

<sup>23</sup> *Goodridge*, 798 N.E.2d at 948

<sup>24</sup> Romans 1:27

<sup>25</sup> Leviticus 18:22-23; 20:13

The hatred continued to flourish in the twentieth century. On October 12, 1998, Matthew Shepard died.<sup>26</sup> Five days earlier, he had been tortured so severely that on “Matt’s brutally disfigured face, . . . the only spots not covered in blood were the tracks cleansed by his tears.”<sup>27</sup> The offense he committed to warrant this torment? Being gay. Two heterosexual men were so repulsed by his homosexuality that they decided to punish Matthew Shepard with death.<sup>28</sup> In the same year, James Byrd, Jr. was similarly punished for being gay: he was tied to the back of a truck, dragged, and beheaded.<sup>29</sup> These two deaths prompted Congress to take action. In October 2009, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act was signed into law.<sup>30</sup> The Act makes it a crime for anyone (not just state actors) to cause or attempt to cause a person bodily injury based on, *inter alia*, the intended victim’s sexual orientation.<sup>31</sup>

The legislature has not been alone in efforts to decriminalize homosexuality. In 2003, the Supreme Court was asked to determine the constitutionality of a Texas law that prohibited sodomy between homosexuals only; heterosexual sodomy was not a crime under the statute.<sup>32</sup> The Court found the statute unconstitutional and held Texas “cannot demean [the homosexual petitioners’] existence or control their destiny by making their private sexual conduct a crime.”<sup>33</sup> In reaching this conclusion, the Court was forced to reconsider its holding seventeen years prior in *Bowers v. Hardwick*.<sup>34</sup> The Court in *Bowers* was required to determine the constitutionality of a Georgia statute that made sodomy between both homosexuals and heterosexuals a crime.<sup>35</sup>

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<sup>26</sup> Beth Loffreda, *Losing Matt Shepard Life and Politics in the Aftermath of Anti-Gay Murder* (Columbia University Press 2000)

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Joyce King, *Hate Crime: The Story of a Dragging in Jasper, Texas* (Pantheon 2002)

<sup>30</sup> 18 U.S.C. § 249 (2009)

<sup>31</sup> *Id.*

<sup>32</sup> *Lawrence*, 539 U.S. at 563; Tex. Penal Code Ann. §§ 21.01-21.06(a) (2003)

<sup>33</sup> *Lawrence*, 539 U.S. at 578

<sup>34</sup> *Id.* at 564

<sup>35</sup> 478 U.S. 186, 187-88 (1986)

*Bowers* held the state statute constitutional on the grounds there is no fundamental right to engage in acts of sodomy.<sup>36</sup> The *Bowers* Court held Georgia voters' belief that sodomy was immoral was sufficient justification to pass muster under the Due Process Clause. Justice Blackmun dissented and opined the "case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be left alone.'"<sup>37</sup> Justice Stevens also wrote a vigorous dissent in which he attacked the majority's acceptance of the morality justification for upholding the sodomy statute.<sup>38</sup> "Although the meaning of the principle that 'all men are created equal' is not always clear, it surely must mean that every free citizen has the same interest in 'liberty' that the members of the majority share. . . . the homosexual and the heterosexual have the same interest in deciding how he will live his own life."<sup>39</sup> Justice Stevens, similarly to Justice O'Connor's concurrence in *Lawrence*, objected to the creation of an "underclass" in which to place homosexuals.<sup>40</sup> "A policy of selective application must be supported by a neutral and legitimate interest – something more substantial than a habitual dislike for, or ignorance about, the disfavored group."<sup>41</sup>

In expressly overruling *Bowers* and adopting the views of Justice Stevens' dissent in *Bowers*, the *Lawrence* Court held "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. . . . [*Bowers*'] continuance as

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<sup>36</sup> *Id.* at 192

<sup>37</sup> *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (quoting *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))

<sup>38</sup> *Id.* at 216 (Stevens, J., dissenting)

<sup>39</sup> *Id.* at 218

<sup>40</sup> *Id.* (quoting *Lawrence*, 539 U.S. at 584 (O'Connor, J., concurring in the judgment) (quoting *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring)))

<sup>41</sup> *Id.* at 219

precedent demeans the lives of homosexual persons.”<sup>42</sup> In so finding, the Court considered and reaffirmed several of its holdings in cases prior to *Bowers*.

