

# FOR BETTER OR FOR WORSE: A CRITICAL ANALYSIS OF FLORIDA'S DEFENSE OF MARRIAGE ACT

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## I. INTRODUCTION

Marriage is one of the main building blocks in the structure of modern society. Many rights and benefits are bestowed upon those speaking the sacred vows: inheritance rights, evidentiary privileges, medical decision-making powers, social security benefits, and employer or state provided health benefits, to name a few.<sup>1</sup>

Same-sex marriage ceremonies occur daily in this nation.<sup>2</sup> Several major religions in the United States recognize same-sex marriages, including the Reformed Jewish, Unitarian Universalist, Episcopalian, Lutheran, Presbyterian and Methodist churches, among others.<sup>3</sup> Currently, the United States denies legal recognition to same-

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1. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 452-61 (1996).

2. See SUZANNE SHERMAN, *LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES* 4-7 (Suzanne Sherman ed., 1992).

3. See *id.*

sex marriages.<sup>4</sup> This reflects America's long-standing persecution of homosexuals.<sup>5</sup>

There are, however, indications that the country is moving towards change. For example, major cities such as San Francisco and Atlanta have adopted domestic partnership laws to grant same-sex partners some of the legal benefits of marriage.<sup>6</sup> A Florida court recently ruled that same-sex couples could lawfully contract with each other for a "permanent sharing of, and participating in, one another's lives" even though the couple "undoubtedly expected a sexual relationship."<sup>7</sup> Moreover, some large American companies, such as the Walt Disney Company, have begun offering employee benefits, typically only offered to married couples, to domestic partners of homosexual workers.<sup>8</sup> Finally, the state of Hawaii may become the first state to legally recognize same-sex marriages.<sup>9</sup>

Despite the advances made toward legal recognition of same-sex marriage in local government and the courts, a backlash has occurred in the federal and state legislatures. This Comment examines this backlash and the legal recognition of same-sex marriages. It focuses particularly on section 741.212, Florida Statutes, the Defense of Marriage Act (Act).<sup>10</sup>

Part II presents a brief introduction to the history of same-sex marriage. Part III examines the Act and the legal framework it addresses. Part IV examines the constitutionality of the Act pursuant to the Florida Constitution. Part V examines the constitutionality of the Act pursuant to the United States Constitution. Part VI analyzes Florida's duty to recognize same-sex marriages legally sanctioned in other states pursuant to the United States Constitution.

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4. The fundamental point of this inquiry is not whether same-sex couples should be allowed to enter the sanctity of marriage, but whether same-sex marriages should be recognized by the American legal system. The debate concerns whether society should grant same-sex partners who choose to marry all the rights, privileges, and immunities bestowed upon different-sex marriages.

5. For a comprehensive study of state-sponsored persecution of homosexuals, see generally William N. Eskridge Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703 (1997); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817 (1997); William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 VAND. L. REV. 419 (1997).

6. See Ronald Smothers, *Atlanta Sued Over its Law On Benefits to the Unwed*, N.Y. TIMES, Sept. 15, 1996, at A25; see also Marc Sandalow, *Valentine's Party to Inaugurate S.F.'s Domestic Partners Law*, SAN FRANCISCO CHRONICLE, Feb. 14, 1991, at A1.

7. *Posik v. Layton*, 695 So. 2d 759, 760-61 (Fla. 5th DCA 1997).

8. See Linda K. Wertheimer, *Partners of Gays at Disney Get Benefits*, ORLANDO SENT., Oct. 7, 1995, at C1.

9. See discussion *infra* Part III.A.

10. FLA. STAT. § 741.12 (1997) (denying legal recognition of same sex marriages, even those validly performed in other states).

## II. A BRIEF HISTORY OF SAME-SEX MARRIAGE

The current wave of same-sex couples entering into sacred vows is not the birth of a new institution; rather, it is the expansion of an institution practiced throughout the world.<sup>11</sup> Same-sex unions have existed for some time in most cultures, including early Western culture and the early Christian church.<sup>12</sup> Pre-Columbian Native Americans participated in same-sex unions.<sup>13</sup> Legitimized same-sex unions also existed in Chinese and African cultures.<sup>14</sup> In addition, there exists evidence of same-sex unions in Mesopotamia<sup>15</sup> and ancient Rome.<sup>16</sup>

Considering the opposition to homosexuality exhibited by some modern denominations of Christianity, the most striking historical evidence of same-sex marriages arises from the doctrines of the early Roman Catholic and Greek Orthodox churches.<sup>17</sup> In the early middle ages, same-sex marital liturgies existed in the church's formal collections virtually identical to those for different-sex marriages.<sup>18</sup> These ceremonies, performed by priests in Catholic churches, were widespread in the fifth century.<sup>19</sup> Evidence of same-sex marriage ceremonies existed through the nineteenth century.<sup>20</sup>

However, contempt for same-sex relationships began during the fall of the Roman Empire.<sup>21</sup> Beginning in the thirteenth century, the persecution of homosexuals became more rampant, as did that of other "non-conformists" such as Jews, heretics, and witches.<sup>22</sup> By the sixteenth century, some of the male same-sex couples who were married at the Church of St. John in Rome were later burned at the stake in the city square.<sup>23</sup> By the nineteenth century, heterosexuality became viewed as "normal" by modern science and homosexuality

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11. See JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* 26 (1980).

12. See *id.*

13. See FRANCISCO GUERRA, *THE PRE-COLUMBIAN MIND* 85 (1971). Much of these accounts came from western explorers who reported the customs of Native Americans. See *id.* at 68.

14. See DAVID F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* 60-61, 92 (1988).

15. None of the early Mesopotamian codes disapproved of same-sex relationships. See *id.* at 124-25.

16. See BOSWELL, *supra* note 11, at 69.

17. See *id.* at 186-94.

18. See William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1450-51 (1993).

19. See *id.* at 1452.

20. See *id.*

21. See *id.* at 1447.

22. See GREENBERG, *supra* note 14, at 279 (discussing the intolerance of homosexuality emerging in the thirteenth century).

