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## Queerly Unconstitutional?: South Carolina Same-Sex Marriages

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## QUEERLY\* UNCONSTITUTIONAL?: SOUTH CAROLINA BANS SAME-SEX MARRIAGE

*The State came first for the homosexuals, but I didn't speak up because I wasn't a homosexual . . . .\*\**

### I. INTRODUCTION

Homosexuals are at it again. Gays and lesbians throughout this nation are once more demanding special rights.<sup>1</sup> This time, the special right they demand is the very same right heterosexuals have enjoyed for millennia: the right to marry.<sup>2</sup> South Carolina has recently set itself squarely against such unions,<sup>3</sup>

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\* Throughout this note, use of the term "queer" is avoided as the author does not wish to cause offense. Instead, the author uses the terms "gay" and "homosexual." The term's appearance in the title is purely a play on words and more a jibe at legislators than anyone else.

\*\* This statement is based on the following quotation known as "I didn't speak up."

In Germany, the Nazi's came first for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics, and I didn't speak up because I was a Protestant. Then they came for me, and by that time there was no one left to speak up.

JOHN BARTLETT, FAMILIAR QUOTATIONS 684 (Justin Kaplan ed., 16th ed., 1992) (attributed to Martin Niemöller).

1. In a letter to the editor of the Wall Street Journal, one gay male admitted that homosexuals do have special rights.

I do have special rights because I am gay. I have the right to be fired from my job and be denied housing in 41 states without legal recourse . . . . I have the right to be denied custody of my son in most legal jurisdictions . . . . I have the right to be denied visitation of my lover in a hospital's intensive care unit because we are not legally considered to be a family. I have the right to incur large legal bills and suffer great uncertainty in an estate settlement if he dies before I do, despite any wills that we might prepare . . . .

I don't want these special rights or any others.

John R. Selig, Letter to editor, Wall St. J., Mar. 22, 1995, at A13.

2. Same-sex couples now enjoy the rights of civil marriage in Denmark, Sweden and Norway. See Lawrence Ingrassia, *Danes Don't Debate Same-Sex Marriages, They Celebrate Them*, Wall St. J., June 8, 1994, at A1.

3. The most explicit prohibition is found in S.C. CODE ANN. § 20-1-15 (Law. Co-op. Supp. 1996): "A marriage between persons of the same sex is void ab initio and against the public policy of this State." But the prohibitory theme is reiterated elsewhere:

(A) All persons, except mentally incompetent persons and persons whose marriage is prohibited by this section, may lawfully contract matrimony.

(B) No man shall marry his mother, grandmother, daughter, granddaughter, stepmother, sister, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter,

and by doing so, joined the increasing number of jurisdictions that ban same-sex marriages within their borders.<sup>4</sup> The legal groundwork is complete, and the legal battle concerning marital recognition is nearing inevitability.<sup>5</sup>

sister's daughter, father's sister, mother's sister, or another man.

(C) No woman shall marry her father, grandfather, son, grandson, stepfather, brother, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother, mother's brother, or another woman."

S.C. CODE ANN. § 20-1-10 (Law. Co-op. Supp. 1996) (emphasis added).

4. For additional examples of state statutes banning same-sex marriages, see ALASKA STAT §25.05.013 (Michie Supp. 1996); ARIZ. REV. STAT. ANN. § 25-101(C) (West Supp. 1996); GA. CODE ANN. § 19-3-3.1 (Supp. 1996); HAW. REV. STAT. ANN. § 572-1 (Michie Supp. 1997); IDAHO CODE §32-209 (Supp. 1996); 750 ILL. COMP. STAT. ANN. 5/212(a)(5), 5/213.1 (West Supp. 1996); TENN. CODE ANN. § 36-3-113 (Supp. 1996).

5. As for the inevitability of confrontation see *infra* section II, THE HAWAIIAN EXPERIENCE.

South Carolina's same-sex marriage prohibition may sound eerily familiar to the many African-Americans who can still hear the ringing of racism expressed in the now defunct anti-miscegenation statutes. Surely there is a similarity between the historical racism of those statutes and the homophobia inherent in the present legislation.

Until the United States Supreme Court decided *Loving v. Virginia*, 388 U.S. 1 (1967), South Carolina law prohibited the inter-marriage of blacks and whites. This anti-miscegenation law appeared in both the state constitution and in the state code. See S.C. CONST. art. III, § 33 ("The marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more of negro blood, shall be unlawful and void"); S.C. CODE ANN. § 20-7 (Law. Co-op. 1962) (stating same but also prohibiting inter-marriage between whites and Indians with an exception for marriages between the Catawba Indians and whites).

The same arguments made in favor of prohibiting inter-racial marriages only one generation ago are today being used to prohibit same-sex marriages. First, opponents of same-sex marriage invoke Christian values as their forerunners, the anti-miscegenation apologists, did. For example, God did not intend men to marry men and women to marry women. See *Genesis 2:22-24* (New Int'l Version):

Then the Lord God made a woman from the rib [H]e had taken out of the man, and [H]e brought her to the man.

The man said, "This is now bone of my bones and flesh of my flesh; she shall be called 'woman,' for she was taken out of man."

For this reason a man shall leave his father and mother and be united to his wife, and they will become one flesh.

See also *Leviticus 18:22* (New Int'l Version) (commanding the Israelites "not [to] lie with man, as one lies with a woman: that is detestable"). Similarly, on the much lesser authority of a Virginia state trial court judge who, when banishing an interracial couple from the Commonwealth, stated: "Almighty God created the races white, black, yellow, malay, and red, and [H]e placed them on separate continents. And but for the interference with this arrangement there would be no cause for such marriages. The fact that [H]e separated the races shows that [H]e did not intend for the races to mix." *Loving v. Virginia*, 388 U.S. 1, 3 (1967). However, as the Hawaii Supreme Court recently noted, "With all due respect to the Virginia courts of a bygone era, we do not believe that trial judges are the ultimate authorities on the subject of Divine Will." *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993).

Second, opponents of same-sex marriages argue that current law does not discriminate against men or women. The Hawaii Supreme Court in *Baehr* rejected this argument, just as the

This note will focus primarily on the prohibitions of South Carolina's statutory law. The local enactments are designed to accomplish two purposes. First, they definitively prohibit recognition of same-sex marriages contracted in this State. Second, they indirectly deny recognition of same-sex marriages validly contracted outside this State. The constitutionality of each statutory component or effect will be analyzed separately.

In addition, certain parallel enactments and decisional law outside this State will be presented because they contain lessons essential to any proper discourse on this subject. Recent litigation in Hawaii is the clear point from which to embark.