In *Griswold*, the Court struck down a state statute that made it a crime to use or aid a married person in the use of contraception.<sup>43</sup> The *Griswold* Court reached this holding on the grounds the Constitution protects the right to privacy in “the protected space of the marital bedroom.”<sup>44</sup> Seven years after *Griswold*, the Court in *Eisenstadt* extended that holding to a state statute that barred contraceptive use by unmarried persons.<sup>45</sup> The *Eisenstadt* Court agreed with the lower court’s opinion that the statute was at odds with “fundamental human rights” and further explained, “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>46</sup> The *Lawrence* Court also looked to the landmark decision in *Roe v. Wade*, which held a woman has a constitutional right to have an abortion “as an exercise of her liberty under the Due Process Clause” of the Fourteenth Amendment.<sup>47</sup> “*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”<sup>48</sup> The *Lawrence* Court held these precedents “as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the

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<sup>42</sup> *Lawrence*, 539 U.S. at 575; 578

<sup>43</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965)

<sup>44</sup> *Id.* at 485

<sup>45</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972)

<sup>46</sup> *Eisenstadt*, 405 U.S. at 453 (emphasis in original)

<sup>47</sup> *Lawrence*, 539 U.S. at 565 (discussing *Roe v. Wade*, 410 U.S. 113 (1973))

<sup>48</sup> *Id.*



relationship” between homosexuals, and the “liberty protected by the Constitution allows homosexual persons the right to make this choice” to engage in sodomy.<sup>49</sup>

The *Lawrence* Court also relied on two cases decided subsequent to *Bowers*, *Casey* and *Romer*, in making the decision to overrule *Bowers*.<sup>50</sup> Giving continued force to the Court’s holding in *Casey*, the *Lawrence* Court observed the “*Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>51</sup>

“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.<sup>52</sup>

In *Romer*, the Court was faced with an amendment to the Colorado Constitution that identified and isolated homosexuals as a class and then declared that class would not be protected under state antidiscrimination laws.<sup>53</sup> Striking it down as unconstitutional, the Court found the amendment “was ‘born of animosity toward the class of persons affected’ and further that it had no rational relation to a legitimate government purpose.”<sup>54</sup> Invalidating the amendment as violative of the Equal Protection Clause, the *Romer* Court borrowed rationale from the seminal *Shelley v. Kraemer* and held “‘Equal Protection of the laws is not achieved through

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<sup>49</sup> *Id.* at 567

<sup>50</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Romer v. Evans*, 517 U.S. 620 (1996)

<sup>51</sup> *Lawrence*, 539 U.S. at 573-74

<sup>52</sup> *Casey*, 505 U.S. at 851

<sup>53</sup> *Romer v. Evans*, 517 U.S. 620 (1996)

<sup>54</sup> *Id.* at 634

indiscriminate imposition of inequalities.”<sup>55</sup> Because “‘class legislation . . . [i]s obnoxious to the prohibitions of the Fourteenth Amendment,’” the Court held the Colorado amendment categorized “‘homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A state cannot so deem a class of persons a stranger to its laws.’”<sup>56</sup> Writing separately in *Lawrence*, Justice O’Connor stated “‘in *Romer v. Evans*, we disallowed a state statute that ‘impos[ed] a broad and undifferentiated disability on a single named group’ – specifically, homosexuals.”<sup>57</sup> Justice O’Connor found the statute in *Lawrence* invalid on Equal Protection grounds (rather than the majority’s Due Process basis) because the statute only made it illegal for gay people to engage in sodomy, and in doing so, “‘Texas treats the same conduct differently based solely on the participants. Those harmed by the law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by’” the sodomy law.<sup>58</sup> Justice O’Connor viewed the Texas statute as creating inequality among two classes of citizens by giving homosexuals a “‘disfavored legal status.’”<sup>59</sup> The Fourteenth Amendment’s Equal Protection Clause “‘neither knows nor tolerates classes among citizens.’”<sup>60</sup> The sodomy statute at issue “‘subjects homosexuals to a ‘lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with ‘the Equal Protection Clause.’”<sup>61</sup>

## **B. THE INSTITUTION OF MARRIAGE**

“Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who

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<sup>55</sup> *Romer*, 517 U.S. at 633 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948))

<sup>56</sup> *Id.* at 635 (quoting *Civil Rights Cases*, 109 U.S. 3, 24 (1883))

<sup>57</sup> *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring in the judgment) (quoting *Romer*, 517 U.S. at 632)

