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## Montana's Marriage Amendment: Unconstitutionally Denying a Fundamental Right

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# COMMENT

## MONTANA'S MARRIAGE AMENDMENT: UNCONSTITUTIONALLY DENYING A FUNDAMENTAL RIGHT

Lisa M. Polk\*

### I. INTRODUCTION

In November 2004, Montana voters enacted Constitutional Initiative 96 (“CI-96”) an amendment to the State Constitution defining marriage as a union strictly between a man and a woman.<sup>1</sup> In so doing, proponents of the bill successfully preempted a potential state constitutional challenge to Montana’s statutory prohibition on same-sex marriage.<sup>2</sup> Although CI-96, also known as the “Marriage Amendment,”

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1. MONT. CONST. art. XIII, § 7.

2. The Montana legislature enacted a statutory prohibition on same-sex marriage in 1997, codified in MONT. CODE ANN. § 40-1-401(1)(d) (2003).

makes a potential state constitutional challenge to the prohibition on same-sex marriage more difficult, it does not prevent such a challenge on federal grounds.<sup>3</sup>

Drawing from United States Supreme Court case law, this comment argues that Montana's Marriage Amendment is patently unconstitutional under the Fourteenth Amendment's Due Process and Equal Protection Clauses.<sup>4</sup> Over the last half century, the Court has consistently held that marriage is a fundamental right protected under the Federal Constitution. Importantly, the Court interprets the modern institution of marriage as encapsulating elements that can apply to same-sex relationships. The Court's decisions also construe the Fourteenth Amendment as guaranteeing lesbians and gays the same due process liberty interests and equal protection rights as heterosexuals. Montana cannot deprive lesbians and gays the right to marry unless there is a compelling state interest, or at the very least, a rationale reasonably related to a legitimate state interest. There is no compelling state interest and no reasonable rationale for denying same-sex couples the right to marry under Montana's Marriage Amendment.

Part II of this comment discusses the Massachusetts case *Goodridge v. Department of Health*<sup>5</sup> and Montana's subsequent enactment of CI-96. Part III chronologically discusses cases in which the United States Supreme Court held marriage is a fundamental right under the Fourteenth Amendment, protected by the Due Process Clause or the Equal Protection Clause, or both. Part IV argues that the traditional definition of marriage does not foreclose the lesbian and gay marriage debate because modern marriage embodies elements applicable to same-sex relationships. Part V examines *Lawrence v. Texas*<sup>6</sup> and its analysis of liberty under the Due Process Clause. Part VI analyzes *Romer v. Evans*,<sup>7</sup> where the Court held that the Equal

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3. The Montana Supreme Court has overruled constitutional amendments on procedural grounds, but never on substantive grounds. See *Cole v. State ex rel. Brown*, 2002 MT 32, 308 Mont. 265, 42 P.3d 760 (state senators and individual electors challenged the process by which voters approved term limits in the 1992 election); and *Marshall v. State ex rel. Cooney*, 1999 MT 33, 293 Mont. 274, 975 P.2d 325 (the court held that constitutional amendments must be voted on separately). Query: Would it be possible to find the Marriage Amendment unconstitutional because the fundamental rights in Article II would trump a miscellaneous provision found in Article XIII?

4. U.S. CONST. amend. XIV, § 1.

5. 798 N.E.2d 941 (Mass. 2003).

6. 539 U.S. 558 (2003).

7. 517 U.S. 620 (1996).

Protection Clause of the Fourteenth Amendment invalidated a Colorado voter initiative with a discriminatory effect on lesbians, gays or bisexuals. Finally, Part VII applies these holdings to Montana's Marriage Amendment and concludes that it violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and should therefore be repealed.

## II. GOODRIDGE AND MONTANA'S RESPONSE

### A. *Goodridge v. Department of Public Health*

In *Goodridge*, the Massachusetts Supreme Judicial Court held unconstitutional a statutory prohibition on same-sex marriage based on numerous provisions in the state constitution.<sup>8</sup> The court reasoned that “[m]arriage is a vital social institution . . . [that] brings stability to our society . . . [and] provides an abundance of legal, financial, and social benefits.”<sup>9</sup> Based on this understanding of marriage, the court held that the Massachusetts Constitution does not permit the Commonwealth to deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry.<sup>10</sup> The Massachusetts court emphasized that its decision was grounded in the state constitution and not the whims of social opinion: “Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach.”<sup>11</sup> Citing the United States Supreme Court’s language in *Lawrence*, the court concluded that its “obligation is to define the liberty of all, not to mandate our own moral code.”<sup>12</sup>

In *Goodridge*, the court focused on the “individual liberty and equality safeguards of the Massachusetts Constitution [that] protect both ‘freedom from’ unwarranted government intrusion into protected spheres of life and ‘freedom to’ partake

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8. *Goodridge*, 798 N.E.2d at 951, nn.7-8. “The plaintiffs alleged violation of the laws of the Commonwealth, including but not limited to their rights under arts. 1, 6, 7, 10, 12, and 16, and Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution.” *Id.* at 950.

9. *Id.* at 948.

10. *Id.* at 969.

11. *Id.* at 948.

12. *Id.* (quoting *Lawrence*, 539 U.S. at 571 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992))).

in benefits created by the State for the common good.”<sup>13</sup> In other words, the *Goodridge* court approached the constitutionality of same-sex marriage under both due process and equal protection analyses.<sup>14</sup> The court held that gays and lesbians have the same due process and equal protection rights as heterosexuals, therefore, the same liberty interests and the same marriage rights enjoyed by everyone else.<sup>15</sup> Using rational basis review, the court held that the government’s three reasons for prohibiting same-sex couples from marrying had no merit.<sup>16</sup> Specifically, prohibiting same-sex marriage does not further procreation, does not ensure the optimal setting for child rearing and does not preserve financial resources.<sup>17</sup>

### *B. Constitutional Initiative 96 – Montana’s Marriage Amendment*

In response to *Goodridge*, and fueled by a fear of same-sex marriage, thirteen states in 2004 amended their constitutions to define marriage as a union only between a man and a woman.<sup>18</sup> Montana voters passed CI-96 amending the Montana Constitution to provide that “only a marriage between one man and one woman shall be valid or recognized as marriage in this state.”<sup>19</sup> This amendment, written into Article XIII of the Montana Constitution, effectively prohibits marriages between persons of the same sex. In addition to Montana, the other states to pass such constitutional amendments are Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Dakota, Ohio, Oklahoma, Oregon and Utah.<sup>20</sup> Prior to 2004, Alaska, Hawaii, Nebraska, and Nevada already had such

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13. *Goodridge*, 798 N.E.2d at 959 (citations omitted).

14. *Id.* at 953.

15. *Id.* at 968.

16. *Id.* at 961. “For due process claims, rational basis analysis requires that statutes bear a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. For equal protection challenges, the rational basis test requires that ‘an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.’” *Id.* at 960 (citations and internal quotation marks omitted).

17. *Id.* at 961-64.

18. See National Gay and Lesbian Task Force, *Anti-Gay Marriage Measures in the U.S.* (Feb. 1, 2005) at <http://www.thetaskforce.org/community/marriagecenter.cfm> (click on PDF file under “Marriage Map – post Nov. 2, 2004 – February 1, 2005”).

19. MONT. CONST. art. XIII, § 7.

20. National Gay and Lesbian Task Force, *supra* note 18.

amendments.<sup>21</sup>

Like most states, Montana has had a statutory prohibition on same-sex marriage in its code for many years; in Montana's case, since 1997.<sup>22</sup> This law effectively kept lesbian and gay couples from marrying. However, the decision by the Massachusetts Supreme Judicial Court in *Goodridge* prompted opponents of same-sex marriage around the country, including in Montana, to have concerns about the constitutionality of their own state bans. Jeff Laszloffy, a Republican state representative from Laurel, Montana and the Executive Director of the Montana Family Foundation, spearheaded the movement to place the initiative on the 2004 ballot. The Montana Family Foundation urged individuals and churches to support CI-96 by providing yard signs obtainable through its website and encouraging individuals and churches to pay for advertisements in local newspapers.<sup>23</sup>

According to Laszloffy, the initiative responded to gay and lesbian activism across the country. Prior to the election, Laszloffy argued that "it's the gay community that is on the offensive. All of the amendments are to stop a movement that already exists."<sup>24</sup> Laszloffy asserted that he wrote CI-96 because he knew the issue would come before Montana courts and he "wanted to give judges a clear message on how the people of Montana want them to respond."<sup>25</sup> In other words, Laszloffy anticipated that a court might hold Montana's statutory prohibition on marriage unconstitutional. In an attempt to preempt the obvious legal battle ahead, he drafted CI-96 and asked the people of Montana to amend the state constitution. Montana voters complied, and in so doing, enacted an amendment that denies lesbian and gay couples the

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21. *Id.*

22. MONT. CODE ANN. § 40-1-401(1)(d) (2003). The states with statutory prohibitions as of February 2005 include: Alabama, Arkansas, Arizona, California, Colorado, Delaware, Florida, Hawaii, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia. National Gay and Lesbian Task Force, *supra* note 18.

23. Montana Human Rights Network, *Waging a Racist Campaign: The National Alliance Targets Montana*, 14 HUMAN RIGHTS NETWORK NEWS 6 (Nov. 2004), available at <http://www.mhrn.org/website.pdf>.

24. Julie Sparrow Carson, *Conflicted Agendas*, MISSOULA INDEPENDENT, Oct. 14, 2004, available at <http://www.missoulanews.com/News/News.asp?no=4390>.