## II. THE HAWAIIAN EXPERIENCE

In 1991, the State of Hawaii declined to issue marriage licenses to three same-sex couples. Two years later, the Supreme Court of Hawaii ruled that the state's refusal to issue these licenses might have violated the equal protection guarantee of the State's constitution.<sup>6</sup> In particular, the Hawaii constitution contains an equal rights amendment which increases the presumptively heterosexual-only marriage law's susceptibility to constitutional challenge.<sup>7</sup> The Hawaii court accepted the analogy to *Loving v. Virginia*<sup>8</sup> and concluded that if a person's right to marry is denied because of the gender of

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United States Supreme Court in *Loving* had rejected a similar argument by anti-miscegenation apologists who claimed that the laws forbidding interracial marriage did not discriminate against blacks or whites.

The parallelism of these arguments has been simply stated by one commentator: just as African-Americans would pollute the sanctity of white womanhood, gays would destroy the sanctity of marriage. See James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 110 (1993).

6. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The case was originally a plurality opinion. However, in a rehearing after Justice Nakayama joined the court, three justices formed a majority and held that the Hawaii marriage law discriminated on the basis of sex and was subject to strict scrutiny analysis. As a result, Justice Burns' "biological fate" concurrence will not control on remand. Evan Wolfson, co-counsel for Plaintiffs in *Baehr*, and Senior Staff Attorney of Lambda Legal Defense and Education Fund, Inc., heralded the *Baehr* decision as "nothing less than a tectonic shift, a fundamental realignment of the landscape." Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 572 (1994-95).

7. HAW. CONST. art. I, § 5 provides in part that "[n]o person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."

8. 388 U.S. 1 (1967). The *Loving* Court rejected the argument that an anti-miscegenation statute did not discriminate against blacks because both participants in an interracial marriage were punished equally. "[W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination . . . ." *Id.* at 8.

that person's partner, then that person has been discriminated against on the basis of gender even though both males and females are treated equally under the marriage statute.<sup>9</sup> The analogy to *Loving* was clear because a simple "[s]ubstitution of 'sex' for 'race' and article I, section 5 for the [F]ourteenth [A]mendment yield[ed] the precise case" before the court.<sup>10</sup>

In federal equal protection analysis, gender discrimination categorically receives intermediate scrutiny<sup>11</sup> whereas race discrimination is subject to strict scrutiny.<sup>12</sup> According to the Hawaii Supreme Court in *Baehr v. Lewin*,<sup>13</sup> however, the more expansive (as in rights-based) Hawaii constitution alters this analysis. In *Baehr*, the Hawaii Supreme Court held that under article I, section 5 of the Hawaii Constitution, sex, like race, is "a 'suspect category' for purposes of equal protection analysis."<sup>14</sup> The court, therefore, demanded that the State show the marriage statute's sex-based classification to be "justified by compelling state interests" and the statute itself to be "narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights."<sup>15</sup> The court remanded the case for the trial court to determine whether the state had such a compelling reason to continue in its discrimination.<sup>16</sup>

Hawaii's State Commission on Sexual Orientation and the Law, the members of which were appointed by the Governor, found no legitimate reason for refusing marriages to same-sex couples. Nevertheless, in reaction to the *Baehr* decision, the Hawaii legislature passed an act reaffirming the State's desire to discriminate on the basis of sexual orientation.<sup>17</sup> The legislature asserted that the state had a "compelling interest" in restricting marriages to different-sex couples because marriage was intended for the propagation of the human race by man-woman units.<sup>18</sup> On remand, the state

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9. *Baehr*, 852 P.2d at 68.

10. *Id.*

11. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976) (holding that a gender classification must serve important governmental objectives and must be substantially related to achieve those objectives). *See also* *United States v. Virginia*, 116 S. Ct. 2264 (1996) (holding that there must be an exceedingly persuasive justification for a gender classification).

12. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (holding that racial classifications be subject to the "most rigid scrutiny").

13. 852 P.2d 44 (Haw. 1993).

14. *Baehr*, 852 P.2d at 67.

15. *Id.*

16. *Id.* at 68.

17. HAW. REV. STAT. ANN. § 572-1 (Michie Supp. 1997).

18. Without quoting statistics, one can safely assume that the human race is not on the brink of extinction in either Hawaii or South Carolina.

failed to persuade the trial court that this interest was sufficiently compelling.<sup>19</sup> The case is once again on appeal, and most commentators agree that “there is a strong possibility that the Hawaii courts will ultimately require the state to issue marriage licenses to same-sex couples.”<sup>20</sup>

### III. SAME-SEX MARRIAGES NOT VALID IF CONTRACTED IN SOUTH CAROLINA

South Carolina may permissibly regulate the right of access to the marital relationship subject to constitutional limitations or restraints.<sup>21</sup> In accord with this basic authority, the General Assembly prohibited recognition of same-sex marriages contracted within the borders of this State. A homosexual couple challenging South Carolina’s ban on same-sex marriage may challenge the statute on due process and equal protection grounds.<sup>22</sup>

#### A. Substantive Due Process

There is a fundamental right to marry.<sup>23</sup> Indeed, the United States

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19. Before the retrial, the *Baehr* case had again been before the Supreme Court of Hawaii. The Church of Jesus Christ of Latter-Day Saints had attempted to intervene in the litigation. The court denied intervention on the grounds that churches would not be required to solemnize same-sex marriages. See *Baehr v. Miiike*, 910 P.2d 112 (Haw. 1996). Lawrence H. Miiike was appointed Director of Health by the Governor of Hawaii in 1994 and has been substituted automatically for his predecessor, Lewin, as a defendant in the action.

20. H.R. REP. NO. 104-664, at 5 (1996) available in 1996 WL 391835. Honeymooners in Hawaii currently sport “his-and-her” T-shirts proclaiming the transformation of their legal status with the words “Just MAUI-ed.” Perhaps, before too long, a new line of “her-and-her” and “his-and-his” T-shirts will be rolling off the presses. See Cheryl Wetzstein, *Hawaii on Threshold to OK Gay Marriages*, THE WASH. TIMES, Feb. 5, 1996, at A3.

21. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

22. Evan Wolfson stated that “. . . Lambda’s marriage strategy is to do everything possible to secure a final victory in Hawaii while temporarily holding back on marriage litigation in states or particular cases in which the prospects for defeat seem great.” Evan Wolfson, *Crossing The Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 611 (1994-95). Lambda (a national organization supporting homosexual rights) sets forth a number of factors to determine if litigation should be pursued in a particular state. These factors include whether the state (1) has a sodomy law; (2) has an equal rights or privacy provision in its constitution; (3) has good case law or legislation regarding personal autonomy, sexual orientation, marital status, and gender discrimination; (4) has a political climate that is not anti-gay and (5) has a state judiciary inclined toward Lambda’s goals. *Id.* at 611 n.194. The prospects for litigation and victory in South Carolina seem dim.

