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## Marriage in California: Is the Federal Lawsuit Against Proposition 8 About Applying the Fourteenth Amendment or Preserving Federalism?

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# Marriage in California: Is the Federal Lawsuit Against Proposition 8 About Applying the Fourteenth Amendment or Preserving Federalism?

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## I. INTRODUCTION

A dramatic saga unfolded as a state supreme court's controversial decision on the civil definition of marriage set the stage for a widely publicized ballot initiative.<sup>1</sup> Once passed by voters, this initiative amended the state constitution and effectively overturned the state supreme court's original decision on the issue of marriage.<sup>2</sup> This description of unfolding events may conjure up a unique set of images related to the 2008 passage of

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1. See *infra* notes 8–16, 29–30 and accompanying text.

2. See *infra* notes 12, 29–30, 90, 134 and accompanying text.

Proposition 8 in California, but it also describes the events that led to the 1998 ratification of article I, section 23 of the Hawai'i Constitution.<sup>3</sup> The events from Hawai'i are presented as an anecdotal illustration of federalist principles in the area of family law, which prescribe a division of responsibility between the federal and state governments<sup>4</sup> and assign regulatory authority in the area of family law, absent a constitutional violation, to the exclusive domain of the states.<sup>5</sup> If article I, section 23 of the Hawai'i Constitution was not deemed unconstitutional on equal protection or due process grounds, Proposition 8 should not be held unconstitutional either.<sup>6</sup> Additionally, states like Massachusetts, Connecticut, or Vermont, which recognized same-sex marriage through state supreme court decisions or state legislative enactments, should have the freedom to define marriage according to their own set of constitutional processes.<sup>7</sup>

In May 1993, the Hawai'i Supreme Court in *Baehr v. Lewin*<sup>8</sup> found that Hawai'i Revised Statute section 572-1, which defined the marriage contract as being between only a man and a woman, created a sex-based classification subject to strict scrutiny<sup>9</sup> for purposes of equal protection

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3. See David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 20 (2000). There are some minor differences between the events occurring in both Hawai'i and California. For example, the Hawai'i Supreme Court remanded its case to a lower court after finding that a state statute, which defined the marital relationship as being between a man and a woman, was subject to strict scrutiny. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993). By contrast, the California Supreme Court directly struck down a similar state statute as unconstitutional. *In re Marriage Cases*, 183 P.3d 384, 452–53 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48, 75–76, 122 (Cal. 2009). Additionally, whereas the state constitutional amendment in Hawai'i gave the state legislature the power to restrict marriage to opposite-sex couples, HAW. CONST. art. I, § 23, Proposition 8 asserted that “[o]nly marriage between a man and a woman is valid or recognized in California.” CAL. CONST. art. I, § 7.5. These minor differences, however, are not legally significant for purposes of this comment. See *infra* notes 26–31 and accompanying text.

4. See *infra* notes 50, 57 and accompanying text.

5. See *infra* notes 24, 48, 54–58, 68–72 and accompanying text.

6. See *infra* notes 23–31, 48, 177 and accompanying text.

7. See *infra* notes 23–24, 80–93 and accompanying text.

8. 852 P.2d 44 (Haw. 1993).

9. There are three recognized levels of judicial scrutiny that apply to enactments challenged on equal protection grounds. See Neelum J. Wadhvani, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 801, 805–06 (2006). Courts will apply the rational basis standard to the challenged enactment unless the classification relates to a fundamental right or a suspect or quasi-suspect class. See Gary Alan Collis, *Romer v. Evans: Gay Americans Find Shelter After Stormy Legal Odyssey*, 24 PEPP. L. REV. 991, 993–94 (1997). If the classification relates to a fundamental right or a suspect class, the court will apply strict scrutiny. *Id.* at 993. Race, ethnicity, and, at times, alienage are protected as suspect classes under federal law. Richard F. Duncan & Gary L. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 93, 101 (1995). The Supreme Court has also identified certain factors for determining whether a particular social group constitutes a suspect class. Collis, *supra*, at 994. The social group must demonstrate an immutable characteristic, political powerlessness, and a history of discrimination. *Id.* The strict scrutiny test requires the government to demonstrate that the enactment furthers a compelling state interest and is narrowly tailored to advance that interest. *Id.* at 993. If the classification relates to a quasi-suspect class, however, the court will apply intermediate

under article I, section 5 of the Hawai'i Constitution.<sup>10</sup> On remand in 1996, the Circuit Court of Hawai'i held that the Defendant, the State of Hawai'i, failed to present sufficient evidence to overcome the strict scrutiny standard and ruled that Hawai'i Revised Statute section 572-1 was unconstitutional on equal protection grounds.<sup>11</sup> After a period of inaction, public debate, and political infighting, both chambers of the state legislature passed a constitutional marriage amendment in April 1997 and, in an effort to effectively overrule the *Lewin* decision, placed the amendment before voters for final ratification.<sup>12</sup>

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scrutiny. Wadhvani, *supra*, at 805. Currently, gender and illegitimacy are protected as quasi-suspect classes under federal law. *Id.* The intermediate scrutiny test requires the government to show that the enactment is substantially related to an important state interest. *Id.*

10. *Lewin*, 852 P.2d at 67. The Hawai'i Supreme Court based this finding on the presence of the equal rights amendment—article 1, section 3—in the Hawai'i Constitution and on the reasoning from the plurality and concurring opinions in *Frontiero v. Richardson*, 411 U.S. 677 (1973). The equal rights amendment in the Hawai'i Constitution explicitly states that “[e]quality of rights under the law shall not be denied or abridged by the State on account of sex.” HAW. CONST. art. I, § 3. Even though a plurality of justices in *Frontiero* indicated that sex-based classifications are subject to strict scrutiny, three concurring justices declined to rule that sex was a suspect classification. 411 U.S. at 691–92 (Powell, J., concurring). The reason for their concurrence was that Congress had recently approved the Equal Protection Amendment and submitted the amendment to the states for ratification, and the concurring justices did not want to subvert the ratification process among each of the fifty state legislatures. *Id.* The Hawai'i Supreme Court relied on these opinions from *Frontiero*, even though subsequent cases have clearly held that intermediate scrutiny is the appropriate standard for assessing whether gender-based classifications violate the U.S. Constitution, because the Hawai'i Supreme Court is free to afford greater protections to its citizens under the state constitution than those afforded by the U.S. Constitution. *Lewin*, 852 P.2d at 64–66; *see also* *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that gender-based classifications are subject to intermediate scrutiny because they “must serve important governmental objectives and must be substantially related to achievement of those objectives”); *Califano v. Goldfarb*, 430 U.S. 199, 209 n.8 (1977) (noting that “gender-based discriminations against men [are subject to intermediate scrutiny because they] have been invalidated when they do not serve important governmental objectives and (are not) substantially related to the achievement of those objectives”) (internal quotation mark omitted); *Califano v. Webster*, 430 U.S. 313, 316–17 (1977) (commenting that “classifications by gender [are subject to intermediate scrutiny because they] must serve important governmental objectives and must be substantially related to achievement of those objectives” (internal quotation mark omitted)). Additionally, Hawai'i had already incorporated the Equal Rights Amendment as part of its state constitution. *See Lewin*, 852 P.2d at 67. It is important to note that the Federal Equal Rights Amendment eventually failed to gain the ratification of enough states in order to be incorporated as part of the U.S. Constitution. George Hodak, *March 22, 1972: Senate Approves Equal Rights Amendment*, 93 A.B.A. J. 72, at 72.

11. *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, at \*21–22 (Haw. Ct. App. Dec. 3, 1996). The State of Hawai'i did present evidence related to the public benefits of Hawai'i Revised Statute section 572-1, but after applying the strict scrutiny standard mandated by the Hawai'i Supreme Court, the circuit court was not persuaded that the statute furthered a compelling state interest. *Id.*

12. *See Coolidge*, *supra* note 3, at 28–82. There was disagreement on the actual meaning and effect of the amendment with respect to the *Lewin* decision. *Id.* at 108. In a summary disposition opinion in December 1999, the Hawai'i Supreme Court sidestepped the issue by deciding that the

Before the Hawai'i Supreme Court was able to address the 1996 circuit court opinion and after a big media stir of campaign coverage, sixty-nine percent of voters ratified the Hawai'i marriage amendment on November 3, 1998.<sup>13</sup> As in the later Proposition 8 saga, where the California Supreme Court decided the legality of a state marriage amendment and ruled on the issue of its retroactivity,<sup>14</sup> the Hawai'i Supreme Court was asked to decide whether the Hawai'i marriage amendment legally validated Hawai'i Revised Statute section 572-1 and whether or not the amendment had a retroactive effect.<sup>15</sup> In the end, the Hawai'i Supreme Court declared the case moot and reversed the circuit court decision.<sup>16</sup>

Alaska also encountered a comparable scenario during the same time period.<sup>17</sup> In February 1998, an Alaskan superior court judge in *Brause v. Bureau of Vital Statistics*<sup>18</sup> found that the right to choose one's life partner is a fundamental right that is protected through the right to privacy, and thus, the State of Alaska must show a compelling state interest in restricting marriage to opposite-sex couples.<sup>19</sup> In response, the state legislature passed

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amendment took Hawai'i Revised Statute section 572-1 out of the ambit of article 1, section 5 of the Hawai'i Constitution, thereby mandating that the statute be treated as constitutional. *Id.* at 109. The Hawai'i Supreme Court did not even reference the *Lewin* decision in its summary disposition opinion. *Id.* at 111.

13. *See id.* at 20, 95–102. The text of the Hawai'i marriage amendment states: "The legislature shall have the power to reserve marriage to opposite-sex couples." HAW. CONST. art. I, § 23.

14. *See Strauss v. Horton*, 207 P.3d 48, 114, 119 (Cal. 2009). The California Supreme Court ruled that Proposition 8 constituted a valid constitutional amendment rather than a revision to the California Constitution, and therefore, Proposition 8 was appropriately presented to voters for approval through the initiative process. *See id.* at 114. Additionally, the California Supreme Court decided that Proposition 8 should apply prospectively from the date of its passage rather than retroactively to invalidate the estimated 18,000 same-sex marriages that were previously performed in the State of California. *Id.* at 119, 121.

15. Coolidge, *supra* note 3, at 106–07. The Hawai'i Supreme Court did not directly answer either question on appeal. On the issue of legal validation of Hawai'i Revised Statute section 572-1, the Hawai'i Supreme Court decided that the statute should be given "full force and effect," which implied that the state legislature was not required to re-pass the statute. *Id.* at 110–11. On the issue of retroactivity, the circuit court judge had stayed the 1996 circuit court decision pending appeal, and as a result, no same-sex marriage licenses had been issued prior to passage of the marriage amendment. *See id.* at 41. Rather than address retroactivity directly, the Hawai'i Supreme Court simply declared the issue moot. *Id.* at 110.

16. *Id.* at 109.

17. *See infra* text accompanying notes 18–22.

18. No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

19. *Id.* at \*4–6. The right to privacy has been implied through the liberty interest in the Alaska Constitution as the right to be let alone. *Breese v. Smith*, 501 P.2d 159, 171–72 (Alaska 1972). Additionally, the Alaska Constitution guarantees that "[t]he right of the people to privacy is recognized and shall not be infringed." ALASKA CONST. art. I, § 22. There are a number of Alaska Supreme Court decisions, however, that demonstrate that the right to privacy should not be extended to instances of public behavior. *See, e.g., Doe v. Alaska Superior Court, Third Judicial Dist.*, 721 P.2d 617, 629 (Alaska 1986) (holding that right to privacy does not apply to a court order in libel action requiring governor to disclose private citizens' correspondence petitioning government on a matter of public importance). Similarly, the right to choose one's life partner may be a private decision, but government recognition of that decision should have the legal significance of

a constitutional marriage amendment and placed it before voters for ratification.<sup>20</sup> On the same day that voters passed a marriage amendment in Hawai'i, November 3, 1998, sixty-eight percent of voters in Alaska ratified their own marriage amendment.<sup>21</sup> After ratification of the amendment, the state legislature requested that the *Brause* case be dismissed as moot, and the Alaska Supreme Court eventually affirmed the superior court's decision to dismiss the case for lack of standing.<sup>22</sup>

These cases in Hawai'i and Alaska illustrate important federalist principles because these states were allowed to conclusively resolve the definition of marriage in accordance with their own set of constitutional processes.<sup>23</sup> Federalism divides political responsibility between federal and state government and prescribes regulation in the area of family law, including marriage, as an issue of traditional state concern as long as the regulation does not violate individual rights guaranteed in the U.S. Constitution.<sup>24</sup> Additionally, the Hawai'i and Alaska case scenarios can be used to draw overarching factual and legal comparisons between the ratification of constitutional marriage amendments in Hawai'i and Alaska, and the ratification of Proposition 8 in California.<sup>25</sup>

constituting a public act. See Kevin G. Clarkson et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 223–24 (1999). But cf. Patrick J. Shipley, *Constitutionality of the Defense of Marriage Act*, 11 J. CONTEMP. LEGAL ISSUES 117, 120 (2000) (noting the U.S. Supreme Court's reluctance to classify marriage as a public act for purposes of the U.S. Constitution's Full Faith and Credit Clause, which would require interstate recognition of same-sex marriage). The Full Faith and Credit Clause provides that every state in the Union must recognize "the public Acts, Records, and judicial Proceedings" of each sister state. U.S. CONST. art. IV, § 1; see also *infra* note 74 and accompanying text.

20. See Clarkson et al., *supra* note 19, at 226–36.

21. *Id.* at 244. The text of the Alaska marriage amendment states: "To be valid or recognized in this State, a marriage may exist only between one man and one woman." ALASKA CONST. art. I, § 25.

22. Eric J. Lobsinger, *A National Model for Reconciling Equal Protection for Same-Sex Couples with State Marriage Amendments: Alaska Civil Liberties Union ex. rel Carter v. Alaska*, 23 ALASKA L. REV. 117, 122 (2006).

23. See *supra* notes 8–22 and accompanying text.

24. See *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) ("[A] statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question."); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (asserting that domestic relations is "an area that has long been regarded as a virtually exclusive province of the States"); *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1877) ("The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."); *overruled on other grounds by Shaffer v. Heitner*, 433 U.S. 186, 212 n.39 (1977); *Barber v. Barber*, 62 U.S. 582, 584 (1858) (declaring that the Supreme Court disclaims "altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony").

25. See *infra* notes 26–31 and accompanying text.

The events in Hawai'i, Alaska, and California are all comparable.<sup>26</sup> Like the Hawai'i and Alaska supreme courts, which found that each state's traditional marriage statute was subject to heightened scrutiny,<sup>27</sup> the California Supreme Court granted the right of same-sex marriage after determining that California's Proposition 22, enacted into law in March 2000, was subject to strict scrutiny.<sup>28</sup> As in Hawai'i and Alaska, where the state court's decision precipitated a campaign to amend the state constitution by popular referendum,<sup>29</sup> the California Supreme Court decision on the issue of marriage induced a ballot initiative to overturn the specific holding of the

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26. See *infra* notes 27–31 and accompanying text.

27. See *supra* notes 10, 19 and accompanying text. The Hawai'i Supreme Court never decided whether Hawai'i Revised Statute section 572-1 met the strict scrutiny standard as required by its decision in *Lewin*. See Coolidge, *supra* note 3, at 24–26, 96. After the case was remanded to the circuit court, the government failed to show sufficient evidence to meet the strict scrutiny standard. *Id.* at 20, 24–26, 41. The circuit court declared Hawai'i Revised Statute section 572-1 unconstitutional, and the appeal of the decision was already complete by the time the state legislature placed the proposed constitutional marriage amendment before voters for ratification on November 3, 1998. *Id.* at 41, 96. The Hawai'i Supreme Court had the opportunity to issue a preemptive decision before voters could vote on the amendment, but the court chose to exercise restraint. *Id.* at 96. Additionally, the Alaska Supreme Court never decided whether the State of Alaska could constitutionally limit marriage to opposite-sex couples because voters ratified a constitutional marriage amendment after the Alaska Supreme Court declined to review the decision of an Alaskan superior court judge. Clarkson et al., *supra* note 19, at 215, 224. In California, however, the state supreme court decided the fate of the state's traditional marriage statute before voters had the opportunity to ratify a constitutional marriage amendment. See *Strauss v. Horton*, 207 P.3d 48, 66 (Cal. 2009). Still, this minor difference between Hawai'i, Alaska, and California is not significant for purposes of this anecdotal comparison.

28. *In re Marriage Cases*, 183 P.3d 384, 409, 452–53 (Cal. 2008), *superseded by* CAL. CONST. art. I, § 7.5, *as recognized in Strauss*, 207 P.3d at 75–76, 122. Proposition 22 was the traditional marriage statute passed by California voters in March 2000. *Strauss*, 207 P.3d at 65. The language of Proposition 22 was exactly the same as that of Proposition 8. *Id.* at 59, 65. Proposition 22 provided the following: “Only marriage between a man and a woman is valid or recognized in California.” *Id.* at 65. The identical language between both propositions led the California Supreme Court to conclude in *Strauss* that Proposition 8 had the same operative effect as Proposition 22 and was intended merely as a rejection of its decision in *In re Marriage Cases*. *Id.* at 76.

29. See *supra* notes 12–13, 20–21 and accompanying text. The state constitution of Hawai'i can either be amended by constitutional convention or by a legislatively proposed amendment. HAW. CONST. art. XVII, § 1. A constitutional amendment proposed by the state legislature must be approved by two-thirds of each chamber if voted on in a single session or by a majority of each chamber if voted on in two successive sessions. *Id.* at § 3. Once either of these requirements is met, the proposed amendment must receive majority approval by the voters in order to be ratified as part of the Hawai'i state constitution. *Id.* at §§ 2–3. On April 29, 1997, the Hawai'i constitutional marriage amendment passed the state senate by unanimous vote and the state house on the same day with forty-four in favor, six opposed, and one excused, which constituted passage by roughly eighty-six percent. See Coolidge, *supra* note 3, at 82. The people of Hawai'i later ratified the amendment with sixty-nine percent of the vote on November 3, 1998. *Id.* at 20. The constitutional amendment process in Alaska requires a similar two-thirds vote in each chamber of the state legislature and a majority vote by the people in the next general election. See ALASKA CONST. art. XIII, § 1. After receiving the requisite approval by the state legislature, the Alaska constitutional marriage amendment was ratified on November 3, 1998, with sixty-eight percent of the vote. Clarkson et al., *supra* note 19, at 236, 244.

*In re Marriage Cases* decision.<sup>30</sup> Just as Hawai'i and Alaska could conclusively resolve the civil definition of marriage in the wake of a state court decision to the contrary, without federal intervention, California and the rest of the states in the Union should be able to do the same.<sup>31</sup>

This article will argue that existing precedent does not support a finding that Proposition 8 violates the U.S. Constitution on either equal protection or due process grounds.<sup>32</sup> In fact, existing precedent in *Washington v. Glucksberg*<sup>33</sup> actually supports the opposite conclusion.<sup>34</sup> Part II of this article discusses the history of marriage and its civil recognition in this country, and the development of federalist principles in the area of family law.<sup>35</sup> Part III of this article discusses the current state of marriage and the gradual decline of federalism as an affirmative limit on the federal government's power in the area of family law.<sup>36</sup> Part IV of this article analyzes some of the current precedent from the U.S. Supreme Court on issues of equal protection and due process, and argues that much of this precedent, except *Glucksberg*, is distinguishable with respect to Proposition 8.<sup>37</sup> Part V of this article addresses the legal implications for this country's federalist system of government if the federal court system decides to strike down Proposition 8 as unconstitutional.<sup>38</sup> Finally, Part VI provides a

30. See *Strauss*, 207 P.3d at 76–77. The California Constitution can be amended through a voter-initiated amendment process if the text of the amendment is presented to the Secretary of State with a total amount of voter signatures equaling eight percent of all the votes cast in the last gubernatorial election. CAL. CONST. art. II, § 8. On June 2, 2008, the California Secretary of State certified that Proposition 8 had obtained enough signatures to qualify as a constitutional amendment in the general election on November 4, 2008. *Strauss*, 207 P.3d at 68.