<sup>58</sup> *Id.* at 581 (O’Connor, J., concurring in the judgment)

<sup>59</sup> *Id.* at 584

<sup>60</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)

<sup>61</sup> *Lawrence*, 539 U.S. at 584 (O’Connor, J., concurring in the judgment) (quoting *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring))

choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits.”<sup>62</sup>

## 1. Historical Roots

Although there is some authority that marriage has been “since pre-colonial days . . . a wholly secular institution,”<sup>63</sup> certainly religion has played an important role in shaping the meaning of marriage throughout history.<sup>64</sup> “Christ taught that marriage was created by God as a union of a man and a woman who had been emancipated from their childhood home.”<sup>65</sup> A leader in the Greek Church in the late fourth and early fifth centuries, Saint John Chrysostom believed God created marriage in order to promote chastity and procreation (with chastity taking priority).<sup>66</sup> Indeed, even Christ himself was said to be married to the Church, with Christ the bridegroom and the Church his bride.<sup>67</sup> The Catholics were not alone in the high esteem they gave to marriage. So too did the Protestants, Calvinists, and Anglicans; the Lutherans regarded marriage as one of “the three foundational estates of the earthly kingdom, alongside the clergy and the magistracy.”<sup>68</sup> “Marriage is more than a relationship sanctioned by our laws. It is a fundamental and ancient social institution that has existed in our state from before its founding and throughout the world for millennia.”<sup>69</sup> Edward Westermarck, a nineteenth century philosopher and sociologist, observed the social theorist Lewis H. Morgan had developed a theory that there have been at least fifteen distinct phases in the evolution and development of

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<sup>62</sup> Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003)

<sup>63</sup> Goodridge, 798 N.E.2d at 954

<sup>64</sup> John Witte Jr., *From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition* (Family, Religion, and Culture) 16 (Westminster John Knox Press 1997)

<sup>65</sup> Id.

<sup>66</sup> Id. at 20

<sup>67</sup> Id.

<sup>68</sup> Id. at 43

<sup>69</sup> Kerrigan, 957 A.2d at 503 (Borden, J., dissenting)

marriage over time.<sup>70</sup> Prior to the “single pair” marriage customary in modern times, one of the first of these fifteen phases included marriage between siblings, which is evidenced by, *inter alia*, the marriage of the Greek king Herod to his sister and of Cleopatra to her brother.<sup>71</sup> The evolution of marriage saw the subordination of wives to their husbands; at common law, “a woman’s legal identity all but evaporated into that of her husband.”<sup>72</sup>

Regardless of the debate about the origins of marriage as an institution, there seems to be a consensus at least about the sheer longevity of the practice. The Supreme Court recognizes “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”<sup>73</sup> A person’s decision to marry “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>74</sup>

## 2. Present Standards

Under federal statute, marriage is presently defined as “only a legal union between one man and one woman as husband and wife.”<sup>75</sup> The Massachusetts Supreme Court indicates the “everyday meaning of ‘marriage’ is ‘the legal union of a man and a woman as husband and wife.’”<sup>76</sup> This definition necessarily excludes from its scope same-sex marriage, polygamy, and bestiality. The majority of states adhere to the same definition, with five exceptions; Massachusetts, Connecticut, Iowa, Vermont, New Hampshire have all declared same-sex marriage legal, either by statute or judicial opinion.<sup>77</sup> Although the remaining states have not legalized gay marriage, some have taken steps to afford gay couples marriage-type rights. New

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<sup>70</sup> Edward Alexander Westermarck, *The History of Human Marriage* 3 (Macmillan & Co. 1901) (1891)

<sup>71</sup> *Id.*

<sup>72</sup> *Goodridge*, 798 N.E.2d at 967 (referencing C.P. Kindregan, Jr. & M.L. Inker, *Family Law and Practice* §§1.9 and 1.10 (3d ed. 2002))

<sup>73</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1941))

<sup>74</sup> *Id.*

<sup>75</sup> 1 U.S.C. § 7 (1996)

<sup>76</sup> *Goodridge*, 798 N.E.2d at 952 (quoting *Black’s Law Dictionary* 986 (7th ed. 1999))

<sup>77</sup> *Goodridge*, 798 N.E.2d 941; *Kerrigan*, 957 A.2d 407; *Varnum*, 763 N.W.2d 862; Vt. Stat. Ann. tit. 15, § 8; N.H. Rev. Stat. § 457:1-a