23. *Zablocki v. Redhail*, 434 U.S. 374 (1978). The Supreme Court declared that “the right to marry is part of the fundamental “right of privacy” implicit in the Fourteenth Amendment’s Due Process Clause.” *Id.* at 384. Also, in the watershed decision of *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court noted that “[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.” *Id.* at 486. Last century, in

Supreme Court has stated that marriage is “essential to the orderly pursuit of happiness by free men.”<sup>24</sup> Apparently, however, two free men may not pursue this happiness together. This is largely because marriage has been considered a “fundamental” right due to its link to procreation.<sup>25</sup> Although gay and lesbian couples can and do have children from prior heterosexual marriages and through adoption, surrogacy, or artificial insemination,<sup>26</sup> no court has ever held, as a result, that homosexuals enjoy the same right to marry as heterosexuals.

The Supreme Court of Hawaii rejected a substantive due process challenge because it viewed the right to same-sex marriage as not “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.”<sup>27</sup> Had the *Loving* Court so narrowly framed the issue as a substantive due process challenge (asking whether there exists a fundamental right to interracial marriage), there likely would not have been a landmark decision. Even interracial marriages do not rise to the level of being implicit in the concept of ordered liberty or a part of this nation’s history.<sup>28</sup> A court intending to honor a substantive due process challenge to South Carolina’s statute, therefore, would have to create a new fundamental right to homosexual marriage. It can be said with some certainty that same-sex

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*Maynard v. Hill*, 125 U.S. 190 (1888), the Supreme Court characterized marriage as “the most important relation in life,” *Id.* at 205, and as “the foundation of the family and of society, without which there would be neither civilization nor progress.” *Id.* at 211.

24. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

25. *See Zablocki*, 434 U.S. at 386 (noting that if the “right to procreate means anything at all, it must imply some right to enter the only relationship in which the State . . . allows sexual relations legally to take place”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”).

26. “A 1988 study by the American Bar Association found that eight to ten million children are currently being raised in three million gay and lesbian households.” Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 215, 224 (1995) (citing Editors of the Harvard Law Review, *Sexual Orientation and the Law* 119 (1990)).

27. *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993). It is, of course, noteworthy that the court decided to frame the issue so narrowly. In this respect, the court’s analysis mirrored that of Justice White in *Bowers v. Hardwick*, 478 U.S. 186 (1986). A broader framing of the issue—such as an individual’s right to marry the person whom he or she chooses to marry — may have led to a very different result on the substantive due process issue.

28. In this country, laws prohibiting interracial marriages have been in existence from as early as Colonial times. *See* Walter Wadlington, *The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189, 1191 (1966).

marriage is not “deeply rooted in this Nation’s history and tradition.”<sup>29</sup> The substantive due process attack appears to be a dead end.

### B. Equal Protection

Essentially, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that states must not discriminate, without sufficient justification, against members of a constitutionally protected class.<sup>30</sup> The United States Supreme Court has not yet addressed the issue of whether homosexuals constitute a suspect or quasi-suspect class.<sup>31</sup> Such a determination, in fact, appears to be moot because of the ruling in the recent case of *Romer v Evans*.<sup>32</sup>

29. *Dean v. District of Columbia*, 653 A.2d 307, 333 (D.C. App. 1995) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). Although not deeply rooted in this nation’s history, same-sex marriages have deep roots in other cultures. The Native American *berdache*, for example, was a male who dressed in female clothes. Such men were revered in Zuni circles for their supposed connection to the supernatural. The most gifted *berdaches* were known as *Ihamana*, or spiritual leader. The most celebrated Zuni *Ihamana* of the nineteenth century was We’Wha who married a man and served as an emissary for the Zuni nation to Washington, D.C. See William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1419 (1993). In ancient times, same-sex marriages were often common. For example, “The consensus among modern historians is that republican Rome, like classical Greece, was tolerant of same-sex relationships.” *Id.* at 1445. Medieval historian John Boswell noted that “by the time of the early [Roman] Empire[,] references to gay marriages [were] commonplace.” *Id.* at 1446 (quoting John Boswell, *Christianity, Social Tolerance, and Homosexuality* 81-82 (1980)). Indeed, the Roman Emperor, Nero, married two men in succession “both in public ceremonies with the ritual appropriate to legal marriage.” *Id.* at 1446. Similar acceptance of gay marriages can be seen in the history of African and Asian cultures prior to their domination by western Europe. *Id.* at 1453-69. As William N. Eskridge noted, “Just as Western-nation-states in the early modern period conquered the New World and killed most of its people, colonized and enslaved Africa, and cartelized and evangelized Asian cultures, so they exported their anti-homosexual attitudes and aggressively suppressed these cultures’ indigenous attitudes and institutions.” *Id.* at 1473. However, post-Christianized Europe had for centuries earlier tolerated and accepted such same-sex unions. For example, same-sex marriages “were performed in Rome in the Church of St. John during the 1570s.” *Id.* at 1472. Furthermore, according to Boswell, Roman Catholic and Greek Orthodox priests continued to perform same-sex marriage ceremonies into the nineteenth century. *Id.* at 1474 n.194. Without the sanction of the church or the state, same-sex unions between women were common among well-educated, professional women in nineteenth century Boston. *Id.* at 1476. These unions were known as “Boston marriages” because the relationships were so similar to the lives of a female couple in Henry James’ novel, *The Bostonians*. *Id.*

30. See *Plyler v. Doe*, 457 U.S. 202 (1982).

31. Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that a state’s right to prohibit consensual homosexual sodomy did not violate the Due Process Clause) with *Romer v. Evans*, 116 S.Ct. 1620 (1996) (holding that a state may not discriminate against a group of its citizens based purely on animus toward that group).

32. 116 S. Ct. 1620 (1996).



In *Romer*, the citizens of Colorado amended their state's constitution to prohibit the State's government, or any of its political subdivisions, from enacting policies to protect homosexuals from discrimination.<sup>33</sup> Although the plaintiffs challenged the amendment on equal protection grounds, the Court did not engage in traditional suspect class analysis. Instead, the Court applied a rigorous rational review to invalidate the amendment.<sup>34</sup> It is thus unlikely that the Supreme Court would change its tack and engage in the traditional suspect class analysis if faced with a similar question, such as an equal protection challenge to South Carolina's statute prohibiting same-sex marriage.<sup>35</sup>

33. *Id.* at 1623.