31. See *supra* notes 23–30 and accompanying text.

32. See *infra* notes 111–201 and accompanying text.

33. 521 U.S. 702 (1997).

34. See *infra* notes 107, 172, 175, 177, 211–13 and accompanying text. According to the Supreme Court in *Glucksberg*, it has “‘always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.’” *Glucksberg*, 521 U.S. at 720 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). Additionally, “[a] similar restraint marks our approach to the questions whether an asserted substantive right is entitled to heightened solicitude under the Equal Protection Clause . . . .” *Moore v. City of East Cleveland*, 431 U.S. 494, 503 n.10 (1977) (plurality opinion). When the Supreme Court extends “constitutional protection to an asserted right or liberty interest, [it], to a great extent, place[s] the matter outside the arena of public debate and legislative action.” *Glucksberg*, 521 U.S. at 720. Thus, the Court must “exercise the utmost care whenever [it is] asked to break new ground in this field,” *Collins*, 503 U.S. at 125, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of [the Supreme Court],” *Glucksberg*, 521 U.S. at 720 (citing *Moore*, 431 U.S. at 502 (plurality opinion)).

35. See *infra* notes 40–72 and accompanying text.

36. See *infra* notes 73–110 and accompanying text.

37. See *infra* notes 111–201 and accompanying text.

38. See *infra* notes 202–14 and accompanying text.



conclusion on the constitutionality of Proposition 8 and argues that federalism in the regulation of family law, including the definition of marriage, should be preserved.<sup>39</sup>

## II. THE HISTORY OF MARRIAGE AND ITS PLACE IN THE FEDERALIST SYSTEM

### A. Societal Norms and Civil Recognition of Marriage

Centuries before Proposition 8, during the founding era of this country, the dominant conception of marriage and the family consisted of a man and a woman living together in matrimony with their biological children.<sup>40</sup> This understanding of marriage and the family continued throughout the nineteenth and twentieth centuries until dramatic demographic changes occurred in the 1960s.<sup>41</sup> The number of cohabitating opposite-sex couples began to rise as laws criminalizing sex outside of marriage were repealed or overturned.<sup>42</sup> It was not until the 2000s, however, that legally recognized same-sex marriage even became a possibility in this country.<sup>43</sup>

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39. See *infra* notes 215–26 and accompanying text.

40. Courtney G. Joslin, *The Evolution of the American Family*, 36 HUM. RTS. 2, 2 (2009). During the founding era, divorce was a rare occurrence and could only be granted through a special act of the state legislature. *Id.* Additionally, during this period, there were marital restrictions placed on African-Americans because they were barred from marrying someone of a different race. See Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559, 560–61 (2000). There is a long history of legal discrimination against African-Americans in the area of marriage and the family. See *id.* at 560. Anti-miscegenation laws remained in effect in the colonies and in the United States for over 300 years. *Id.* At the time the U.S. Supreme Court finally declared all anti-miscegenation laws unconstitutional, see *Loving v. Virginia*, 388 U.S. 1, 12 (1967), there were statutes and constitutional provisions in sixteen states that prohibited interracial marriage, see Sealing, *supra*, at 560. As will be discussed later in this comment, however, the Supreme Court's decision in *Loving* is distinguishable from California's enactment of Proposition 8. See *infra* notes 180–201 and accompanying text.

41. Joslin, *supra* note 40, at 3. By 2000, these changes relating to marriage and the family were so dramatic that Justice Sandra Day O'Connor commented as follows: "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households." *Troxel v. Granville*, 530 U.S. 57, 63–64 (2000).

42. Joslin, *supra* note 40, at 3.

43. *Id.* at 4–5. In 1989, Denmark became the first country to provide same-sex couples with a method of having their relationships legally recognized by the government. Craig A. Sloane, *A Rose by Any Other Name: Marriage and the Danish Registered Partnership Act*, 5 CARDOZO J. INT'L & COMP. L. 189, 200 (1997). The Danish Registered Partnership Act provided same-sex couples with all the legal rights and benefits of marriage. *Id.* at 200–01. Norway and Sweden soon passed similar laws in 1993 and 1994, respectively. *Id.* at 200. These developments actually preceded domestic partnership legislation in California, which was offered to same-sex couples in 1999. Meghan McCalla, *The "Socially Endorsed, Legally Framed, Normative Template": What Has In re Marriage Cases Really Done for Same-Sex Marriage?*, 1 EST. PLAN. & COMMUNITY PROP. L.J. 203, 215 (2008). Today, Belgium, Canada, the Netherlands, Norway, Spain, South Africa, and Sweden have

Civil recognition of marriage has its roots in eighteenth century English law with the passage of Lord Hardwicke's Marriage Act of 1753.<sup>44</sup> This Act was the first intervention by the state in regulating marriage, and even though the Act was later repealed, it set the stage for a series of laws that would challenge ecclesiastical dominance in the regulation of marriage.<sup>45</sup> Later, as state regulation of marriage developed in the United States, many licensing and registration frameworks were optional and not thoroughly enforced.<sup>46</sup> As a result, marriage in this country did not achieve its current conception as a clearly demarcated legal status until the twentieth century when government officials became concerned with issues of fraud and

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allowed government recognition of same-sex marriage. Kenneth Mck Norrie, *Recognition of Overseas Same-Sex Relationships in New Zealand*, 23 N.Z.U.L.R. 339, 340 (2009). Additionally, the Czech Republic, Finland, Germany, Hungary, Iceland, Luxembourg, New Zealand, Slovenia, Switzerland, and the United Kingdom provide some form of civil union status or benefits to same-sex couples. *Id.*

44. Hazel D. Lord, *Husband and Wife: English Marriage Law from 1750: A Bibliographic Essay*, 11 S. CAL. REV. L. & WOMEN'S STUD. 1, 1 (2001). Before 1753, ecclesiastical courts maintained almost exclusive authority in the area of marriage law. *Id.* At the time, marriage was defined as "the voluntary union for life of one man and one woman, to the exclusion of all others," and the Church allowed boys as old as fourteen and girls as old as twelve to enter into the marriage sacrament. *Id.* at 3 (quoting *Hyde v. Hyde*, L.R. 130, 133 (P. & D. 1866)). Marriage vows could not be undone, and given the ease of making these vows, ecclesiastical institutions began requiring certain formalities, including the presence of clergy and other witnesses, for marriage under canon law. *Id.* at 3-4. Despite efforts to enforce these formalities, couples were entering into irregular or clandestine marriages that did not meet canon requirements. *Id.* at 4. Lord Hardwicke's Marriage Act of 1753 was simply a product of societal efforts to reduce marriage irregularity in England. Leah Leneman, *The Scottish Case that Led to Hardwicke's Marriage Act*, 17 LAW & HIST. REV. 161, 169 (1999). The Act had the ultimate effect of declaring that clandestine marriages were not validly recognized civil unions. Lord, *supra*, at 7.

45. Lord, *supra* note 44, at 1. The growth of the Methodist and Baptist denominations created growing opposition to Lord Hardwicke's Marriage Act because the 1753 Act gave the Church of England a virtual monopoly over marriage ceremonies. *Id.* at 9-10. After a period of intense lobbying, Parliament passed the Marriage Act of 1836, which allowed marriage ceremonies within other religious denominations and provided that newly-appointed civil registrars could issue marriage licenses. *Id.* at 10. The 1836 Act also allowed for purely secular marriages that could be performed in the civil registrar's office. *Id.* Thus, this Act had the effect of creating civil marriage apart from religious marriage. *Id.* Subsequent legislation made minor changes to the system, but it remains largely intact up to the present day. *Id.*

46. Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 VAND. L. REV. 1085, 1118 (2009). During the nineteenth century, because marital registration laws were not thoroughly enforced, state courts played a larger role than state legislatures in the regulation of marriage. *Id.* at 1118-19. These courts generally favored the recognition of marriages through liberal evidentiary rules and, in most states, the doctrine of common law marriage. *Id.* at 1119. According to the Chief Justice of the Supreme Court of Judicature in the State of New York, marriage could "be proved . . . from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which a marriage may be inferred. No formal solemnization of marriage was requisite." *Fenton v. Reed*, 4 Johns. 52, 52 (N.Y. Sup. Ct. 1809) (per curiam) (citation omitted).

convenience in the administration of new government programs that offered benefits to either married couples or on the basis of marital status.<sup>47</sup>

### *B. Federalism in Family Law—An Area of Traditional State Concern*

Even before marriage became a well-documented legal status, family law in the United States was viewed as being an area of traditional state concern because of certain federalist principles in the Constitution.<sup>48</sup> Federalism can be understood as the appropriate relationship between the federal government and the states as defined by “various constitutional grants of authority to, and limitations on, both federal and state governments.”<sup>49</sup> The framers of the U.S. Constitution envisioned the

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47. Collins, *supra* note 46, at 1121. There were concerns about the impact that common law marriage would have on workers' compensation or social security programs. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 746 (1996). With the social security system, for example, a large number of benefits are not only conditioned on marital status, but the federal statute enacting the social security system also required reliance on state marriage laws to determine marital status. *Id.* When faced with this new challenge, government officials recommended that common law marriage be abolished rather than devote the time and attention needed to meet this new administrative challenge. *Id.* at 746–47. At about the same time, states began abolishing common law marriage and imposing stricter licensing and registration requirements on marriage. Collins, *supra* note 46, at 1121–22.

48. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *In re Burrus*, 136 U.S. 586 (1890) to reassert the principle that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States”); see also Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 YALE J.L. & FEMINISM 221, 221 (2005) (asserting that “[t]he principle of ‘federalism in family law’ is long-established and deeply embedded in the United States”). *But cf.* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 870–84 (2004) (challenging the notion that family law is an exclusively local concern and arguing that federal intervention in the area of family law is not necessarily unprecedented or inappropriate). Although federal law governs a number of areas that pertain to the family or directly or indirectly affect family life, such as taxation, immigration, and bankruptcy, the U.S. Constitution explicitly grants regulatory authority to the federal government in these areas. See Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1884–85 (1995). The U.S. Constitution provides that “[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, . . . [and] [t]o establish a[] uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States . . . .” U.S. CONST. art. I, § 8, cls. 1, 4. Additionally, the expanding scope of federal legislation in the twentieth and twenty-first centuries has ensured that the federal government encounters the family in a multitude of different ways. See Dailey, *supra*, at 1884. Despite this overlap in spheres of sovereignty between the federal government and the states, the core domain of family law can still be properly characterized as constituting a traditional state concern because actual pronouncements of marriage, divorce, alimony, and child custody are still regulated by the states. See *id.* at 1821 n.113. *But cf.* Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL’Y 101, 118–34 (2006) (discussing the federal government’s attempts to eliminate polygamy through various legislation and the challenges polygamy created for Utah in its attempts to achieve statehood).

49. Sonny Swazo, *The Future of High-Level Nuclear Waste Disposal, State Sovereignty and the Tenth Amendment: Nevada v. Watkins*, 36 NAT. RESOURCES J. 127, 137 (1996). One example of federalism in the Constitution is the Tenth Amendment, which provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. The original purpose and primary

national government as having certain substantive limits on its sphere of authority.<sup>50</sup> Additionally, federalism was designed to serve not only as a check on the accumulation of power in the federal government but also as a means for citizens to hold their government accountable.<sup>51</sup>

Federalism provides a mechanism for the clear division of political responsibility, which provides citizens with some knowledge of which governmental body to hold accountable for failure to perform a particular

function of the Tenth Amendment was to serve as a substantive limit on federal power. See Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469, 471 (2008). In fact, James Madison envisioned the Tenth Amendment as precluding the federal government from exercising any power that was not contained explicitly in the Constitution. Kurt T. Lash, *James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 168 (2006). As a result of this restraint on federal power, the Tenth Amendment also created a residual realm of state sovereignty. See Dailey, *supra* note 48, at 1797–98. Despite the Tenth Amendment's limit on federal power, however, the Supreme Court developed an expansive interpretation of Congress's implied powers in *McCulloch v. Maryland*, 17 U.S. 316, 406–15 (1819). In *McCulloch*, the Court ruled on the constitutionality of the Bank of the United States and whether Congress had the power to bring the Bank into existence. *McCulloch*, 17 U.S. at 317–19. Chief Justice John Marshall articulated the principle that the express powers granted to Congress under Article I also implied an ability to choose the best means of effectuating those powers. Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 56 n.233 (1999). According to Marshall, the Necessary and Proper Clause in Article I, which gives Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,” U.S. CONST. art. I, § 8, cl. 18, simply provided confirmation of this principle, Nelson & Pushaw, *supra*, at 56 n.233.

50. See Dailey, *supra* note 48, at 1796–98. Even though the Supreme Court adopted an expansive view of congressional powers in *McCulloch*, see *supra* note 49, a number of early decisions under the Commerce Clause also served an important role in placing broad limits on federal power, Dailey, *supra* note 48, at 1797–98. The Commerce Clause implied a correlative sphere of state authority over issues of local concern because the U.S. Constitution granted express authority for Congress to regulate interstate economic activity. See, e.g., *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824) (clarifying that the meaning of the Commerce Clause cannot be construed as referring to commerce “which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States”). In *Gibbons*, the Court interpreted the Commerce Clause as granting an expansive power to Congress in regulating commerce among the several states. See Nelson & Pushaw, *supra* note 49, at 57–63. First, the Court defined commerce not only as the buying and selling of goods but also as all commercial intercourse, which included activities associated with the buying and selling of goods, such as navigation. *Gibbons*, 22 U.S. at 190–92, 215–18. Second, the Court defined “among the several states” as including intrastate matters that may affect commerce in other states. *Id.* at 195–97, 204. These early Commerce Clause cases, however, articulated a residual sphere of state sovereignty that allowed states to exercise control over matters that were noncommercial or not among the several states, which provided states with certain police powers to regulate the public health, safety, and welfare of its citizens. See Nelson & Pushaw, *supra* note 49, at 61–63. Ironically, Marshall's own interpretation of the Commerce Clause in *Gibbons* was invoked during the New Deal era as a justification for expanding the scope of Congress's power beyond the substantive limits of the Commerce Clause. *Id.* at 63.

51. *United States v. Lopez*, 514 U.S. 549, 576–77 (1995) (Kennedy, J., concurring).

political function.<sup>52</sup> In fact, “the resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.”<sup>53</sup> Federalism provides a context for understanding why the framers and subsequent generations of jurists have all asserted that family law is of traditional state concern.<sup>54</sup> This context of federalism also demonstrates that family law did not develop into an area of traditional state concern as a result of arbitrary ideas or decisions.<sup>55</sup> Localism in family law serves an important function in protecting against tyranny and preserving this country’s republican form of government.<sup>56</sup> Structurally, state regulation of family law was designed as a mechanism for restraining the reach of the national government into the area of family life, thereby promoting individual liberty.<sup>57</sup> Furthermore, localism in family law serves the purpose of promoting civic virtue and republican ideals.<sup>58</sup>

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52. *Id.* A clear division of political responsibility is crucial to the theory that a constitutional system with two governments will afford more liberty to the people than it would if there were only one government. *See id.* at 576. This theory is premised on James Madison’s expectation that each of the governments will restrain each other through a competitive process of vying for the affections of the people. *Id.* at 567–77.

53. *Id.* at 577. To a large degree, the federalist balance between the national and state government depends on and is preserved by the political process. *Id.* Each branch of government, however, is obligated to preserve and protect all aspects of the Constitution, including the government’s federalist structure. *Id.* Even though Congress has a substantial impact on the federalist balance, there are disincentives related to political convenience that require the judiciary to preserve and protect the federal balance as well. *Id.* at 576–78.

54. *See infra* notes 56–58 and accompanying text.

55. *See Wardle, supra* note 48, at 231–34, 240–41. Jill Elaine Hasday argues that jurists frequently cite historical practice as a primary justification for localism in family law without articulating the doctrine’s rational underpinnings. *See* Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1301–19 (1998). Alternatively, it is more likely that the principle for localism in family law has become so widely accepted and pervasive as to render clear articulation and constant justification of its rational underpinnings unnecessary. *See infra* notes 56–72 and accompanying text.

56. *See infra* notes 57–58 and accompanying text.

57. *See Wardle, supra* note 48, at 226–27. Family life has traditionally been viewed as a refuge from the individualistic and amoral aspects of the public sphere. Dailey, *supra* note 48, at 1827. The domestic sphere is the place where individuals develop personal values and ideals apart from governmental mandates. *Id.* Although the government often exerts a strong influence in regulating the domestic sphere, there are certain limits placed on regulation in this area. *Id.* at 1827–31. Additionally, there are defined roles for both the federal and the state governments in regulating aspects of the domestic sphere. *Id.* at 1825; *see also infra* notes 66, 68–72 and accompanying text. Governmental regulation of what constitutes “the good family life” requires individuals to express their own moral vision through the deliberative process of communitarian decision-making. Dailey, *supra* note 48, at 1872–75. State authority in this regard preserves individual liberty because state regulation reduces the inherent risk in heterogeneous societies that this process will degenerate into a widespread imposition of a defined moral code. *Id.*

58. Wardle, *supra* note 48, at 232–33. The framers of the U.S. Constitution envisioned that a variety of local institutions, such as families, churches, and schools, would provide a necessary role in preserving the constitutional system. *See id.* at 249–51. These institutions fostered certain virtues among the citizenry that laid the essential foundation for a republican form of government. *See id.* at 249. Situated at the heart of this essential foundation was the importance of marriage and the family,

A number of important principles have developed in U.S. constitutional jurisprudence as a result of the doctrine that family law is a matter of traditional state concern.<sup>59</sup> First, in 1859, the Supreme Court recognized in dicta that federal courts do not have jurisdiction over “the subject of divorce, or for the allowance of alimony.”<sup>60</sup> This assertion in dicta later formed the basis of the domestic relations exception to federal court jurisdiction, and this exception came to encompass a whole range of cases, including those involving pronouncements of marriage, divorce, alimony, and child custody.<sup>61</sup> In 1992, the U.S. Supreme Court affirmed the domestic relations exception in *Ankenbrandt v. Richards*,<sup>62</sup> but it gave little guidance to circuit and district courts on the exception’s proper scope and application.<sup>63</sup> The Court also noted that the continued recognition of the exception in previous

serving as a school of civic virtue for the next generation of citizens. *Id.* at 251. These republican virtues include, among others, participation in the political system, respect for differing viewpoints, critical dialogue and deliberation, honesty, reasonableness, and rational thought. Dailey, *supra* note 48, at 1835–40. Many critics would argue, however, that these virtues can be better instilled in children in school rather than at home. *Id.* at 1839–40. This viewpoint neglects consideration of the most important republican virtue—autonomy. *See id.* at 1840. This virtue gives future generations a reason to value liberty and resist tyranny. *See Wardle, supra* note 48, at 232–33. As a result, “[f]ederalism in this context destroys the federal government’s power to mold the moral character of future citizens in its own uniform image.” Dailey, *supra* note 48, at 1820.

59. *See infra* notes 60–67 and accompanying text.

60. *Barber v. Barber*, 62 U.S. 582, 584 (1859). The U.S. Supreme Court based this decision on the historical argument that federal court jurisdiction only extended to matters within the scope of English law and equity powers. *See* Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669, 673–75 (1995). At the time the U.S. Constitution was adopted, issues of divorce and alimony were strictly within the jurisdiction of English ecclesiastical courts. *See id.* While the Court disclaimed jurisdiction over divorce and alimony pronouncements, it did assert jurisdiction over the enforcement of such decrees as being matters within both English and federal court jurisdiction. *Id.* at 675. The dissent argued, however, that Article III courts completely lacked jurisdiction over domestic relations issues. *Id.* at 676.