25. *Id.*

fundamental right to marry in violation of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.<sup>26</sup>

### III. MARRIAGE IS A FUNDAMENTAL RIGHT

In 1942, the United States Supreme Court declared the importance of marriage in *Skinner v. Oklahoma*.<sup>27</sup> In that case, the Court overturned an Oklahoma law permitting sterilization of certain criminals, while simultaneously declaring “[m]arriage and procreation are fundamental.”<sup>28</sup> Since *Skinner*, the Court has continuously held that marriage is a fundamental right that may be deprived only if the government has a compelling purpose.<sup>29</sup>

In analyzing whether a person has the right to marry under the Federal Constitution, the Court has used the Due Process Clause or the Equal Protection Clause, or a combination of both. According to constitutional law scholar Erwin Chemerinsky, the Court often reaches the same result through either clause—the difference has to do with the phrasing of the constitutional argument.<sup>30</sup> Under due process, the issue is whether a sufficient purpose justifies the government’s interference with a fundamental right, while under equal protection, the issue is whether a sufficient purpose justifies the government discriminating as to who can exercise the right.<sup>31</sup> The Court has reaffirmed marriage as a fundamental right under the Fourteenth Amendment in several cases, including *Loving v. Virginia*,<sup>32</sup> *Boddie v. Connecticut*,<sup>33</sup> *Zablocki v. Redhail*,<sup>34</sup> and *Turner v. Safely*.<sup>35</sup>

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26. U.S. CONST. art. VI. See also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 4 (2d ed. 2002) (“Practically, the effect of the Supremacy Clause is that state and local laws are deemed preempted if they conflict with federal law.”).

27. 316 U.S. 535 (1942).

28. *Id.* at 541.

29. See *Meyer v. Nebraska*, 262 US 390, 399 (1923) where the Court held prior to *Skinner* that liberty under the Due Process Clause of the Fourteenth Amendment includes “the right of the individual . . . to marry, establish a home and bring up children.”

30. CHERMERINSKY, *supra* note 26, at 763.

31. *Id.*

32. 388 U.S. 1 (1967).

33. 401 U.S. 371 (1971).

34. 434 U.S. 374 (1978).

35. 482 U.S. 78 (1987). Multiple cases discuss the importance of marriage,

A. *Loving v. Virginia*

In 1967, *Loving* held unconstitutional Virginia's statutory ban on mixed race marriages based on both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.<sup>36</sup> In June of 1958, Richard Loving, a white man, and Mildred Jeter, a black woman, both Virginia residents, were married in the District of Columbia.<sup>37</sup> The couple subsequently moved to Caroline County, Virginia.<sup>38</sup> By October 1958, they faced arrest for violating the State's ban on interracial marriages.<sup>39</sup> Virginia convicted the Lovings under a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The first of the two statutes explained that "any white person and colored person" who left Virginia to marry and then returned would be punished under the law.<sup>40</sup> The second statute defined miscegenation as a felony punishable "by confinement in the penitentiary for not less than one nor more than five years."<sup>41</sup> In addition, the Virginia statutory scheme included a provision that all marriages between "a white person and a colored person" are automatically void without any judicial proceeding.<sup>42</sup>

After the Lovings pled guilty to the charges, the Virginia

including, but not limited to the following: *Griswold*, 381 U.S. at 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."); *Casey*, 505 U.S. at 847-48, 859 ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th Century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia* . . . . While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage . . . .") (alterations in original) (citations and internal quotation marks omitted); *Washington v. Glucksberg*, 521 U.S. 702, 726 (1997) ("The Due Process Clause . . . protect[s] certain fundamental rights and 'personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,' and . . . many of those rights and liberties 'involv[e] the most intimate and personal choices a person may make in a lifetime.'") (third alteration in original) (citations omitted) (emphasis added).

36. *Loving*, 388 U.S. at 2.  
 37. *Id.*  
 38. *Id.*  
 39. *Id.* at 2-3.  
 40. *Id.* at 4.  
 41. *Id.*  
 42. *Loving*, 388 U.S. at 4.



trial court sentenced them to a year in jail, but told the couple the sentence would be suspended if they left Virginia and never returned together for a period of twenty-five years.<sup>43</sup> In an opinion with sentiments strikingly familiar to today's arguments endorsing a ban on same-sex marriage, the trial judge in *Loving* stated:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.<sup>44</sup>

In response to the lower court's ruling, the Lovings appealed their convictions on the ground that Virginia's anti-miscegenation laws violated the Federal Constitution.<sup>45</sup> The Supreme Court of Virginia affirmed the convictions, and the Lovings appealed their case to the United States Supreme Court.<sup>46</sup>

In 1967, the year *Loving* was decided, sixteen states had statutory prohibitions on interracial marriage.<sup>47</sup> In addressing the constitutionality of Virginia's statutory ban on interracial marriages, the Court looked to the Fourteenth Amendment's Due Process and Equal Protection Clauses, which state in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."<sup>48</sup>

In defending its statutory scheme, Virginia set forth a two-fold argument. First, that with regard to equal protection, the miscegenation laws treated both blacks and whites as equals because both participants received punishment equally.<sup>49</sup> In backing this point, the State argued that during the ratification process of the Fourteenth Amendment, members of the Thirty-Ninth Congress and state legislatures asserted that penal laws

43. *Id.* at 3.

44. *Id.*

45. *Id.*

46. *Id.* at 3-4.

47. *Id.* at 6, n.5. The sixteen states with statutory prohibitions on interracial marriage when *Loving* was decided included: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Virginia, and West Virginia. Montana was one of the fourteen states to repeal its ban on interracial marriage in the fifteen years prior to *Loving*. The other states included: Arizona, California, Colorado, Idaho, Indiana, Maryland, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming. *Id.*

48. *Loving*, 388 U.S. at 2, n.1; U.S. CONST. amend. XIV, § 1.

49. *Loving*, 388 U.S. at 7-8.

satisfied equal protection if they similarly punished white and black participants.<sup>50</sup> Secondly, Virginia argued that its anti-miscegenation laws were rational because “the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.”<sup>51</sup>

The Court summarily rejected both arguments. Writing for a unanimous Court, Chief Justice Warren held the “racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the ‘integrity’ of all races.”<sup>52</sup> In reaching its conclusion, the Court first addressed the equal protection analysis. “[T]he Equal Protection Clause,” Chief Justice Warren wrote, “demands that racial classifications, especially suspect in criminal statutes, be subjected to the ‘most rigid scrutiny’ and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination.”<sup>53</sup>

The Court concluded that no legitimate purpose justified the statutory classifications and that racial discrimination marked the sole purpose behind the laws.<sup>54</sup> The Chief Justice noted that Virginia, dating back to the Racial Integrity Act of 1924, prohibited whites from marrying any nonwhite—with the exception of Pocahontas’s descendants—but permitted non-whites to intermarry without statutory interference.<sup>55</sup> This prohibition, Chief Justice Warren held, indicated that Virginia designed the statutes to maintain white supremacy.<sup>56</sup> As such, the Court held: “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”<sup>57</sup>

In addition to violating equal protection, the Court held that the anti-miscegenation statutes violated the Due Process Clause by “depriv[ing] all the State’s citizens of liberty without due process of law.”<sup>58</sup> In reaching this conclusion, the Court stressed

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50. *Id.* at 9-10.

51. *Id.* at 8.

52. *Id.* at 12, n.11.

53. *Id.* at 11 (citations omitted).

54. *Id.*

55. *Loving*, 388 U.S. at 5, n.4.

56. *Id.* at 11.

57. *Id.* at 12.

58. *Id.*

the importance of marriage as “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”<sup>59</sup> “The freedom to marry,” the Court noted, “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>60</sup> Chief Justice Warren ended the *Loving* opinion by declaring: “Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”<sup>61</sup>

### B. *Boddie v. Connecticut*

Four years after *Loving*, the Supreme Court held that a Connecticut law requiring all persons seeking a divorce to pay \$60 to cover filing fees and service of process violated the Due Process Clause.<sup>62</sup> The appellants, welfare recipients residing in Connecticut, brought a class action in federal court after the clerk of court informed them that their divorce paperwork would not be accepted unless they paid the required costs.<sup>63</sup> The appellants argued that the filing costs essentially barred indigent citizens from obtaining a divorce, which in turn prohibited these same people from entering into a new marriage.<sup>64</sup>

Writing for the Court, the second Justice Harlan reaffirmed *Skinner's* and *Loving's* holdings that marriage is a fundamental right.<sup>65</sup> In holding that the Connecticut law violated due process, the Court reasoned that a divorce is a necessary precondition to remarrying.<sup>66</sup> If the judicial process prevents indigents from divorcing because they cannot afford filing fees, it effectively prohibits the fundamental right to marry to these persons. The Court held that the Due Process Clause protects the right to judicial process when access to the courts affects a “fundamental human relationship” such as marriage.<sup>67</sup> To deprive a person of judicial process essential to obtaining a divorce, and in turn marriage, Connecticut had to show that a

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59. *Id.* (citing *Skinner*, 316 U.S. at 541).

60. *Id.*

61. *Loving*, 388 U.S. at 12.

62. *Boddie*, 401 U.S. at 372-74.

63. *Id.* at 372.

64. *Id.* at 372-73.

65. *Id.* at 376, 383.

66. *Id.* at 382-83.