34. *Id.* at 1627-29.

35. However, if the Court were to employ the traditional analysis, it is not clear whether homosexuals would enjoy the greater level of scrutiny available to suspect and quasi-suspect classes. The constitutional analysis that legislative treatment of particular classes of individuals requires greater judicial scrutiny can be traced to dictum in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). Justice Stone, in his famous footnote four, explained that "prejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and [so] may call for a correspondingly more searching judicial inquiry." Since then, the judicial inquiry into suspectness has developed to include a number of indicia.

First, a suspect class must have suffered a history of purposeful discrimination. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). Homosexuals have historically suffered discrimination. Justice Brennan once noted in a dissent from a denial of certiorari that "homosexuals have historically been the object of pernicious and sustained hostility." *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985). For a catalog of the forms of discrimination that homosexuals have suffered, see Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143, 157 (1988).

Second, a suspect class is subject to such deep-rooted prejudice that its members suffer disabilities based upon inaccurate stereotypes not reflecting the individual's ability to contribute to society. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam). It is difficult to conceive of a class of persons who have suffered more from stereotyping than have homosexuals. Homosexuals are stereotyped as sexually promiscuous, as pedophiles and as persons who do not want to "settle down" into long-term, committed relationships. The demand for equal rights to marriage alone would seem to shatter all of these stereotypes in one blow.

Third, a suspect class is defined by the presence of an immutable trait. *See Frontiero v. Richardson*, 411 U.S. 677 (1973). The issue of immutability is perhaps the most controversial. As the District of Columbia Court of Appeals recently noted, "There is no scientific consensus about the origin of sexual orientation." *Dean v. District of Columbia*, 653 A.2d 307, 346 (D.C. App. 1995). This is, indeed, the crux of the matter for the question of suspectness may well turn on whether homosexuality is a sexual orientation resulting from genetic and hormonal differences between heterosexuals and homosexuals or whether homosexuality is entirely a learned, and thus psychological, phenomenon. Those who believe homosexuality is learned behavior or a product of choice look to evidence of homosexuals who have been "cured." The notion of curing homosexuality is not new. *See Dean v. District of Columbia*, 653 A.2d 307, 348 n.53 (D.C. App. 1995) (citing B.H. Fookes, *Some Experiences in the Use of Aversion Therapy in Male Homosexuality, Exhibitionism, and Fetish-Transvestism*, 115 BRIT. J. PSYCHIATRY 339 (1969) (finding that six out of nine males who had not experienced heterosexual intercourse prior to

Under the *Romer* analysis, states such as South Carolina would bear the burden of proving that proffered state interests are legitimate and that a statute prohibiting recognition of same-sex unions is rationally related to these legitimate state interests.<sup>36</sup> If a state should fail to carry this burden, a same-sex marriage prohibition “raise[s] the inevitable inference”<sup>37</sup> that the law is “inexplicable by anything but animus toward the class [of persons] that it affects.”<sup>38</sup> Since neither Colorado nor South Carolina may pass legislation for

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shock aversion therapy demonstrated a decreased homosexual arousal and engaged in heterosexual sex after three years)). But as Justice Ferren in a concurrence in *Dean* noted, “[E]nforcing a public policy for ‘curing’ homosexuals [is] an Orwellian road not to be traveled.” *Dean*, 653 A.2d at 352.

Finally, a suspect class is typically a politically powerless minority. See *Rodriguez*, 411 U.S. at 28. Homosexuals are not perceived as being politically powerless. Justice Scalia, for example, does not consider homosexuals to be politically powerless. In one vigorous dissent, the Justice employed a little stereotyping of his own when he generalized that:

[B]ecause those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, . . . have high disposable income, . . . and of course care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide . . . . [T]hey devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.

*Romer v. Evans*, 116 S. Ct. 1620, 1634 (1996) (Scalia, J., dissenting). Congress seems to agree with Justice Scalia because a recent House Report described the struggle for equal rights in marriage as an “orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers.” H.R. REP. NO. 104-664, at 2 (1996) available in 1996 WL 391835. Measuring the political powerlessness of homosexuals is complicated because, unlike African-Americans or women, many in the class are “closeted.” As a result, the political power of homosexuals is more diffuse than other groups seeking legislative change. However, as one court recently noted, “There can be no question that the political power of gays and lesbians has grown.” *Dean*, 653 A.2d. at 350. It is unlikely, however, that their power has reached the “gay under every bed” stage Justice Scalia believes has arrived.

Therefore, it remains a matter of pure speculation whether the Supreme Court will ultimately classify homosexuals as a suspect or quasi-suspect class for purposes of an equal protection challenge to a state’s statutory refusal to recognize same-sex marriages. This eventuality seems unlikely for two reasons. First, the Supreme Court seems to have set its face against recognizing more suspect and quasi-suspect classes. See *Romer v. Evans*, 116 S. Ct. 1620 (1996) (choosing not to consider the question of whether homosexuals constitute a suspect class); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445-46 (1985) (“[I]f the mentally retarded were deemed quasi-suspect . . . , it would be difficult to find a principled way to distinguish a variety of other groups . . . who can claim some degree of prejudice from at least part of the public at large . . . . [Therefore, the Court is] reluctant to set out on that course.”). Second, without clear scientific proof that sexual orientation is the result of genetics, homosexuals would have great difficulty in proving a sufficient level of suspectness to warrant greater protection from the Court.

36. See generally *Romer*, 116 S. Ct. 1620 (appearing to place the burden of proof on the state instead of on the plaintiff who traditionally bears this burden under rational review).

37. 116 S. Ct. at 1628.

38. *Id.* at 1627.

the sole purpose of making homosexuals “unequal to everyone else,”<sup>39</sup> it is an essential step to examine any interests the state may proffer to explain this legislation.