61. Stein, *supra* note 60, at 669–70. Thirty years later, the U.S. Supreme Court used the dicta from *Barber* as precedent for *In re Burrus*. *Id.* at 676. There, the Court asserted that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.” *In re Burrus*, 136 U.S. 586, 593–94 (1890). Domestic relations cases can be divided up into four classifications of cases arising under both diversity and federal question jurisdiction. Stein, *supra* note 60, at 669–70. These four classifications include the following: (1) core cases, (2) claims regarding the enforcement of decrees in core cases, (3) injury claims with respect to the rights decreed in core cases, and (4) claims regarding constitutional or other federal violations of the rights decreed in core cases. *Id.* Core cases are those involving pronouncements of marriage, divorce, alimony, and child custody. *Id.* Even though there is considerable debate on the scope of the domestic relations exception, there is widespread agreement among jurists that the exception extends to core cases under the first classification. *Id.* at 679.

62. 504 U.S. 689 (1992).

63. *See* Stein, *supra* note 60, at 671.

cases rested “upon the virtually exclusive primacy at that time of the States in the regulation of domestic relations.”<sup>64</sup>

Second, the Supreme Court has set a high standard of deference for instances where state family law conflicts with a federal statute.<sup>65</sup> In these cases, the Court has held that state family law and family property law should only be preempted if there will be “major damage” to a “clear and substantial” federal interest if the state law is applied.<sup>66</sup> According to the Court, the rationale behind this deferential standard is the constitutional theory and precedent that requires attentiveness to state concerns, especially in the area of family law.<sup>67</sup>

The notion that family law is a matter of traditional state concern, however, does not preclude the federal government from regulating certain aspects of the domestic sphere.<sup>68</sup> While localism in family law and in other areas of law, which have traditionally been governed by the states, ensures autonomy and preserves individual liberty,<sup>69</sup> there must also be a check on the state’s ability to violate certain classically liberal values.<sup>70</sup> As a result, the federal government has the responsibility of ensuring that certain individual rights, such as equality, privacy, and parental authority, continue

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64. *Ankenbrandt v. Richards*, 504 U.S. 689, 714 (1992). Contrary to Hasday’s argument, *see supra* note 55, this quote lends credence to the idea that localism in family law was based on the framers’ understanding of federalism and the importance of family life in restraining tyranny and cultivating republican virtues rather than on justifications of historical legal practice. *See supra* notes 56–58 and accompanying text.

65. *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979). A conflict between state family law and a federal statute creates constitutional implications under the Supremacy Clause. *See id.* The Supremacy Clause provides the following: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

66. *United States v. Yazell*, 382 U.S. 341, 352 (1966). Even in light of the Supremacy Clause, the Supreme Court has found that the federal law must directly conflict with state law in order for the federal law to preempt a state family law or family property law statute. *Hisquierdo*, 439 U.S. at 581. A conflict in language is not enough. *Id.* This rule of preemption also reflects the distinct roles that federal and state government play in regulating aspects of the domestic sphere. *See Dailey, supra* note 48, at 1825. State governments have the primary responsibility of integrating communitarian values into a shared vision of what constitutes “the good family life.” *Id.* The federal government should not intervene in the moral domain of family law, but the federal government’s role in regulating family life does include protecting vital national interests, such as issues of individual rights. *Id.*

67. *Yazell*, 382 U.S. at 352.

68. *See Wardle, supra* note 48, at 233.

69. *See supra* notes 56–58 and accompanying text.

70. *Dailey, supra* note 48, at 1872; *see, e.g., Boddie v. Connecticut*, 401 U.S. 371, 385 (1971) (“The power of the States over marriage and divorce is, of course, complete except as limited by specific constitutional provisions.”) (Douglas, J., concurring); *Labine v. Vincent*, 401 U.S. 532, 538–39 (1971) (“[T]he power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws.”).

to be preserved in the domestic sphere.<sup>71</sup> This narrowly defined role for the federal government serves as a limit on state constitutional authority and as a further guarantee of liberty.<sup>72</sup>

### III. CURRENT STATE OF MARRIAGE AND FEDERALISM IN FAMILY LAW

#### A. *Legal Developments After Lewin and Brause*

As courts in Hawai'i and Alaska were following their own constitutional processes in applying strict scrutiny to their marriage statutes,<sup>73</sup> there was increasing uncertainty about whether the Full Faith and Credit Clause<sup>74</sup> in

71. Dailey, *supra* note 48, at 1881. For example, the U.S. Supreme Court found that state restrictions on interracial marriage were a violation of individual rights under the Equal Protection Clause of the Fourteenth Amendment. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("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.").

72. Dailey, *supra* note 48, at 1880.

73. See *supra* notes 10, 19 and accompanying text. The Hawai'i Supreme Court in *Lewin* found that the state's traditional marriage statute was subject to strict scrutiny for purposes of equal protection because it created a sex-based classification. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993). The Hawai'i Supreme Court remanded the case to a lower court for a determination of whether the statute met the strict scrutiny standard. *Id.* at 68. Voters, however, ratified a state constitutional amendment giving the state legislature the power to limit marriage to opposite-couples before the Hawai'i Supreme Court was able to hear the case again for final adjudication. Coolidge, *supra* note 3, at 20, 95–102. Similarly, in *Brause*, an Alaskan superior court judge found that restrictions on same-sex marriage were subject to strict scrutiny as a violation of a state constitutional right to privacy. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*4–6 (Alaska Super. Ct. Feb. 27, 1998). Before the Alaska Supreme Court could decide the issue, voters ratified a constitutional marriage amendment defining marriage as being between one man and one woman. See Lobsinger, *supra* note 22, at 122.

74. The Full Faith and Credit Clause states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1. The first sentence of the Full Faith and Credit Clause has been interpreted narrowly by the U.S. Supreme Court and, thus, imposes only a minor set of constraints on the states in terms of their power to apply choice-of-law rules to disputes in state courts. Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 261 (1998). In *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312–13 (1981), the Supreme Court set forth the test to determine whether a state could constitutionally apply its own law to a dispute, rather than the law of another state under the Full Faith and Credit Clause. States can constitutionally apply their own substantive law to a dispute if the state can establish sufficient contact or aggregation of contacts to the parties or transaction such that the application of its own law would not be arbitrary or fundamentally unfair. *Id.* The second sentence of the Full Faith and Credit Clause, also known as the Effects Clause, gives Congress the power to determine the substantive effect that state statutes will have on the laws of other states. Whitten, *supra*, at 255, 262. This congressional power, however, raises questions about whether Congress can prescribe a substantive effect for state statutes that exceeds the constitutional choice-of-law rules defined by the Supreme Court under the first sentence of the Full Faith and



the U.S. Constitution would require other states in the Union to recognize same-sex marriages performed in a sister state.<sup>75</sup> Some states responded by passing statutes explicitly prohibiting the recognition of same-sex marriages, even if the marriages were valid in other jurisdictions.<sup>76</sup> On a federal level, Congress also passed the Defense of Marriage Act in an effort to protect states from having to recognize same-sex marriages performed in a sister state.<sup>77</sup> Finally, after November 1998, the people of various states began

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Credit Clause. *Id.* at 262.

75. See, e.g., Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551 (1994). The sufficient contacts test from *Allstate* allowed states to adopt their own choice-of-law doctrine with respect to marriage. *Id.* at 560. At the time, however, the Restatement (Second) of Conflict of Laws indicated that out-of-state marriages should be recognized in other states so long as the marriage did not conflict with "the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971). This public policy exception, as articulated in the Restatement (Second) of Conflict of Laws, had previously been used to deny recognition to marriages that involved incest, polygamy, minors, and the mentally incompetent. Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1439 (1997). With Hawai'i on the verge of recognizing same-sex marriage, there were questions raised about whether this public policy exception applied to marriages between two parties of the same sex. See Henson, *supra*, at 555–56, 560–62. Additionally, the Supreme Court had not specifically addressed whether the Full Faith and Credit Clause applied to state recognition of marriage, and there was concern that choice-of-law rules might change if Hawai'i and other states began recognizing same-sex marriage. See Ruskay-Kidd, *supra*, at 1449.

76. See Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 239 app.II (1998) (listing statutes in twenty-eight states that were passed from 1995 to 1998 to explicitly prohibit the recognition of same-sex marriages).

77. George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 583 (1999). The Defense of Marriage Act ("DOMA") has the operative effect of declaring that marriages are the equivalent of licenses and not judgments. See Ruskay-Kidd, *supra* note 75, at 1439–40. Thus, state recognition of marriage is not subject to the Full Faith and Credit Clause. See *id.* The text of DOMA states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C (1996). Section three of DOMA also states:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (2000). Some critics of section three of DOMA argue that this provision is an unprecedented encroachment into an area of law that has traditionally been exclusively the concern of the states. See, e.g., Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221, 221, 231 (1999). Another critic cites section three of DOMA to draw attention to a growing body of federal family law and challenge the traditional understanding of family law as an exclusively local concern. Hasday, *supra* note 55, at

1302, 1373–82. In *Massachusetts v. U.S. Department of Health & Human Services*, 698 F. Supp. 2d 234, 249 (D. Mass. 2010), the District Court of Massachusetts even declared that DOMA was a violation of the Tenth Amendment because “DOMA plainly intrudes on a core area of state sovereignty—the ability [of states] to define the marital status of its citizens.” According to the district court, however, a challenge to a federal statute under the Tenth Amendment cannot prevail without the following three elements: “(1) the statute must regulate the States as States, (2) it must concern attributes of state sovereignty, and (3) it must be of such a nature that compliance with it would impair a state’s ability to structure integral operations in areas of traditional governmental functions.” *Id.* (quoting *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997)). When assessing DOMA under the first prong of the test, the District Court of Massachusetts cited evidence related to the economic burden that DOMA places on Massachusetts’s bottom line in order to demonstrate that DOMA regulates the “States as States.” *Id.* The origin of this requirement under the first prong of the *Bongiorno* test can be traced back to the Supreme Court’s decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Usery*, the “States as States” concept developed out of a factual scenario where the federal government, under the Commerce Clause, extended the minimum wage and maximum hour provisions of the Fair Labor Standards Act (“FLSA”) of 1938 to cover all state and municipal employees. 425 U.S. at 835, 842. Accordingly, the Court found that “Congress may not exercise . . . [the Commerce Clause] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.” *Id.* at 855. In light of this background on the “States as States” requirement, it seems surprising that the District Court of Massachusetts would simply use evidence of an economic burden on the Commonwealth of Massachusetts to demonstrate that “the Commonwealth easily satisfies the first requirement of a successful Tenth Amendment challenge.” *U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d at 249. By way of counterargument, *Garcia*’s rejection of an “integral” or “traditional” function test, in exempting states from federal regulation under the Commerce Clause, might be construed as impliedly precluding the first and third prongs under the *Bongiorno* test. See *infra* note 97 and accompanying text. The district court’s analysis under the second prong of state sovereignty, however, is equally as questionable because the court misunderstands the extent of state sovereignty in the area of family law, see *U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d at 249–51, and fails to appreciate the consequences of the fact that section three of DOMA only defines marriage for federal purposes, see *Dent, supra*, at 583. With the prospect that Hawai’i would soon recognize same-sex marriage, see *supra* notes 8–11 and accompanying text, the federal government was faced with an administrative challenge, within its own sphere of sovereignty, similar to the one it had previously faced when dealing with the issue of common law marriage, see *supra* note 47 and accompanying text. Up to this point, the federal government relied heavily on state marriage laws to determine marital status for social benefit programs, such as social security claims. See *supra* note 47 and accompanying text. With the uncertain state of marriage law in Hawai’i, the federal government passed DOMA to define marriage for its own administrative purposes. See 1 U.S.C. § 7 (2000). Additionally, DOMA was written using broad language so as not to interfere with the states’ ability to regulate the pronouncements of marriage. Nancy J. Feather, *Defense of Marriage Acts: An Analysis Under State Constitutional Law*, 70 TEMP. L. REV. 1017, 1032 (1997). This conception of DOMA is, thus, consistent with the widely-accepted interpretation of the domestic relations exception to federal court jurisdiction, in that the states have exclusive authority to regulate the core domain of family law—pronouncements of marriage, divorce, alimony, and child custody. See *supra* note 61 and accompanying text. By contrast, DOMA gives the federal government the power to regulate claims regarding the enforcement of such pronouncements with respect to federal benefit programs, thereby still respecting the principle that marriage should generally be defined by local societal norms. See 1 U.S.C. § 7 (2000); see also *supra* note 61 and accompanying text. As a result of these distinctions, DOMA cannot be characterized as constituting a national marriage law in the same way as overturning Proposition 8 would be because the latter constitutes a direct encroachment into the

ratifying state constitutional marriage amendments because they viewed the traditional definition of marriage as being in jeopardy.<sup>78</sup> Currently, the number of states that have adopted constitutional marriage amendments has grown to a total of twenty-nine state jurisdictions, including the 2008 amendments adopted in California, Florida, and Arizona.<sup>79</sup>

In 2003, one of the states that did not ratify a state constitutional marriage amendment, Massachusetts, became the first state to legally recognize same-sex marriage.<sup>80</sup> The Massachusetts Supreme Judicial Court found that restricting marriage to one man and one woman was not

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states' ability to regulate the pronouncements of marriage—the core domain of family law. See *supra* notes 48, 61 and accompanying text. In *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374, 393 (D. Mass. 2010) (emphasis in original), a companion case to *U.S. Department of Health & Human Services*, the District Court of Massachusetts noted that DOMA “was, in fact, a significant departure from the status quo at the federal level.” Unlike the court’s characterization in *Gill*, however, a “significant departure” in the law is not inherently unconstitutional. A “significant departure” can be constitutional as long as the governmental body enacting the change in law has the power to do so under the U.S. Constitution, and the change does not amount to an individual rights violation. See *supra* notes 4, 5 and accompanying text. As mentioned previously, the U.S. Constitution explicitly grants Congress exclusive authority on matters of taxation, immigration, and bankruptcy. See *supra* note 48. In *Helvering v. Davis*, 301 U.S. 619, 640–41, 645 (1937), the Supreme Court has also held that Social Security legislation is constitutional under congressional taxing and spending powers. Later, the federal benefit programs of Medicare and Medicaid were enacted as the Social Security Amendments of 1960. Phyllis E. Bernard, *Social Security and Medicare Adjudications at HHS: Two Approaches to Administration Justice in an Ever-Expanding Bureaucracy*, 3 HEALTH MATRIX 339, 384 (1993). Thus, Congress should have the power under the U.S. Constitution to determine the appropriate method of distributing federal benefits relating to marriage in the areas of federal taxation, immigration, bankruptcy, Social Security, Medicare, and Medicaid. Moreover, section three of DOMA defines marriage as “a legal union between one man and one woman as husband and wife,” 1 U.S.C. § 7 (2000), which is strikingly similar to Proposition 8’s language that “[o]nly marriage between a man and a woman is valid or recognized in California,” CAL. CONST. art. I, § 7.5. Thus, it would be difficult to characterize section three of DOMA as constituting an individual rights violation if California’s enactment of Proposition 8 is not also an individual rights violation, and as explained later in this comment, Proposition 8 does not violate the U.S. Constitution on equal protection or due process grounds. See *supra* notes 111–201 and accompanying text.

78. Lynn D. Wardle, *State Marriage Amendments: Developments, Precedents, and Significance*, 7 FLA. COASTAL L. REV. 403, 403–05 (2005). Without DOMA, state courts would be responsible for deciding whether there was a strong enough public policy exception in making choice-of-law decisions with respect to recognition of out-of-state same-sex marriages. See Ruskay-Kidd, *supra* note 75, at 1440. Some state courts may have decided to give recognition to out-of-state same-sex marriages out of respect for the principle that sister state decisions should be given full credit. *Id.* As a result, states began passing state statutes and constitutional marriage amendments to codify public policy with respect to recognition of out-of-state same-sex marriages. See *id.* at 1446.

79. Kimberly N. Chehardy, *Conflicting Approaches: Legalizing Same-Sex Marriage Through Conflicts of Law*, 8 CONN. PUB. INT. L.J. 131, 148, 159 n.193 (2009). While this figure includes the ratification of Proposition 8 in California, see CAL. CONST. art. I, § 7.5, it does not include the Hawai’i marriage amendment, which merely gives the Hawai’i state legislature the power to restrict marriage to opposite-sex couples, HAW. CONST. art. I, § 23.

80. See Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that Was Valid at Its Inception?: Considering the Legal Effect of Proposition 8 on California’s Existing Same-Sex Marriages*, 60 HASTINGS L.J. 1063, 1074 (2009).

rationally related<sup>81</sup> to a legitimate state interest for purposes of state equal protection and due process requirements.<sup>82</sup> As a result, the court did not decide the issue of whether sexual orientation was a suspect or quasi-suspect class.<sup>83</sup> Instead, the court simply defined marriage as “the voluntary union of two persons as spouses, to the exclusion of all others.”<sup>84</sup>

Subsequently, in 2008, California and Connecticut became the second and third states, respectively, to legalize same-sex marriage.<sup>85</sup> The California and Connecticut state supreme court decisions, which addressed the legalization of same sex-marriage, were unique in that both states had already granted all the legal rights and responsibilities of marriage, available at the state level, to same-sex couples through domestic partnerships or civil unions.<sup>86</sup> Additionally, these two decisions were the first cases where a final

81. Courts generally find that a statute is constitutional under the rational basis standard, which was applied by the Massachusetts Supreme Judicial Court, because courts traditionally treat challenged legislation with a presumed level of deference under this standard. Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 783 (1987). Traditionally, the government only needs to provide a plausible set of facts to justify the challenged statute. *Id.* Even in instances where the government cannot provide a plausible set of facts, courts will supplant their own justification for the statute or re-characterize its purpose to render the statute rationally related to a legitimate state interest. *Id.* In recent cases, however, courts have begun to afford less deference to legislation under rational basis review, which leads some scholars to characterize this new standard as rational basis with bite. See Wadhvani, *supra* note 9, at 806–07.

82. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003). The Massachusetts Supreme Judicial Court rejected the argument that traditional marriage advances the state’s interest in procreation because same-sex couples can procreate through artificial insemination and a number of opposite-sex couples get married without any desire to have children. *Id.* at 961–62. Additionally, the court rejected the argument that traditional marriage serves the purpose of placing children in an optimal living environment by noting demographic changes that have led to the breakdown of the traditional family in society. *Id.* at 962–63. Finally, the court rejected the argument that traditional marriage conserves scarce state resources, on the theory that same-sex couples are more financially independent of each other than opposite-sex couples, because same-sex couples could make use of marital benefits to care for children or other dependents. *Id.* at 964. Some legal scholars have criticized the results-oriented rationale in *Goodridge*. See, e.g., Jamal Greene, *Divorcing Marriage from Procreation*, 114 YALE L.J. 1989, 1989 (2005). The marriage statute in *Goodridge* only needed to be rationally related to one of the above goals in order for it to meet the rational basis standard. *Id.* at 1991. Even if traditional marriage is both under-inclusive and over-inclusive for purposes of the state’s interest in advancing procreation, the rational basis standard allows the state to draw arbitrary boundaries in furthering its interests. *Id.* at 1991 n.15. Thus, traditional marriage statutes cannot fail unless some form of heightened scrutiny is applied. *Id.* at 1991.

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

84. *Id.* at 969.