23. See Eskridge, *supra* note 18, at 1472.

ultimately became viewed as pathological.<sup>24</sup> Thus, same-sex unions were restricted and viewed as damaging to the psyche.<sup>25</sup>

Evidence of same-sex marriages, though not legally sanctioned, appeared in the United States during the eighteenth century.<sup>26</sup> "Legal" same-sex marriages also occurred surreptitiously when one woman would disguise herself as a man.<sup>27</sup> When greater numbers of homosexuals began coming "out of the closet" in the 1950s, many modern American religions began endorsing same-sex marriages and performing actual same-sex marriage ceremonies.<sup>28</sup>

### III. FROM HAWAII TO WASHINGTON TO TALLAHASSEE: THE LEGAL HISTORY AND DEVELOPMENT OF FLORIDA'S DEFENSE OF MARRIAGE ACT

#### A. Baehr v. Lewin

The case of Baehr v. Lewin<sup>29</sup> arose when Hawaii denied three same-sex couples marriage licenses on the grounds that same-sex marriages are invalid under Hawaii law.<sup>30</sup> The Hawaii Supreme Court ultimately ruled that the state's prohibition of same-sex marriages, on its face, discriminated on the basis of sex in violation of article I, section 5 of the Hawaii Constitution.<sup>31</sup> The Baehr court considered the mere mention of sex within the statute as discriminatory, stating: "HRS section 572-1, on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex. As such, HRS § 572-1 es-

24. See JEFFREY WEEKS, *SEX, POLITICS, AND SOCIETY: THE REGULATION OF SEXUALITY SINCE 1800* 102-03 (John Stevenson ed., 1981).

25. See *id.* at 104 (emphasizing the transition of the perception of homosexuality as a sin to homosexuality as a sickness or mental illness).

26. See LILLIAN FADERMAN, *SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP AND LOVE BETWEEN WOMEN FROM THE RENAISSANCE TO THE PRESENT* 190 (1981).

27. See VERN L. BULLOUGH & BONNIE BULLOUGH, *CROSS DRESSING, SEX, AND GENDER* 94-112 (1993) ("Some [cross-dressing women] even married other women . . .").

28. See SHERMAN, *supra* note 2, at 5-6 (discussing the performance of same-sex marriages in the United States by various religious groups).

29. 852 P.2d 44 (Haw. 1993).

30. See *id.* at 49-50. The governing statute restricted the marital relation to a male and a female. See HAW. REV. STAT. § 572-1 (1985).

31. This provision, modeled after the Equal Protection Clause of the U.S. Constitution, states: "No person shall be deprived of life, liberty or property without due process of law, nor 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." HAW. CONST. art. I, § 5. The decision was based only on Hawaii state law, precluding review by the United States Supreme Court of whether Hawaii's refusal to recognize same-sex marriages violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. See Baehr, 852 P.2d at 50-60. For a comprehensive discussion of the "primacy" of state constitutions, see generally Rachel E. Fugate, Comment, *The Florida Constitution: Still Champion of Citizens' Rights?*, 25 FLA. ST. U. L. REV. 87 (1997).

tablishes a sex-based classification.”<sup>32</sup>

In his answer brief, the director of the Hawaii Department of Health argued that “the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman.”<sup>33</sup> The court rejected this argument by relying upon the U.S. Supreme Court’s analysis in *Loving v. Virginia*,<sup>34</sup> in which the Court ruled Virginia’s anti-miscegenation statute unconstitutional.<sup>35</sup> The Hawaii court found the reasoning of *Loving* analogous since the Virginia statute characterized marriage as a relation only between persons of the same race.<sup>36</sup>

The Baehr court also considered whether the right to privacy under the Hawaii Constitution included a right to same-sex marriage.<sup>37</sup> The court looked to the fundamental right of marriage under the Due Process Clause of the U.S. Constitution and concluded that the right was not inclusive of same-sex marriage.<sup>38</sup> The court found that the right to same-sex marriage was not “so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice.”<sup>39</sup> The court did not directly consider whether the prohibition would violate the privacy jurisprudence of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>40</sup>

The Hawaii Supreme Court remanded Baehr to the circuit court to determine whether the regulation in question “furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.”<sup>41</sup> In late 1996, the Hawaii circuit court released its opinion containing extensive findings of fact and conclusions of law.<sup>42</sup> The circuit court found that the state failed to present evidence of a legitimate public purpose and enjoined the Hawaii Department of Health from denying marriage licenses solely

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32. Baehr, 852 P.2d at 64 (citation omitted).

33. Id. at 61 (quoting Appellee’s brief at 7).

34. 388 U.S. 1 (1967).

35. See id. at 11-12 (holding that the Commonwealth of Virginia’s ban on interracial marriages violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution).

36. See Baehr, 852 P.2d at 62-63 (“Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix.” (quoting *Loving*, 388 U.S. at 3)).

37. See id. at 55-56; see also discussion *infra* Part IV.

38. See Baehr, 852 P.2d at 57.

39. Id.

40. See discussion *infra* Part V.A.

41. Baehr, 852 P.2d at 68.

42. See *Baehr v. Miike*, No. CIV.91-1394, 1996 WL 694235, at \*19 (Haw. Cir. Ct. Dec. 3, 1996).

on the basis of sex.<sup>43</sup>

The circuit court's decision is presently on appeal to the Hawaii Supreme Court, which may affirm the ruling and end Hawaii's refusal to recognize same-sex marriages. However, after the circuit court announced its decision the Hawaii Legislature took action. It passed a broad domestic partnership package for homosexual couples and placed a referendum on the November 1998 ballot that would allow the Legislature to "reserve marriage to opposite-sex couples."<sup>44</sup> If approved by the Hawaii electorate, the amendment will quickly end legal recognition of same-sex marriage in Hawaii.