67. *Id.* at 383.

necessary connection existed between the statute's requirements that a person pay money to file for a divorce and the State's reasons for such a requirement.<sup>68</sup>

In defending its statute, Connecticut argued that the divorce fee substantially prevented frivolous litigation, that the State rationally used the divorce fee and processed court costs to scarce resources, and that the law reasonably balanced the defendant's right to notice and the plaintiff's right to access.<sup>69</sup> The Court held that none of the State's arguments sufficiently overrode a person's interest in having access to a divorce.<sup>70</sup> Specifically, the Court determined that a litigant's assets are not necessarily connected to the seriousness of his or her motives for filing for a divorce.<sup>71</sup> In addition, courts could conserve time and prevent frivolous litigation by other means, such as penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process.<sup>72</sup> As for service costs, reliable alternatives existed to service by a State-paid sheriff—such as postal mail.<sup>73</sup> Thus, the Court held that Connecticut could not constitutionally block an indigent's access to the judicial process by requiring a fee. Justice Harlan concluded:

[G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.<sup>74</sup>

In separate concurring opinions, both Justice Douglas and Justice Brennan stated they would have used an equal protection analysis in determining Connecticut's statute unconstitutional. Justice Douglas reasoned that because Connecticut required married couples to pay money to divorce, the more affluent could afford the legal process, but indigents could not.<sup>75</sup> As a result, wealth became the basis for denying divorce, and in some cases, for granting marriage.<sup>76</sup> Justice Douglas concluded that [a]ffluence does not pass muster under

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68. *Boddie*, 401 U.S. at 381.

69. *Id.*

70. *Id.* at 381-83.

71. *Id.* at 381.

72. *Id.* at 381-82.

73. *Id.* at 382.

74. *Boddie*, 401 U.S. at 374.

75. *Id.* at 384 (Douglas, J., concurring).

76. *Id.* at 386 (Douglas, J., concurring).

the Equal Protection Clause for determining who must remain married and who shall be allowed to separate.”<sup>77</sup> Similarly, Justice Brennan asserted that in addition to due process, the “case present[ed] a classic problem of equal protection of the laws.”<sup>78</sup> Equal justice under the law applies “to rich and poor alike . . . . [The courts] fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent plaintiffs altogether.”<sup>79</sup>

Importantly, the *Boddie* decision centered on the fact that marriage—a fundamental right—was at stake.<sup>80</sup> The Court held that because states have a monopoly on dissolving this fundamental right, Connecticut deprived the poor of liberty without due process of law by not waiving divorce filing fees for the indigent.<sup>81</sup>

### C. *Zablocki v. Redhail*

In *Zablocki v. Redhail*, the question before the Court involved the constitutionality of a Wisconsin statute prohibiting a resident from marrying if he or she had an obligation to pay for a minor child not in his or her custody.<sup>82</sup> The law required a resident to prove compliance with child support obligations, as well as demonstrate that the child covered by the support obligation was not and would not become a public charge in the future.<sup>83</sup> In 1974, Wisconsin denied Roger Redhail a marriage application because he had not paid child support to his illegitimate child who had become a charge of the State on welfare benefits.<sup>84</sup> The complaint alleged that Redhail expected a child with another woman he wished to marry and wanted the union legitimized before the birth.<sup>85</sup>

The Court held the Wisconsin law unconstitutional on equal protection grounds.<sup>86</sup> Writing for a divided Court, Justice Marshall referenced *Loving* as the leading case on the right to

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77. *Id.* (Douglas, J., concurring).

78. *Id.* at 388 (Brennan, J., concurring).

79. *Id.* at 388-89 (Brennan, J., concurring).

80. *M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996).

81. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1946-47 (2004).

82. 434 U.S. at 375.

83. *Id.*

84. *Id.* at 378.

85. *Id.* at 379.

86. *Id.* at 382.

marry.<sup>87</sup> Since the Wisconsin law did not involve a suspect classification comparable to the race-based classification in *Loving*, the Court justified applying strict scrutiny based solely on the law's restriction of the right to marry: "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."<sup>88</sup> Justice Marshall reiterated the Court's language in *Loving*: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>89</sup> Justice Marshall emphasized the Court's deference to the fundamental right to marry by comparing the Court's *Boddie* holding regarding divorce fees to its subsequent decision in *United States v. Kras* in which it held "that filing fees in bankruptcy actions did not deprive indigents of due process or equal protection."<sup>90</sup> The Court distinguished the cases by stating: "The denial of access to the judicial forum in *Boddie* touched directly . . . on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution."<sup>91</sup>

The Wisconsin statute prohibited people from marrying who were unable to pay child support obligations or prove their children would not become charges of the State.<sup>92</sup> Applying strict scrutiny under an equal protection analysis, the Court held that the statute's interference with the right to marry required Wisconsin to show that sufficiently important state interests supported the law and that it was "closely tailored to effectuate only those interests."<sup>93</sup> In defending its provision, Wisconsin made two arguments. First, the requirement that out-of-compliance parents must receive permission to marry allowed for counseling to be given to these individuals regarding their child support obligations; second, the welfare of the

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87. *Id.* at 383.

88. *Zablocki*, 434 U.S. at 384; *see also* WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 128 (The Free Press 1996).

89. *Zablocki*, 434 U.S. at 383 (quoting *Loving*, 388 U.S. at 12).

90. *Id.* at 385, n.10.

91. *Id.* (quoting *Kras*, 409 U.S. at 444) (alteration in original).

92. *Id.* at 387.

93. *Id.* at 388.

children not in custody would be protected.<sup>94</sup> Justice Marshall rejected the first argument on the ground that the statute did not mandate or provide any counseling whatsoever, and rejected the second argument because the State provided no evidence that children not in custody actually received money to protect them.<sup>95</sup> To the contrary, Justice Marshall noted that preventing this group of people from marrying prevented financial stability that often comes with marriage and caused more out-of-wedlock children.<sup>96</sup> Because Wisconsin did not provide valid justification for the law, the Court held the statute unconstitutional.<sup>97</sup>

Once again, the Court stressed that the principle of *Loving* is not limited to race discrimination, but applies more broadly to other types of discrimination affecting the fundamental right to marry.<sup>98</sup> *Zablocki* established that a state law placing a direct legal obstacle in the path of persons desiring to get married denies equal protection of the laws to those persons, unless the government can support the law with sufficiently important state interests and closely tailors it to effectuate only those interests.<sup>99</sup>

#### D. *Turner v. Safley*

In *Turner v. Safley*, the Court once again upheld the importance of marriage, particularly for the emotional, spiritual and financial benefits it provides couples.<sup>100</sup> In *Turner*, the Court analyzed the Missouri Division of Corrections' policy of regulating prison marriages by prohibiting an inmate from marrying unless the prison superintendent found a compelling reason—generally pregnancy or the birth of a child—to grant the right.<sup>101</sup> The regulation prohibited marriages between inmates, as well as between inmates and civilians.<sup>102</sup> The respondents brought a class action for injunctive relief and damages, arguing that the regulation violated their

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94. *Id.*

95. *Zablocki*, 434 U.S. at 388-89.

96. *Id.* at 390.

97. *Id.* at 390-91.

98. *Id.* at 384.

99. ESKRIDGE, *supra* note 88, at 128 (citing *Zablocki* at 388).

100. *Turner*, 482 U.S. at 95-96.

101. *Id.* at 82. The Court also addressed the constitutionality of prison regulations related to inmate correspondences. *Id.* at 81-82.

102. *Id.* at 97.

constitutional rights.<sup>103</sup>

Writing for the Court, Justice O'Connor first addressed the principles that frame the analysis of prisoners' constitutional claims: "It is settled that a prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'"<sup>104</sup> The prison conceded that marriage is a fundamental right under *Zablocki* and *Loving*, but argued that the fundamental right to marry did not apply in a prison forum.<sup>105</sup> The Court disagreed, holding that although a prison setting provides obvious restrictions on marriage, "important attributes of marriage remain" that provide sufficient reasons to constitutionally protect the marital relationship in the prison context.<sup>106</sup>

First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property benefits (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock).<sup>107</sup>

Justice O'Connor concluded that these marriage elements require that the fundamental right to marry apply to prisoners.<sup>108</sup>

In balancing prisoners' fundamental right to marry versus the warden's need to regulate inmates, the Court did not exclusively rely on equal protection arguments or traditional strict scrutiny analysis of a fundamental right under due process. Instead, the Court appeared to apply due process analysis of a fundamental right using rational basis review: "when a prison regulation impinges on inmates' constitutional

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103. *Id.* at 81.

104. *Id.* at 84, 95 (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

105. *Turner*, 482 U.S. at 95.

106. *Id.*

107. *Id.* at 95-96.

108. *Id.* at 96.



rights, the regulation is valid if it is reasonably related to legitimate penological interests.”<sup>109</sup> The Court determined that the prison’s reasons for the regulation—safety and rehabilitation—were insufficient.<sup>110</sup> Although legitimate security concerns surely required reasonable restrictions, the Court held that the regulation served as an “exaggerated response” to such needs: “There are obvious, easy alternatives to the Missouri regulation that accommodate the right to marry while imposing a *de minimis* burden on the pursuit of security objectives.”<sup>111</sup>

The *Turner* analysis provides important reasons for why the Court protects marriage as a fundamental right. Significantly, the elements elucidated in Justice O’Connor’s opinion did not include procreation or child-rearing.<sup>112</sup> Instead, the Court held that the fundamental right to marry is constitutionally protected because marriage is a statement by two people to each other and the world of their interpersonal commitment, emotional companionship, and spiritual and physical fulfillment.<sup>113</sup> Since these aspects of marriage are unaffected by prisoner status, the Court held unconstitutional the warden’s prohibition on inmates marrying.<sup>114</sup>

#### IV. MARRIAGE ELEMENTS APPLY TO SAME-SEX RELATIONSHIPS

Opponents of same-sex marriage argue that the fundamental right analysis does not apply to same-sex couples because marriage, by definition, only applies to unions between opposite-sex persons.<sup>115</sup> This semantics-based argument simply does not foreclose the constitutional issue. As Professor William Eskridge, Jr. notes, standard dictionaries define marriage as the “legal union of one man and one woman as husband and wife,” but some modern dictionaries describe marriage more generically as “an intimate or close union.”<sup>116</sup> Black’s Law

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109. *Id.* at 87, 89.