85. See Weithorn, *supra* note 80, at 1074–75.

86. Bennett Klein & Daniel Redman, *From Separate to Equal: Litigating Marriage Equality in a Civil Union State*, 41 CONN. L. REV. 1381, 1383, 1383 n.2 (2009). Connecticut’s civil union law was actually passed after the Connecticut case was filed, but the civil union law was a contextual feature of the litigation. *Id.* at 1383. Additionally, the California Supreme Court issued its *In re Marriage Cases* decision before Connecticut legalized same-sex marriage in *Kerrigan v.*

appellate court applied heightened scrutiny to a state marriage statute.<sup>87</sup> Given the nature of domestic partnership and civil union laws in California and Connecticut,<sup>88</sup> both decisions held that a separate legal framework for same-sex couples with only a difference in nomenclature was still sufficient to constitute a constitutional violation.<sup>89</sup> Currently, the Connecticut decision still stands as valid law, but the specific holding of the California decision has been superseded by a constitutional amendment which provides that “[o]nly marriage between a man and a woman is valid or recognized in California.”<sup>90</sup>

After the passage of Proposition 8, there have been a number of legal developments on the issue of marriage.<sup>91</sup> First, in a unanimous 2009 decision, the Supreme Court of Iowa legalized same-sex marriage and resoundingly rejected a civil union alternative.<sup>92</sup> Second, Vermont, New

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*Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008). See Weithorn, *supra* note 80, at 1074–75. However, the California case was actually litigated after *Kerrigan* while a ruling from the Connecticut Supreme Court was pending. Klein & Redman, *supra*, at 1383 n.2.

87. See Klein & Redman, *supra* note 86, at 1383 n.1. The California Supreme Court found that the privacy and due process provisions of the California Constitution provide individuals with a fundamental right “to establish a legally recognized family with the person of one’s choice.” *In re Marriage Cases*, 183 P.3d 384, 423, 429 (Cal. 2008). After considering a number of factors, the court also held that sexual orientation is a suspect class for equal protection purposes because it found that sexual orientation is an integral part of a person’s identity. *Id.* at 442–43. As a result, the court ruled that differential treatment on the basis of sexual orientation is inappropriate and, thus, applied strict scrutiny to California’s traditional marriage statute. See *id.* at 442–43, 447. The Connecticut Supreme Court, however, held that sexual orientation was a quasi-suspect class for equal protection purposes because it found that sexual orientation is an essential aspect of personhood. See *Kerrigan*, 957 A.2d at 431–32. The Connecticut court also found that there has been a history of discrimination against gays and lesbians in the United States and, thus, applied intermediate scrutiny to Connecticut’s marriage statute. See *id.* at 432–34, 476.

88. See *supra* note 86 and accompanying text.

89. See Chehardy, *supra* note 79, at 305–06. The California Supreme Court held that restricting the designation of marriage to opposite-sex couples violated the California Constitution on equal protection grounds. *In re Marriage Cases*, 183 P.3d at 452. Thus, the court found that either the designation of marriage should be withheld from opposite-sex couples, or the same designation should be extended to same-sex couples. See *id.* at 452–53. Given the long history of using the designation of marriage in society, the court ruled that extending marriage to same-sex couples would be the remedy that is more consistent with the probable intent of voters who passed Proposition 22. *Id.* at 453. Similarly, the Connecticut Supreme Court found that restricting the designation of marriage to opposite-sex couples created a legally cognizable injury to same-sex couples. See *Kerrigan*, 957 A.2d at 416–20. The court came to this conclusion even though, at the time, Connecticut had a civil union law that provided all the legal rights and obligations of marriage, available at the state level, to same-sex couples. See *id.*

90. See Marc R. Poirier, *Name Calling: Identifying Stigma in the “Civil Union”/“Marriage” Distinction*, 41 CONN. L. REV. 1425, 1427–33 (2009); CAL. CONST. art. I, § 7.5.

91. See *infra* notes 92–96 and accompanying text.

92. *Varnum v. Brien*, 763 N.W.2d 862, 906–07 (Iowa 2009). The Supreme Court of Iowa found that Iowa Code section 595.2 (2001), which stated that “[o]nly marriage between a male and a female is valid,” violated the state constitution on equal protection grounds. *Id.* at 907. In analyzing the state statute, the court determined that state legislation based on sexual orientation, at a minimum, was subject to an intermediate level of scrutiny, which requires that the statute be substantially related to an important governmental interest. *Id.* at 896–97. The court then

Hampshire, and the District of Columbia legalized same-sex marriage in 2009 through the legislative process.<sup>93</sup> Third, the California Supreme Court ruled that Proposition 8 reversed the specific holding of *In re Marriage Cases* with respect to the designation of marriage, while recognizing as legally valid the estimated 18,000 same-sex marriages that were performed prior to the passage of Proposition 8.<sup>94</sup> Finally, the U.S. District Court for the Northern District of California declared that Proposition 8 was a violation of both the Equal Protection and Due Process Clauses of the Fourteenth Amendment,<sup>95</sup> and that decision was appealed to the U.S. Court

determined that the state marriage statute did not substantially further any of the government's proffered objectives and, thus, concluded that the statute was unconstitutional. *Id.* at 904, 906. As a remedy of this violation, the court also rejected "parallel civil institutions for same-sex couples" because it noted that these institutions would equally violate equal protection principles. *Id.* at 906. Although the Iowa Supreme Court borrowed from federal constitutional principles in analyzing Iowa's guarantee of equal protection, the court explained that it has "jealously guarded [its] right to 'employ a different analytical framework' under the state equal protection clause as well as to independently apply the federally formulated principles." *Id.* at 878 n.6 (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 4-7 (Iowa 2004)). Moreover, the Iowa Supreme Court explicitly stated that *Varnum* did "not implicate federal constitutional protections." *Id.* at 878 n.6. In fact, it is important to note that the U.S. Supreme Court currently uses the rational basis test when applying equal protection principles to classifications based on sexual orientation. *See infra* notes 121, 142 and accompanying text.

93. *See Poirier, supra* note 90. at 1430-31, 1431 n.22; Ian Urbina, *District of Columbia Backs Same-Sex Marriage*, N.Y. TIMES, Dec. 16, 2009, at A28, available at 2009 WLNR 25290319. The state legislatures of New York and New Jersey seriously considered similar enactments, but in the end, neither state legislature was able to muster enough votes to legalize same-sex marriage in their respective states. Jeremy W. Peters, *New York Senate Turns Back Bill on Gay Marriage*, N.Y. TIMES, Dec. 3, 2009, at A1, available at 2009 WLNR 24363436; David Kocieniewski, *New Jersey Senate Defeats Same-Sex Marriage Bill*, N.Y. TIMES, Jan. 8, 2010, at A18, available at 2010 WLNR 386658.

94. *Strauss v. Horton*, 207 P.3d 48, 75-76, 121-22 (Cal. 2009). The specific holding of *In re Marriage Cases* was that same-sex couples were entitled to the designation of marriage. *In re Marriage Cases*, 183 P.3d at 453, superseded by, CAL. CONST. art. I, § 7.5, as recognized in *Strauss*, 207 P.3d at 75-76. According to the court in *Strauss*, however, Proposition 8 did not overturn same-sex couples' right under the privacy and due process provisions of the California Constitution to form their own protected family relationships because Proposition 8 merely carved out a limited exception to the preexisting scope of these constitutional provisions as recognized in *In re Marriage Cases*. *Strauss*, 207 P.3d at 74-76. Moreover, Proposition 8 did not overrule the notion that sexual orientation is a suspect class under California law. *Id.* at 78. According to the court, strict scrutiny should still be applied in all other contexts except for the designation of marriage. *Id.*

95. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003-04 (N.D. Cal. 2010). The district court cited Supreme Court precedent as evidence that "[t]he freedom to marry is recognized as a fundamental right protected by the Due Process Clause." *Id.* at 991. In making this assertion, however, the court focused on cases that did not involve the fundamental right of same-sex couples to marry and that relied heavily on the holding of *Loving v. Virginia*, 388 U.S. 1 (1967), which stood for the principle that individuals had a fundamental right to marry in the interracial context. *See Perry*, 704 F. Supp. 2d at 991-92 (citing *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); and *Loving*, 388 U.S. at 12); *see also infra* note 186 and accompanying text. The court noted

of Appeals for the Ninth Circuit.<sup>96</sup>

### B. *The Decline and Modest Revival of Federalism in Family Law*

Long before various states began recognizing same-sex marriage, the import and significance of federalism began to erode. Moreover, federalist principles were applied inconsistently over time, which had a corresponding effect on federalism's influence in the area of family law.<sup>97</sup> The Court under

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that the question presented “is whether plaintiffs seek to exercise the fundamental right to marry; or, because they are couples of the same sex, whether they seek recognition of a new right.” *Perry*, 704 F. Supp. 2d at 992. To decide this question under the Due Process Clause, as required by *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997), the court examined the history and practice of marriage and found certain common characteristics of marriage throughout U.S. legal tradition. *Perry*, 704 F. Supp. 2d at 992–93. Despite the fact that the dominant conception of marriage throughout U.S. legal history has been as a union between a man and a woman, *see supra* notes 40–43 and accompanying text, the court glossed over this fact “as an artifact . . . of a [former] time,” *Perry*, 704 F. Supp. 2d at 993, and did not address the reality that forty-five states in the United States currently recognize marriage in a traditional fashion, *see infra* note 204 and accompanying text. Furthermore, the opinion did not mention the Supreme Court’s reasoning in *Glucksberg* where the Court was hesitant “to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” *Glucksberg*, 521 U.S. at 720 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). Under the equal protection analysis, the court determined that strict scrutiny is the appropriate standard for all classifications based on sexual orientation, *Perry*, 704 F. Supp. 2d at 997, despite the Supreme Court’s application of the rational basis standard in *Romer v. Evans*, 517 U.S. 620, 632 (1996). The opinion virtually conceded this point by subsequently explaining why Proposition 8 fails even the rational basis standard. *See Perry*, 704 F. Supp. 2d at 997–98. This conclusion stands out in direct contrast to the prevailing sentiment as expressed in *Romer* because Proposition 8 is much more limited in scope than Colorado’s Amendment 2. *See infra* notes 117–43 and accompanying text. Thus, Proposition 8 cannot be similarly characterized as being the product of bare animus against gay and lesbian individuals and should pass constitutional muster under the rational basis standard. *See infra* notes 117–43 and accompanying text.

96. *See* The Associated Press, *California: State Officials Seek Resumption of Same-Sex Marriages*, N.Y. TIMES, Aug. 7, 2010, at A10, available at 2010 WLNR 15728701.

97. *See* Wardle, *supra* note 48, at 221. During the New Deal era, the U.S. Supreme Court began showing a high degree of deference to Congress at the expense of certain substantive limits on federal power. *See* Nelson & Pushaw, *supra* note 49, at 63. In *United States v. Darby*, 312 U.S. 100, 123–26 (1941), the Supreme Court upheld the FLSA of 1938 while also referring to the Tenth Amendment as a mere “truism” that did not impose meaningful limits on congressional action. FLSA prohibited the introduction of goods into interstate commerce that were not produced according to certain labor standards, including minimum wage and maximum hour requirements. *Id.* at 109. In upholding FLSA, the Court invoked Marshall’s interpretation of congressional power in *Gibbons v. Ogden*, 22 U.S. 1 (1824) and *McCulloch v. Maryland*, 17 U.S. 316 (1819) to support its holding that Congress could regulate noncommercial intrastate activity as long it has a substantial effect on interstate commerce. *Darby*, 312 U.S. at 113–14, 118–20. This “substantial effects” test was later retooled in *Wickard v. Filburn*, 317 U.S. 111 (1942). There, the Court held that Congress could regulate private production and consumption of wheat because the activity, when considered in the aggregate, had a substantial effect on interstate commerce. *Id.* at 128–29; *see also* Nelson & Pushaw, *supra* note 49, at 81 (“[E]ven though consumption of wheat by individual farmers like Filburn had a ‘trivial’ impact on [wheat] price[s], the aggregate of all such home consumption significantly influenced wheat prices and hence substantially affected interstate commerce.”). In its final form, the test merely required a finding that Congress could have had some “rational basis” for determining that the activity substantially affected interstate commerce. *See* Heart of Atlanta Motel,

Chief Justice William Rehnquist, however, initiated a modest revival of federalism, which undergirded the long-standing principle that family law is a matter of traditional state concern.<sup>98</sup> In *United States v. Lopez*,<sup>99</sup> the Court struck down the Gun-Free School Zones Act in a decision that dramatically reaffirmed the principle of federalism in family law.<sup>100</sup> There, Chief Justice

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*Inc. v. United States*, 379 U.S. 241, 258 (1964). This final version of the test essentially made it possible for Congress to regulate any and all conduct, including domestic relations, because everything can have a substantial effect on interstate commerce if Congress were to follow a causal chain of attenuated events. Nelson & Pushaw, *supra* note 49, at 6. Additionally, the Tenth Amendment was applied inconsistently in *National League of Cities v. Usery*, 426 U.S. 833 (1976) and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Usery*, the Court asserted that the Tenth Amendment was significant, even if it was previously referred to as only a “truism.” *Usery*, 426 U.S. at 842–43, *abrogated by Garcia*, 469 U.S. at 556–57. According to the Court, the Tenth Amendment precluded the federal government from regulating state employment practices under FLSA because the “Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.” *Id.* at 843 (quoting *Fry v. United States*, 421 U.S. 542, 547 (1975)). This bold rejection of the Court’s view of the Tenth Amendment in *Darby*, however, was short-lived. *See Garcia*, 469 U.S. at 556–57. In *Garcia*, the issue was whether FLSA could be applied to state operation of a public mass transit system in San Antonio, Texas. *Id.* at 531, 533. The Court reasoned that it was futile to design any affirmative limits on congressional action under the Commerce Clause and that the political process provided the appropriate safeguards for ensuring the federalist balance between the national government and the states. *Id.* at 556. In so doing, the Court affirmatively rejected an “integral” or “traditional” function test in exempting states from federal regulation under the Commerce Clause. *Id.* at 546–47. Thus, the Court overruled *Usery* and held that application of FLSA to state employment practices did not contravene a constitutional limit on congressional power. *Id.* at 555–57.

98. Wardle, *supra* note 48, at 221.

99. 514 U.S. 549 (1995).

100. *See Dailey, supra* note 48, at 1789–90. *Lopez* did not directly take up the issue of federalism in family law. *Id.* at 1789. Rather, the issue on appeal was whether Congress had the power under the Commerce Clause to pass legislation that made it a federal offense to knowingly possess a firearm within a school zone. *Lopez*, 514 U.S. at 551–52. The reasoning in dicta from this case, however, strongly affirmed the principle that issues of “marriage, divorce, and child custody” are exclusively within the regulatory authority of the states and beyond the constitutional powers of the federal government. *See id.* at 564. Even though *Lopez* was a 5–4 decision with a number of concurring opinions, all of the justices were in agreement on the idea that the federal government did not have the constitutional authority to regulate in the area of family law. *See Dailey, supra* note 48, at 1789. For example, Justice Clarence Thomas opined that the Commerce Clause “can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States.” *Lopez*, 514 U.S. at 585 (Thomas, J., concurring). While Justice Stephen Breyer disputed the holding of the case, he still affirmed the principle of federalism in family law because he asserted that declaring the statute constitutional was not the equivalent of blurring the line between national and local concern or holding that the federal government had the power to regulate the domain of family law. *See id.* at 624 (Breyer, J., dissenting). Finally, Justice Anthony Kennedy added another reason for holding the federal statute constitutional. *Id.* at 583 (Kennedy, J., concurring). He argued that the statute would deprive the states of an opportunity to perform needed experimentation in an area where the states traditionally have a significant amount of expertise. *Id.* According to Kennedy, the statute had the effect of displacing all the programs that states put in place for the prevention of guns in schools, and



Rehnquist developed a test that subjected congressional action under the Commerce Clause to heightened scrutiny if it regulated noncommercial activity that was of traditional state concern.<sup>101</sup> Furthermore, in *United States v. Morrison*,<sup>102</sup> the Court struck down the Violence Against Women Act (“VAWA”) out of concern for federal encroachment in the area of family law.<sup>103</sup> According to the Court, Congress did not have the power under the Commerce Clause to provide a federal civil remedy for victims of gender-based violence because VAWA regulated conduct that has traditionally been reserved as an area within the sovereign province of the states.<sup>104</sup>

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that as a result, all state efforts “to organize their governmental functions in a certain way” would have to bend at the direction of the federal government in order to effectuate a unified policy. *Id.* Even though the intrusion may seem minor in comparison to other examples, Kennedy explained that it is nonetheless significant. *Id.*

101. *Lopez*, 514 U.S. at 559–61; see also Nelson & Pushaw, *supra* note 49, at 94–95 (describing the rationale from *Lopez* as suggesting that “scrutiny should be increased if the Court determines that a particular federal law regulates either ‘noncommercial’ activity or areas of ‘traditional state concern,’ or both”). In *Lopez*, a high school student brought a concealed handgun to school and was originally charged under a Texas state law that banned firearms on school premises. *Lopez*, 514 U.S. at 551. The state law charges were later dropped, and the high school student was then charged with violating the Gun-Free School Zones Act (“GFSZA”). *Id.* at 551. Upon conviction, the high school student challenged the validity of GFSZA as exceeding the scope of congressional power under the Commerce Clause. *Id.* at 552. The Court reasoned that GFSZA pertained to two areas of law that were traditionally the concern of the states, education and crime, and that the statute was noncommercial in nature. *Id.* at 561, 564. Additionally, GFSZA was not part of a larger framework of legislation seeking to regulate interstate economic activity for which it might be essential to regulate intrastate activity. *Id.* at 561. Thus, the Court held that the statute was not within the scope of congressional power under the Commerce Clause. See *id.* at 567.

102. 529 U.S. 598 (2000).

103. See Wardle, *supra* note 48, at 241. Again, *Morrison* did not directly take up the issue of federalism in family law on appeal, but the Court’s reasoning in dicta reaffirmed the principles espoused in *Lopez*. See *id.* at 241–42. Rather, the issue on appeal was whether the U.S. Constitution granted Congress the power, under the Commerce Clause, to create a federal cause of action for women that suffered gender-related assaults and violence. *Id.* at 241. The majority declared the statute unconstitutional primarily because the justices believed that regulating domestic relations was not within the constitutional authority of Congress. *Id.* The Court reasoned that if it upheld the VAWA, there would be no way to distinguish future federal statutes that directly regulated family life. See *id.*; see also *Morrison*, 529 U.S. at 599 (asserting in dicta that an attenuated causal chain argument justifying the substantial effects of gender-related violence on interstate commerce would “not limit Congress to regulating violence, but may be applied equally as well to family law and other areas of state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant”). Unlike *Lopez*, however, where the entire Court agreed on the principle of federalism in family law, the dissent took a much different approach in *Morrison*. See Wardle, *supra* note 48, at 241–43. The dissent noted the interstate aspects of VAWA and argued that the boundaries of local and national concern delineated by the Court were merely illusory in a highly developed and technological age. *Id.* at 241–42. As a practical matter, according to the dissent, any activity can be tied in some way to some form of interstate economic activity and, thus, may be regulated by Congress under the substantial effects test associated with the Commerce Clause. *Id.*

104. *Morrison*, 529 U.S. at 601, 617–18. In *Morrison*, a female student at Virginia Polytechnic Institute (“Virginia Tech”) alleged that she was beaten and raped by two male students who were members of the varsity football team. *Id.* at 602. After an internal investigation and hearing, one of

In *Lopez* and *Morrison*, the Court rejected the view that the Commerce Clause could be construed as encompassing congressional authority to regulate issues of traditional state concern, such as local crime and family law.<sup>105</sup> Correspondingly, in light of *Washington v. Glucksberg*,<sup>106</sup> federal courts would be wise to view the Fourteenth Amendment in a similar fashion with respect to Proposition 8.<sup>107</sup> The original purpose of the

the male students was suspended from the school for two semesters, but he successfully appealed the decision and was able to return to school before completing the original suspension. *Id.* at 603. The female student then dropped out of school and filed suit against Virginia Tech in federal district court under VAWA. *Id.* at 601, 603–05. The Supreme Court relied on *Lopez* in concluding that Congress did not have the power to pass VAWA because Congress could regulate areas such as marriage, divorce, and childrearing if allowed to regulate noncommercial, intrastate criminal activity. *Id.* at 615–17.