### B. Washington Responds: The Defense of Marriage Act of 1996

On September 21, 1996, President Clinton signed the Defense of Marriage Act (Federal Act),<sup>45</sup> adding the next piece to the legal puzzle of same-sex marriage.<sup>46</sup> The Federal Act was clearly in response to Baehr.<sup>47</sup> The Federal Act accomplished two objectives. First, it established that the federal government would not recognize same-sex marriages for purposes of social security or other benefits.<sup>48</sup> Second, and essential to this inquiry, the Federal Act attempted to create a "gay exception" to the Full Faith and Credit Clause of the U.S. Constitution.<sup>49</sup> The Federal Act attempted to confer authority upon the

43. See *id.* at \*21-\*22.

44. Susan Essoyan, *Hawaii Approves Benefits Package for Gay Couples Laws*, L.A. TIMES, Apr. 30, 1997, at A3.

45. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

46. See Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996, at A21.

47. See H.R. REP. NO. 104-664, at 4 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906 (examining the legal implications of Baehr on the states and the federal government). The House report identified the following governmental interests protected by the legislation: "defending and nurturing the institution of traditional, heterosexual marriage;" "defending traditional notions of morality;" "protecting state sovereignty and democratic self-governance;" and "preserving scarce government resources." *Id.* at 9-13.

48. To accomplish this end, the Federal Act amended the U.S. Code by adding:

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 (1996). This section, although unrelated to this inquiry, could be attacked via an independent equal protection challenge. See *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996) (stating that animosity towards a class of persons cannot satisfy even rational relationship review); see also *infra* Part V.B.

49. The Federal Act 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.

states to deny legal recognition of same-sex marriages sanctioned in other states.<sup>50</sup> The constitutionality of the Federal Act's "gay exception" is very questionable.<sup>51</sup>

### C. Florida's Defense of Marriage Act

The 1997 Florida Legislature responded to the same-sex issue by overwhelmingly enacting the Florida Defense of Marriage Act.<sup>52</sup> In response to Governor Chiles' decision to let the bill become law, the bill's senate sponsor, John Grant,<sup>53</sup> stated he thought it was "Great that [the Act] takes effect on June 4, right smack dab in the middle of Gay Pride Week."<sup>54</sup> Chiles went on record more softly, stating, "I believe that, by and large, most Floridians are tolerant and will one day come to view a broader range of domestic partnerships as an acceptable part of life. But, that is not the case today."<sup>55</sup>

The major thrust of the Act, in accordance with the Federal Act, is to prevent same-sex couples from lawfully marrying in Hawaii and subsequently migrating to Florida to claim the rights, privileges, and immunities granted to different-sex couples in Florida.<sup>56</sup> The Act also

28 U.S.C. § 1738c (1996).

50. Though not an exhaustive list, examples of similar "Defense of Marriage" statutes include ALASKA STAT. § 25.05.013 (Michie 1996); ARK. CODE ANN. § 9-11-107 (Michie 1996); GA. CODE ANN § 19-3-3.1 (1996); IDAHO CODE § 32-209 (1996); 5 ILL. COMP. STAT. 750/216 (West 1997); MICH. COMP. LAWS § 551.272 (1996); 23 PA. CONS. STAT. § 1704 (1996).

51. See discussion *infra* Part VI.B.

52. Ch. 97-268 § 1, 1997 Fla. Laws. 4957, 4957 (codified at Fla. Stat. § 741.212 (1997)); Bill Cotterell, Marriage Act Will Be Law Next Week, TALL. DEM., May 30, 1997, at A1.

53. Repub., Tampa.

54. Cotterell, *supra* note 52.

55. Press Release from Off. of the Gov., Gov. Lawton Chiles, (May 29, 1997) (statement regarding House Bill 147) (on file with Gov.'s Press Off.).

56. Section 741.212, Florida Statutes, states:

(1) Marriages between persons of the same sex entered into in any jurisdiction, whether within, or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within, or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.

(2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.

(3) For purposes of interpreting any state statute or rule, the term "marriage" means only a legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union.

FLA. STAT. § 741.212 (1997).

expressly codified the present Florida ban on legal recognition of same-sex marriages.<sup>57</sup>

The Act was a major part of the new Republican majority's 1997 legislative agenda.<sup>58</sup> Florida House Speaker Daniel Webster<sup>59</sup> went on record in late January, pledging his support for the legislation.<sup>60</sup> Senator Grant began spurring the debate as early as December 1996, stating that "God created Adam and Eve, not Adam and Steve, and it was never intended that there be a lawful contract of marriage between same-sex people."<sup>61</sup>

Several committees considered the bill,<sup>62</sup> including the Senate Judiciary Committee.<sup>63</sup> Senator Grant introduced the bill, stating that "Florida law provides that a marriage relationship is one man and one woman. Generally, organized civilization for about 6000 years has defined that as the definition of marriage."<sup>64</sup> Senator Grant attempted to characterize the issue as economic, and focused on the impacts of the legislation on government and employee benefit packages.<sup>65</sup> However, the financial impact was not ascertainable by either the House or Senate.<sup>66</sup>

Testimony heard by the committee included that of Larry Spalding of the ACLU of Florida, who discussed the background of the issue:

Over the past decade or so, gay men and lesbians in our state and elsewhere are not content to stay in the closet anymore. They want to be recognized as human beings. . . . Some of these folks want the same opportunity to enter into a marriage contract, the same opportunity to succeed or fail at marriage that we have. That means if we allow them to do it, if they can at least come up with about a fifty-one percent success rate they'd be doing better than we were.<sup>67</sup>

Other testimony came from representatives of the Christian Coali-

57. See *id.*

58. See John Kennedy, Webster Wants Gay Marriages Outlawed, FT. LAUD. SUN SENT., Jan. 30, 1997, at B22.

59. Repub., Ocoee.

60. See Kennedy, *supra* note 58.

61. Bill Cotterell, Senator To Oppose Same Sex Marriages, TALL. DEM., Dec. 13, 1996, at B1.

62. See Fla. HB 147 (1997).

63. See FLA. S. JOUR. 211, 236 (Reg. Sess. Mar. 19, 1997) (Conference Comm. Rep. on Fla. CS for SB 272).

64. Fla. S. Comm. on Judiciary, tape recording of proceedings (Mar. 12, 1997) (on file with comm.) (remarks of Sen. John Grant) [hereinafter Judiciary Debate].