Jersey recognizes same-sex civil unions; California, Maine, Washington, Nevada, and Oregon offer domestic partnerships; and Hawaii offers “reciprocal beneficiary rights” to same-sex couples.<sup>78</sup>

### C. HOMOSEXUAL MARRIAGE

Having examined the histories of both homosexuality and marriage, it is evident there has been a long tradition of limiting marriage to one man and one woman. Indeed, opponents of same-sex marriage often rely on this historical justification for continuing the status quo and excluding homosexuals from the benefits and privileges of being married. New Jersey, for example, “rest[ed] its case on age-old traditions, beliefs, and laws, which have defined the essential nature of marriage to the union of a man and a woman. The long-held historical view of marriage, according to the State, provides a sufficient basis to uphold the constitutionality of marriage statutes.”<sup>79</sup> Connecticut state officials made a similar argument (although they were ultimately unsuccessful): limiting marriage to one man and one woman is constitutionally permissible because “that is the definition of marriage that has always existed.”<sup>80</sup> This argument is not without support- even from the Supreme Court. Justice Scalia opined that “when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.”<sup>81</sup> In regard to the constitutionality of a long-standing rule, its “validation is in its pedigree.”<sup>82</sup> However, Justice Scalia also recognized that “preserving the traditional institution of marriage” is just a kinder way of describing the

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<sup>78</sup> Kathy Belge, *Places where Gay Civil Unions are Legal* (2010), [http://lesbianlife.about.com/cs/wedding/a/wheremarriage\\_2.htm](http://lesbianlife.about.com/cs/wedding/a/wheremarriage_2.htm)

<sup>79</sup> *Lewis v. Harris*, 908 A.2d 196, 206 (N.J. 2006)

<sup>80</sup> *Kerrigan*, 957 A.2d at 478

<sup>81</sup> *U.S. v. Virginia*, 518 U.S. 515, 569 (1996) (Scalia, J., dissenting) (quoting *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting))

<sup>82</sup> *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990)

State's moral disapproval of same-sex couples.<sup>83</sup> However, the Supreme Court has been clear throughout its jurisprudence that “[n]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack.”<sup>84</sup> The Massachusetts Supreme Court realized that while history has been dominated by the view that marriage is between a man and woman only, “history cannot and does not foreclose the constitutional question.”<sup>85</sup> If history was the only justification required to pass constitutional muster, “[s]tates could insulate discriminatory practices simply by showing that they had engaged in those practices for years, if not decades.”<sup>86</sup>

Indeed, history has proven a formidable opponent in the battle to achieve equality in marriage for homosexuals. That opponent was finally defeated, in Massachusetts at least, in 2003 when the state Supreme Court held “civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.”<sup>87</sup> The court reached its holding upon the proposition that the state constitution did not permit the “creation of second-class citizens” and demanded equality for all.<sup>88</sup> By not permitting an individual to marry the person of his or her choice, that individual is “arbitrarily deprived of membership in one of our community’s most rewarding and cherished institutions.”<sup>89</sup> Civil marriage is a “social institution of the highest importance,” and the court points out that institution is a creation of the government, rather than a religious invention.<sup>90</sup> The state does not require any type of religious celebration or ceremony in order to marry.<sup>91</sup> The court described every civil marriage as having three actors: two spouses

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<sup>83</sup> Lawrence, 539 U.S. at 602 (Scalia, J., dissenting)

<sup>84</sup> Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) (quoting Williams v. Illinois, 399 U.S. 235, 239 (1970))

<sup>85</sup> Goodridge, 798 N.E.2d at 953

<sup>86</sup> Suzanne B. Goldberg, supra note 8, at 1403 (2009)

<sup>87</sup> Goodridge, 798 N.E.2d at 969

<sup>88</sup> Id. at 948

<sup>89</sup> Id. at 949

<sup>90</sup> Id. at 954

<sup>91</sup> Id.

and the state.<sup>92</sup> Despite being an important component in religious history, the court is clear that that justification is not sufficient to continue to deny same-sex partners the ability to marry; it is Massachusetts, not any church, that legally marries a couple.<sup>93</sup>