105. *See supra* notes 99–103 and accompanying text. Even though the Court strengthened the affirmative limits on congressional action in *Lopez* and *Morrison*, the effect of these cases was largely undercut by the Court's later holding in *Gonzales v. Raich*, 545 U.S. 1 (2005). There, two extremely ill women in California began ingesting locally grown marijuana, under the advisement of their doctors, as a method of alleviating certain symptoms associated with their ongoing treatment. *Id.* at 6–7. The State of California passed the Compassionate Use Act of 1996 in order to provide “seriously ill” patients with access to the benefits of medicinal marijuana use. *Id.* at 5–6. Medicinal use of marijuana, however, still remained unlawful according to the federal Controlled Substances Act. *See id.* at 7. The two women filed a federal lawsuit alleging that enforcing the federal law with respect to them would result in a violation of the Commerce Clause. *Id.* at 8. The Supreme Court held that the federal Act was within congressional authority under the Commerce Clause because there was a rational basis for concluding that intrastate cultivation and use of marijuana, in the aggregate, had a substantial effect on interstate commerce. *Id.* at 22. Additionally, the Court found that the heightened scrutiny standard of *Lopez* and *Morrison* did not apply in *Raich* because the regulation of intrastate use and cultivation of marijuana was part of a larger statutory framework designed to curtail the interstate production and distribution of controlled substances. *Id.* at 23–26. The Court reached this conclusion, however, even though the regulation was noneconomic and related to intrastate criminal activity, which has traditionally been reserved as an area of state regulation. *Id.* at 23–26, 29.

106. 521 U.S. 702 (1997).

107. Ironically, it was the judicial branch that was originally intended to serve as a check on the expansion of the federal government's power into the realm of state sovereignty. *See McCulloch v. Maryland*, 17 U.S. 316, 401 (1819). *Lopez* and *Morrison*, thus, addressed congressional intervention in areas of traditional state concern, *see supra* notes 99–104 and accompanying text, which is arguably distinguishable from possible federal court interpretation of the Fourteenth Amendment to include a new constitutional right that infringes on traditional state powers. Additionally, the Court's holding in *Raich* poses the question of why dicta from *Lopez* and *Morrison*, with respect to federalism in family law, should guide federal courts in their interpretation of the Fourteenth Amendment. *See supra* note 105 and accompanying text. A potential answer lies in the Supreme Court's discussion of the Fourteenth Amendment when considering a proposed right to physician-assisted suicide in *Washington v. Glucksberg*, 521 U.S. 702 (1997). There, four doctors, three patients, and a non-profit organization brought a federal challenge to a state statute that prohibited assisted suicide. *Id.* at 707–08. Washington Revised Code section 9A.36.060(1) (1994) provided that “[a] person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.” Even though the State of Washington had always prohibited assisted suicide, the plaintiffs argued that the Due Process Clause of the Fourteenth Amendment conferred a right to die. *Id.* at 708–09. The district court agreed and also held that the statute violated the U.S.

Fourteenth Amendment was to counteract the prejudicial treatment of racial minorities through equal protection principles and not to effectively cede regulatory authority to the federal government on issues of traditional state concern.<sup>108</sup> With respect to Proposition 8, a number of jurists argue that

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Constitution's Equal Protection Clause. *Id.* at 708. The Supreme Court, however, was more reluctant than the district court "to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Id.* at 720 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). The Court expressed tangible concern about recognizing a new constitutional right out of fear that the Due Process Clause would become no more than an engine for implementing judicial policy preferences. *Id.* Similar restraint marks the Supreme Court's "approach to the question[] whether an asserted substantive right is entitled to heightened solicitude under the Equal Protection Clause . . ." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 n.10 (1977) (plurality opinion). The Court also noted that history and legal tradition demonstrated a long-standing prohibition on assisted suicide as an expression of this country's commitment to the value and dignity of human life. *Glucksberg*, 521 U.S. at 710. Moreover, "the structure and limitations of federalism . . . [have traditionally] allow[ed] the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (internal quotation marks omitted)). As a result, state regulation of medical practice, such as the practice of physician-assisted suicide, has been recognized as an area traditionally encompassed by the states' police power. *See id.* at 271, 274. At the time *Glucksberg* was decided, a number of states, including California, Oregon, Iowa, Rhode Island, and New York, were "engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues," and the Court was unwilling to cut off public debate in this arena. *Glucksberg*, 521 U.S. at 717–20. Although many states, excluding Oregon, were simply reaffirming bans on physician-assisted suicide, some states were developing alternative methods of addressing the underlying problem. *Id.* at 716–17. Modern medicine and technology made it more likely for Americans to remain in an unhealthy state in institutions as a result of chronic illness. *Id.* at 716. In response, states began permitting "living wills,' surrogate health-care decisionmaking, and the withdrawal or refusal of life-sustaining medical treatment" as alternatives to assisted suicide. *Id.* *Glucksberg* is analogous to the current scenario with respect to Proposition 8. As in *Glucksberg*, where history and legal tradition supported a long-standing commitment to and respect for human life, *id.* at 710, the dominant conception of marriage in this country's jurisprudence has been as a union between a man and a woman, *see supra* notes 40–43 and accompanying text. When *Glucksberg* was decided, a number of states were engaged in a debate over the legal recognition of assisted suicide, which produced alternative solutions on an issue of traditional state concern. *Glucksberg*, 521 U.S. at 716–19. Similarly, there are a number of states that are currently developing alternative solutions with respect to same-sex marriage, such as civil unions and domestic partnerships, as a result of debate on this family law issue, which is also one of local concern. *See supra* notes 73–94 and accompanying text. Thus, in light of *Glucksberg* and when considering newly proposed rights under the Fourteenth Amendment, *see Glucksberg*, 521 U.S. at 720, it would be wise to give greater weight to certain background principles of federalism in the Constitution, and in Supreme Court precedent, that promote liberty and eschew tyranny through an appropriate relationship between the federal government and the states, *see supra* notes 48–72 and accompanying text.

108. *See Wardle, supra* note 48, at 234–36. The Fourteenth Amendment was part of a series of Reconstruction Amendments to the U.S. Constitution after the Civil War. *Id.* at 234–35. These amendments did not directly address the issue of federalism in family law, but they did grant increased power to Congress to pass legislation designed to effectuate the purposes of the Thirteenth, Fourteenth, and Fifteenth Amendments. *Id.* Additionally, the Thirteenth Amendment abolished slavery, which was considered a domestic relations matter in the United States. *Id.* at 235. In this manner, the Reconstruction Amendments can be viewed as affecting state sovereignty over domestic relations because their purpose was to completely destroy slavery in the states. *Id.* The focus on slavery, however, demonstrates that this change was intended to be very specific, and it was not meant to affect state sovereignty in regulating other areas of family law. *Id.*

defining marriage between a man and a woman is a violation of equal protection or due process rights guaranteed under the Fourteenth Amendment to the U.S. Constitution.<sup>109</sup> The remainder of this comment will address those arguments by examining U.S. Supreme Court precedent and comparing the facts and legal principles of those cases to the factual context of the Proposition 8 scenario.<sup>110</sup>

#### IV. EXAMINING FOURTEENTH AMENDMENT PRECEDENT

The Fourteenth Amendment to the U.S. Constitution provides that 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>111</sup> The U.S. Supreme Court has previously interpreted the Equal Protection and Due Process Clauses in the context of a state constitutional amendment in Colorado, which denied protection against same-sex discrimination,<sup>112</sup> a state statute criminalizing sodomy in Texas,<sup>113</sup> and a state ban on interracial marriage in Virginia.<sup>114</sup> These cases are often cited as precedent to support the proposition that there is a right under the U.S. Constitution to same-sex marriage.<sup>115</sup> The subsequent discussion will

109. See, e.g., Richard M. Lombino, II, *Gay Marriage: Equality Matters*, 14 S. CAL. REV. L. & WOMEN'S STUD. 3, 23 (2004) (“Marriage is a fundamental, civil and moral right of all Americans. It is guaranteed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution.”).

110. See *infra* notes 111–201 and accompanying text.

111. U.S. CONST. amend. XIV, § 1.

112. *Romer v. Evans*, 517 U.S. 620 (1996). The U.S. Supreme Court struck down Amendment 2, which was a state constitutional amendment in Colorado that prevented the government from protecting gay and lesbian individuals from discrimination, because it violated the U.S. Constitution on equal protection grounds. See *id.* at 624, 635–36. An Equal Protection claim requires a showing of invidious discrimination against a particular social group. *Collis, supra* note 9, at 993. Additionally, the court must decide which standard of review to apply in the particular case at hand. *Id.* The court will assume the lowest standard of review, and determine whether the law is rationally related to a legitimate state interest, unless the law infringes on a fundamental right or targets a suspect class. *Id.* Only if one of these conditions is met can the court apply some form of heightened scrutiny. *Id.* This comment’s examination of *Romer*, however, will not discuss invidious discrimination or the appropriate standard of review at length because this comment argues that current precedent does not support a finding that there is an individual right to same-sex marriage. See *infra* notes 117–43 and accompanying text. Any interpretation of the Fourteenth Amendment that includes such a right in the Proposition 8 context would have greater consequences to the liberty interest in the Due Process Clause because of federal encroachment into an area of traditional state concern. See *infra* notes 175–79 and accompanying text. The U.S. Supreme Court has held that the Fourteenth Amendment applies not only to the states but also to the federal government through the Fifth Amendment’s Due Process Clause. *Collis, supra* note 9, at 992–93.

113. *Lawrence v. Texas*, 539 U.S. 558 (2003).

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

115. See, e.g., Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court*

show, however, that all three of these cases are distinguishable on their merits and do not support a finding that state constitutional marriage amendments violate either the Equal Protection or Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution.<sup>116</sup>

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*Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL'Y & L. 253, 279–98 (citing *Romer*, *Lawrence*, and *Loving* as a potential avenue for “gay rights advocates to lay claim to the Fourteenth Amendment’s promises, especially in the area of marriage rights”).

116. See *infra* notes 117–201 and accompanying text. As demonstrated by *Romer*, *Lawrence*, and *Loving*, this comment does not argue that all state regulation in the area of family law, or all laws relating to classifications based on sexual orientation, should be consistent with individual rights as found in the U.S. Constitution. This comment simply argues that existing precedent does not support a finding that traditional marriage laws are a violation of individual rights. See *infra* notes 117–201 and accompanying text. For example, in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 868–69 (2006), the Eighth Circuit rejected arguments that a state constitutional marriage amendment in Nebraska violated the U.S. Constitution’s Equal Protection Clause. Nebraska voters unequivocally ratified a constitutional marriage amendment in November 2000, which was codified as Article I, section 29 of the Nebraska Constitution and provided that: “Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.” *Citizens for Equal Protection*, 455 F.3d at 863. The Eighth Circuit found that the State that Nebraska’s enactment of section 29 of its constitution was “rationally related to the government interest in steering procreation into marriage,” and rejected the conclusion that that *Romer* controlled the outcome of the case. *Id.* at 867–68. The court held:

We likewise reject the district court’s conclusion that the Colorado enactment at issue in *Romer* is indistinguishable from § 29. The Colorado enactment repealed all existing and barred all future preferential policies based on “orientation, conduct, practices, or relationships.” The Supreme Court struck it down based upon this “unprecedented” scope. Here, § 29 limits the class of people who may validly enter into marriage and the legal equivalents to marriage emerging in other States—civil unions and domestic partnerships. This focus is not so broad as to render Nebraska’s reasons for its enactment “inexplicable by anything but animus” towards same-sex couples.

*Id.* at 868 (citations omitted.). The Eighth Circuit also discussed the appropriateness of recognizing a new constitutional right over the will of a democratic majority. *Id.* at 871. The court stated:

Constitutional rights are, after all, rights against the democratic majority. But public opinion is not irrelevant to the task of deciding whether a constitutional right exists. . . . If it is truly a new right, as a right to same-sex marriage would be . . . [sic] [judges] will have to go beyond the technical legal materials of decision and consider moral, political, empirical, prudential, and institutional issues, including the public acceptability of a decision recognizing the new right.

*Id.* (second alteration in original) (quoting Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1585 (1997)). In *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010), however, the district court held the following:

Plaintiffs do not seek recognition of a new right. To characterize plaintiffs’ objective as “the right to same-sex marriage” would suggest that plaintiffs seek something different from what opposite-sex couples across the state enjoy—namely, marriage. Rather, plaintiffs ask California to recognize their relationships for what they are: marriages.

One problem with *Perry*’s reasoning is that there is no evidence, for due process purposes, to support the idea that the history and practice of marriage has involved any sort of recognition of same-sex relationships, see *supra* note 95, nor is there evidence, for equal protection purposes, that sexual orientation is recognized as a protected class, see *infra* note 142. Additionally, there is some dispute over the precedential value of *Baker v. Nelson*, 409 U.S. 810 (1972), *dismissing appeal from* 191 N.W.2d 185 (Minn. 1971). There, the Supreme Court dismissed a Fourteenth Amendment challenge “for want of a substantial federal question” to the Minnesota Supreme Court’s decision to deny the

A. *Romer v. Evans*

In 1992, Colorado voters passed a statewide referendum known as Amendment 2.<sup>117</sup> This amendment to the Colorado Constitution was found to have the explicit intent of preventing any and all government action that was designed to protect gay and lesbian individuals from discrimination in the State of Colorado.<sup>118</sup> Colorado voters passed Amendment 2 as a

issuance of a same-sex marriage license. *Id.* at 810. Unlike a denial of certiorari, “[a] dismissal for want of a substantial federal question[] is a disposition on the merits” and serves as binding precedent for federal circuit courts, federal district courts, and all state courts. *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (quoting CHARLES ALAN WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 495 (2d ed. 1970)). This type of precedent, however, is only dispositive of “the specific challenges presented in the statement of jurisdiction,” and it does not validate the reasoning of the court whose judgment is appealed. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*). Moreover, the Supreme Court’s dismissal “for want of a substantial federal question” serves as precedent as long as there are no “doctrinal developments [that] indicate otherwise.” *Hicks*, 422 U.S. at 344 (quoting *Port Auth. Bondholders Protective Comm. v. Port. of N.Y. Auth.*, 387 F.2d 259, 262 n.3 (2d Cir. 1967)). In *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 872–73 (C.D. Cal. 2005), *rev’d on other grounds*, 447 F.3d 673 (9th Cir. 2006), the court distinguished *Baker* as not having precedential value in a Fourteenth Amendment challenge to DOMA. There, in distinguishing *Baker*, the court noted the difference between Minnesota law regulating “the type of relationship [that] could [be] sanctif[ie]d as a marriage” and federal law defining “who will receive the federal rights and responsibilities of marriage.” *Id.* According to the court, the “issue of allocating benefits is different from the issue of sanctifying a relationship.” *Id.* at 873. Even though this reasoning may undercut *Baker*’s precedential value in a Fourteenth Amendment challenge to DOMA, it also supports the idea that DOMA is, in fact, consistent with the Tenth Amendment and the constitutional principle that family law is an area of traditional state concern. *See supra* note 77 and accompanying text. In *Smelt*, the court also noted that “Supreme Court cases decided since *Baker* show the Supreme Court does not consider unsubstantial a constitutional challenge brought by homosexual individuals” on equal protection or due process grounds. *Smelt*, 374 F. Supp. 2d at 873 (citing *Romer* and *Lawrence* as examples). These intervening cases could possibly demonstrate doctrinal developments to the contrary of *Baker*, which might mean that *Baker* no longer has precedential value. *See Hicks*, 422 U.S. at 344. The remainder of this comment, however, will discuss why *Romer* and *Lawrence* should not be relied on as precedent in finding a new constitutional right to same-sex marriage. *See infra* notes 117–79 and accompanying text.

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

118. *Id.* at 624. The text of Amendment 2 stated:

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

*Id.* There was considerable disagreement about the scope and meaning of Amendment 2 and its effect on gay and lesbian individuals in the State of Colorado. *See* Timothy M. Tymkovich, John Daniel Dailey & Paul Farley, *A Tale of Three Theories: Reason and Prejudice in the Battle over Amendment 2*, 68 U. COLO. L. REV. 287, 294–98 (1997). The complexity of Amendment 2’s language made it difficult to interpret, and because the lawsuit in *Romer* asserted a facial

response to the enactment of ordinances that prohibited same-sex discrimination in several municipalities, such as Aspen, Boulder, and Denver.<sup>119</sup> The U.S. Supreme Court ruled that Amendment 2 was unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>120</sup> The Court applied the rational basis test and found that the amendment could be rooted in nothing more than animus toward gay and lesbian individuals.<sup>121</sup> As a result, Amendment 2, according to the Court, did not pass the rational basis test because “a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>122</sup>

Some commentators have speculated that *Romer* might be the first step on the road to making sexual orientation a quasi-suspect class for purposes of the Equal Protection Clause of the Fourteenth Amendment.<sup>123</sup>

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constitutional challenge, the courts did not have the benefit of reviewing its official construction and application by the State of Colorado. *Id.* at 294. The U.S. Supreme Court, however, did rely on the Colorado Supreme Court’s interpretation of the amendment. *Romer*, 517 U.S. at 626. The State of Colorado argued for a narrow interpretation of Amendment 2 and claimed that the amendment merely precluded governmental entities from creating special privileges or rights for gay and lesbian individuals. *See id.* The big question was whether Amendment 2 prevented the government from enforcing any general enactment that protected gays and lesbians from discrimination. Tymkovich et al., *supra*, at 295–96. Opponents of Amendment 2 argued for a broader interpretation of Amendment 2 and suggested that it interfered with the ability of state courts to adjudicate claims of general discrimination against gays and lesbians. *Id.* at 296. The U.S. Supreme Court eventually agreed with a broad interpretation of the amendment. *See Romer*, 517 U.S. at 626–27.

119. *Romer*, 517 U.S. at 623–24.

120. *Id.* at 635–36. The U.S. Supreme Court asserted a different legal theory to invalidate Amendment 2 than the Colorado Supreme Court did. *See Tymkovich et al., supra* note 118, at 288. The Colorado Supreme Court found that there is a fundamental right under the Fourteenth Amendment to equal participation in the political process and also held that any infringement on this right is subject to strict scrutiny. Collis, *supra* note 112, at 1000. The U.S. Supreme Court, however, invalidated Amendment 2 on the theory that the amendment has the effect of putting gays and lesbians “in a solitary class with respect to transactions and relations in both the private and governmental spheres.” *Romer*, 517 U.S. at 627. The holding in *Romer* rested on the argument that Amendment 2 had far reaching implications to gay and lesbian individuals beyond the scope of simply repealing the various municipal ordinances passed throughout the State of Colorado. *See id.* at 627–31.

121. *See Romer*, 517 U.S. at 632. Some jurists argue that the application of the rational basis standard makes *Romer* a pyrrhic victory for gay rights activists because lower courts continue to uphold laws that would be struck down if heightened scrutiny were applied. *See Robert D. Dodson, Homosexual Discrimination and Gender: Was Romer v. Evans Really a Victory for Gay Rights?*, 35 CAL. W. L. REV. 271, 289–90 (1999); cf. Greene, *supra* note 82, at 1991 (arguing that traditional marriage statutes cannot be struck down unless some form of heightened scrutiny is applied). *But cf.* Kevin H. Lewis, Note, *Equal Protection after Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 177–78 (1997) (proposing “a framework for understanding how courts might use the rational basis test to invalidate prejudicial classifications against gays and lesbians . . .”).