110. *Id.* at 97.

111. *Turner*, 482 U.S. at 97-98.

112. ESKRIDGE, *supra* note 88, at 129; *see also* Appellant’s Opening Brief at 31-32, *Goodridge*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860) (2002 WL 32364782).

113. *Turner*, 482 U.S. at 96; *see also* Appellant’s Opening Brief at 31-32, *Goodridge*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860) (2002 WL 32364782).

114. *Turner*, 482 U.S. at 95-96.

115. ESKRIDGE, *supra* note 88, at 89.

116. *Id.*

Dictionary includes a definition of same-sex marriage as “the ceremonial union of two people of the same sex; a marriage or marriage-like relationship between two women or two men.”<sup>117</sup> Members of the lesbian and gay community have used the word “marriage” to apply to their relationships.<sup>118</sup> Congress clearly recognized this fact when, during the codification of the ban on gays in the military, it included a provision excluding people in homosexual marriages.<sup>119</sup> Most significantly, the fact that fifteen states have gone to the extraordinary trouble to amend their constitutions to define marriage as a union between a man and a woman, indicates the term’s definitional elasticity.<sup>120</sup>

Importantly, the Court’s justification for protecting the fundamental right status of marriage does not turn on a definition or description exclusive to opposite-sex couples. The Court held in *Turner* that marriage is fundamental to society because of the commitment it recognizes.<sup>121</sup> *Turner* describes marriage elements that are wholly unrelated to heterosexuality. The *Turner* reasoning marked a significant shift from the Court’s earlier emphasis in *Loving* that marriage furthers “existence and survival.”<sup>122</sup> Even prior to *Loving*, however, the Court emphasized in *Griswold v. Connecticut* the importance of marriage in non-procreative terms: “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.”<sup>123</sup> Since *Griswold* held that the government cannot

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117. BLACK’S LAW DICTIONARY 994 (8th ed. 2004). In addition, Dictionary.com lists several definitions of marriage, including “[a] union between two persons having the customary but usually not the legal force of marriage: a same-sex marriage,” at <http://dictionary.reference.com/search?q=marriage>.

118. ESKRIDGE, *supra* note 88, at 89.

119. *Id.*

120. See National Gay and Lesbian Task Force, *supra* note 18.

121. *Turner*, 482 U.S. at 95-96.

122. *Loving*, 388 U.S. at 12; see also *supra* text accompanying note 59. This shift makes sense in light of American society’s evolution from agrarian, where procreation is important to survival, to urban, where personal and interpersonal fulfillment are more important. See ESKRIDGE, *supra* note 88, at 130.

123. 381 U.S. 479, 486 (1965). See also *Casey*, 505 U.S. at 847-48, 859 (“[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th Century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the

impose procreation on couples, it is unsurprising that Justice Douglas's description of marriage did not mention procreating or child rearing as a necessary component of marriage.

*Griswold* portrays marriage as a hopefully enduring, intimate relationship that promotes harmonious living—a set of goals certainly attainable by same-sex couples. Today, not all people marry for romantic love, but most would agree that affection and respect are crucial aspects of a successful marriage.<sup>124</sup> Lesbians and gays have the same human ability as heterosexuals to create relationships around love, commitment, respect and loyalty.<sup>125</sup> Like heterosexuals, lesbians and gays benefit from the valuable support shared in caring, loving and intimate relationships.<sup>126</sup> Lesbians and gays raise happy, healthy and well-adjusted children with equal parenting skills to heterosexuals.<sup>127</sup> Given that same-sex couples are capable of attaining the attributes associated with America's modern, romantic, companionate marriage, the definitional argument that marriage only applies to opposite-sex couples falls apart.

The Massachusetts Supreme Judicial Court recognized the failure of the definitional argument by reasoning in *Goodridge* that civil marriage does not require procreation because the marriage licensing laws do not question applicants on their ability or intention to conceive children.<sup>128</sup> “Fertility is not a condition of marriage, nor is it grounds for divorce.”<sup>129</sup> The *Goodridge* court described marriage as “a vital social institution . . . [that] brings stability to our society [and] provides an

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Due Process Clause in *Loving v. Virginia* . . . . While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage . . . .” (citations and quotations omitted); *Glucksberg*, 521 U.S. at 726 (“the Due Process Clause . . . protect[s] certain fundamental rights and ‘personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,’ and . . . many of those rights and liberties ‘involv[e] the most intimate and personal choices a person may make in a lifetime.’”) (citations omitted) (emphasis added).

124. Adam Haslett, *Love Supreme: Gay Nuptials and the Marking of Modern Marriage*, THE NEW YORKER, May 31, 2004, at 76.

125. Carlos A. Ball, *Marriage, Same-Gender Relationships, and Human Needs and Capabilities*, in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 138 (Lynn D. Wardle et al. eds., 2003).

126. *Id.* at 139.

127. Nancy D. Polikoff, LESBIAN AND GAY PARENTING: THE LAST THIRTY YEARS, 66 Mont. L. Rev. 55 (2005).

128. *Goodridge*, 798 N.E.2d at 961.

129. *Id.*

abundance of legal, financial, and social benefits.”<sup>130</sup> The court concluded that while “perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”<sup>131</sup> Importantly, if the court had held otherwise, Massachusetts would potentially have a legal claim to prohibit persons from marrying who are sterile, impotent or aged.<sup>132</sup>

Furthermore, relying on a traditional understanding of marriage as only between a man and a woman fails to recognize that marriage is an evolving institution, and like many institutions, generational changes result in new interpretations of the standard.<sup>133</sup> European marriage was once a contract between families to protect property or forge political alliances.<sup>134</sup> A century ago, the woman’s role in a traditional American marriage was strictly domestic, as evidenced by the Court’s 1873 decision to refuse Myra Bradwell admission to the State Bar of Illinois.<sup>135</sup> In that case, Justice Bradley wrote in a concurring opinion: “The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.”<sup>136</sup> Modern times, however, render Justice Bradley’s interpretation of a wife’s role obsolete. The expansion of women’s employment outside the home sparked the Court to move toward gender equality in its decisions.<sup>137</sup> As with the current debate over same-sex marriage, the evolved perspective of women as equal partners to men did not come without criticism. On the changing role of women in society, one historian lamented in the 1950s that “the fundamental nature and purpose of marriage have been lost in a struggle for equality and social justice in isolation from the biological and domestic context in which, in

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130. *Id.* at 948

131. *Id.* at 961.

132. ESKRIDGE, *supra* note 88, at 96.

133. See generally E.O. JAMES, MARRIAGE AND SOCIETY (John de Graff 1955) for a historical analysis of marriage in different cultures and times pre-1955.

134. Haslett, *supra* note 124, at 76.

135. *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130 (1873).

136. *Id.* at 141 (Bradley, J., concurring).

137. Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women under the Law*, 26 HOFSTRA L. REV. 263, 269 (Winter 1997) .

its natural setting, the institution occurs.”<sup>138</sup> According to Justice Ginsburg, the Court moved away from this narrow interpretation of the female role and toward gender equality in response to a changed social climate.<sup>139</sup> Similarly, the Court should recognize the growing number of same-sex couples and their ability to engage in marital relationships.<sup>140</sup>

The religious argument that marriage by definition can only embody opposite-sex couples because it is an institution with ancient Judeo-Christian roots that rejects homosexuality also fails.<sup>141</sup> As Arthur S. Leonard notes:

Genesis is the product of a particular ancient culture that is just one of many ancient world cultures, all of whose diverse descendants are now participants in the multicultural phenomenon that is modern American society . . . . Our contemporary American society was born out of a rejection of established churches and an insistence under our constitutional structure that there be a secular justification for every legal rule, reflecting an early recognition of religious and cultural diversity in a new nation whose residents were drawn from a multitude of cultural and religious heritages.<sup>142</sup>

Regardless of whether marriage has religious roots, modern civil marriage is a non-religious institution granted by the states to Americans of all religious persuasions. Civil marriage is an institution created to serve society’s needs.<sup>143</sup> States encourage marriage because of the presumption that society benefits from having couples promise to care for each other.<sup>144</sup> In return for this presumed societal benefit, the government provides married couples with a wide range of rights and benefits.<sup>145</sup> In cases such as *Turner*, the Court has acknowledged the importance of marriage for reasons unrelated to traditional notions of procreative marriage. Because lesbians and gays share with heterosexuals the human ability to love and care for a partner and children, it necessarily follows that the definition of marriage can and should apply to same-sex couples.

138. JAMES, *supra* note 133, at 187.

139. Ginsburg, *supra* note 137, at 268.

140. The census shows that same-sex couples have been increasing since 1990 everywhere in the United States. Arthur S. Leonard, *Reply to “Marriage by Design,”* in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 92 (Lynn D. Wardle et al. eds., 2003).

141. *Id.* at 91.