The Goodridge court emphasized the array of benefits marriage bestows upon a couple.<sup>94</sup> Civil marriage fulfills desires and yearnings for “mutuality, companionship, intimacy, fidelity, family, . . . security, safe haven, and [a] connection that express[es] our common humanity.”<sup>95</sup> Further, marriage yields enormous benefits in a more tangible sense, including rights “touching nearly every aspect of life and death.”<sup>96</sup> Included in these benefits are property rights, like joint income tax filing, tenancy by the entirety, automatic inheritance rights, alimony benefits upon divorce, the right to bring claims for wrongful death or loss of consortium upon the death of a spouse, and punitive damages in successful tort actions.<sup>97</sup> In addition to property rights, spouses enjoy certain evidentiary rights, like the prohibition on testifying against one’s spouse; the right to take leave to care for individuals related by marriage; “an automatic ‘family member’ preference to make medical decisions . . . ; the application of predictable rules of child custody . . . ; priority rights to administer the estate of a deceased spouse . . . ; and the right to interment in the lot or tomb owned by” a deceased spouse.<sup>98</sup>

Without enjoying the right to marry someone of the same sex, gay individuals are arbitrarily denied these enormous benefits. Although it is true that, at least theoretically, civil union or domestic partnership statutes could rectify this by providing these benefits to homosexual couples, it is still not enough. The “separate but equal” reasoning is not unlike the

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<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> Id. at 954-55

<sup>95</sup> Id.

<sup>96</sup> Id. at 955-56

<sup>97</sup> Id.

<sup>98</sup> Id. at 956

logic to which the Supreme Court subscribed in upholding the constitutionality of racial segregation in *Plessy v. Ferguson*.<sup>99</sup> Since 1954, however, *Plessy*'s "separate but equal" doctrine with respect to racial segregation has no place in the United States.<sup>100</sup> When a state singles out a class of individuals, homosexuals, and creates a rule for them that is different than others, i.e. not being allowed to marry, we are reverting to the times of *Plessy*, when separate but equal was accepted as a rule of law. In refusing to declare states' prohibitions on same-sex marriage unconstitutional, the federal government is promulgating the creation of an American "underclass"<sup>101</sup> and telling members of that underclass, homosexuals, that they just are not good enough to enjoy the liberty and privilege to marry a person of their own choosing or the equal protection of state marriage statutes.

Although it is true homosexuals are not absolutely denied the right to marry (they may technically still marry a person of the opposite sex), "the right to marry means little if it does not include the right to marry the person of one's choice."<sup>102</sup> The United States Supreme Court seems to agree: in 1978 the Court declared the right to marry as "part of the fundamental 'right to privacy' implicit in the Fourteenth Amendment's Due Process Clause," and further that "[l]aws may not interfere directly and substantially with the right to marry."<sup>103</sup> Like the United States Supreme Court's declaration that a prohibition on interracial marriage violates the Equal Protection and Due Process Clauses, a prohibition on same-sex marriage is unconstitutional in the same ways.<sup>104</sup> "Whether and whom to marry, how to express sexual intimacy, and whether

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<sup>99</sup> 163 U.S. 537 (1896)

<sup>100</sup> *Brown v. Board of Ed.*, 347 U.S. 483 (1954)

<sup>101</sup> *Plyler*, 457 U.S. at 239 (Powell, J., concurring)

<sup>102</sup> *Goodridge*, 798 N.E.2d at 958

<sup>103</sup> *Zablocki v. Redhail*, 434 U.S. 374, 384-87 (1978)

<sup>104</sup> *Id.* at 958 (citing *Loving v. Virginia*, 388 U.S. 1 (1967))



and how to establish a family- these are among the most basic of every individual's liberty and due process rights.”<sup>105</sup>

In Goodridge, the state made four primary arguments in its attempt to declare the marriage law constitutional, and the court debunked each in turn.<sup>106</sup> First, the state argued heterosexual-only marriage is necessary in order to encourage procreation.<sup>107</sup> The court, however, pointed out that neither the ability to conceive a child nor the intention to do so is a prerequisite to obtaining a marriage license; heterosexuals who have no desire or intention or ability to have children are nevertheless permitted to marry.<sup>108</sup>

Second, the state argued heterosexual parenting produces a better environment for children.<sup>109</sup> To this, the court held the “demographic changes of the past century make it difficult to speak of an average American family.”<sup>110</sup> Additionally, the state's argument was flawed in that a same-sex marriage ban would not result in a ban on homosexuals having and raising children; the effect of a gay marriage ban would, however, “prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of ‘a stable family structure in which children will be reared, educated, and socialized.’”<sup>111</sup> In fact, the majority held, children of same-sex couples would be penalized by prohibiting their parents from marrying.<sup>112</sup>

The state's third argument was that a same-sex marriage ban was necessary in order to conserve scarce state resources; the state argued same-sex couples have more financial

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<sup>105</sup> Id. at 959

<sup>106</sup> Id. at 961-65

<sup>107</sup> Id. at 961-62

<sup>108</sup> Id.