### 1. Procreation

Society cares about heterosexual unions because they are critical for the raising of children. By contrast, “[w]hether homosexual relationships endure is of little concern to society.”<sup>40</sup> Marriage, however, is quite simply not founded on procreation.<sup>41</sup> Society permits heterosexual couples to marry regardless of whether the couple intends to procreate. Not everyone who gets married has children, and not everyone who has children is married. As Evan Wolfson once noted, “Marriage licenses, after all, are not issued with a ‘sunset provision’ whereby you have two years to produce a child or your marriage expires.”<sup>42</sup> A United States House Committee on the Judiciary responded to these arguments, asserting that the absence of such provisions is the result of practicality more than denial of the base reasons for the institution of marriage. The Committee retorted, “Surely no one would propose requiring couples intending to marry to submit to a medical examination to determine whether they can reproduce, or to sign a pledge indicating that they intend to do so. Such steps would be both offensive and unworkable.”<sup>43</sup>

The logic that marriage is principally for procreation raises the question, why is there no government supervision attempting to ensure propagation of the species? The rationale preventing such involvement is that, as the Committee said, forcing married couples to procreate is “offensive” and “unworkable.” Perhaps the Committee saw a distinction, not readily apparent to this author, between the offensiveness of the hypothetical government involvement and the offensiveness of denying two persons in love the right to marry simply because they are of the same sex.

### 2. Tradition and the Traditional Family

Courts have rejected equal protection challenges to marriage statutes by asserting that the institution of marriage has *traditionally* been defined to

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39. *Id.* at 1629.

40. Lisa Schiffren, Op. Ed., *Gay Marriage, an Oxymoron*, N.Y. TIMES, Mar. 23, 1996, at A.

41. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the right to privacy prohibits the government from interfering with a married couple’s decision *not* to procreate).

42. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 576 n.42 (1994-95).

43. H.R. REP. NO. 104-664, at 14 (1996) *available in* 1996 WL 391835.

include only one man and one woman.<sup>44</sup> The “reasoning” continues that same-sex couples may not marry because they are unable to enter into an institution which by its very definition excludes them. This reasoning evades the central equal protection issue; moreover, the tautological and circular nature of the argument should embarrass those courts which employed it.<sup>45</sup>

Tradition is neither a justification for discrimination nor an impenetrable legal barrier. In the same spirit as the heterosexual tradition currently relied upon, marriage was once defined as an institution in which a man owned his wife as property. Blackstone described this eighteenth-century marital bliss: “The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and *cover* she performs everything . . . .”<sup>46</sup> This tradition has been abandoned. Just as the Supreme Court in *Loving* demonstrated the error in a tradition which defined marriage as an institution between parties of the same race only, a court could abandon the tradition of recognizing only heterosexual marriages.<sup>47</sup> Thus, if tradition remains the state’s only claimed purpose, perhaps the act *is* the result of animus toward homosexuals.

44. See *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995) (holding that the District of Columbia’s marriage statute refers only to the legal union of one man and one woman); *Jones v. Hallahan*, 501 S.W.2d 558, 589 (Ky. 1973) (noting that “marriage has always been considered as the union of a man and a woman”); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (noting that “[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis”); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971) (holding that a “[m]arriage is and always has been a contract between a man and a woman”); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984) (holding that common-law same-sex marriages did not exist in Pennsylvania); *Singer v. Hara*, 522 P.2d 1187, 1191 (Wash. Ct. App. 1974) (noting that marriage is “the legal union of one man and one woman”); see also 55 C.J.S. *Marriage* § 1 (1948) (defining marriage as “a contract under which a man and a woman reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife”); 52 AM. JUR. 2D *Marriage* § 1 (1970) (defining marriage as “the status or relation of a man and a woman who have been legally united as husband and wife”); BLACK’S LAW DICTIONARY 972 (6th ed., 1990) (defining marriage as the “[l]egal union of one man and one woman as husband and wife”); RANDOM HOUSE DICTIONARY 879 (10th ed., 1994) (defining marriage as “the social institution under which a man and a woman establish their decision to live as husband and wife by legal commitments, religious ceremonies, etc.”).

45. The Supreme Court of Hawaii rejected this argument characterizing it as an exercise in “tortured and conclusory sophistry.” *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993). Indeed, the court noted that the same argument had already been rejected by the United States Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967). *Id.*

46. 1 WILLIAM BLACKSTONE, COMMENTARIES \*442.

47. As Justice Holmes quipped a hundred years ago, “It is revolting to have no better reason for a rule than that so it was laid down in the time of Henry IV.” Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

Defenders of the status quo may vehemently argue, as the contributors to the House Committee Report on the Defense of Marriage Act opined, that “[i]t would be incomprehensible for any court to conclude that traditional marriage laws are . . . motivated by animus toward homosexuals.”<sup>48</sup> This is undoubtedly true because most marriage statutes were enacted at a time when same-sex unions were unthinkable to all “right-minded” Americans. Homosexuals may still argue, however, that the recently enacted statutes, not the traditional laws defining marriage, are the product of animus toward them as a group. In *Romer*, the second amendment to Colorado’s constitution “identifie[d] persons by a single trait and then denie[d] them protection across the board.”<sup>49</sup> Similarly, the General Assembly has identified homosexuals by a single trait (whether it is their sexual orientation or their sexual conduct) and denied to them the privileges and obligations inexorably linked to the institution of civil marriage.<sup>50</sup> South Carolina’s own precedent would seem to indicate that such an act is not favored in this state.

A decade ago, the South Carolina Court of Appeals noted that strict scrutiny is appropriate in the marriage context “where the obstacle to marriage is a direct one, i.e., one that operates to preclude marriage entirely for a *certain class* of people.”<sup>51</sup> The recent prohibition on same-sex marriages squarely conflicts with this decisional rule. The statute expressly forbids males from marrying other males and females from marrying other females. Homosexuals—as a class—are denied a right granted to others based only on their sexual orientation.

### 3. Religion and Enforced Morality

Conceivably, the General Assembly enacted the statute prohibiting recognition of same-sex marriages based upon its perception of majority religious values. Enactment on such grounds would appear to find favor with the Justices of the United States Supreme Court. In 1986, the Court decided the landmark case of *Bowers v. Hardwick*,<sup>52</sup> which lends credence to the state’s argument that enforcement of religious morality is a legitimate interest.

48. H.R. REP. NO. 104-664, at 33 (1996), *available in* 1996 WL 391835.

49. *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996).

50. The United States Supreme Court has identified four “important attributes of marriage.” *Turner v. Safley*, 482 U.S. 78, 95 (1987). First, marriages are expressions of emotional support and public commitment; second, the commitment of marriage may be an exercise in religious faith as well as a personal dedication; third, marriages are usually solemnized with the ultimate intent to consummate; finally, marital status is the precondition to a number of benefits. *Id.* at 95-96. For a complete list of the legal incidents of marriage, see Marriage Project: Legal and Economic Benefits, Lambda Legal Defense and Education Fund, Inc.

51. *Hamilton v. Board of Trustees of Oconee County*, 282 S.C. 519, 524, 319 S.E.2d 717, 720 (Ct. App. 1984) (emphasis added).

52. 478 U.S. 186 (1986).