142. *Id.*

143. ESKRIDGE, *supra* note 88, at 92.

144. See *Id.* at 66 (Listing the legal rights and benefits the government grants married couples).

145. *Id.*

Modern marriage is an institution embodying elements of humanity attainable by lesbian and gay couples. In view of the Court's recognition of this fact, same-sex couples have a compelling constitutional claim that state laws denying them the fundamental right to marry are unconstitutional. As discussed next, the *Lawrence* ruling and its focus on a fundamental liberty right to create consensual adult relationships furthers this argument.<sup>146</sup>

### V. LAWRENCE V. TEXAS

In 1986, the Court upheld a Georgia statute criminalizing sodomy in *Bowers v. Hardwick*.<sup>147</sup> In that case, the State convicted Michael Hardwick of violating the sodomy statute after a police officer looked through Hardwick's bedroom door and saw him engaged in oral sex with a male companion.<sup>148</sup> Despite the fact that the sodomy statute applied to heterosexual and homosexual couples alike, Justice White took the opportunity to condone discriminatory treatment of homosexuals. According to Professor Laurence Tribe, Justice White "recast the claim into something it had never been—an asserted 'fundamental right to engage in homosexual sodomy'—and that, having thus recast the claim, proceeded to dismiss it as 'at best, facetious.'"<sup>149</sup> Instead of addressing whether the government has any business legislating against consensual oral sex between adults in a private home, Justice White focused his opinion on dismissing a substantive due process argument for protecting homosexual activity.<sup>150</sup> Importantly, the *Bowers* decision relied upon a historical and moral argument that proscriptions against homosexual conduct have "ancient roots" based on a belief that such behavior is immoral.<sup>151</sup>

Seventeen years later in *Lawrence v. Texas*, the Court overruled *Bowers* in a ruling joined by six of the justices.<sup>152</sup> The facts of *Lawrence* are similar to *Bowers* in that police arrested two men, John Geddes Lawrence and Tyron Garner, for violating a sodomy statute after seeing the respondents engaged

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146. *Lawrence*, 539 U.S. at 567.

147. 478 U.S. 186 (1986).

148. Tribe, *supra* note 81, at 1952.

149. *Id.* at 1953.

150. *Bowers*, 478 U.S. at 190.

151. *Lawrence*, 539 U.S. at 567-68 (citing *Bowers*, 478 U.S. at 192).

152. *Id.* at 561, 578.

in consensual sexual activity in Lawrence's bedroom.<sup>153</sup> The State prosecuted the men under a Texas statute that criminalized sexual contact with a person of the same sex.<sup>154</sup> Writing for the Court, Justice Kennedy declared that "*Bowers* was not correct when it was decided, and it is not correct today," and "now is overruled."<sup>155</sup> The Court thus held in *Lawrence* that the government may not criminalize homosexual activity.

Justice O'Connor wrote a concurring opinion in which she argued for the same result, but under the Equal Protection Clause.<sup>156</sup> Justice Scalia argued in a dissent joined by Chief Justice Rehnquist and Justice Thomas that the majority opinion opened the door to same-sex marriage.<sup>157</sup> Additionally, Justice Thomas wrote a separate, short dissent calling the Texas law "uncommonly silly," but noted that the Texas Legislature must repeal the law, not the Court.<sup>158</sup>

In his majority opinion, Justice Kennedy applied a libertarian approach, revolutionizing substantive due process analysis.<sup>159</sup> The Fourteenth Amendment's Due Process Clause mandates that no "State [shall] deprive any person of life, liberty, or property, without due process of law."<sup>160</sup> Traditional substantive due process analysis upholds a claimed liberty interest not expressly mentioned in the text of the Constitution if the Court determines the right is sufficiently important to be regarded as fundamental.<sup>161</sup> For the last several decades, this approach has more or less confined the implementation of

153. Police officers were "dispatched to a private residence in response to a reported weapons disturbance. . . . The right of the police to enter does not seem to have been questioned." *Id.* at 562-63, 566. See also Tribe, *supra* note 81, at 1952 (facts concerning *Bowers*).

154. TEX. PENAL CODE ANN. § 21.06(a) (2003) provided: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as follows: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object. *Id.* § 21.01(1). See also *Lawrence*, 539 U.S. at 563.

155. *Lawrence*, 539 U.S. at 578.

156. *Id.* at 579 (O'Connor, J., concurring).

157. *Id.* at 604-05 (Scalia, J., dissenting).

158. *Id.* at 605 (Thomas, J., dissenting) (citing *Griswold*, 381 U.S. at 479).

159. MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 170 (W. W. Norton & Co. 2005). See also Tribe, *supra* note 81 at 1898.

160. U.S. CONST. amend. XIV § 1 (emphasis added).

161. Chemerinsky, *supra* note 26 at 763.

substantive due process to an exercise of listing fundamental rights such as speaking, praying, raising children, and using contraceptives in the privacy of the marital bedroom.<sup>162</sup> Determining a fundamental right using this due process approach has never been a vision of clarity for the Court. Justice Harlan described due process not as a formula, but rather a balancing act between “respect for the liberty of the individual” and “demands of organized society,” while simultaneously taking into account historical traditions.<sup>163</sup> Thus, while liberty is an integral aspect of substantive due process analysis, the Court also gives government ample consideration.

In *Lawrence*, Justice Kennedy reconfigured traditional substantive due process analysis by shifting the role of liberty to the center and placing a greater burden on the government to justify interference with an individual’s liberty. According to Justice Kennedy’s opinion, an individual has the right to control a personal relationship provided it does not involve minors, persons who might be injured or coerced, those who might not easily refuse consent, or public conduct or prostitution.<sup>164</sup> In other words, as a general rule, neither the State nor a court should define the meaning of a relationship, nor should they set boundaries unless there would otherwise be “injury to a person or abuse of an institution the law protects.”<sup>165</sup>

*Lawrence* further holds that liberty and dignity apply equally to individuals in terms of how they relate to, and interact with, one another.<sup>166</sup> “Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>167</sup> Accordingly, the fundamental right protected by substantive due process is “liberty” in of itself, and not, as held in earlier decisions, extracted notions such as privacy, family autonomy or marriage.<sup>168</sup> Professor Tribe asserts that Justice

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162. Tribe, *supra* note 81 at 1898.

163. *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting). See also Tribe, *supra* note 81 at 1937.

164. *Lawrence*, 539 U.S. at 578.

165. *Id.* at 567.

166. Tribe, *supra* note 81 at 1898.

167. *Lawrence*, 539 U.S. at 562.

168. See *Moore v. East Cleveland*, 431 U.S. 494, 511 (1977) (“[i]f any freedom not specifically mentioned in the Bill of Rights enjoys a ‘preferred position’ in the law it is most certainly the family”) (citations omitted); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (“the right of personal privacy includes the abortion decision”); and *Loving*, 388 US at 12



Kennedy rejected *Bowers*'s traditional due process approach to fundamental rights as a "given set of data points on a two-dimensional grid"<sup>169</sup> whereby states have wide reign in writing laws grounded in morality. To this end, Justice Kennedy wrote in *Lawrence*:

The condemnation [of homosexuality] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of our lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'<sup>170</sup>

Quoting Justice Stevens's dissent in *Bowers*, the Court noted history's limitations in constitutional decision-making:

[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; neither history nor tradition could save a law prohibiting miscegenation [in *Loving*] from constitutional attack.<sup>171</sup>

*Lawrence* thus overruled *Bowers* by holding that a liberty interest under the Due Process Clause extends to gay and lesbian relationships, while concluding that the moral and historical arguments on which *Bowers* was based did not sufficiently withstand constitutional analysis.<sup>172</sup>

Notably, Justice O'Connor joined the 1986 *Bowers* decision and did not agree with overruling it.<sup>173</sup> She thus agreed with the judgment in *Lawrence*, but wrote a concurring opinion relying on the Equal Protection Clause.<sup>174</sup> Justice O'Connor distinguished *Lawrence* from *Bowers* by differentiating the statutory language at issue in both cases. The Georgia statute in *Bowers* applied to heterosexual couples engaged in sodomy, as

("[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men").

169. Tribe, *supra* note 81 at 1898-99. See *id.* at 1936-37 for a further discussion on the idea of "data points."

170. *Lawrence*, 539 U.S. at 571 (quoting *Casey*, 505 U.S. at 850).

171. *Id.* at 577-78.

172. *Id.*

173. *Id.* at 579 (O'Connor, J., concurring).

174. *Id.* (O'Connor, J., concurring)

well as homosexuals engaged in such conduct.<sup>175</sup> In Justice O'Connor's opinion, the Texas law at issue in *Lawrence* failed rational basis review because it "treat[ed] the same conduct differently based solely on the participants."<sup>176</sup> Justice O'Connor concluded that Texas's attempt to justify its statute by arguing that it promoted morality misconstrued the *Bowers* holding:

*Bowers* did not hold that that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished. This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, 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.<sup>177</sup>

As Professor Tribe notes, the *Lawrence* "decision's unmistakable heart is an understanding that liberty is centered in equal respect and dignity for both conventional and unconventional human relationships."<sup>178</sup> The dignity, freedom and liberty of which Justice Kennedy recognized, extends beyond privacy and sexual relations, or any other list of unconnected individual rights.<sup>179</sup> Accordingly, lesbian and gay adults have the right to foster consenting relationships. "The liberty protected by the Constitution allows homosexual persons the right to make this choice" to engage in sexual practices common to the lesbian or gay lifestyle without criminal punishment.<sup>180</sup> *Lawrence* thus establishes a long overdue precedent that adults may choose to engage in same-sex relationships without losing their dignity as free persons.<sup>181</sup>

The majority opinion did not address same-sex marriage, but Justice O'Connor mentioned it in her concurring opinion,

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175. *Id.* at 566.