<sup>109</sup> Id. at 961

<sup>110</sup> Id. at 962-63

<sup>111</sup> Id. at 995 (Cordy, J., dissenting)

<sup>112</sup> Id. at 964

independence than married couples and thus would rely on state aid less.<sup>113</sup> The court found this argument ludicrous, as well. The court noted that the state had not shown how children and dependents of same-sex couples are less needy of state aid.<sup>114</sup> Additionally, nowhere in the heterosexual marriage statute was a requirement that a showing of financial dependence was a prerequisite to obtaining a marriage license.<sup>115</sup>

Finally, the state argued amending the marriage laws to allow homosexuals the right to marry would “trivialize or destroy the institution of marriage as it has historically been fashioned.”<sup>116</sup> The court disagreed and pointed out that proponents of same-sex marriage were not looking to abolish civil marriage; they only wanted to broaden its scope to include homosexuals.<sup>117</sup> The court made an interracial marriage comparison and reasoned that legalizing same-sex marriage would do no more harm to the institution than did allowing a person of one race to marry someone of a different race.<sup>118</sup> Having negated all of the state’s arguments in favor of limiting marriage to a man and woman only, the court held “civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.”<sup>119</sup> To conclude otherwise, to “limit[] the protections, benefits and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.”<sup>120</sup> If same-sex couples are prohibited from marrying, how can it possibly be said they are equally protected, receive due process, or enjoy all the privileges or immunities guaranteed to them under the Constitution?

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<sup>113</sup> Id. at 961

<sup>114</sup> Id. at 964

<sup>115</sup> Id.

<sup>116</sup> Id. at 965

<sup>117</sup> Id.

<sup>118</sup> Id.

<sup>119</sup> Id. at 969

<sup>120</sup> Id. at 968

### **III. STANDARDS FOR ASSESSING THE CONSTITUTIONALITY OF SAME-SEX MARRIAGE**

Both state and federal courts have used various constitutional provisions in assessing the validity of measures enacted concerning gay rights and, specifically, gay marriage. The Due Process and Equal Protection Clauses are the most widely used provisions for analysis of homosexual rights, but the Fourteenth Amendment's Privileges or Immunities Clause provides an independent basis for invalidating state bans on same-sex marriages.

#### **A. THE DUE PROCESS AND EQUAL PROTECTION CLAUSES**

“In matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts [of due process and equal protection] frequently overlap.”<sup>121</sup> The United States Supreme Court has the same view: “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”<sup>122</sup> The Due Process Clause has been used to invalidate Texas's ban on homosexual sodomy<sup>123</sup> and uphold a woman's right to have an abortion as an exercise of her liberty<sup>124</sup>. The Equal Protection Clause has been used to strike down state laws prohibiting the distribution of contraceptives to unmarried persons<sup>125</sup>, a state law that discriminated against “hippies” in terms of food stamp eligibility<sup>126</sup>, and an amendment to a state constitution that declined to extend discrimination protection to homosexuals<sup>127</sup>. Courts have also used the two Clauses in tandem in determining the constitutionality of state laws: a state law that denied marriage rights to same sex couples violated an individual's liberty and due process rights and also that person's access to the equal

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<sup>121</sup> Id. at 953

<sup>122</sup> Lawrence, 539 U.S. at 575

<sup>123</sup> Id.

<sup>124</sup> Roe, 410 U.S. 113; Casey, 505 U.S. 833

<sup>125</sup> Eisenstadt, 405 U.S. 438

<sup>126</sup> Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973)

<sup>127</sup> Romer, 517 U.S. 620

protection of the Massachusetts marriage law.<sup>128</sup> A ban on interracial marriage similarly impeded a person's liberty in deciding who to marry and denied that person equal protection of the Virginia marriage statute.<sup>129</sup>