65. See *id.*

66. See, e.g., Fla. H.R. Comm. on Govtl. Ops., HB 147 (1997) Staff Analysis 9 (Mar. 6, 1997) (on file with comm.) ("[S]taff could find no reliable data to assess the percentage of the population which would avail itself of same-sex married status if it were to become legal.")

67. Judiciary Debate, *supra* note 64 (testimony of Larry Spalding, ACLU of Florida).

tion and the American Family Association. In favor of the bill, John Dallas of the Christian Coalition stated that:

granting non-marital relationships the same status as marriage would mean that millions would be disenfranchised from our own government. The state, in essence, would be telling them that their beliefs are no longer valid, and would turn the civil rights laws into battering rams against them. . . . Business owners may be required to provide family health benefits to same sex couples, children could be taught in schools that homosexual sex is the moral equivalent of marital love.<sup>68</sup>

Carol Griffin of the American Family Association commented that “[l]egalizing same-sex marriages would destroy the moral foundation and definition of Florida families. Additionally, homosexuals would immediately be entitled to gay rights: status, adoption privileges and private insurance benefits, as a spouse based solely on the characteristic of how, and with whom they have sex.”<sup>69</sup>

The only substantive amendment proposed by Representative Lois Frankel,<sup>70</sup> would have also refused legal recognition of marriages performed in other jurisdictions where the parties to the marriage were “involved in an adulterous relationship with each other prior to the marriage.”<sup>71</sup> In a legislative session that echoed morality and personal responsibility, it is quite noteworthy that this amendment overwhelmingly failed.<sup>72</sup> Interestingly, Representative Johnnie Byrd, Jr., the sponsor of the House bill, and every one of the thirty-nine co-sponsors of the bill, voted against the “adultery amendment.”<sup>73</sup>

#### IV. FLORIDA’S DEFENSE OF MARRIAGE ACT AND THE PRIVACY AMENDMENT TO THE FLORIDA CONSTITUTION

In 1980, the Florida electorate amended the Florida Constitution to confer upon its citizens the “right to be let alone and free from governmental intrusion into his private life.”<sup>74</sup> This explicit right of privacy extends more protection than the right of privacy recognized under the Due Process Clause of the U.S. Constitution.<sup>75</sup> “[The]

68. *Id.* (testimony of John Dallas, Christian Coalition).

69. *Id.* (testimony of Carol Griffin, American Family Ass’n).

70. Dem., West Palm Beach.

71. FLA. H.R. JOUR. 306, 317 (Reg. Sess. 1997) (proposing and rejecting Amendment 1).

72. See *id.*

73. See *id.*

74. FLA. CONST. art. I, § 23.

75. See *In re T.W.*, 551 So. 2d 1186, 1191-92 (Fla. 1989) (“Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution . . . it can only be concluded that the right is much broader in scope than that of the Federal Constitution.”).

amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy.<sup>76</sup> To prevail over privacy rights, the state must show that the “statute furthers a compelling state interest through the least intrusive means.”<sup>77</sup>

Soon after the amendment’s passage, the Florida Supreme Court formally recognized that marriage and other “family rights” fall within the general right of privacy.<sup>78</sup> Since that time, the court has recognized a piecemeal of privacy interests, including the right to refuse medical treatment,<sup>79</sup> abortion rights,<sup>80</sup> the right of a minor to have sexual intercourse with another minor,<sup>81</sup> and confidentiality rights.<sup>82</sup>

In the closest analogy to same-sex marriage, the Florida Supreme Court recently affirmed a lower court opinion denying recognition of a privacy interest in one’s sexual orientation during adoption proceedings.<sup>83</sup> However, this decision does not implicate the fundamental right to marriage recognized pursuant to the Florida Constitution’s right to privacy and would not be controlling.<sup>84</sup> Lower Florida courts have recognized the privacy rights of homosexuals.<sup>85</sup>

In *Baehr*, the Hawaii Supreme Court found that the state ban on same-sex marriages did not violate the affirmative right of privacy

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76. *Id.* at 1192.

77. *B.B. v. State*, 659 So. 2d 256, 259 (Fla. 1995) (quoting *In re T.W.*, 551 So. 2d at 1193).

78. See *Shevin v. Byron*, 379 So. 2d 633, 636 (Fla. 1980) (recognizing privacy interests in marriage, procreation, contraception, and family relationships).

79. See *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96, 98 (Fla. 1989) (recognizing the fundamental right to refuse a life-saving blood transfusion); *In re Browning*, 568 So. 2d 4, 17 (Fla. 1990) (finding the right to terminate feeding pursuant to patient’s prior instructions); *Singletary v. Costello*, 665 So. 2d 1099, 1110 (Fla. 4th DCA 1996) (acknowledging the right to refuse medical treatment).

80. See *In re T.W.*, 551 So. 2d at 1193.

81. See *B.B.*, 659 So. 2d at 259.

82. See *Rasmussen v. South Fla. Blood Serv.*, 500 So. 2d 533, 538 (Fla. 1987) (finding a privacy interest in not being named as a blood donor).

83. See *Cox v. Florida Dep’t of HRS*, 656 So. 2d 902, 903 (Fla. 1995) (remanding to the lower court to determine the validity of the equal protection challenge). Florida is one of two states imposing a statutory ban on adoptions by homosexuals. See FLA. STAT. § 63.042(3) (1997) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”); N.H. REV. STAT. ANN. § 170-B:4 (1996) (“[A]ny individual not a minor and not a homosexual may adopt.”).