122. *Romer*, 517 U.S. at 634–35 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

123. *See, e.g., Tobias Barrington Wolff, Principled Silence: Romer v. Evans*, 106 YALE L.J. 247, 250–52 (1996) (comparing the rational basis review from *Romer* to the development of heightened scrutiny with respect to sex discrimination and concluding that *Romer* is consistent with a future finding of heightened scrutiny with respect to sexual orientation). If sexual orientation was

Additionally, *Romer* stands for the proposition that anti-gay bias can never be a legitimate legislative end.<sup>124</sup> Commentators use these concepts to support the idea that the traditional definition of marriage is unconstitutional on equal protection grounds.<sup>125</sup> There is little legal precedent, however, for extending the holding of *Romer* in this manner.<sup>126</sup>

In *Romer*, the U.S. Supreme Court relied on the Colorado Supreme Court's interpretation of Amendment 2,<sup>127</sup> and thus, it is appropriate to rely on the California Supreme Court's construction of Proposition 8 in *Strauss v. Horton*<sup>128</sup> in order to determine *Romer*'s applicability to the current situation in California.<sup>129</sup> In *Strauss*, the California Supreme Court was forced to rule on the constitutionality of a proposition designed to overrule its previous decision to extend the right of marriage to same-sex couples.<sup>130</sup>

recognized as a quasi-suspect class, then the government would have to demonstrate that classifications related to sexual orientation are substantially related to an important state interest. Wadhvani, *supra* note 9, at 805. As mentioned previously, only gender and illegitimacy are currently recognized as quasi-suspect classes. *Id.*

124. See *Romer*, 517 U.S. at 635.

125. See Lewis, *supra* note 121, at 177.

126. See William C. Duncan, *The Legacy of Romer v. Evans—So Far*, 10 WIDENER J. PUB. L. 161, 165–84 (2001). There are a few state cases that may have persuasive implications for possible attempts to cite *Romer* in a challenge to state marriage laws passed through the referendum process. See *id.* at 183–84. For example, the Supreme Court of Kansas rejected reliance on *Romer* in a lawsuit against the state tax code for differential treatment of married and unmarried persons. *Peden v. Kansas*, 930 P.2d 1, 12–14 (Kan. 1996). The court held that the differential tax rate was constitutional because it was unlike Amendment 2 in Colorado in that Kansas had a legitimate state interest in encouraging marriage in society. *Id.* at 17–18. Additionally, a state appellate court in Texas espoused similar reasoning when it validated a proposition that overturned a city's policy of providing domestic partner benefits to public employees. See *Bailey v. City of Austin*, 972 S.W.2d 180, 188–89 (Tex. App. 1998). In a case similar to *Romer*, the Sixth Circuit upheld a local charter initiative that excluded protection against discrimination on the basis of sexual orientation. *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 300–01 (6th Cir. 1997). The court found this case distinguishable from *Romer* because it involved a citywide, not statewide, policy. Duncan, *supra*, at 183. Additionally, the initiative only banned preferential treatment on the basis of sexual orientation, and it passed the rational basis test because it would save the city money. *Id.*

127. *Romer*, 517 U.S. at 626. The U.S. Supreme Court relied on the Colorado Supreme Court's interpretation of Amendment 2 because a preliminary injunction prevented the amendment from taking effect before various courts were able to review its constitutionality. See *id.* at 625. Unlike *Romer*, where Amendment 2 was enjoined from becoming a part of the Colorado Constitution, see *id.*, Proposition 8 became part of the state constitution shortly after its passage by a majority of voters in the State of California. See *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009). This difference between the two amendments, however, is not legally significant for purposes of the foregoing analysis.

128. 207 P.3d 48 (Cal. 2009).

129. See *infra* notes 130–34 and accompanying text.

130. See M.K.B. Darmer & Tiffany Chang, *Moving Beyond the "Immutability Debate" in the Fight for Equality After Proposition 8*, 12 SCHOLAR 1, 35–36 (2009). As mentioned previously, *In re Marriage Cases* held that gay and lesbian individuals had a fundamental right under the privacy and



The court ultimately held that Proposition 8 was a valid amendment to the state constitution, but the estimated 18,000 same-sex marriages performed before the passage of Proposition 8 were still considered valid because Proposition 8 could not be applied retroactively.<sup>131</sup>

When considering the overall scope and meaning of Proposition 8, the court held that the amendment did not abrogate same-sex couples' privacy and due process rights or fundamentally alter the substance of state equal protection principles as articulated by *In re Marriage Cases*.<sup>132</sup> Instead, Proposition 8 created a narrowly defined exception to these constitutional rights with respect to the designation of marriage.<sup>133</sup> According to the California Supreme Court, state voters were voting for a state constitutional amendment in order to overturn the specific holding of *In re Marriage Cases*.<sup>134</sup>

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due process provisions of the state constitution to form legally recognized family relationships with their partner of choice. See *supra* note 87. Additionally, the California Supreme Court found that sexual orientation was a suspect class for equal protection purposes and ruled that it was unconstitutional for the state to withhold the designation of marriage to same-sex couples. See *supra* notes 87, 89.

131. See *supra* note 14 and accompanying text. The California Supreme Court articulated two different rationales for why Proposition 8 constituted a valid amendment to the California Constitution. *Strauss*, 207 P.3d at 98–100. First, the brevity and simplicity of the amendment demonstrated that Proposition 8 could not constitute a constitutional revision. *Id.* at 98. Second, Proposition 8 was limited in scope and meaning such that it only withheld the designation of marriage from same-sex couples, and it was a constitutional amendment because it did not substantially alter California's basic governmental framework. *Id.* at 98–100. With respect to the retroactivity component, the California Supreme Court noted that enacted law generally applies prospectively, unless there is a clear legislative or voter intent to the contrary. *Id.* at 119–20. According to the court, neither the language of the initiative nor the accompanying ballot materials provide a clear indication that Proposition 8 was intended to apply retroactively. *Id.* at 471–73. Additionally, the court rejected the argument that the measure should be applied retroactively because it was written in the present tense. *Id.* at 120–21. Thus, the court ruled that the measure should be construed as applying prospectively, thereby holding that the same-sex marriages, performed before the passage of Proposition 8, remained valid. *Id.* at 122.

132. *Strauss*, 207 P.3d at 61.

133. *Id.* at 61–62. According to the California Supreme Court, Proposition 8 leaves unchanged the right of gay and lesbian individuals to form an established family relationship with the person of their own choosing and the constitutional guarantee of equal protection under the law. *Id.* at 61. The California Supreme Court also indicated that a state appellate court's interpretation of California Family Code section 308.5 supported a finding that Proposition 8 had a narrow and limited effect on same-sex couples' state constitutional rights. See *id.* at 76. Proposition 8 and California Family Code section 308.5 contained identical language—"Only marriage between a man and a woman is valid or recognized in California." *Id.* In *Knight v. Superior Court*, 26 Cal. Rptr. 3d 687 (Ct. App. 2005), section 308.5 was interpreted as limiting same-sex couples' right to the designation of marriage but not as precluding them from possessing similar substantive rights. *Strauss*, 207 P.3d at 76.

134. See Frederick Mark Gedicks, *Atmospheric Harms in Constitutional Law*, 69 MD. L. REV. 149, 149 n.3 (2009). In addition to the reasoning from the *Knight* case, the California Supreme Court pointed to two other reasons why Proposition 8 should be interpreted as having a narrow meaning and effect. See *Strauss*, 207 P.3d at 76–77. First, a much broader initiative was circulated in California as an alternative to Proposition 8, but this initiative did not garner the requisite number of signatures to be placed on the November 2008 ballot. *Id.* at 76 n.8. This broader measure would

At first glance, there are striking similarities between the passage of Amendment 2 in Colorado and Proposition 8 in California,<sup>135</sup> but a closer look reveals a few important legal distinctions of significance, which make Amendment 2 distinguishable from Proposition 8.<sup>136</sup> Unlike in *Romer*, where Amendment 2 was found to have a much broader effect than just reversing recently-passed municipal ordinances banning same-sex discrimination,<sup>137</sup> Proposition 8 had the limited effect of overturning only the specific holding of *In re Marriage Cases*.<sup>138</sup> Whereas Amendment 2 prevented the government from enforcing any general legislation that protected gays and lesbians from discrimination,<sup>139</sup> Proposition 8 only

not only have defined marriage between a man and a woman, but it also would have mandated the following: “[n]either the Legislature nor any court, government institution, government agency, initiative statute, local government, or government official shall . . . bestow statutory rights, incidents, or employee benefits of marriage on unmarried individuals.” *Id.* Second, the court looked to the arguments in favor Proposition 8 as stated in the official ballot that was circulated by the California Secretary of State. *Id.* at 77. As a rebuttal argument, the official ballot explicitly stated that Proposition 8 would not eliminate the state constitutional right of gay and lesbian individuals to form officially recognized family relationships with their partner of choice. *Id.* The rebuttal argument stated: “Your YES vote on Proposition 8 means that only marriage between a man and a woman will be valid or recognized in California, regardless of when or where performed. *But Prop. 8 will NOT take away any other rights or benefits of gay couples.*” *Id.* at 77 n.9.

135. *See supra* notes 117–34 and accompanying text. As in the Amendment 2 context, where voters in Colorado ratified a state constitutional amendment through the referendum process, *Romer v. Evans*, 517 U.S. 620, 623 (1996), California voters ratified a constitutional amendment by ballot initiative, *Strauss*, 207 P.3d at 114, 119. Like *Romer*, where the amendment took away certain rights that were formerly granted to gay and lesbian individuals through municipal ordinances that banned same-sex discrimination, *Romer*, 517 U.S. at 623–24, Proposition 8 eliminated the right to same-sex marriage that had been created by the California Supreme Court in *In re Marriage Cases*, *see Strauss*, 207 P.3d at 75–77.

136. *See infra* text accompanying notes 137–42.

137. *See supra* note 118 and accompanying text. The U.S. Supreme Court in *Romer* determined that Amendment 2 not only precluded state agencies from providing special rights to gay and lesbian individuals, but it could also be inferred that the broad language of the measure prevented Colorado from protecting these individuals from general discrimination. *Romer*, 517 U.S. at 630. According to the Court, even if these individuals could be protected from discrimination, Amendment 2 imposed a special disability on them. *Id.* at 631. As the Court reasoned, if gay and lesbian individuals were specifically targeted for discrimination, they would have to seek safe harbor in laws of general application or enlist the Colorado citizenry to re-amend the state constitution in order to receive protection. *Id.*

138. *See supra* note 134 and accompanying text.

139. *See supra* note 118 and accompanying text. Justice Kennedy specifically described the Court’s interpretation of Amendment 2’s effect as follows:

Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State’s view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these

created a narrow exception to the privacy, due process, and equal protection rights of same-sex couples under the California Constitution.<sup>140</sup> Unlike in *Romer*, where Justice Anthony Kennedy concluded that Amendment 2 could be rooted in nothing more than animus toward gay and lesbian individuals because of the measure's sweeping effect,<sup>141</sup> the scope of Proposition 8 was limited specifically to the designation of marriage.<sup>142</sup> Thus, Kennedy's rationale from *Romer* should not be used to argue that Proposition 8 is rooted in nothing more than animus toward gay and lesbian individuals.<sup>143</sup>

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are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

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

140. See *supra* notes 132–33 and accompanying text.

141. See *supra* notes 121–22 and accompanying text.

142. See *Romer*, 517 U.S. at 632; see also *supra* notes 132–34 and accompanying text. Currently, the U.S. Supreme Court has not identified sexual orientation as a suspect or quasi-suspect class. See Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2770 (2005). Because sexual orientation was not a suspect or quasi-suspect class at the time, *Romer* used the rational basis test to declare Amendment 2 unconstitutional, *Romer*, 517 U.S. at 632, and as a result, this portion of this comment assumes rational basis scrutiny in order to distinguish the Proposition 8 factual scenario from the circumstances surrounding the passage of Amendment 2 in Colorado. Moreover, in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006), the Eighth Circuit relied on *Romer* in applying the rational basis test to Nebraska's enactment of its constitutional marriage amendment. The application of the rational basis test to Proposition 8 is also consistent with the Supreme Court's rationale in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), which essentially cautioned against the creation of new constitutional rights under the Fourteenth Amendment. Whereas Amendment 2 did not pass the rational basis test because of its broad effect, see *id.*, Proposition 8 had a narrow effect and was limited to the designation of marriage because its primary purpose was to overrule the specific holding of *In re Marriage Cases*, see Gedicks, *supra* note 134, at 149 n.3. As mentioned previously, the rational basis test allows the state to be both under-inclusive and over-inclusive when drawing boundaries with respect to marriage for purposes of the state's legitimate interest in furthering procreation. See *supra* notes 81–82; see also *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the [human] race."). In *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010), the district court properly noted that the government has never inquired into the procreative capacity of couples, or their intent to have children, before issuing marriage licenses. This practice would result in an unconstitutional intrusion into the privacy of the marital bedroom, see *infra* notes 149–50 and accompanying text, but there is nothing that precludes the government from using a general, physiological understanding of procreative capacity in determining the definition of marriage, see Greene, *supra* note 82, at 1991. The use of a general understanding of procreation, without an intrusion into the privacy of the marital bedroom, is precisely the reason for the under-inclusiveness and over-inclusiveness of traditional marriage laws. As a result, a traditional definition of marriage, although seemingly arbitrary, should pass constitutional muster under the rational basis test. See *id.*; see also *Heller v. Doe*, 509 U.S. 312, 319 (1993) ("[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." (internal quotation marks omitted)); *Vance v. Bradley*, 440 U.S. 93, 108 (1979) ("Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn . . . [is] imperfect, it is nevertheless the rule that in a case like this perfection is by no means required." (internal quotation marks omitted)).

143. See *supra* notes 135–42 and accompanying text.

## B. Lawrence v. Texas

In 2003, the U.S. Supreme Court decided *Lawrence*, which declared a Texas state statute that criminalized sodomy unconstitutional.<sup>144</sup> This decision directly overturned existing precedent in *Bowers v. Hardwick*,<sup>145</sup> where a similar state statute from Georgia was upheld in 1986.<sup>146</sup> In *Lawrence*, Justice Kennedy relied on the liberty interest in the Due Process Clause of the Fourteenth Amendment to invalidate the Texas anti-sodomy law.<sup>147</sup> Kennedy redefined the issue from *Bowers* and framed it as one

144. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

145. 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 578.

146. *Id.* at 188, 196. In *Bowers*, the U.S. Supreme Court refused to take a more expansive view of the Due Process Clause and to find that there was a fundamental right to engage in sodomy. *See id.* at 194–95. At the time, approximately twenty-five states had existing anti-sodomy laws, and the Court was extremely hesitant to expand the reach of certain substantive rights without express authority from the U.S. Constitution. *Id.* at 195. In the Court's opinion, Justice White asserted that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Id.* at 194. There were a number of intervening events, however, between the *Bowers* decision in 1986 and the *Lawrence* decision in 2003 that served to undermine the rationale and holding of *Bowers*. *See* Jessica A. Gonzalez, *Decriminalizing Sexual Conduct: The Supreme Court Ruling in Lawrence v. Texas*, 35 ST. MARY'S L.J. 685, 693–99 (2004). First, there were a number of U.S. Supreme Court cases that interpreted the liberty interest protected by the Due Process Clause in the Fourteenth Amendment. *Id.* at 693–94; *see also infra* notes 147–63 and accompanying text. Additionally, when *Lawrence* was decided in 2003, the number of states with anti-sodomy laws had decreased from twenty-five, at the time of the *Bowers* decision, to only thirteen. *See Lawrence*, 539 U.S. at 559. Interestingly, there are forty-five states that currently define marriage as only being between a man and a woman. *See supra* note 204 and accompanying text.

147. Gonzalez, *supra* note 146, at 693–94. The Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend XIV, § 1. This right to liberty in the Due Process Clause was originally interpreted as being freedom from restraint. *See* Julia M. Glencer, *An 'Atypical and Significant' Barrier to Prisoners' Procedural Due Process Claims Based on State-Created Liberty Interests*, 100 DICK. L. REV. 861, 875 (1996). Over time, however, the right to liberty was understood to include other values and freedoms, including interests such as reputation, *see, e.g., Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), and personal autonomy, *see, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), which are important part of preserving democracy, *see* Glencer, *supra*, at 875. In *Paul v. Davis*, 424 U.S. 693, 710 (1976), Chief Justice William Rehnquist mentioned that there are a variety of interests that can be classified as pertaining to liberty. According to Justice Rehnquist, there are those interests that are recognized by the U.S. Constitution and are protected directly by the Due Process Clause. *Id.* at 710–11. Additionally, there are state-created liberties that are not recognized by the U.S. Constitution, but some of them, such as the right to a driver's license, are nevertheless entitled to protection under the Due Process Clause. *See id.* at 711. According to *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570–71 (1972), courts must not look to the weight but to the nature of the interest at stake in determining whether a state-created liberty interest is entitled to protection under the Due Process Clause. In other words, the interest must come within the ambit of the Due Process Clause's protection of liberty. *Id.* at 571. As this comment argues, the interest in obtaining government recognition of one's same-sex marriage does not arise under the Fourteenth Amendment's protection of liberty as a right recognized by the U.S. Constitution, nor is it a state-

striking at the heart of liberty in this country.<sup>148</sup> Kennedy also traced the development of case law, starting with *Griswold v. Connecticut*,<sup>149</sup> which articulated a right to make one's own decisions regarding sexual conduct.<sup>150</sup> After detailing a progression of case law that interpreted the liberty interest in the Due Process Clause,<sup>151</sup> the *Lawrence* opinion shifted its focus to *Bowers* as a wrongly decided anomaly in this trend of cases regarding personal decisions of sexual conduct.<sup>152</sup>

Justice Kennedy believed that Justice Byron White misunderstood the issue presented to the Court in *Bowers*.<sup>153</sup> White framed the issue as whether there was a constitutional right to engage in sodomy, but Kennedy believed that the issue should be framed in the context of liberty.<sup>154</sup> In *Lawrence*, Kennedy rearticulated the reasoning from *Planned Parenthood v. Casey*<sup>155</sup> by explaining that the Court's "obligation is to define the liberty of all, not to mandate [its] own moral code."<sup>156</sup> He believed that the Texas

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created right entitled to protection under the Due Process Clause. See *infra* notes 148–201 and accompanying text.

148. See *Lawrence*, 539 U.S. at 564, 571. Justice Kennedy references the fact that there have been various voices throughout history defining notions of moral and acceptable behavior, but according to Kennedy, these convictions do not pertain to the question presented to the Court. *Id.* at 571. He redefines the issue as being "whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law." *Id.* In this way, Kennedy redefines the issue as one of liberty and conclusively rejects the idea that that government can mandate its own moral code. *Id.*

149. 381 U.S. 479 (1965).

150. Gonzalez, *supra* note 146, at 693. Justice Kennedy began the discussion with reference to the Court's invalidation of a state statute in *Griswold* that banned the use of contraceptives and the provision of counseling related to the use of contraception. *Lawrence*, 539 U.S. at 564. The rationale for the *Griswold* decision rested on the right to privacy and the intimate nature of the marital bedroom. *Id.* at 564–65. After *Griswold*, the Court extended this same right to unwed couples on equal protection grounds in *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972).

151. See *Lawrence*, 539 U.S. at 564–66. *Griswold* and *Eisenstadt* set the stage for the Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). There, the Court relied on the notion of personal privacy to invalidate a Texas state statute banning abortions, discussing how a woman's right to an abortion should be grounded in the protections of personal liberty found in the U.S. Constitution. *Id.* at 153–54. According to the Court, this protection of a woman's personal liberty would preclude states from banning abortion. See *id.* at 153. The Court later reaffirmed *Roe* in *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992). In reaffirming *Roe*, the Court relied heavily on the Fourteenth Amendment as setting forth the foundational concept of the right of personal privacy. *Casey*, 505 U.S. at 847–49, 898, 901.

152. See *Lawrence*, 539 U.S. at 566–68.

153. *Id.* at 566–67.

154. See *id.* at 566–67. Justice White framed the issue in *Bowers* as being whether gay and lesbian individuals have a constitutional right to engage in sodomy. *Id.* Justice Kennedy, however, believed that White's framing of the issue demonstrated "the Court's own failure to appreciate the extent of the liberty at stake." *Id.* at 567. According to Kennedy, "[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Id.*

155. 505 U.S. 833 (1992).