176. *Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring). Justice O'Connor notes that a "more searching form of rational basis review" applies under equal protection analysis when a law harms a politically unpopular group, as evidenced by *Romer*. *Id.* at 580 (O'Connor, J., concurring) (emphasis added).

177. *Id.* at 582 (O'Connor, J., concurring) (citations omitted).

178. Tribe, *supra* note 81 at 1955.

179. *Id.*

180. *Lawrence*, 539 U.S. at 567.

181. *Id.*

asserting that “[u]nlike the moral disapproval of same-sex relations . . . other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”<sup>182</sup> While Justice O’Connor references same-sex marriage, she does not argue that *Lawrence* analyzes the issue or indicates a specific result. Justice Scalia, on the other hand, strongly argued in his dissent that the majority’s reasoning unquestionably opened the door to same-sex marriage:

Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is no legitimate state interest for purposes of proscribing that conduct; and if . . . sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,’ *what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising the liberty protected by the Constitution?*<sup>183</sup>

Thus, while Justice Scalia angrily dissented from the majority’s reasoning, he openly conceded the *Lawrence* reasoning provides a strong liberty argument for permitting same-sex marriage.<sup>184</sup> In view of *Lawrence*, combined with the Court’s earlier *Romer* decision where it recognized the equal rights of lesbians and gays, Justice Scalia’s dissenting thoughts on the inevitability of marriage are unsurprising.

## VI. ROMER V. EVANS

In the 1996 case *Romer v. Evans*, the Court addressed the constitutionality of an amendment to the Colorado Constitution, adopted in a 1992 statewide referendum.<sup>185</sup> The Supreme Court ultimately held the amendment unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment.<sup>186</sup>

In *Romer*, Colorado voters adopted “Amendment 2” to their

182. *Id.* at 585 (O’Connor, J., concurring). While the majority opinion did not explicitly discuss marriage, Justice Kennedy wrote that liberty “as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.” *Id.* at 567. See also text accompanying *supra* note 165.

183. *Lawrence*, 539 U.S. at 604-05 (Scalia, J., dissenting) (emphasis added) (citations and quotations omitted).

184. Tribe, *supra* note 81 at 1945.

185. *Romer*, 517 U.S. at 623.

186. *Id.*

constitution by statewide referendum.<sup>187</sup> This amendment precluded all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their homosexual, lesbian or bisexual orientation, conduct, practices or relationships.<sup>188</sup> The citizens enacted Amendment 2 in response to local ordinances in Aspen, Boulder and Denver that banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services.<sup>189</sup> These local ordinances were consistent with traditional statutory protections provided by state legislatures to counter discrimination.<sup>190</sup> The laws specified both the persons or entities precluded from discriminating and the groups or persons protected.<sup>191</sup> Colorado's local governments extended antidiscrimination laws to an extensive list of classes beyond sexual orientation, including, for example: age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, and physical or mental disability of an individual.<sup>192</sup> To the extent these ordinances prohibited discrimination on the basis of sexual orientation, Amendment 2 repealed them.<sup>193</sup> This meant that lesbians, gays and bisexuals could no longer seek protection under antidiscrimination ordinances. In essence, Amendment 2 nullified specific legal protections for lesbians, gays and bisexuals in all transactions related to housing, sale of real estate insurance, health and welfare services, private education, and employment.<sup>194</sup> Not limited to the private sphere, Amendment 2 also effectively repealed or forbade all laws and policies operating to protect gays and lesbians from discrimination on every level of Colorado

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187. COLO. CONST. art. 2, § 30b, *enjoined by Romer*, 517 U.S. at 635 (“[n]either 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”).

188. *Romer*, 517 U.S. at 624.

189. *Id.* at 623-24.

190. *Id.* at 628.

191. *Id.*

192. *Id.* at 628-29.

193. *Id.* at 624.

194. *Romer*, 517 U.S. at 624.

government.<sup>195</sup> Perhaps most troublesome, Amendment 2 created circumstances whereby lesbians, gays and bisexuals could only receive protection against discrimination similar to everyone else by enlisting the Colorado citizenry to amend the state constitution again.<sup>196</sup>

In overturning the amendment, the Colorado Supreme Court applied the United States Supreme Court's voting rights cases and held that under the Fourteenth Amendment, Colorado's Amendment 2 infringed the fundamental rights of gays and lesbians to participate in the political process.<sup>197</sup> The United State Supreme Court reached the same result in affirming the ruling, but based its decision on equal protection grounds, instead of voting rights.<sup>198</sup> The majority opinion, written by Justice Kennedy, began with a quote from the first Justice Harlan's dissent in *Plessy v. Ferguson*, the notorious opinion affirming racial segregation released almost one hundred years to the day before *Romer*:<sup>199</sup> "One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.' Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake."<sup>200</sup>

The Court then held that the Equal Protection Clause enforces this principle, rendering Colorado's Amendment 2 invalid.<sup>201</sup>

In explaining equal protection analysis, Justice Kennedy noted that if a law neither burdens a fundamental right nor targets a suspect class, the Court will uphold the legislative classification so long as it bears a rational relation to some legitimate end.<sup>202</sup> "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end," Justice Kennedy wrote, "we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."<sup>203</sup> The rational basis test

195. *Id.* at 629.

196. *Id.* at 631.

197. *Id.* at 625.

198. *Id.* at 623, 626.

199. TUSHNET, *supra* note 159 at 167.

200. *Romer*, 517 U.S. at 623 (internal citation omitted).

201. *Id.*

202. *Id.* at 633.

203. *Id.*

requires a link between the classification and the legislation's objective.<sup>204</sup> This link provides guidance and discipline for the legislature to know what sorts of laws it can pass and marks the limits of its authority.<sup>205</sup> In the ordinary case, a law will be sustained if it advances a legitimate government interest, even if the law seems unwise or disadvantages a particular group, or if the rationale seems tenuous.<sup>206</sup> In *Romer*, the Court held that "Amendment 2 fail[ed], indeed defie[d], even this conventional inquiry."<sup>207</sup>

Colorado argued that its citizens, in particular landlords and employers, had the right to freely associate and, therefore, discriminate against homosexuals based on moral or religious grounds.<sup>208</sup> The State further argued that the provision put lesbians, gays and bisexuals in the same position as all other persons; in other words, it denied them no more than "special rights."<sup>209</sup> The Court disagreed, concluding that the local ordinances did not create special protections for gays and lesbians: "It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of *general laws and policies* that prohibit arbitrary discrimination in governmental and private settings."<sup>210</sup> Essentially, Amendment 2 destroyed the equal application of antidiscrimination laws by specifically *excluding* lesbians, gays and bisexuals from receiving general protections ensured by local ordinances. The Court stated that Amendment 2 imposed "a special disability" upon lesbians, gays and bisexuals alone by forbidding them "the safeguards that others enjoy or may seek without constraint."<sup>211</sup>

Amendment 2 failed the rational basis test because the broad and undifferentiated disability imposed on homosexuals lacked a legitimate connection to the reasons offered for the law.<sup>212</sup> The Court found no precedent for the amendment's identifying persons by a single trait and then denying them

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204. *Id.* at 632.

205. *Id.*

206. *Romer*, 517 U.S. at 632.

207. *Id.*

208. *Id.* at 635.

209. *Id.* at 626.

210. *Id.* at 630 (emphasis added).

211. *Id.* at 631.

212. *Romer*, 517 U.S. at 632-33.

protection enjoyed by all other citizens.<sup>213</sup>

Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.<sup>214</sup>

Ultimately, the Court held that Colorado failed to provide a legitimate public policy reason for Amendment 2.<sup>215</sup> Because the language of Amendment 2 did nothing to further the reasons offered by the State for its implementation, the Court did not accept Colorado's argument that Amendment 2 guaranteed other citizens' freedom of association and liberty interests, and conserved resources to fight discrimination against other groups.<sup>216</sup> Instead, the Court concluded that Colorado enacted Amendment 2, not to further a proper legislative end, but to further the inequality experienced by lesbians and gays out of pure animus.<sup>217</sup> In essence, *Romer* stands for the proposition that lesbians and gays have the same constitutional rights as other citizens.

## VII. THE UNCONSTITUTIONALITY OF MONTANA'S MARRIAGE AMENDMENT

Article XIII, section 7 of the Constitution of the State of Montana now provides: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state."<sup>218</sup>

At the time the Marriage Amendment went into effect, Montana already had a statutory prohibition on same-sex marriage in its code.<sup>219</sup> Like Massachusetts's statutory prohibition, however, advocates for same-sex marriage in

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213. *Id.*

214. *Id.* (internal quotes and citations omitted).

215. *Id.* at 635.

216. *Id.*

217. *Id.* at 632, 635.

218. MONT. CONST. art. XIII, § 7.

219. MONT. CODE ANN. § 40-1-401(1)(d) (2003).

Montana had a viable constitutional challenge to this statute based on its state constitution.<sup>220</sup> For this reason, opponents of same-sex marriage petitioned to place CI-96 on the November 2004 ballot.<sup>221</sup> The Marriage Amendment succeeds in making it far more difficult to challenge the constitutionality of Montana's prohibition on same-sex marriage on state constitutional grounds.<sup>222</sup> The amendment, however, does not preclude a challenge under the United States Constitution. As evidenced by the federal cases analyzed in this comment, Montana's Marriage Amendment violates the Fourteenth Amendment's Due Process and Equal Protection Clauses.