84. In its analysis, the Fourth District Court of Appeal looked to specific rights that had been recognized under the privacy amendment, and denied a facial challenge because the ban on homosexuals as adoption candidates did not implicate any specifically recognized rights. See *Cox v. Florida Dep’t of HRS*, 627 So. 2d 1210, 1215 (Fla. 4th DCA 1993), *aff’d*, 656 So. 2d 902 (Fla. 1995). Such an analysis will not suffice in examining section 741.212, Florida Statutes, because it directly implicates marriage, which is specifically recognized as a fundamental right. See *Shevin v. Byron*, 379 So. 2d 633, 636 (Fla. 1980).

85. For example, a Florida court found that the discharge of a deputy sheriff because it was discovered he was homosexual violated his right to privacy. See *Woodard v. Gallagher*, No. 89-5776, 1992 WL 252279, at \*2 (Fla. 9th Cir. Ct. June 9, 1992).

granted by the Hawaii Constitution.<sup>86</sup> However, while the Hawaii provision is interpreted in congruence with the right of privacy recognized under the Due Process Clause of the Fourteenth Amendment, the Florida right of privacy is “much broader in scope than that of the Federal Constitution.”<sup>87</sup>

While the legality of Florida’s ban on same-sex marriage remains an open question for Florida’s courts, the Legislature’s denial of legal recognition to same-sex marriages does, however, appear to violate article 1, section 23 of the Florida Constitution.

## V. FLORIDA’S REFUSAL TO RECOGNIZE SAME-SEX MARRIAGES AND THE UNITED STATES CONSTITUTION

### A. Substantive Due Process

Substantive Due Process stems from the Fifth and the Fourteenth Amendments to the U.S. Constitution. Under substantive due process, if a statute infringes upon a fundamental right, then it is subject to the strictest scrutiny and the state must proffer a compelling governmental interest to justify the statute.<sup>88</sup> The Supreme Court has found that under the U.S. Constitution, there is a fundamental right to marriage.

#### 1. The Fundamental Right to Marriage

Beginning with the historic decisions of *Meyer v. Nebraska*<sup>89</sup> and *Pierce v. Society of Sisters*,<sup>90</sup> the U.S. Supreme Court began modern

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86. See *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) (“[C]ouples do not have a fundamental constitutional right to same-sex marriage arising out of the right of privacy or otherwise.”).

87. *In re T.W.*, 551 So. 2d at 1192. Compare HAW. CONST. art. I, § 6 (“The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.”), with FLA. CONST. art. I, § 23 (“Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.”); Compare *In re T.W.* (“Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution . . . it can only be concluded that the right is much broader in scope than that of the Federal Constitution.”), with *Baehr*, 852 P.2d at 57 (“[T]he privacy right found in article I, section 6 is similar to the federal right”), and *State v. Mueller*, 671 P.2d 1351, 1360 (Haw. 1983) (“[A] purpose to lend talismanic effect to ‘the right to be left alone,’ ‘intimate decision,’ or ‘personal autonomy,’ or ‘personhood’ cannot be inferred from the State provision, any more than it can from the federal decisions.”).

88. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997).

89. 262 U.S. 390 (1923) (invalidating a state law prohibiting the teaching of any modern language other than English in any public or private grammar school, and recognizing a right to educate one’s children in the language of their ancestors).

90. 268 U.S. 510 (1925) (invalidating a state statute requiring students to attend public school and recognizing a right to educate and raise one’s own children).

privacy jurisprudence.<sup>91</sup> These cases are founded upon the premise that the guarantee of “liberty” in the Due Process Clause of the Fourteenth Amendment “denotes not merely freedom from bodily restraint but also the right . . . to marry, establish a home and bring up children.”<sup>92</sup> Thus, even as early as Meyer, the Court recognized marriage as a fundamental right.<sup>93</sup>

In the landmark decision of *Griswold v. Connecticut*<sup>94</sup> the Court firmly imbedded rights based upon the sanctity of marriage into substantive due process jurisprudence.<sup>95</sup> Two years later, the Court decided *Loving v. Virginia*.<sup>96</sup> In *Loving*, the Court ruled that Virginia’s anti-miscegenation statute<sup>97</sup> violated the Equal Protection Clause<sup>98</sup> and the Due Process Clause of the Fourteenth Amendment.<sup>99</sup>

91. Meyer and Pierce provided the foundation for the Court’s modern substantive due process doctrine, recognizing a right of privacy. See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

92. Meyer, 262 U.S. at 398.

93. See *id.*

94. 381 U.S. 479 (1965).

95. In *Griswold*, the Court recognized a general right of privacy emanating from the Bill of Rights and held that a Connecticut statute forbidding the use of contraception violated the right of privacy. See *id.* at 485. Later cases employed this “penumbra” theory in Fourteenth Amendment substantive due process doctrine. See, e.g., *Roe*, 410 U.S. at 152. Regarding the fundamental right of marriage, the *Griswold* Court, speaking through Justice William O. Douglas, stated:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

*Griswold*, 381 U.S. at 486.

96. 388 U.S. 1 (1967).

97. Some interesting parallels exist between laws prohibiting same-sex marriage and anti-miscegenation laws. Some opponents of same-sex marriage argue that it must be prohibited to prevent homosexuality from “spreading.” See Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 *BERKELEY WOMEN’S L.J.* 134, 165-66 (1987). This argument parallels the common argument by white supremacists who espouse that interracial marriage would cause the mix of both races and produce inferior offspring. Others argue that children will become confused if persons of the same-sex are allowed to marry. This parallels the same contention made in terms of interracial marriage. See Teresa D. Marciano, *Homosexual Marriage and Parenthood Should Not Be Allowed*, in *CURRENT CONTROVERSIES IN MARRIAGE AND FAMILY* 293, 299-300 (Harold Feldman & Margaret Feldman eds., 1985).

98. Other decisions of the Court based on the Equal Protection Clause of the Fourteenth Amendment also recognize marriage as a fundamental right. See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (striking down as unconstitutional a Wisconsin statute that prohibited marriage if one could not show that they could support children from prior relationships); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (striking down as unconstitutional a zoning statute forbidding extended families from living in the same residence); discussion *infra* Part V.B.