In refusing to recognize gay Americans' fundamental right to marry a person of his or her choice, the states and the federal government are, in effect, segregating a specific group of individuals, homosexuals, and creating an "underclass" in which to place them. In prohibiting gay marriage, homosexuals receive the same kind of "disfavored legal status" Justice O'Connor found to be violative of the Equal Protection Clause. Despite this blatant constitutional violation, states continue to justify their discrimination by claiming to have a compelling interest in limiting marriage to a man and woman. The Constitution, the foundation of our country, does not protect bigotry. Laws that are born out of prejudice and animosity toward a specific class of individuals are precisely what the Equal Protection Clause is designed to prohibit. Nor does the Due Process Clause permit a state to deprive a person of the liberty to marry an individual of his or her choice. Neither a historical tradition of discrimination nor a selfish belief that homosexuality is somehow immoral are sufficient justifications to prohibit a gay person from exercising one of 'basic civil rights of man,' fundamental to our very existence and survival."<sup>130</sup>

## **B. THE PRIVILEGES OR IMMUNITIES CLAUSE**

In the wake of the Civil War, Congress passed the Civil Rights Act of 1866 and the Freedmen's Bureau Act in order to extend "birthright American citizenship" to all United States citizens.<sup>131</sup> The legislation proved to be insufficient in securing equality for black people,

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<sup>128</sup> Goodridge, 798 N.E.2d at 959

<sup>129</sup> Loving, 388 U.S. 1

<sup>130</sup> Loving, 388 U.S. at 12 (quoting Skinner, 316 U.S. at 541)

<sup>131</sup> Freedmen's Bureau Act 14 Stat. 27 (April 9, 1866)

however, in light of presidential vetoes, Southern opposition, and judicial activism.<sup>132</sup>

Representative John Bingham of Ohio wrote Section One of the Fourteenth Amendment in order to constitutionally achieve what the legislation was unable to accomplish.<sup>133</sup> The provisions in the Bill of Rights had been created in order to restrain the federal government from infringing those critical rights contained therein. The amendments comprising the Bill of Rights were “proposed and adopted largely because of fear that Government might unduly interfere with prized individual liberties.”<sup>134</sup> However, the states were not bound by those provisions and were free to impede those rights. Section One of the Fourteenth Amendment was designed to remedy this. The enactment of Section One was intended to guarantee the rights encompassed in the Bill of Rights to every American citizen- on both the state and federal level. Justice Black, in his Adamson dissent, opined Section One of the “Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights.”<sup>135</sup>

The Privileges or Immunities Clause provides “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>136</sup> What, then, are privileges or immunities? James Madison’s Federalist No. 42, in discussing the meaning of the terms as employed by the Privileges and Immunities Clause in Article IV, Section Two, used the words “privileges” and “rights” “interchangeably.”<sup>137</sup> In 1823, Justice Washington announced an opinion in the federal circuit in which he interpreted the terms to mean “those

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<sup>132</sup> See Dred Scott v. Sandford, which denied United States citizenship to black people

<sup>133</sup> Cong. Globe, 39th Cong., 1st Sess. 1291 (1866)

<sup>134</sup> Adamson v. California, 332 U.S. 46, 70 (1947) (Black, J., dissenting)

<sup>135</sup> Id. at 75

<sup>136</sup> U.S. Const. amend. XIV, §1

<sup>137</sup> James Madison, FEDERALIST NO. 42 (1788)

privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union.”<sup>138</sup> By way of illustration, Justice Washington described privileges and immunities as the right to be protected by the government, to enjoy life and liberty, to acquire property, and to seek happiness and safety.<sup>139</sup> Representative Rogers, an opponent of the Fourteenth Amendment, defined privileges and immunities as “all the rights we have under the laws of the country. . . . The right to marry is a privilege.”<sup>140</sup> Representative Rogers continued: “I hold if [the Fourteenth Amendment] ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities.”<sup>141</sup>

Representative Howard introduced the Fourteenth Amendment in the Senate and declared the goal of Section One was to curb state power and command them to respect the fundamental rights embraced under the terms “privileges” and “immunities.”<sup>142</sup> Indeed, it was Representative Bingham’s intention that the entire Bill of Rights be incorporated to the states through the enactment of the Privileges or Immunities Clause.<sup>143</sup> Section One of the Fourteenth Amendment “was designed to reinstate, to borrow Professor Barnett's imagery, an American ‘sea of [individual] liberty’ interrupted only occasionally by discrete ‘islands of government power[.]’”<sup>144</sup>

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<sup>138</sup> Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823)

<sup>139</sup> Id.

<sup>140</sup> Cong. Globe, 39th Cong., 1st Sess. 2538 (1866)

<sup>141</sup> Id.