Over the years, the Court has deemed some liberty interests not expressly written into the Constitution—such as marriage, family autonomy, procreation, and sexual activity—“fundamental rights” protected under due process analysis, and in many cases, also equal protection.<sup>223</sup> Under due process analysis, the Court generally applies strict scrutiny and asks whether the government has a compelling state interest for taking away the liberty interest in question.<sup>224</sup> In applying equal protection, the Court identifies the classification, decides the applicable level of scrutiny—strict, intermediate or rational basis review—and asks whether the law in question meets the level of scrutiny.<sup>225</sup> Challenging a law under the rational basis test can be difficult, as the Court tends to be highly deferential to the government under this lowest level of scrutiny.<sup>226</sup> Even so, the Court held in *Romer* that “equal protection of the laws is not achieved through indiscriminate imposition of inequalities. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare.”<sup>227</sup> In applying equal protection analysis to lesbians and gays, the *Romer* Court utilized “a more searching form of rational basis review” and held that the government failed to further a proper legislative end in denying equal

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220. For example, Montana's statutory prohibition could have been challenged under the equal protection and dignity clauses of Article II, section 4 of Montana's Constitution, which states: “The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws.” MONT. CONST. art. II, § 4.

221. Carson, *supra* note 24.

222. *Supra* note 3.

223. Chemerinsky, *supra* note 26 at 762.

224. *Id.*

225. *Id.* at 644-48.

226. *Id.* at 646.

227. *Romer*, 517 U.S. at 633 (internal quotes and citations omitted).



protection to lesbians and gays.<sup>228</sup>

As discussed previously, *Loving*, *Boddie*, *Zablocki* and *Turner* provide that marriage is a fundamental right under the Fourteenth Amendment. The Court assigns marriage fundamental right status, not for religious or procreative reasons, but for the stability, emotional support, and the public commitment it provides. Modern companionate marriage entails elements fully attainable by same-sex couples. Therefore, Montana cannot deprive lesbians and gays the fundamental right to marry unless it can satisfy, under strict scrutiny, its burden of showing a compelling state interest overriding the constitutional rights of gays and lesbians. Even without applying strict scrutiny under fundamental right analysis, *Lawrence* and *Romer* evidence that lesbians and gays have the same rights as heterosexuals. Consequently, Montana cannot deny lesbians and gays legal marriage unless a link exists between this prohibition and a legitimate state interest. While the government has not articulated any state interests allegedly supporting the Marriage Amendment, a number of reasons were listed by the CI-96 proponents in the 2004 Voter Information Pamphlet in support of prohibiting lesbians and gays from marrying.<sup>229</sup>

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228. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring); *Romer*, 517 U.S. at 632.

229. The "Argument for CI-96" in the 2004 Voter Information Pamphlet reads as follows:

The time-honored, vital institution of marriage is being threatened. Homosexual activists have pushed legislatures in Montana and across the U.S. to legalize same-sex marriage. Legislators have repeatedly said no because voters, by an overwhelming majority, reject same-sex marriage. Lack of legislative success has caused homosexual activists to change tactics. They now seek out activist judges who are willing to mandate same-sex marriage by judicial decree. Public policy should be decided by the people, either directly through ballot initiative, or indirectly through their elected representatives, not by activist judges. Voting yes on CI-96 places the definition of marriage in the hands of the people, rather than the courts. CI-96 will ensure that natural marriage is preserved by defining it constitutionally. Special interest groups are constantly seeking to gain special rights that infringe on the rights of the rest of society. Such special rights cost all Montanans both in dollars and in lost freedom. For instance, in this case, we could lose the freedom to teach our children as we wish. The issue of same-sex marriage will come before Montana's courts soon. Voting yes on CI-96 allows the people to give clear direction to judges on this important issue. Voters have never legalized same-sex marriage in any state. In every instance where same-sex marriage was mandated by a court decision, the voters immediately overturned the court through ballot initiative, and then amended their state constitutions to define marriage as a union between a man and a woman. If CI-96 fails, how will homosexual marriage one day affect your family?

First and foremost, proponents of the Marriage Amendment stated that the people of Montana should create public policy, not the courts.<sup>230</sup> The argument for CI-96 employed inflammatory scare tactics, stating that lesbians and gays are “seeking to gain special rights that infringe on the rest of society,” and warned voters that same-sex marriage will “cost all of Montanans both in dollars and in lost freedom.”<sup>231</sup> Proponents listed myriad predictions for how same-sex marriage would affect Montana families: (1) Montana public schools would have to change their curriculum to teach that same-sex couples are normal; (2) business owners would lose money from having to pay benefits to employees’ same-sex spouses; (3) churches would be forced to provide religious ceremonies to same-sex couples; and (4) “natural marriage” provides for future generations and better serves children.<sup>232</sup> In summation, proponents argued in their rebuttal:

This amendment insures that parents will be ‘let alone’ to raise their children as they deem best. It insures churches will be ‘let alone’ to practice their faith as they feel led, and it insures

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- Every public school in Montana would be required to teach your children that same-sex marriage and homosexuality are perfectly normal. Pictures in textbooks will also be changed to show same-sex marriage as normal.

- Small business employers in Montana may someday be required to provide expanded health coverage, retirement and fringe benefits to same-sex “spouses” of employees. The broad subjectivity of such un-funded mandates could hurt Montana’s economy and jobs.

- Your church will be legally pressured to perform same-sex weddings. When courts – as happened in Massachusetts – find same-sex marriage to be a “constitutional and fundamental human right,” homosexual activists will successfully argue that government is underwriting discrimination by offering tax exemptions to churches and synagogues that only honor natural marriage. Natural marriage is extremely important for future generations. Men and women are distinctly different. Each gender brings vitally important, and unique, elements to a child’s development. Saying that children don’t necessarily need fathers or mothers is saying that one gender or the other is unnecessary. A loving and compassionate society always aids motherless and fatherless families. Compassionate societies never intentionally create families without mothers or fathers, which is exactly what same-sex homes do.

Of 193 countries, only Scandinavia and two other countries have legalized same-sex marriage. This radical departure from thousands of years of time-tested natural marriage has only occurred within the last 10 years. Let’s protect our families and children from this vast, untested, social experiment. Please vote FOR CI-96!

MONTANA SECRETARY OF STATE, VOTER INFORMATION PAMPHLET (2004), *available at* <http://sos.state.mt.us/Assets/elections/voterinfopamphlet2004.htm>.

230. *Id.*

231. *Id.*

232. *Id.*

employers will be 'let alone' to run their businesses in a manner they feel best serves their employees and customers.<sup>233</sup>

These reasons set forth by proponents of the Marriage Amendment fail to even pass the lowest scrutiny test because they do not show that banning same-sex marriage is rationally related to a legitimate state interest.

According to the first argument, allowing same-sex marriage would require Montana public schools to change their curriculum to teach that same-sex couples are normal.<sup>234</sup> Prohibiting same-sex marriage, of course, does not ensure that school curriculums will be anti-gay or anti-lesbian. At the heart of this first argument is a belief that the government approves immoral conduct by legalizing same-sex marriage.<sup>235</sup> As Professor Eskridge points out, however, the state does not have a policy of checking the morality of marriage applicants.<sup>236</sup> Heterosexual couples from across the moral spectrum can file for and receive a marriage license from the government with minimal inconvenience.<sup>237</sup> The state does not comb through marriage forms to discard evil, perverted, or incompetent applicants.<sup>238</sup> After all, not just ex-convicts, but prisoners too, can obtain a marriage license.<sup>239</sup> Regardless of popular sentiment, moral grounds are not enough to justify states banning same-sex marriages. Many citizens disagreed with interracial marriage when *Loving* held anti-miscegenation laws unconstitutional.<sup>240</sup> But the *Loving* Court recognized that the rule of law did not coincide with society's beliefs at the time and overturned the prohibitory statutes accordingly.<sup>241</sup> The same is true today regarding same-sex marriage. The fact that a majority of Montana voters apparently believe same-sex relationships are inappropriate does not qualify as a legitimate state interest.

Second, CI-96 proponents argued that if marriage is not limited to heterosexual couples, business owners would lose money from paying benefits to same-sex couples. This is an

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233. *Id.* (Proponent Rebuttal Argument).

234. *Id.*

235. ESKRIDGE, *supra* note 88 at 104.

236. *Id.* at 106-07.

237. *Id.* at 106.

238. *Id.* at 106-07.

239. *See generally Turner*, 482 U.S. 78.

240. ESKRIDGE, *supra* note 88 at 109.

241. *Id.*

ironic argument considering the emphasis proponents of the Marriage Amendment place on encouraging heterosexual marriage. The Montana Family Foundation, the organization behind CI-96, includes two articles on its website that laud the advantages of marriage.<sup>242</sup> One article states that “married couples may have advantages in terms of economic resources, social and psychological support and encouragement of healthful lifestyles.”<sup>243</sup> The posting of these articles on Montana Family Foundation’s website clearly infers that the organization encourages people to enter into heterosexual marriages. Encouraging more heterosexual marriages, of course, increases the benefits business owners must pay to employees. This supposed economic justification for the Marriage Amendment is disingenuous and not a constitutionally valid rationale for the Marriage Amendment.