99. See *Loving*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942))).

Speaking through Chief Justice Warren, the Court explained that “the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”<sup>100</sup>

## 2. *Bowers v. Hardwick*: Lack of a Fundamental Right

The fundamental right of “marriage” does not necessarily confer a fundamental right of same-sex marriage. In *Bowers v. Hardwick*,<sup>101</sup> by a five-to-four majority,<sup>102</sup> the Court ruled that there is no fundamental right to homosexual sodomy,<sup>103</sup> and that a majority electoral sentiment that homosexuality is immoral was a rational basis for Georgia’s sodomy statute.<sup>104</sup> Although the Georgia sodomy statute at issue was written in terms that prohibited sexual acts between heterosexuals as well as homosexuals, to reach the majority’s holding Justice White framed the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”<sup>105</sup>

Framing the issue in *Bowers* as whether there is a fundamental right to homosexual sodomy, as opposed to a general fundamental right to engage in consensual sexual activity, implicitly created a bifurcation of privacy rights based upon sexual orientation. In *Moore v. City of East Cleveland*,<sup>106</sup> the Supreme Court held that the recognition of rights inherent in the concept of “liberty” embraced by the Due Process Clause is limited by “tradition,” or whether the right sought to be protected is one of the “basic values that underlie our society.”<sup>107</sup> Because there is not a “deeply rooted” history and tradition of same-sex marriage in the United States, and pursuant to the

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100. *Id.*

101. 478 U.S. 186 (1986).

102. Justice Powell, who concurred in the result of *Bowers*, publicly recanted his decision after his retirement from the Court. Justice Powell stated that he found *Bowers* “inconsistent in a general way” with *Roe*. See Linda Greenhouse, *When Second Thoughts in Case Come Too Late*, N.Y. TIMES, Nov. 5, 1990, at A5.

103. See *Bowers*, 478 U.S. at 194.

104. See *id.* at 196. Comparatively, in one of the Court’s equal protection cases, the class of persons being discriminated against were not only unpopular, but as unauthorized aliens, their status in the United States was, in and of itself, illegal. See *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (evaluating the state’s denial of free public education to illegal alien children). Nonetheless, the Court extended protection as a suspect class and struck down the statute despite the group’s illegal status. See *id.* at 230.

105. *Bowers*, 478 U.S. at 190. There was substantial debate between Justice White and the dissenting justices as to whether the issue was properly presented in light of the Court’s privacy jurisprudence. See *id.* at 200-01 (Blackmun, J., dissenting) (“The sex or status of the persons who engage in the act is irrelevant as a matter of state law. . . . I therefore see no basis for the Court’s decision to treat this case as an ‘as applied’ challenge.”).

106. 431 U.S. 494 (1977).

107. *Id.* at 503 (“Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.” (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965))).

bifurcation of the privacy doctrine implicit in *Bowers*, a court may determine the Act does not implicate a fundamental right. If a court determines that the Act does not violate a fundamental right, then it does not infringe upon substantive due process rights and will be subject to the lowest level of constitutional scrutiny, or the rational relationship test. According to *Bowers*, and under the lowest level of constitutional scrutiny, electoral sentiment that homosexuality is immoral is a rational basis for the Act, and the Act would pass constitutional muster.<sup>108</sup>

### 3. *Romer v. Evans*

The irony of basing legal rules in “history and tradition” is that these are fluid concepts, changing over time. As previously stated, same-sex marriage is becoming a common aspect of contemporary American culture.<sup>109</sup> This suggests that as same-sex marriages become increasingly common, the institution will ultimately find full recognition as a fundamental right.<sup>110</sup>

Moreover, there is substantial debate regarding the validity of *Bowers*. The bifurcation of privacy rights seems to violate the Court’s holding in *Loving*. Indeed, *Loving* was based upon the premise that the fundamental right of marriage applies to different-race couples to the same extent that it applies to same-race couples.<sup>111</sup> *Loving* stands for the proposition that the fundamental right of marriage exists for any couple entering into the sacred vows.<sup>112</sup>

Furthermore, in light of the Court’s equal protection jurisprudence in *Romer v. Evans*,<sup>113</sup> animosity toward an unpopular group is not a legitimate state purpose.<sup>114</sup> In *Romer*, the Court was faced with an amendment to the Colorado Constitution that prohibited all state action that entitled any person to have minority status, quota preferences, protected status, or claims of discrimination based on sexual orientation.<sup>115</sup> In striking down the amendment, the Court refused to

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108. See *Bowers*, 478 U.S. at 196. The rational relationship test is discussed more thoroughly *infra* Part V.B.3.

109. See SHERMAN, *supra* note 2, at 4-7.

110. See *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977).

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

112. See *id.*

113. 116 S. Ct. 1620 (1996). *Romer* involved a challenge to an amendment of the Colorado Constitution which precluded any state action protecting the status of homosexuals. See *id.* at 1622.

114. Under the Equal Protection Clause, rational relationship review is not satisfied when the electorate passes laws based solely on animus for an unpopular group. See *id.* at 1628. This analysis has also been applied to hippies, see *U.S.D.A. v. Moreno* 413 U.S. 528, 534 (1973), the mentally retarded, see *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985), illegal alien children, see *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982), and homosexuals, see *Romer*, 116 S. Ct. at 1628.