In *Bowers*, the Court held that a Georgia law criminalizing sodomy<sup>53</sup> was constitutional. Indeed, Justice White, writing for the majority, expressly held that the anti-sodomy law served the legitimate purpose of expressing “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.”<sup>54</sup> Furthermore, as Chief Justice Burger noted in his concurrence, “Condemnation of [homosexual conduct] is firmly rooted in Judeo-Christian [sic] moral and ethical standards.”<sup>55</sup>

If majority religious thinking is a legitimate rationale for state action, what is left of the First Amendment’s Establishment Clause?<sup>56</sup> As Justice Blackmun asserted in his dissent in *Bowers*, “The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.”<sup>57</sup> A rationale for South Carolina’s statute based upon religious doctrine ought, therefore, to be an illegitimate purpose under the First and Fourteenth Amendments. Does *Bowers* carve out an exception to the developed law of religious freedom in this country and tell us that homosexuals have no right to their own set of moral standards?

#### 4. Potential Violations of the Buggery Statute

The State might plausibly argue that allowing marriage between persons of the same sex could lead to violations of South Carolina’s law against buggery.<sup>58</sup> The buggery statute has, however, been so rarely enforced that it belies reason to suggest that it is the legitimate purpose behind South

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53. GA. CODE ANN. § 16-6-2 (1984). Although the statute prohibits both heterosexual and homosexual sodomy (involving married or unmarried participants), the Court considered only the application of the statute to homosexuals.

54. *Bowers*, 478 U.S. at 196.

55. *Id.*

56. The First Amendment, made applicable to the states under the Fourteenth Amendment Due Process Clause, provides, in pertinent part, that government—federal or state—“shall make no law respecting an establishment of religion.” U.S. CONST. amend. I.

57. *Bowers*, 478 U.S. at 211 (Blackmun, J., dissenting).

58. S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1976).

Whoever shall commit the abominable crime of buggery, whether with mankind or with beast, shall, on conviction, be guilty of [a] felony and shall be imprisoned in the Penitentiary for five years or shall pay a fine of not less than five hundred dollars, or both, at the discretion of the court.

The statute does not define what acts constitute the “abominable crime of buggery.” However, BLACK’S LAW DICTIONARY defines “buggery” as “[a] carnal copulation against nature; a man or a woman with a brute beast, a man with a man, or man unnaturally with a woman.” BLACK’S LAW DICTIONARY 194 (6th ed. 1990). This term is often used interchangeably with “sodomy.” *Id.*; see also 1976 WL 30521 (S.C.A.G.) (opining that same-sex marriages would be in direct conflict with the buggery law so that allowing such marriages would lead to violations of that statute if the union were ever consummated).

Carolina's prohibition on same-sex marriages.<sup>59</sup> Indeed, lesbians, whether granted marital rights or not, do not appear biologically capable of committing the "abominable crime of buggery."<sup>60</sup>

Furthermore, the state's use of the buggery statute as an explanation for its prohibition on same-sex marriages raises additional equal protection problems. First, the buggery statute is not limited to homosexual buggery because heterosexual couples—married and unmarried—are capable of violating the statute. Second, the State's allowance for heterosexual, common law marriages, unfairly seems to condone the violation of another morality statute—the prohibition on fornication.<sup>61</sup> In the end, attempting to find a legitimate interest in the buggery statute raises more constitutional questions than it puts to rest.

### *C. Summary of Due Process and Equal Protection Attacks on the In-State, Same-sex Marriage Ban*

A substantive due process challenge to South Carolina's statute is dead on arrival. An equal protection challenge is, on the other hand, somewhat promising because of the import of *Romer v. Evans*.<sup>62</sup> In *Romer*, the Court held that "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."<sup>63</sup> Thus, a gay couple that could successfully demonstrate the flaws in each of the proffered interests discussed above would have a fair chance at striking down South Carolina's ban on same-sex marriage because, short of some surprising development, the statute can only be the result of animus toward homosexuals.

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59. Of course, one explanation of the statute's lack of enforcement is that the proscribed activity normally occurs between consenting adults in the privacy of their own home. Although this would seem to be more of an argument for its repeal than an explanation for its non-enforcement, it does have some merit. However, the abuse of narcotic drugs also often takes place in the privacy of the home and yet the state expends a great deal of resources to prosecute those who break its drug laws. A more rational explanation in this author's view, is therefore that the act of buggery, unlike the illegal use of narcotics, simply does not have a widespread deleterious effect on society.

60. See BLACK'S LAW DICTIONARY definition of "buggery," *supra* note 58.

61. S.C. CODE ANN. § 16-15-80 (Law. Co-op. 1976), fornication is defined as "the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and woman, both being unmarried." South Carolina's fornication law appears to be as infrequently enforced as the state's buggery statute.

62. 116 S. Ct. 1620 (1996).

63. *Id.* at 1628 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).  
<https://scholarcommons.sc.edu/sclr/vol48/iss3/9>

#### IV. SOUTH CAROLINA'S REFUSAL TO RECOGNIZE SAME-SEX MARRIAGES CONTRACTED IN OTHER JURISDICTIONS

"Within the limits of her political power [South Carolina] may . . . enforce her own policy regarding the marriage relation—an institution more basic in our civilization than any other."<sup>64</sup> South Carolina's power to refuse recognition of marriages is, however, constitutionally limited by the Full Faith and Credit Clause of the United States Constitution.<sup>65</sup>

##### *A. The Full Faith and Credit Clause*

If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.<sup>66</sup>

##### *1. Application of the Clause to Marriage*

Putting aside for the moment objections founded on public policy, the Full Faith and Credit Clause would appear to compel all other states and United States territories to recognize same-sex marriages legally contracted in Hawaii (which assumes that state will ultimately legalize such unions). The United States Supreme Court, however, has never ruled on the issue of whether marriages must be accorded full faith and credit: that is, whether a marriage contract is an "public Act[], Record[] or judicial Proceeding[]."<sup>67</sup> Evan Wolfson<sup>68</sup> has argued that marriages should be afforded full faith and credit.<sup>69</sup> First, he asserts that the creation of a civil marriage is a "public Act" because it is performed pursuant to a statutory scheme and usually by a publicly

64. *Williams v. North Carolina*, 317 U.S. 287, 303 (1942).

65. U.S. CONST. art. IV, § 1.

66. *Estin v. Estin*, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting).

67. The Clause provides that "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; *see also* 28 U.S.C. §§ 1738-1739 (1994) (enforcing the Full Faith and Credit Clause).