Third, CI-96 proponents argued that without the Marriage Amendment, churches would be forced to participate in marrying same-sex couples. Specifically, their argument in the 2004 Voter Information Pamphlet stated that “church[es] will be legally pressured to perform same-sex weddings” because “homosexual activists will successfully argue that government is underwriting discrimination by offering tax exemptions to churches and synagogues that only honor natural marriage.”<sup>244</sup> This speculation is patently unsubstantiated. In *Boy Scouts of America v. Dale*, the Supreme Court held: “The First Amendment protects expression, be it of the popular variety or not.”<sup>245</sup> The Court concluded that the government may not force an organization with an express anti-gay or anti-lesbian purpose or message to include lesbians or gays.<sup>246</sup> Moreover, government interference with religious practices is stringently limited by the First Amendment’s free exercise clause.<sup>247</sup> As the opponent rebuttal to CI-96 noted: “Churches retain the special right to refuse to solemnize the marriage of any couple for any reason.”<sup>248</sup> Legalizing same-sex marriage concerns a legal and

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242. Associated Press, *Married Folks More Likely to be Healthy* (Dec. 15, 2004); Associated Press, *The Benefits of Marriage* (March 3, 2004), available at <http://www.montanafamily.org/start.asp?file=newsindex>.

243. Associated Press, *Married Folks More Likely to be Healthy*.

244. MONTANA SECRETARY OF STATE, *supra* note 229

245. 530 U.S. 640, 660 (2000).

246. *Id.* at 661.

247. Chemerinsky, *supra* note 26 at 1200.

248. MONTANA SECRETARY OF STATE, *supra* note 229 (Opponent Rebuttal).

civil right—not a religious ceremony, which churches control—and is not based on a particular religious doctrine.<sup>249</sup>

Fourth, CI-96 proponents argued that “[n]atural marriage is extremely important for future generations” and the Marriage Amendment will protect Montana “families and children from this vast, untested, social experiment” of same-sex parenting.<sup>250</sup> According to the proponents’ argument, men and women are different, with differences vitally important to a child’s development.<sup>251</sup> This assertion is problematic for several reasons. First, it implies that the Marriage Amendment is necessarily linked to stopping lesbians and gays from becoming parents. Lesbians and gays, however, *already are parents*.<sup>252</sup> Second, this argument implies that the amendment affirmatively helps children. Yet, the Marriage Amendment fails to mention children or any affirmative measures to improve children’s lives.

The Census Bureau reported in 2000 that twelve hundred Montana households identified themselves as headed by lesbian or gay couples.<sup>253</sup> This figure marks a 326% increase since 1990.<sup>254</sup> Importantly, many of these couples are parents of children either through a prior relationship, adoption, or reproductive technology.<sup>255</sup> The Marriage Amendment fails to improve the lives of these Montana families. Instead, the amendment hurts them by denying lesbian and gay couples the social and financial benefits associated with legal marriage. Lesbian and gay Montana families have the same burdens of maintaining a joint household as heterosexual families.<sup>256</sup> The government grants numerous benefits to married couples because it presumes society benefits from people vowing to care for each other and their families.<sup>257</sup> As the *Goodridge* court noted, these benefits “are enormous, touching nearly every

249. *Discrimination Written into Montana's Constitution* (Montana Human Rights Network) Nov. 2004 at 6, available at <http://www.mhrn.org/website.pdf>.

250. MONTANA SECRETARY OF STATE, *supra* note 229

251. *Id.*

252. ESKRIDGE, *supra* note 88 at 110.

253. Brief of Amici Curiae MEA-MFT at 5-6, *Snetsinger v. University of Montana*, 2004 MT 390, 325 Mont. 148, 104 P.3d 445. Twelve hundred households equals roughly 0.6% of the total married or unmarried coupled households in Montana. *Id.* (citing U.S. CENSUS BUREAU, UNITED STATES CENSUS 2000, Table PCT22).

254. *Id.* This figure is believed to be higher than reported. *Id.* at 6, n.4.

255. *Id.* at 6.

256. *Id.*

257. ESKRIDGE, *supra* note 88 at 66-67.

aspect of life and death.”<sup>258</sup> Lesbian and gay families exist in Montana and deserve the same social and legal protections, benefits, and obligations accorded heterosexual households in the State.<sup>259</sup>

The argument that “natural marriage” serves children better because “[e]ach gender brings vitally important, and unique, elements to a child’s development” is based on unsubstantiated assumptions about the benefits of heterosexual parenting.<sup>260</sup> In fact, the American Academy of Pediatricians, the American Psychological Association, the American Psychoanalytic Association, and the American Academy of Child and Adolescent Psychiatrists all support the ability of lesbians and gays to raise children.<sup>261</sup> All of these reputable organizations have participated in friend-of-the-court briefs and have written position papers arguing that studies support the proposition that lesbians and gays are capable parents.<sup>262</sup> An American Psychological Association study concluded that “[t]he results of existing research comparing gay and lesbian parents to heterosexual parents and children of gay or lesbian parents to children of heterosexual parents are quite uniform: common stereotypes are not supported by the data.”<sup>263</sup> The *Goodridge* court concluded that confining marriage to opposite-sex couples does not ensure that children are raised in the “optimal” setting: “Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy.”<sup>264</sup>

Finally, CI-96 proponents argued, “Special interest groups are constantly seeking to gain special rights that infringe on the rights of the rest of society.”<sup>265</sup> As was the case regarding Colorado’s “special rights” argument in *Romer*, this reasoning is

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258. *Goodridge*, 798 N.E.2d at 955.

259. Importantly, Professor Nancy D. Polikoff argues that *all* families deserve the governmental benefits accorded heterosexual married couples, no matter the family form. See generally Polikoff, *supra* note 127. While I agree with Professor Polikoff’s contention, this comment focuses exclusively on the discrimination at issue in the marriage laws.

260. MONTANA SECRETARY OF STATE, *supra* note 229

261. Polikoff, *supra* note 127, at 55.

262. *Id.*

263. CHARLOTTE J. PATTERSON, AMERICAN PSYCHOLOGICAL ASSOCIATION, University of Virginia, Part I, *Summary of Research Findings*, available at <http://www.apa.org/pi/parent.html>.

264. *Goodridge*, 798 N.E.2d at 962.

265. MONTANA SECRETARY OF STATE, *supra* note 229

patently implausible.<sup>266</sup> Allowing same-sex couples to marry does not create “special rights” for lesbians and gays. To the contrary, and similar to the Court’s holding in *Romer*, permitting same-sex couples to obtain marriage licenses simply allows for legal benefits that heterosexual couples take for granted.<sup>267</sup> Montanans face no harm whatsoever if lesbians and gays obtain marriage licenses. To the contrary, permitting same-sex couples to marry would improve the lives of Montana lesbian and gay families by providing essential government benefits. The Marriage Amendment fails to address the real issues facing families today, such as divorce rates, domestic violence and economic issues.<sup>268</sup> It fails to address these issues because the purpose behind CI-96 was never to help families, but rather to hold one family form as superior to another.<sup>269</sup>

### VIII. CONCLUSION

This comment argues that Montana’s Marriage Amendment is unconstitutional because it violates both due process and equal protection under the Fourteenth Amendment of the United States Constitution. The Supreme Court held in *Loving, Boddie, Zablocki*, and *Turner* that the state cannot infringe on the fundamental right to marry unless it presents compelling governmental interests. Even prisoners, the Court held in *Turner*, have a right to marry because of the social and economic benefits the institution provides a couple.<sup>270</sup> The Court reached this conclusion by finding that marriage expresses a couple’s emotional support and public commitment that may be religious or spiritual, and provides myriad governmental, property and other, less tangible benefits.<sup>271</sup> This reasoning presented by the Court has nothing to do with heterosexuality. Marriage is fundamental to society and individuals for reasons entirely attainable by lesbian and gay couples.

“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” Justice Kennedy wrote in *Lawrence*.<sup>272</sup> This means

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266. *Romer*, 517 U.S. at 626, 631.

267. *Id.* at 631.

268. Montana Human Rights Network, *supra* note 249, at 6.

269. *Id.*

270. *Turner*, 482 U.S. at 95-96.

271. *Id.*

272. *Lawrence*, 539 U.S. at 562.

that lesbians and gays have the same liberty interest to enter into intimate relationships with members of their own sex as heterosexuals have with the opposite sex. Moreover, *Romer* holds that the state cannot prohibit lesbians and gays from experiencing their constitutional rights unless a link exists between the prohibition and a legitimate state interest.<sup>273</sup> Denying same-sex couples the fundamental right to marry requires the state to show a compelling governmental interest, but Montana fails to even pass the less strict *Romer* test—no link exists between prohibiting same-sex couples from marrying and furthering legitimate state goals.

Today, Montana is one of seventeen states with a constitutional amendment effectively banning same-sex marriage. In the fifteen years prior to *Loving*, it was one of fourteen states to repeal its ban on interracial marriage.<sup>274</sup> Montana should follow suit with regard to its Marriage Amendment. Similar to anti-miscegenation laws, the Marriage Amendment discriminates against same-sex couples because they do not look like the traditional marriage model. The “natural marriage” argument that same-sex marriage is a “radical departure from thousands of years of time-tested natural marriage,”<sup>275</sup> resembles the *Loving* trial judge’s commentary that God placed the races on separate continents “[a]nd but for the interference with his arrangement there would be no cause for such marriages.”<sup>276</sup> Like the people involved in interracial and heterosexual relationships, lesbians and gays are human beings with the capacity to love, nurture, and maintain loyal, committed unions. Just as anti-miscegenation laws are now viewed as unfortunate relics of a bigoted past, so too, I predict, same-sex marriage will one day be regarded. If Montana fails to repeal its Marriage Amendment, as Virginia failed to repeal its ban on interracial marriage, due process and equal protection should prevail under the Fourteenth Amendment to grant Montana’s lesbian and gay couples access to this fundamental right and all the social and economic benefits that it provides.

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273. *Romer*, 517 U.S. at 632.

274. *Loving*, 388 U.S. at 6, n.5.

275. MONTANA SECRETARY OF STATE, *supra* note 229.

276. *Loving*, 388 U.S. at 3.