115. See *Romer*, 116 S. Ct. at 1622.

recognize the primary rationale offered by Colorado—that the legitimate purpose of the discriminatory statute was “respect for other citizens’ freedom of association, particularly landlords or employers who have personal or religious objections to homosexuality.”<sup>116</sup> This rationale is quite similar to that offered by the State of Georgia in *Bowers*. Justice Kennedy’s failure to even cite *Bowers* in the majority opinion in *Romer* leaves unanswered the “million dollar question” which could itself be the subject of a lengthy inquiry: whether *Bowers* remains good law, and whether the Court will continue to bifurcate rights between heterosexuals and homosexuals.<sup>117</sup>

Should the Court choose to overrule *Bowers*, it would seem that the bifurcation of the privacy rights doctrine would also fall. This would establish that homosexuals are entitled to the same fundamental privacy rights as heterosexuals.<sup>118</sup> In the absence of *Bowers*, because the fundamental right to marriage is clearly established by *Griswold* and related cases, the only conclusion would be that same-sex marriage would be entitled to fundamental-right status.<sup>119</sup> If a court determines that same-sex marriage is a fundamental right, then the Act would be subject to strict scrutiny and the state would have to show that the Act furthers a compelling interest.<sup>120</sup> Moral sentiment alone is not a compelling reason to justify the violation of fundamental rights; thus, the Act would be constitutional.<sup>121</sup>

## B. Equal Protection of the Laws

The Supreme Court has structured equal protection analysis into three distinct categories, applying different levels of scrutiny to each.<sup>122</sup> The Court employs “strict scrutiny,” the most stringent level of analysis, in situations where the classification is racial in nature,<sup>123</sup> or involves deprivation of a fundamental right to a distinct

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116. *Id.*; compare *id.* with *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (noting that “majority sentiments about the morality of homosexuality” are a legitimate state purpose).

117. See *Romer*, 116 S. Ct. at 1630 (Scalia, J., dissenting).

118. Indeed, Justice Stevens’ dissenting opinion in *Bowers* evidences that at least one justice is dedicated to this outcome. He writes:

Although the meaning of the principle that “all men are created equal” is not always clear, it surely must mean that every free citizen has the same interest in “liberty” that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.

*Bowers*, 478 U.S. at 218-19 (Stevens, J., dissenting).

119. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

120. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997).

121. See discussion *infra* Part V.B.2.

122. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985).

123. See *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944) (“All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that

class of citizens.<sup>124</sup> At this level of scrutiny, laws must be furthered by a compelling governmental interest.<sup>125</sup> Second, “intermediate scrutiny” applies to gender based classifications and quasi-suspect classes.<sup>126</sup> Laws of this variety are constitutional only if the state interests underlying the statute prove to be “exceedingly persuasive.”<sup>127</sup> The lowest level of analysis, “rational relationship” review, applies when the question of law does not affect a fundamental right and when the class of citizens affected is not a suspect or quasi-suspect class.<sup>128</sup> Here, the law need only be rationally related to the governmental interest.<sup>129</sup>

Florida’s prohibition on the legal recognition of same-sex marriages may require analysis at all three levels. First, the Act may be invalid because it discriminates on the basis of sex.<sup>130</sup> Second, although homosexuals are not a “suspect class” for equal protection purposes,<sup>131</sup> the Act deprives homosexuals of the fundamental right to marriage, implicating strict scrutiny analysis.<sup>132</sup> Finally, the Act fails to satisfy even rational relationship review.<sup>133</sup>

### 1. Intermediate Scrutiny and Gender Classifications

The Act may be challenged because it facially discriminates on the basis of sex. Here, the issue of consequence is whether sex is truly implicated by the Act. The heightened level of scrutiny afforded to gender-based classifications under the Equal Protection Clause is

all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”)

124. See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

125. In fact, excluding cases involving affirmative action, *Korematsu* is the only case in which the discriminatory statute was upheld despite the Court’s application of strict scrutiny. The court found that in times of war, government may have a compelling interest to discriminate. See *Korematsu*, 323 U.S. at 224.

126. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

127. See *United States v. Virginia*, 116 S. Ct. 2264, 2271 (1996) (holding that a state-sponsored university’s refusal to admit women violates the Equal Protection Clause). There remains some doubt as to whether the “exceedingly persuasive” standard extends beyond the education context, as this language seems to strengthen the level of scrutiny applied to previous gender-based classification case law. Compare *id.* with *Craig*, 429 U.S. at 197 (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

128. See *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) (describing rational relationship review).

129. See *id.*

130. See *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) (ruling that Hawaii’s ban on same-sex marriage violated the Equal Protection Clause of the Hawaii Constitution because it classified on the basis of sex).

131. See *Romer*, 116 S. Ct. at 1624.

132. See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

133. See *Romer*, 116 S. Ct. at 1628 (ruling the amendment unconstitutional because it was based upon animus toward homosexuals).

justified by a history of discrimination against women.<sup>134</sup> Although the Act's "same-sex" classification is technically based on the sex of the parties to the marriage, the Act does not implicate discrimination against women or men.<sup>135</sup> Nor does it involve an effort to proactively protect women because of their sex. It clearly involves discrimination against homosexuals.<sup>136</sup> The gender classification contained in the Act (i.e., "[m]arriages between persons of the same sex") is incidental to the Act's purpose, namely, non-recognition of homosexual marriages and applies equally to women and men.<sup>137</sup>

Although the Baehr court ruled on the basis of sex pursuant to the more stringent requirements of the Hawaii Constitution, other state courts have rejected claims that the prohibition of same-sex marriage is a gender-based classification pursuant to the Equal Protection Clause of the U.S. Constitution and state constitutional provisions. For example, in *Singer v. Hara*,<sup>138</sup> the Washington Supreme Court found that Washington's ban on same-sex marriages did not violate the federal Equal Protection Clause or the Equal Rights Amendment to the Washington Constitution.<sup>139</sup> The court did not apply heightened scrutiny to its analysis because it found that the same-sex couple was "not being discriminated against because they are males, they [were] being discriminated against because they happen to be homosexual."<sup>140</sup>

Thus, pursuant to constitutional equal protection jurisprudence, the Act would not invoke intermediate scrutiny as its sex-based classification does not classify or disadvantage on the basis of gender

134. "[O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes." *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

135. FLA. STAT. § 741.212 (1997).

136. See *Judiciary Debate*, supra note 64.

137. See FLA. STAT. § 741.212 (1997).

138. 522 P.2d 1187 (Wash. 1974).