<sup>142</sup> Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866)

<sup>143</sup> Michael Lawrence, *Second Amendment Incorporation Through the Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 19 (2007)

<sup>144</sup> Id. at 4 (citing Randy E. Barnett, *Restoring the Lost Constitution 1* (2004))

Despite the drafters' intent, the Supreme Court all but obliterated the Privileges or Immunities Clause in 1873.<sup>145</sup> The Slaughter-House Cases Court held the Privileges or Immunities Clause did not incorporate the Bill of Rights to the states.<sup>146</sup> Since that time, the Clause has successfully been used to invalidate a state law that restricted an individual's right to travel between states by limiting benefits a person could receive based upon what that person's former state would have provided; the law discriminated against one class of a state's citizens (those who had lived there less than twelve months) but not against another class (those who had lived there more than twelve months).<sup>147</sup>

The Privileges or Immunities Clause has not come close to serving Representative Bingham's intended purpose of full incorporation of the Bill of Rights, however. In fact, the Clause has remained dormant, with the exception of Saenz, and federal courts have instead used the Due Process Clause to enforce selective incorporation of only some of the Bill of Rights. This, however, is an incorrect approach to incorporation. Representative Bingham was explicit in his desire that Section One, of which he was the author, would incorporate the Bill of Rights to the states.

Among the privileges guaranteed to American citizens by Section One are fundamental rights; "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."<sup>148</sup> In fact, even opponents of the Fourteenth Amendment recognized the fundamental nature of the right to marry: "the right to marry is a privilege."<sup>149</sup> In addition to the rights delineated in the Bill of Rights, the Privileges or Immunities Clause encompassed pre-existing rights that had been retained and enjoyed by the people before the creation of the

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<sup>145</sup> Slaughter-House Cases, 83 U.S. 36 (1873)

<sup>146</sup> Id.

<sup>147</sup> Saenz v. Roe, 526 U.S. 489 (1999)

<sup>148</sup> Loving, 388 U.S. at 12, (quoting Skinner, 316 U.S. at 541)

<sup>149</sup> Cong. Globe, 39th Cong., 1st Sess. 2538 (1866)

Amendments. Among the privileges and immunities are the “natural rights of man.”<sup>150</sup> Marriage “is a fundamental and ancient social institution that has existed in our state from before its founding and throughout the world for millennia.”<sup>151</sup> Because the right to marry is a privilege that both pre-existed and is recognized by the Constitution, the Clause can properly be read as: “No State shall make or enforce any law which shall abridge the right to marry of citizens of the United States.” However, in forty-five states, the right of gay people to marry is abridged in clear violation of the Fourteenth Amendment. How is it that homosexuals are guaranteed equal protection under the law, yet the Constitution is failing to protect them from the state’s abridgement of their constitutionally protected privilege to marry someone of his or her choice? Matthew Shepard and James Byrd, Jr. were tortured and murdered for being gay. The country was understandably horrified, and Congress was prompted to take action. Why, then, are homosexuals continuing to be punished by state laws preventing them from the same benefits as heterosexuals? Further, why is the Supreme Court, bound by the Constitution, allowing the punishment to continue?

#### **IV. CONCLUSION**

More than fifty-five years ago, the Supreme Court held unconstitutional a policy of “separate but equal” because it was a tool used to discriminate against individuals based solely on their race.<sup>152</sup> This same “separate but equal” policy is being used by the states in order to create laws that do not afford its citizens the right to marry a person of the same sex. Despite the obvious unconstitutionality of these state laws, both the Supreme Court and Congress have refused to abolish the underclass into which homosexuals have been condemned. Neither history, individual opinions about morality, or religious beliefs are sufficient reasons to deny the

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<sup>150</sup> Cong. Globe, 39th Cong., 1st Sess. 1117 (Statement of Rep. Wilson) (1866)

<sup>151</sup> Kerrigan, 957 A.2d at 503

<sup>152</sup> Brown, 347 U.S. 483



fundamental right to marry to homosexuals. By creating an underclass of Americans and denying them their right to marry someone of the same sex, the states who prohibit gay marriage are violating the Due Process, Equal Protection, and Privileges or Immunities Clause of the fourteenth amendment. By choosing not to rectify these violations, both the Supreme Court and Congress have implicitly supported the continuing existence of this underclass and have allowed “separate but equal” to thrive once again in the United States.