A number of lower federal courts and states have addressed the issue. *See, e.g.*, *Thomas v. Sullivan*, 922 F.2d 132, 134 (2d Cir. 1990) (noting that although New York does not recognize common-law marriages, it gives full faith and credit to those marriages validly contracted under the laws of other states); *Orsburn v. Graves*, 210 S.W.2d 496 (Ark. 1948) (holding that Arkansas must give full faith and credit to a validly contracted Texas common-law marriage).

68. Co-counsel in *Baehr* and Senior Staff Attorney of the Lambda Legal Defense and Education Fund, Inc.

69. *See* Evan Wolfson, *Winning and Keeping Equal Marriage Rights: What Will Follow Victory in Baehr v. Lewin?*, Lambda Legal Defense and Education Fund, Inc. (Nov. 7, 1994).



designated official. Furthermore, the marriage itself is “an act—a res, a thing or status itself created by [the] State.”<sup>70</sup> Second, Wolfson points out that the marriage certificate may be considered a “Record” of the *res*, recording that the marriage was validly contracted and that the contracting parties were statutorily competent<sup>71</sup> to enter into the contract.<sup>72</sup> Finally, Wolfson argues that “celebrating a marriage is arguably a ‘judicial Proceeding’ in at least those sixteen states in which judges, court clerks, or justices of the peace officiate.”<sup>73</sup> Wolfson’s arguments were sufficiently persuasive to prod a number of state legislatures and ultimately Congress into action.<sup>74</sup>

## 2. The “Public Policy” Exception to the Full Faith and Credit Clause

The statute refusing to recognize same-sex marriages in South Carolina does not explicitly declare that South Carolina will refuse to recognize same-sex marriages legally performed in other states.<sup>75</sup> Instead, South Carolina law mandates such marriages are “void ab initio”<sup>76</sup> and against the public policy of this State.<sup>77</sup>

The United States Supreme Court has generally recognized a public policy exception to the Full Faith and Credit Clause. In *Pink v. A.A.A. Highway Express*,<sup>78</sup> the Court noted that “the full faith and credit clause is not an inexorable and unqualified command . . . . [Thus,] consistent with the appropriate application of the [clause], there are limits to the extent to which the laws and policy of one state may be subordinated to those of another.”<sup>79</sup> More specifically, the Court opined in *Nevada v. Hall*<sup>80</sup> that “the Full Faith and Credit Clause does not require a State to apply another State’s law in

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70. *Id.* at 4.

71. *See, e.g.*, S.C. CODE ANN. § 20-1-10 (Law. Co-op. 1976).

72. Wolfson *supra* note 69, at 4.

73. *Id.*

74. When considering H.R. 3396, *see supra* note 20, the House Committee on the Judiciary reported that Wolfson’s Full Faith and Credit strategy was “plausible.” H.R. REP. NO. 104-664, at 6 (1996), available in 1996 WL 391835.

75. 1995 S.C. H.B. 4502 included language that “marriages between persons of the same sex valid in another state are void in this State.” A Senate bill included similar language. *See* 1995 S.C. S.B. 1151. The bill signed into law by the Governor did not include such direct language regarding South Carolina’s intent not to recognize same-sex marriages performed in other states.

76. “From the beginning; from the first act . . . .” BLACK’S LAW DICTIONARY 6 (6th ed. 1990).

77. S.C. CODE ANN. § 20-1-15 (Law. Co-op. Supp. 1996).

78. 314 U.S. 201 (1941).

79. *Id.* at 210.

80. 440 U.S. 410 (1979).

violation of its own legitimate public policy.”<sup>81</sup> According to these precedents, South Carolina would have to demonstrate merely that recognition of a same-sex marriage validly contracted in another state violates the public policy of this State—a fairly simple task in light of current statutory language. The rather recently enacted Defense of Marriage Act<sup>82</sup> simplifies the task even further.

In fact, passage of the Defense of Marriage Act made arguments regarding the Full Faith and Credit Clause nugatory.<sup>83</sup> In one stroke of the pen, President Clinton removed the Constitutional stumbling block (meager as it was) of the Full Faith and Credit Clause. States may now refuse to recognize gay marriages validly contracted elsewhere without running afoul of a constitutional provision that the United States Supreme Court once noted had “altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established

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81. *Id.* at 422; see also *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 502 (1939) (noting that there are limits upon the extent “to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy”).

82. 28 U.S.C. § 1738C (Supp. 1997). The Defense of Marriage Act provides in pertinent part that:

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.

*Id.* The act also defines “marriage” as “the legal union between one man and one woman as husband and wife” and “spouse” to refer “only to a person of the opposite sex who is a husband or a wife.” *Id.* Discussion of the impact of this section of the Act is beyond the scope of this note. However, it should be noted that the federal government will not recognize same-sex marriages even if the state in which the couple resides does recognize their union. This will, in effect, mean that gay marriages will be second class marriages. A second class marriage for a second class citizen?

83. The Act has two purposes. First, Congress was trying to defend the institution of traditional heterosexual marriage. Second, Congress intended “to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.” H.R. REP. NO. 104-664, at 2 (1996), available in 1996 WL 391835. States’ rights advocates who argue that this federal legislation is a step forward in the march toward greater state, and lesser federal, control need to re-examine their thinking. It confounds logic to argue that states may increase their sovereignty by the legislative grace of the U.S. Congress. As the dissenting view in the House Report noted, “The clear expression in this legislation that the Congress has a role in determining when a state may not offer full faith and credit creates a standard of Federal control antithetical to conservative philosophy and the Tenth Amendment: That powers not enumerated for the Federal Government are reserved to the States.” *Id.* at 40.

by the judicial proceedings of the others.”<sup>84</sup> No more. The “gay exception” to the Full Faith and Credit Clause effectively returns states to a pre-constitutional status. As for how they choose to legally regard homosexual unions, the states are again islands of their own decisional postures. They are, in this limited context, free to completely ignore their sister sovereigns.

Congress has constitutional authority to pass such a piece of legislation, aimed to deny rights to one particular group, based upon Article IV, section one of the United States Constitution, which provides that “Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”<sup>85</sup> As a result of the Defense of Marriage Act, South Carolina may enforce its statute without ever encountering a conflict regarding the Full Faith and Credit Clause. Cross border treatment of marriage is subject only to a common law conflict of laws analysis.

### *B. Conflict of Laws Analysis*

South Carolina follows the “general rule [that] ‘the validity of a marriage is determined by the law of the place where it is contracted,’ . . . and will be recognized in another state unless ‘such recognition would be contrary to a strong public policy of that State.’”<sup>86</sup> South Carolina’s public policy may be found “in the state’s constitution, statutes and decisional law.”<sup>87</sup> The

84. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943), *partially overruled on other grounds by* *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980).