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

anti-sodomy statute had far-reaching implications for liberty in society because the state law allowed the government to intrude into decisions of sexual intimacy that regularly occurred in the home, the most private of all places.<sup>157</sup>

The Kennedy opinion in *Lawrence* also invalidated the statute for other reasons beyond asserting that anti-sodomy laws violated the liberty interest of the Due Process Clause of the Fourteenth Amendment.<sup>158</sup> Two important cases had changed the legal landscape that once supported the holding of *Bowers*.<sup>159</sup> *Casey* had affirmed the principle that there was a liberty interest in “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,”<sup>160</sup> and *Romer* had held that a constitutional amendment found to have been passed out of mere animus toward gay and lesbian individuals could not have a legitimate governmental purpose.<sup>161</sup> Additionally, the political landscape had changed. There were twenty-five states that had previously enacted anti-sodomy laws at the time of *Bowers*, but when *Lawrence* was decided, there were only

157. *Id.* at 567. Justice Kennedy found it particularly important that this case concerned a criminal statute. *Id.* It was Kennedy’s view that criminal penalties, even minor ones, attached a stigma that was not trivial. *Id.* at 575. According to Kennedy, the arm of the state should not be used to create this societal stigma through the enforcement of a criminal statute. *Id.* at 571.

158. See *infra* text accompanying notes 159–63.

159. Gonzalez, *supra* note 146, at 698.

160. *Lawrence*, 539 U.S. at 573–74 (citing *Casey*, 505 U.S. at 851). *Casey* stated this proposition in reference to the Court’s discussion in *Carey v. Population Services International*, 431 U.S. 678, 684–85 (1977). *Carey* explained that decisions related to marriage are “among the decisions that an individual may make without unjustified government interference.” *Carey*, 431 U.S. at 684–85 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)). Because the Court in *Carey* relied on *Loving* as authority for this principle, see *id.*, Kennedy’s reference to the same principle in *Lawrence* should be understood in light of the holding in *Loving*. As will be discussed later in this comment, the Court’s holding in *Loving* should not be relied on as precedent in the Proposition 8 context. See *infra* notes 180–201 and accompanying text. Additionally, *Carey* explained that family relationships are also protected from government interference by citing the Court’s discussion in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). In *Prince*, the Court was referring to constitutional protection for a “parent’s authority to provide religious with secular schooling, and the child’s right to receive it, in light of the state’s requirement of attendance at public schools.” *Prince*, 321 U.S. at 166. (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). *Prince* also referenced the child’s right to receive instruction in a language other than the nation’s predominant language. *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

161. *Lawrence*, 539 U.S. at 574 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)). As has been discussed earlier in this comment, there are significant legal distinctions between Amendment 2 in Colorado and Proposition 8 in California. See *supra* notes 135–43 and accompanying text. Because of these important differences, it cannot be automatically assumed that Proposition 8 was born out of mere animus toward gay and lesbian individuals. See *supra* notes 135–43 and accompanying text. In fact, the limited effect of Proposition 8 actually indicates more strongly that it was not born out of mere animus, and that *Romer* should not control in the federal lawsuit challenging Proposition 8. See *supra* notes 141–43 and accompanying text.

thirteen states in the Union with existing anti-sodomy statutes.<sup>162</sup> As part of his conclusion, however, Kennedy specifically noted that the issue in *Lawrence* did not involve governmental recognition of same-sex relationships.<sup>163</sup>

Although the reasoning of *Lawrence* appears facially applicable to Proposition 8,<sup>164</sup> there are legally significant factual differences that indicate otherwise.<sup>165</sup> Unlike *Lawrence*, where there was a criminal statute at issue,<sup>166</sup> Proposition 8 relates to the definition of marriage and does not prescribe criminal penalties for engaging in same-sex relations.<sup>167</sup> In fact, Proposition 8 only carves out a limited exception with respect to the designation of marriage and does not preclude gay and lesbian individuals from forming established family relationships with the person of their own choosing.<sup>168</sup> Whereas *Lawrence* involves conduct that occurs almost

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162. *Lawrence*, 539 U.S. at 573. Justice Kennedy also discussed the history of anti-sodomy laws in the United States and mentioned that it was not until the 1970s that states began to target same-sex intimacy for enforcement and prosecution. *Id.* at 568–70. At the time *Lawrence* was decided, Kennedy indicated that only nine states had passed statutes that specifically targeted same-sex relations. *Id.* at 570.

163. *Id.* at 578. Justice Kennedy actually noted that the *Lawrence* case did not concern a number of different scenarios. *Id.* According to Kennedy, the situation did not involve minors, coerced conduct, public conduct, prostitution, or formal recognition of same-sex relationships. *Id.* He proceeded to note specifically that the *Lawrence* case involved two adult men who engaged in consensual sexual activity within the private sphere, which constitutes “a realm of personal liberty” protected from government intervention by the Constitution. *Id.* (quoting *Casey*, 505 U.S. at 847).

164. See *supra* notes 144–63 and accompanying text. The reasoning from *Lawrence* appears facially applicable because Justice Kennedy refers to the societal stigma that many gay and lesbian individuals faced as a result of various anti-sodomy statutes. See *Lawrence*, 539 U.S. at 573. Additionally, Kennedy traced a line of cases that began to interpret the liberty interest of the Fourteenth Amendment more expansively with regard to sexual conduct, which could lead many observers to speculate that the liberty interest should include a right to same-sex marriage. See *supra* notes 150–52 and accompanying text.

165. See *infra* notes 166–72 and accompanying text.

166. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003). The statute provided that: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” *Id.* Deviate sexual intercourse was defined 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).

167. See *supra* note 144, 157 and accompanying text.

168. *Strauss v. Horton*, 207 P.3d 48, 61 (Cal. 2009). Even after the enactment of Proposition 8, same-sex couples could still obtain all the legal rights and incidents of marriage, available through the state government, under California’s domestic partnership program. See *id.* at 77. California began a statewide registration program for domestic partners in 1999 with the enactment of AB 26. Ben Johnson, *Putative Partners: Protecting Couples from the Consequences of Technically Invalid Domestic Partnerships*, 95 CAL. L. REV. 2147, 2157 (2007). Under California law, committed same-sex couples, or committed opposite-sex couples with one partner who is at least sixty-two years old, can register with the state government under the domestic partnership program. CAL. FAM. CODE § 297 (West 2004). AB 26 set up a mostly symbolic statewide registration system for domestic partners because this system only offered hospital visitation rights and dependent health care benefits for government employees, and these rights were already offered to many same-sex couples under similarly fashioned city and county registries. Johnson, *supra*, at 2159. The California state legislature later granted all the legal rights and benefits of marriage to same-sex couples in a

exclusively in the privacy of the bedroom,<sup>169</sup> Proposition 8 is distinct on a spatial level because it involves governmental recognition of marriage, which relates to activities outside the bedroom.<sup>170</sup> Unlike in *Lawrence*, which was decided at a time when there were only thirteen states with existing anti-sodomy laws,<sup>171</sup> there are currently forty-five states that define marriage as only being between one man and one woman.<sup>172</sup>

These factual differences appear to indicate that federal courts would have to expand the interpretation of the liberty interest in the Due Process Clause if they were to rely on *Lawrence* to invalidate Proposition 8.<sup>173</sup> In fact, Justice Kennedy's own words from the opinion illustrate this point: "The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."<sup>174</sup> Expansion of the Due Process Clause to encompass governmental

domestic partnership when it passed the Domestic Partner Rights and Responsibilities Act of 2003. See *Strauss*, 207 P.3d at 67. Same-sex couples, however, were not entitled to the designation of marriage until the California Supreme Court granted them this right in 2008. In re Marriage Cases, 183 P.3d 384, 452–53 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, as recognized in *Strauss*, 207 P.3d at 75–76, 122.

169. See *supra* note 157 and accompanying text.

170. See CAL. CONST. art. I, § 7.5.

171. See *supra* note 162 and accompanying text. Justice Kennedy took particular note of the fact that only four of these thirteen states prohibited sodomy against only gay and lesbian individuals. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003). Additionally, many of the states fell into a pattern of non-enforcement with respect to these anti-sodomy statutes. *Id.* The State of Texas even admitted that it had not prosecuted anyone under its statute since 1994. *Id.*

172. See *supra* note 79 and accompanying text. Although the number of state statutes, constitutional provisions, or court decisions at issue would not be relevant if there is a clear constitutional violation because of the Supremacy Clause, see U.S. CONST. art. VI, cl. 2, there is a degree of ambiguity and uncertainty when the federal judiciary is confronted with a newly proposed right under the Fourteenth Amendment, see *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). When confronted with a newly proposed right to die in *Glucksberg*, the U.S. Supreme Court surveyed developments on the issue of assisted suicide in California, Oregon, Iowa, Rhode Island, and New York. *Glucksberg*, 521 U.S. at 717–19. After surveying developments amongst the states, the Court was reticent to interpret a new constitutional right arising out of the Fourteenth Amendment because it was unwilling to cut off public debate on an issue for which it did not have sufficient guidance from the Constitution or current precedent. See *id.* at 720. According to the Court, the nation was "engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide," and the Court believed that its holding allowed "this debate to continue, as it should in a democratic society." *Id.* at 735. Moreover, at least one federal court has noted that "public opinion is not irrelevant to the task of deciding whether a constitutional right exists," especially when judges are considering a new constitutional right. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 871 (2006) (quoting Posner, *supra* note 116, at 1585). Accordingly, the federal judiciary would be wise to survey developments amongst the states on the issue of marriage and consider the benefits to liberty and democracy of public debate amongst the states on this controversial issue. See *Glucksberg*, 521 U.S. at 735.

173. See *supra* notes 164–72 and accompanying text.

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



recognition of same-sex marriages, however, would create important implications for liberty in this country.<sup>175</sup> As discussed in Part III of this comment, the framers of the Constitution and succeeding generations of jurists recognized federalism in family law as a fundamental restraint on the accumulation of federal government power.<sup>176</sup> By using the Fourteenth Amendment to end the constitutional decision-making processes on marriage that are currently occurring at the state level, the federal government would be initiating a direct encroachment into the core domain of family law.<sup>177</sup> This type of encroachment, through an expansive

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175. See *infra* notes 176–79, 207–11 and accompanying text. During the debate to ratify the U.S. Constitution, there was great fear among the citizenry that the federal government would destroy certain liberties enjoyed on a local level. THE FEDERALIST NO. 33, at 201–02 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Opponents of the Constitution believed that the federal government could use the Supremacy Clause and the Necessary and Proper Clause in tandem as an engine to accomplish such destructive purposes. *Id.* Alexander Hamilton argued, however, that “it will not follow from this doctrine [of supremacy] that acts of the large society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land.” *Id.* at 204. Additionally, James Madison argued that federalism and the separation of powers “to a certain extent [are] admitted on all hands to be essential to the preservation of liberty.” THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961). The Supreme Court’s restraint in interpreting a right to die from the Due Process Clause in *Glucksberg* demonstrates that these background principles of federalism should also be given consideration when the federal judiciary is confronted with a newly proposed right under the Fourteenth Amendment. See *Glucksberg*, 521 U.S. at 720. This restrained approach to interpreting newly proposed rights would preclude the Fourteenth Amendment from becoming nothing more than a tool for implementing judicial policy preferences. *Id.*

176. See *supra* notes 48–58 and accompanying text. While maintenance of this federal balance remains largely an issue of political judgment, the judiciary plays an important function in preserving this balance as well. See *United States v. Lopez*, 514 U.S. 549, 577–78 (1995). According to *Lopez*, “the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.” *Id.* at 578. As a result, a number of judicial doctrines reflect the important function that the judiciary plays in maintaining the federal balance. *Id.* at 578–79. Some of these judicial doctrines include the following: abstention, see, e.g., *Younger v. Harris*, 401 U.S. 37, 46 (1971) (discussing the fundamental policy against federal judicial intervention in state criminal prosecutions); rules regarding when to apply substantive state law, see, e.g., *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (asserting that the laws of the state should be applied in diversity cases unless there is a federal statute or federal constitutional provision at issue); and the preemption doctrine, see, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230–31 (1947) (discussing the circumstances when federal legislation is supreme over state exercise of the police power).

177. See *supra* note 48 and accompanying text. Currently, as in *Glucksberg*, where states were rethinking bans on assisted suicide, *Glucksberg*, 521 U.S. at 716–19, a number of states are engaged in a thoughtful reexamination of their traditional marriage statutes, see *supra* notes 73–94 and accompanying text. While many states are simply reaffirming traditional marriage statutes or ratifying constitutional marriage amendments, see *supra* note 79 and accompanying text, other states are taking a different course or coming up with alternative options for same-sex couples, see, e.g., Laura Mansnerus, *Legislators Vote for Gay Unions in New Jersey*, N.Y. TIMES, Dec. 15, 2006, at A1, available at 2006 WLNR 21800756 (reporting on New Jersey’s decision to provide civil unions to same-sex couples in 2006). For example, Massachusetts, Connecticut, and Iowa granted recognition of same-sex marriage through high-profile court decisions, and Vermont, New Hampshire, and the District of Columbia recognized same-sex marriage through legislation. See *supra* notes 80–93 and accompanying text. Other states, such as California, Arizona, and Florida,

interpretation of the Fourteenth Amendment, would upset the current balance between the federal and state governments, which the founders deemed essential for the preservation of the republic.<sup>178</sup> Thus, *Lawrence* should not control with respect to Proposition 8 because an expansive interpretation of the Fourteenth Amendment, which includes a new right to same-sex marriage, would have significantly negative ramifications for individual liberty in this country.<sup>179</sup>

### C. *Loving v. Virginia*

In 1967, the U.S. Supreme Court struck down miscegenation laws that made it unlawful for a white person to marry a black person in the State of Virginia.<sup>180</sup> At the time, Virginia was one of sixteen states that punished

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have decided to reaffirm the traditional definition of marriage through state constitutional amendments. Jessie McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1, available at 2008 WLNR 21173920. Additionally, while reaffirming the traditional definition of marriage, some states are considering or have already created civil unions or domestic partnerships as an alternative to same-sex marriage. See, e.g., The Associated Press, *Hawaii Debates Same-Sex Unions*, N.Y. TIMES, Feb. 23, 2009, at A17, available at 2009 WLNR 3483749 (reporting on the debate in the Hawai'i state legislature to provide civil unions to same-sex couples); Steve Friess, *Nevada Partnership Bill Now Law*, N.Y. TIMES, June 1, 2009, at A12, available at 2009 WLNR 10345381 (noting that Nevada passed a domestic registry for same-sex and unmarried, opposite-sex couples after a spirited debate in the state legislature); The Associated Press, *Hawaii: Governor Vetoes Same-Sex Unions*, N.Y. TIMES, July 7, 2010, at A11, available at 2010 WLNR 13576694 (reporting on the Hawai'i governor's reasons for vetoing a same-sex civil union bill).

178. See *supra* note 58 and accompanying text. James Madison articulately explained that “[a]mbition must be made to counteract ambition.” THE FEDERALIST NO. 51, *supra* note 175, at 322 (James Madison). Madison believed that government was simply a reflection of human nature, and as a result, certain controls needed to be set in place in order to provide a security against the abuses of government. *Id.* The primary way of accomplishing this task was by dividing up various departments of the government and providing them with rival and competing interests. *Id.* Additionally, Madison believed that the administration of two governments, rather than a single government, created a double security against tyranny and the abuse of governmental power. *Id.* at 323.

179. See *supra* notes 175–78 and accompanying text.

180. *Loving v. Virginia*, 388 U.S. 1, 4–5, 11–12 (1967). The Lovings were convicted under two miscegenation laws that were part of a comprehensive statutory scheme in Virginia. *Id.* at 4. Specifically, the Lovings were convicted for leaving the State of Virginia and getting married in a different state. *Id.* At the time, section 20-58 of the Virginia Code provided that anyone who entered into an interracial marriage was guilty of a felony, which was punishable by confinement in the state penitentiary for up to five years. *Id.* Section 20-59 further provided that a black and a white person who married in a different state and returned to Virginia would be subject to the same penalty under section 20-59, as if the marriage actually occurred in Virginia. *Id.* Section 20-59 provided that anyone who enters into an interracial marriage is guilty of a felony that is punishable by confinement in the state penitentiary for up to five years. *Id.*

people who entered into interracial marriages.<sup>181</sup> In defense of the statutory scheme, Virginia argued and the state supreme court agreed that, absent a constitutional violation, marriage is a social relation subject to the state's police power.<sup>182</sup> The U.S. Supreme Court found, however, that the miscegenation statutes in Virginia violated individual rights on both equal protection and due process grounds.<sup>183</sup> When examining the statutes under the Equal Protection Clause, the Court held that "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."<sup>184</sup> In assessing matters of due process, the Court also found that "[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."<sup>185</sup>

A number of subsequent decisions cite *Loving* for the principle that matters of personal choice in marriage are a constitutional right under the

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181. *Id.* at 6.

182. *Id.* at 7. As part of its holding, the state court relied on *Maynard v. Hill*, 125 U.S. 190, 205 (1888), where the U.S. Supreme Court asserted that:

Marriage . . . has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

The State of Virginia, however, did not dispute that there were limits on its regulation of marriage based on *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). In *Meyer*, the U.S. Supreme Court articulated that "liberty may not be interfered with, under the guise of protecting the public interest . . ." *Meyer*, 262 U.S. at 399–400. Ultimately, the State of Virginia unsuccessfully argued on appeal that the Equal Protection Clause merely mandated equal penalty for both whites and blacks who entered into interracial marriages. See *Loving*, 388 U.S. at 7–8, 11–12.

183. *Loving*, 388 U.S. at 11–12. When finding that the Virginia statute was unconstitutional on equal protection grounds, the Court specifically noted that the Equal Protection Clause, at a minimum should require strict scrutiny for invidious racial classifications, especially those that proscribe criminal sanctions on the basis of race. *Id.* at 11. In fact, the Court noted that two of its members even indicated that they could not think of a valid legislative purpose where it would be constitutional to impose criminal sanctions on someone because of his or her skin color. *Id.* Additionally, when describing the freedom to marry, the Court described discrimination based on racial classifications as the characteristic of the Virginia statute that violated the central purpose of the Equal Protection Clause. *Id.* at 12. When assessing matters of due process, the freedom to marry was also understood as a freedom to choose one's partner irrespective of skin color. *Id.*

184. *Id.* at 11.

185. *Id.* at 12 (citing *Skinner*, 316 U.S. at 541 and *Maynard*, 125 U.S. 190). In *Skinner*, the State of Oklahoma passed the Habitual Criminal Sterilization Act, which allowed Oklahoma's Attorney General to implement proceedings for the sterilization of individuals convicted of more than two felonies of moral turpitude. *Skinner*, 316 U.S. at 536–37. The U.S. Supreme Court indicated that the statute in question violated the Equal Protection Clause because it deprived convicts of "one of the basic civil rights of man." *Id.* at 541. According to the Court, procreation and marriage are fundamental to humankind's "very existence and survival." *Id.* In *Maynard*, the issue was whether a couple's marriage could be dissolved through an act of the Oregon state legislature. See *Maynard*, 125 U.S. at 209. There, in deciding the legislature's authority to dissolve a marital union, the Court referred to marriage "as creating the most important relation in life" and "as having more to do with the morals and civilization of a people than any other institution." *Id.* at 205.

Fourteenth Amendment.<sup>186</sup> These decisions, however, should not be taken at face value, but should only be read in light of the holding in *Loving*, which was decided with the explicit understanding that “[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”<sup>187</sup> Additionally, the U.S. Supreme Court has discussed the significance of that goal of the Fourteenth Amendment in other cases.<sup>188</sup> These cases demonstrate that the fundamental purpose of the Fourteenth Amendment was the preservation of certain civil and political rights for former slaves.<sup>189</sup> According to the Court,

186. See, e.g., *Turner v. Safely*, 482 U.S. 78, 95 (1987) (citing *Loving* for the principle “that the decision to marry is a fundamental right”); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (referencing *Loving* as a foundational case that confirms “that the right to marry is of fundamental importance for all individuals”); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–85 (1977) (citing *Loving* for the proposition that “it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage . . .”) (internal quotation mark omitted); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (citing *Loving* for the principle that “freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment”).