85. U.S. CONST. art. IV, § 1. The House Report on the Defense of Marriage Act found that “while States are generally obligated to treat laws of other States as they would their own—Congress retains a discretionary power to carve out such exceptions as it deems appropriate.” H.R. REP. NO. 104-664, at 25 (1996), *available in* 1996 WL 391835. Professor Laurence Tribe of Harvard University Law School, disagrees that Congress possesses the ability to pass such a piece of legislation under the “Effects Clause.” In a letter to Senator Edward M. Kennedy, subsequently entered into the Congressional Record, Professor Tribe argues that “congressional power to ‘prescribe . . . [the] effect’ of sister-state acts, records, and proceedings . . . includes no congressional power to prescribe that some acts, records, and proceedings that would otherwise be entitled to full faith and credit . . . shall instead be entitled to no faith or credit at all!” 142 CONG. REC. S5931-33 (daily ed. June 6, 1996) (statement of Sen. Kennedy). Professor Tribe also suggested that the Act may violate the equal protection component of the Due Process Clause of the Fifth Amendment, *see Romer v. Evans*, 116 S. Ct. 1620 (1996), “on the ground that it singles out same-sex relationships for unfavorable legal treatment for no discernable reason beyond public animosity to homosexuals.” *Id.* at S5932.

86. *Zwerling v. Zwerling*, 270 S.C. 685, 686, 244 S.E.2d 311, 312 (1978) (quoting 52 AM. JUR. 2D *Marriage* §§ 80, 82 (1970)) (emphasis added); *see also* *Everly v. Baumil*, 209 S.C. 287, 290, 39 S.E.2d 905, 906 (1946) (“It is fundamental that each state has the right to determine the marital status of its citizens under its laws.”).

87. *Newberry v. Georgia Dep’t of Indus. & Trade*, 283 S.C. 312, 316, 322 S.E.2d 212, 214 (Ct. App. 1984).

dissenting view in the House Report on the Defense of Marriage Act noted that “[s]tates could show their public policy exception to same-sex marriage by offering gender specific marriage laws, anti-sodomy statutes, common law, etc.”<sup>88</sup>

South Carolina’s public policy is to “foster and protect the marriage relationship.”<sup>89</sup> Indeed, “no State in the Union has been more ardent, as a matter of public policy, in protecting marriage as an institution; together with all of the reciprocal rights and duties of both husband and wife, than has the State of South Carolina.”<sup>90</sup> Just as South Carolina’s statutes and common law indicate a public policy favoring the traditional institution of marriage, the law appears to indicate a concomitant policy of disfavoring recognition of same-sex unions. Even before the statutory ban was enacted, the Attorney General felt sufficiently confident to proclaim to the Honorable Terry E. Haskins that “South Carolina law does not recognize marriages between members of the same sex . . . [because] such marriages performed in this State are void, against public policy and contrary to centuries of common law teachings and traditions.”<sup>91</sup>

Moreover, South Carolina could assert that validating a same-sex marriage contracted in another state would violate the natural and positive law of this State. An appellate court in New Mexico recently took such an approach and expressed the public policy test to be “whether the marriage is considered odious by the common consent of nations or whether such marriages are against the laws of nature.”<sup>92</sup> However, because Denmark, Sweden, and Norway now recognize same-sex marriages,<sup>93</sup> it may be more difficult to argue that gay marriages are odious by the common consent of nations. Blackstone certainly considered homosexual sodomy, an implicit by-product of same-sex marriage, to be against the laws of nature. Indeed, he wrote that sodomy was an act “the very mention of which is a disgrace to human nature.”<sup>94</sup> It is noteworthy that South Carolina, like many other states, once prohibited *interracial* marriages because such unions were believed to

88. H.R. REP. NO. 104-664, at 38 (1996), *available in* 1996 WL 391835.

89. *Watson v. Watson*, \_\_ S.C. \_\_, \_\_, 460 S.E.2d 394, 395 (1995); *see also* *Russo v. Sutton*, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992) (noting that the public policy of South Carolina is “to foster and protect marriage”).

90. *Page v. Winter*, 240 S.C. 516, 531, 126 S.E.2d 570, 578 (1962) (Bussey, J., dissenting).

91. Letter from Charles M. Condon, Attorney General, to Honorable Terry E. Haskins, Speaker Pro Tempore 4 (April 11, 1996).

92. *Leszinske v. Poole*, 798 P.2d 1049, 1055 (N.M. Ct. App. 1990).

93. *See* Wetzstein, *supra* note 20, at A3.

94. *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*215).

violate natural law.<sup>95</sup> Thus, what is “natural” and “unnatural” appears to be subject to change. At present, however, South Carolina’s positive law does not bode well for recognition of same-sex marriages contracted in another state.

## V. CONCLUSION

South Carolina will not likely be the principal battleground in any gay rights litigation. Yet, the question still exists, how formidable an obstacle is the State’s statutory prohibition on same-sex marriage? Perhaps the most exploitable weakness in the statute’s legality is the interaction between the equal protection arguments and the conflict of laws arguments. South Carolina may well find itself in a “catch-22” because the more animus toward homosexuals the state heaps upon the scale to demonstrate that same-sex marriage recognition would violate the State’s public policy, the lighter the equal protection scale becomes. Ultimately, South Carolina may be less capable of successfully defeating an equal protection challenge as its public policy arguments undercut any claims that the statute was passed for legitimate purposes. The State would have to rob Peter to pay Paul in order to prevent Peter from marrying Paul.

It seems likely that Hawaii, and perhaps other states, will eventually recognize same-sex unions. It also seems likely that the Defense of Marriage Act will withstand constitutional attack. Therefore, the United States will become a patchwork, with a few states recognizing same-sex marriages but most finding such unions violative of their strong public policies. Will the few states that allow for recognition become havens for gay couples who wish to live their lives under an umbrella of relative legal certainty the likes of which heterosexuals take for granted? A married gay couple traveling on this country’s interstate roadways would, without much fiction, present its marriage license at each border crossing. And the legend would read, “void where prohibited by law.”

*Rodney Patton*

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95. See *Kinny v. Virginia*, 71 Va. (30 Gratt) 284, 287 (1878) (describing interracial marriages as “connections and alliances so unnatural that God and nature seem to forbid them”); see also *Loving v. Virginia*, 388 U.S. 1 (1967) (noting that Virginia courts had attempted to justify anti-miscegenation statutes on the basis that such unions were contrary to natural law).