187. *Loving*, 388 U.S. at 10. In *Baker v. Nelson*, 191 N.W.2d 185, 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972), the Minnesota Supreme Court explicitly rejected any reliance on *Loving* in a case where a same-sex couple was denied issuance of a marriage license in the State of Minnesota. According to the court, “Virginia’s antimiscegenation statute, prohibiting interracial marriages, was invalidated solely on the grounds of its patent racial discrimination.” *Id.* at 187. Thus, the Minnesota Supreme Court found that “there is a clear distinction between a restriction on marriage based merely upon race and one based upon the fundamental difference in sex.” *Id.* Even though the U.S. Supreme Court dismissed the appeal “for want of a substantial federal question,” *Baker*, 409 U.S. at 810, this type of dismissal does not affirm the reasoning of the Minnesota Supreme Court, see *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). Thus, the reasoning of the Minnesota Supreme Court in *Baker* does not have precedential value in subsequent federal cases. See *Mandel*, 432 U.S. at 176.

188. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (“[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.”); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”); *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (asserting that the Equal Protection Clause’s “central mandate is racial neutrality in governmental decisionmaking”).

189. *Shelley v. Kramer*, 334 U.S. 1, 23 (1948). In *Shelley*, the Supreme Court stated:

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color.

*Id.* This case involved a number of restrictive covenants on land that precluded African-American families from purchasing the property at issue because of the color of their skin. *Id.* at 4–6. In assessing the constitutionality of these covenants, the Court noted that the equal enjoyment of property was an essential precondition for ensuring the basic civil and political rights that the Fourteenth Amendment was designed to provide to African-Americans. *Id.* at 10. As a result, the Court held that state judicial enforcement of these restrictive covenants was a violation of the Equal Protection Clause, and the action of the state courts must be overturned as a violation of the

the historical context surrounding the passage of the Fourteenth Amendment should be considered when interpreting the Amendment, and its provisions should “be construed with this fundamental purpose in mind.”<sup>190</sup>

Thus, even though the rationale in *Loving* appears applicable in the Proposition 8 situation,<sup>191</sup> federal courts should be guided by the fundamental purpose of the Fourteenth Amendment when construing *Loving’s* meaning with respect to the issue of marriage.<sup>192</sup> Therefore, references in *Loving* that describe the “the freedom to marry,”<sup>193</sup> or to *Loving’s* progeny, which explain that there is a constitutional right to personal choice in matters relating to marriage and family relationships,<sup>194</sup> should not be taken at face value when analyzing Proposition 8.<sup>195</sup>

There are important differences that preclude *Loving* from being used as precedent when determining whether there is a constitutional right to same-sex marriage.<sup>196</sup> Unlike in *Loving*, where Virginia’s statutory scheme imposed criminal penalties on those entering into interracial marriages,<sup>197</sup>

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Fourteenth Amendment. *Id.* at 20.

190. *Id.* at 23 (citing *Slaughter-House Cases*, 83 U.S. 36 (1872)). The Court explained that the Fourteenth Amendment should be understood in light of its central purpose of securing certain basic civil and political rights for those who had been discriminated against on the basis of race or color. *Id.*

191. *See supra* notes 180–85 and accompanying text.

192. *See supra* notes 186–90 and accompanying text.

193. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

194. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974). In *LaFleur*, two female public school teachers, who became pregnant during the course of their employment, were forced into taking maternity leave and foregoing their salaries until the birth of their children. *Id.* at 634–35. In assessing the constitutionality of the school’s actions and policies, the Supreme Court cited *Loving* for the principle that there is a constitutional freedom of choice with respect to matters of marriage and family life. *Id.* at 639–40. The Court reasoned that the school’s policy of mandatory maternity leave placed an undue burden on an individual’s ability to exercise freedom of choice with respect to marriage and family life. *Id.* at 640. Other cases, such as *Carey*, also cite *Loving* for the exact same principle, *see Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–685 (1977), but it is important to note the context in which this constitutional freedom of marital choice arises and the rationale that led the Court to arrive at its conclusion, *see supra* notes 187–90 and accompanying text.

195. *See supra* notes 186–90 and accompanying text. *LaFleur* is distinguishable from the Proposition 8 context. Unlike in *LaFleur*, where public employees were forced to take a mandatory maternity leave and forego their salaries until the birth of their children, *LaFleur*, 414 U.S. at 634–35, Proposition 8 precludes private individuals from obtaining the civil designation of marriage for their same-sex relationships, *Strauss v. Horton*, 207 P.3d 48, 75–76 (Cal. 2009). Additionally, unlike *LaFleur*, where the Court noted that school policies placed an undue burden on the exercise of individual freedoms with respect to marriage and family relationships, *LaFleur*, 414 U.S. at 640, same-sex couples in California enjoy all the legal rights and benefits of marriage that are available at the state level, and Proposition 8 does nothing to prevent them from forming officially recognized family relationships with the partner of their choice, *Strauss*, 207 P.3d at 75–76. Thus, *LaFleur* should not be relied on as precedent in finding a new constitutional right to same-sex marriage.

196. *See infra* notes 197–200 and accompanying text.

197. *See supra* note 180 and accompanying text. Section 20-59 of the Virginia Code provided: “Punishment for marriage.-If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by

Proposition 8 merely withholds the designation of marriage from same-sex couples. The State of California already provides same-sex couples with all the rights and benefit that are associated with marriage at the state level.<sup>198</sup> Additionally, whereas *Loving* was decided with the Thirteenth and Fifteenth Amendments as a guide in understanding the scope and meaning of the Equal Protection and Due Process Clauses,<sup>199</sup> no such constitutional provision or federal statute exists with respect to sexual orientation.<sup>200</sup> Thus, *Loving* should not be relied on as precedent in finding a new constitutional right to same-sex marriage because it would have the effect of cutting off public debate on an important issue, which traditionally has been regulated by the states because of their regulatory expertise in this area.<sup>201</sup>

#### V. LEGAL IMPLICATIONS OF FINDING A CONSTITUTIONAL RIGHT TO SAME-SEX MARRIAGE

An expansive interpretation of the Fourteenth Amendment would create a number of legal implications for liberty and for the structural foundation of this nation's governmental system.<sup>202</sup> By redefining marriage, the federal

confinement in the penitentiary for not less than one nor more than five years." VA. CODE ANN. § 20-59 (1960). Additionally, Section 20-57 of the Virginia Code provided: "Marriages void without decree.-All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." *Id.* § 20-57 (1960).

198. See *supra* notes 86, 132-34 and accompanying text. Same-sex couples currently receive all the legal rights and benefits of marriage available at the state level through California's domestic partnership program. See *supra* note 168 and accompanying text. In addition, as stated by the California Supreme Court, Proposition 8 "does not purport to alter or affect the more general holding in the *Marriage Cases* that same-sex couples, as well as opposite-sex couples, enjoy the constitutional right, under the privacy and due process clauses of the California Constitution, to establish an officially recognized family relationship." *Strauss*, 207 P.3d at 75.

199. See *supra* notes 186-90 and accompanying text.

200. See Luke A. Boso, *Disrupting Sexual Categories of Intimate Preference*, 21 HASTINGS WOMEN'S L.J. 59, 64 n.9 (2010). As a caveat, Congress has passed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act in order to provide greater protection for individuals targeted for violent crime based on their actual or perceived sexual orientation or gender identity. *Legislation & Regulations*, 33 MENTAL & PHYSICAL DISABILITY L. REP. 1060, 1060 (2009).

201. See *supra* notes 107, 172, 191-200 and accompanying text.

202. See *infra* notes 206-14 and accompanying text. Even though Chief Justice John Marshall espoused a broad interpretation of congressional authority under the implied power doctrine in *McCulloch* and the Commerce Clause in *Gibbons*, Marshall still envisioned certain affirmative limits on federal government power. See *supra* notes 49-50 and accompanying text. In *Gibbons*, the Court noted that Congress could not regulate noncommercial, intrastate activities that did not affect or concern other states. *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824). This interpretation of congressional power under the Commerce Clause implied a correlative sphere of state sovereignty under the Tenth Amendment and provided states with certain police powers to regulate the public health, safety, and welfare of their citizenries. Nelson & Pushaw, *supra* note 49, at 61-63. Additionally, federal law was only supreme over the states if Congress passed legislation pursuant to

judiciary would be interfering with the established principle that domestic relations, as an area of traditional state concern, should be regulated on a local level so long as that regulation does not violate a constitutional right.<sup>203</sup> Additionally, such action would have the effect of overturning laws with respect to marriage in a total of forty-five states.<sup>204</sup> If the federal judiciary were to strike down California's Proposition 8 on equal protection or due process grounds, the same arguments and legal theories would also be applicable to the laws and constitutional provisions of every other state in the Union pursuant to the Supremacy Clause.<sup>205</sup>

As can be seen, the implications of finding a new constitutional right to same-sex marriage are far-reaching.<sup>206</sup> An expansive interpretation of the Equal Protection Clause or the liberty interest provided for by the Due

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the powers delegated to it by the Constitution. THE FEDERALIST NO. 33, *supra* note 175, at 204 (Alexander Hamilton). Even though the Supreme Court has increasingly declined to recognize the full import and significance of the Tenth Amendment after the New Deal, *see supra* note 97 and accompanying text, an expansion of the Fourteenth Amendment to include the right of same-sex marriage would interfere in an area that has traditionally been viewed as being the exclusive domain of the states, *see, e.g.,* *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (asserting that domestic relations is "an area that has long been regarded as a virtually exclusive province of the States"). This encroachment on the substantive limits of federal government power would perpetuate the decline of the Tenth Amendment in this country's constitutional jurisprudence, *see supra* note 97 and accompanying text, and it would weaken the ability of federalism to serve as a security against the abuses of governmental power, *see* THE FEDERALIST NO. 51, *supra* note 175, at 322–23 (James Madison).

203. *See supra* notes 24, 48–72 and accompanying text. As an anecdotal example, Hawai'i was able to conclusively resolve its definition of marriage in the 1990s because the federal government left the decision exclusively within the sovereign province of the Hawai'i state government. *See supra* notes 8–16 and accompanying text. Additionally, Alaska faced a similar scenario, and voters were allowed to ratify a constitutional marriage amendment without federal government intervention. *See supra* notes 17–22 and accompanying text. Even though no federal lawsuit was filed against the Hawai'i constitutional marriage amendment, the factual and legal similarities between the scenarios in Hawai'i and Alaska and Proposition 8 in California demonstrate the importance of considering background principles of federalism when assessing newly proposed rights with respect to same-sex marriage. *See supra* note 23–31 and accompanying text. Background principles of federalism remain essential in securing important freedoms in this country, and the federal judiciary, as much as any other branch of government, has a role to play in preserving the federalist balance. *See* *United States v. Lopez*, 514 U.S. 549, 578 (1995).

204. Currently, there are twenty-nine states with popularly enacted constitutional marriage amendments, Chehardy, *supra* note 79, at 318, but this figure does not include Hawai'i, which has a constitutional amendment that gives the state legislature the power to limit marriage to opposite-sex couples, *see supra* note 79 and accompanying text. If the Supreme Court found a right to same-sex marriage under the U.S. Constitution, it would be supreme over state constitutional amendments, state statutes, and state court decisions that define marriage as only being between one man and one woman. *See* U.S. CONST. art. VI, cl. 2. The following five states currently recognize same-sex marriage: Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire. *See supra* notes 80–93 and accompanying text. By deduction, there are forty-five states that recognize marriage as only being between a man and a woman either by state statute, constitutional amendment, or court decision. As a result, a constitutional right to same-sex marriage would have the effect of overturning marriage laws in a total of forty-five states. *See* U.S. CONST. art. VI, cl. 2.

205. U.S. CONST. art. VI, cl. 2.

206. *See infra* notes 203–14 and accompanying text.

Process Clause will create important implications for freedom in this country.<sup>207</sup> The framers of the Constitution and succeeding generations of jurists understood how the promise of liberty is preserved through maintaining the appropriate balance of power between the federal and state governments.<sup>208</sup> Additionally, federalism in family law ensures that future generations of citizens are inculcated with certain civic virtues and republican ideals.<sup>209</sup> State regulation in family law promotes a commitment to autonomy, which causes people to value liberty and resist tyranny.<sup>210</sup> By using the judicial power to expand the scope of the Fourteenth Amendment, thereby intervening in the state's regulation of the domestic sphere, Article III courts would be upsetting the federalist balance that has ensured the preservation of this country's republican form of government for over 200 years.<sup>211</sup>

Finally, an expansive interpretation of the Fourteenth Amendment, which includes a new right of same-sex marriage, would have the effect of cutting off public debate on the civil definition of marriage when the states are currently engaged in a thoughtful examination of the subject.<sup>212</sup> When

207. See *infra* notes 208–11 and accompanying text.

208. See, e.g., THE FEDERALIST NO. 51, *supra* note 175, at 321–23 (James Madison) (discussing the importance of federalism and the separation of powers in providing a double security for the rights of the people); *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (describing how “federalism secures to citizens the liberties that derive from the diffusion of sovereign power”).

209. See *supra* note 58 and accompanying text. These ideals and virtues include participation in the political system, respect for differing viewpoints, critical dialogue and deliberation, honesty, reasonableness, and rational thought. Dailey, *supra* note 48, at 1835–40. Most importantly, federalism in family law inculcates future generations of citizens with the republican virtue of autonomy, see *id.* at 1840, which leads them to value liberty and resist tyranny, see Wardle, *supra* note 48, at 232–33.

210. See *supra* note 58 and accompanying text.

211. See *supra* notes 207–10 and accompanying text. During the founding era of the United States, there was concern that the Supremacy Clause and the Necessary and Proper Clause could be used by the federal government to take away newly acquired liberties at the state and local level. THE FEDERALIST NO. 33, *supra* note 175, at 201–02 (Alexander Hamilton). Alexander Hamilton articulately noted that laws that interfered with the sovereign domain of the states would not be enacted pursuant to the federal government's powers as granted by the Constitution and, thus, would not be the supreme law of the land. *Id.* at 204. In light of concern during the founding era, the Fourteenth Amendment should create a similar concern about the potential abridgement of civil liberties if the federal judiciary decides not to give greater weight to background principles of federalism when confronted with newly proposed rights under the Equal Protection and Due Process Clauses. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

212. See *supra* notes 107, 172 and accompanying text. Public debate and reexamination of certain norms is an essential part of this country's democratic system. *Glucksberg*, 521 U.S. at 735. Without the ability to engage in public debate, states cannot make use of their traditional expertise in the area of family law in order to develop alternative solutions on the issue of marriage. See *id.* at 716. Currently, states are determining whether to offer civil unions to same-sex couples as an alternative to marriage. See, e.g., *Hawaii Debates Same-Sex Unions*, *supra* note 177 at A17



assessing newly proposed rights under the Fourteenth Amendment, the U.S. Supreme Court has articulated the importance of restraint in any context where there is little guidance from the Constitution or established precedent.<sup>213</sup> The possibility that the Fourteenth Amendment could become no more than an engine of the judiciary's policy preferences cautions against finding a new constitutional right to same-sex marriage.<sup>214</sup>

## VI. CONCLUSION

Just as the Supreme Court has established and developed the doctrine of judicial review and the right to privacy through its own case law,<sup>215</sup> the framers of the Constitution and the justices of the Supreme Court have articulated the importance of federalism in family law.<sup>216</sup> This domestic relations doctrine recognized by the framers and the Court holds that states should have the power to regulate matters pertaining to family life absent a violation of individual rights as enumerated in the Constitution.<sup>217</sup> The rationale behind this doctrine is that domestic relations are quintessentially and traditionally local and, thus, should be of state concern.<sup>218</sup>

The definition of marriage lies at the heart of what constitutes the core

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(reporting on the debate in the Hawai'i state legislature to provide civil unions to same-sex couples); Mansnerus, *supra* note 177, at A1 (reporting on New Jersey's decision to provide civil unions to same-sex couples in 2006). For example, California also initiated a domestic partnership program for same-sex couples, which eventually included all the legal rights and benefits of marriage available at the state level. Johnson, *supra* note 168, at 2159–60. As in *Glucksberg*, where the states were engaged in a thoughtful examination of physician assisted suicide, it would be somewhat premature for the federal judiciary to conclusively decide that same-sex marriage is the appropriate solution with respect to the ongoing debate over government recognition of same-sex relationships, *see Glucksberg*, 521 U.S. at 716–20, especially given this country's tradition of defining marriage as only being between one man and one woman, *see supra* notes 41–43 and accompanying text.

213. *See supra* notes 187–90 and accompanying text. Currently, there are no constitutional provisions that directly address the issue of same-sex relationships or same-sex marriage, *see supra* note 200 and accompanying text, and there are no Supreme Court cases, except *Glucksberg*, that are directly on point with respect to this issue, *see supra* notes 117–201 and accompanying text. *Romer* is distinguishable because Colorado's Amendment 2 had a much broader effect than Proposition 8. *See supra* notes 117–43 and accompanying text. *Lawrence* is distinguishable because Justice Kennedy specifically noted that the case did not involve governmental recognition of same-sex relationships. *See supra* notes 144–79 and accompanying text. *Loving* is distinguishable because the Supreme Court's holding with respect to the freedom to marry was decided in the context of invidious racial classifications. *See supra* notes 180–201 and accompanying text. When there is no clear guidance with respect to a newly proposed right under the Fourteenth Amendment, the Supreme Court has urged restraint in order for the federal judiciary to make a responsible decision that does not have the effect of cutting off debate on an important matter of public concern. *See Glucksberg*, 521 U.S. at 720.

214. *See supra* notes 107, 172 and accompanying text.

215. *See, e.g.,* *Marbury v. Madison*, 5 U.S. 137, 176–78 (1803) (establishing the power of judicial review); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (creating a right to privacy to protect a woman's right to have an abortion).

216. *See supra* notes 48–72 and accompanying text.

217. *See supra* notes 24, 68–72 and accompanying text.

218. *See supra* notes 48–58 and accompanying text.

domain of family law. As a result, each state should be able to follow its own methods of determining the definition of marriage for its people.<sup>219</sup> California should be allowed to define marriage as being between one man and one woman without federal government intervention,<sup>220</sup> and Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and the District of Columbia likewise should be allowed to follow their own constitutional processes in recognizing same-sex marriage.<sup>221</sup>

Currently, Supreme Court precedent does not support a finding that there is a constitutional right to same-sex marriage.<sup>222</sup> *Romer* should not be relied on because Colorado's Amendment 2 affected general participatory rights, while California's Proposition 8 only deals with the designation of marriage.<sup>223</sup> Additionally, *Lawrence* should not be relied on because Justice Kennedy specifically mentioned that governmental recognition of same-sex marriage was not at issue.<sup>224</sup> Finally, *Loving* should not control because the Fourteenth Amendment should be viewed in light of the historical context of Reconstruction.<sup>225</sup> Thus, Proposition 8 does not violate an individual right found in the Constitution, and California should be allowed to regulate an area as quintessentially local as family law without federal government intervention.<sup>226</sup>

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219. See *supra* notes 48, 177 and accompanying text.

220. See *supra* note 134 and accompanying text.

221. See *supra* notes 80–93 and accompanying text.

222. See *infra* notes 223–25 and accompanying text.

223. See *supra* notes 117–43 and accompanying text.

224. See *supra* notes 144–79 and accompanying text.

225. See *supra* notes 180–201 and accompanying text.

226. See *supra* notes 215–18, 222–25 and accompanying text.

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