139. With respect to the Equal Rights Amendment to the Washington Constitution, which extended more protection than the federal Equal Protection Clause, the court stated that:

the purpose of the ERA is to provide the legal protection, as between men and women, that apparently is missing from the state and federal Bill of Rights, and it is in light of that purpose that the language of the ERA must be construed. To accept the appellants' contention . . . that the ERA must be interpreted to prohibit same-sex marriages would be to subvert the purpose for which the ERA was enacted by expanding its scope beyond that which was undoubtedly intended by the majority of the citizens of this state who voted for the amendment.

*Id.* at 1194.

140. *Id.* at 1196; cf. *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) ("It is the state's regulation of access to the status of married persons, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution.").

and because homosexuals are not a quasi-suspect class.<sup>141</sup>

## 2. Strict Scrutiny and the Fundamental Right of Marriage

The Act may be challenged on the basis that it deprives a class of citizens of the fundamental right to marriage. Equal protection analysis provides that the state may not deny a class of citizens rights recognized under the federal Due Process Clause.<sup>142</sup> The issue of consequence to this claim is whether same-sex marriage qualifies for fundamental right status as a matter of federal Substantive Due Process.<sup>143</sup>

If *Bowers* and its bifurcated view of association rights were overruled, the legality of the Act would likely be resolved via the due process claim. Hence, the Act would deny same-sex couples in Florida of their fundamental right to marriage. However, even in the absence of such a ruling, precedent exists for the proposition that states may not deny same-sex couples the fundamental right of marriage. If the states bestow the right to marry (and all the benefits that come with it) upon different-sex couples, they must do the same for same-sex couples as a matter of equal protection law. Having attached so many rights, privileges, and immunities to marriage, Florida cannot bestow the right to marriage upon different-sex couples and refuse to recognize same-sex marriage.<sup>144</sup>

This proposition is supported by dicta within the Court's equal protection jurisprudence. In *Loving v. Virginia*, the Court did not address whether the statute's denial of a fundamental right violated the Equal Protection Clause.<sup>145</sup> However, this is of no consequence to the issue at hand because in *Zablocki v. Redhail*,<sup>146</sup> the Court applied the fundamental rights analysis to marriage.<sup>147</sup> Speaking through Justice Marshall, the Court held that "[a]lthough *Loving* arose in the

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141. See *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973); see also *Singer*, 522 P.2d at 1196 (stating that excluding same sex marriages from marriage status may be upheld under the rational relationship test).

142. See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

143. See discussion *supra* Part V.A.

144. This outcome is analogous to the Court's procedural due process jurisprudence. In order to claim a procedural due process right (i.e. the right to a hearing) a plaintiff must allege a property interest or a liberty interest. See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (finding that a professor at a state college did not have a property interest in an expired contract). Although the courts define liberty interests, property interests are defined by the state in granting rights to its citizens. See *id.* In the context of the fundamental rights equal protection analysis and same-sex marriage, the argument is that having attached rights, privileges, and immunities to the fundamental right of marriage, Florida may not deny this fundamental right to a distinct class of citizens as a matter of federal equal protection law.

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

146. 434 U.S. 374 (1978).

147. See *id.* at 384.

context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals.”<sup>148</sup>

The Court also noted that “[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”<sup>149</sup> The *Romer* Court found that the alleged state purpose of respect for individual morality was merely a pretext for animus towards an unpopular group, and therefore insufficient to survive even a mere “rational relationship” review.<sup>150</sup> Florida’s purposes for the Act, based on “morality” and the protection of different-sex marriages, should fare no better.

### 3. Rational Relationship Review

Even if a court found that same-sex marriage was not entitled to fundamental-right status, the Act would likely be unconstitutional under rational relationship review.<sup>151</sup> When the class of persons discriminated against by a legal rule is a politically unpopular group, the rational relationship analysis employed is increased toward intermediate scrutiny.<sup>152</sup> The Act is based on animosity towards homosexuality, and as the Court in *Romer* found, this justification “lacks a rational relationship to legitimate state interests.”<sup>153</sup>

Should the Court be unwilling to overrule *Bowers*, the state could prevail by contending that the Act is narrowly tailored to serve the public interest.<sup>154</sup> The *Romer* Court held the Colorado amendment unconstitutional because it disenfranchised homosexuals. In *Romer*, the Court stated:

First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an . . . invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment

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148. *Id.* (emphasis added) (finding unconstitutional a statute which forbade anyone from entering into a marriage who was under obligation to support non-custodial children).

149. *Id.* at 388.

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

151. Cf. *Romer*, 116 S. Ct. at 1629 (holding that a state constitutional amendment that discriminated against homosexuals could not survive rational relationship review because it bore no relationship to legitimate state interests).

152. See *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (striking down a statute forbidding public education to illegal alien children even though education is not a fundamental right and by their presence in the country the children committed an illegal act).

153. *Romer*, 116 S. Ct. at 1627. But see *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

154. Compare *Romer*, 116 S. Ct. at 1627 (animus toward a class lacks a rational relationship to legitimate state interests), with *Bowers*, 478 U.S. at 196 (morality sentiments of the majority are sufficient under rational relationship review).

seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.<sup>155</sup>

The Act only denies homosexuals the right to legal recognition of marriage; it is not a broad disability of the sort described in *Romer*.<sup>156</sup> If *Bowers* is upheld, the Court could distinguish *Romer* on this basis and uphold the Act.

## VI. FLORIDA'S CONSTITUTIONAL DUTY TO RECOGNIZE SAME-SEX MARRIAGES LEGALLY SANCTIONED IN OTHER STATES

The Act seeks to withhold legal recognition to non-Florida marriages between members of the same sex.<sup>157</sup> Florida's obligation to recognize same-sex marriages legally sanctioned in other states has its basis in several strands of constitutional jurisprudence, including the Privileges and Immunities Clause<sup>158</sup> and the Full Faith and Credit Clause.<sup>159</sup>

### A. The Right to Interstate Travel

The right to travel is perplexing because it finds authority in no specific constitutional provision.<sup>160</sup> The right has been attributed to the Privileges and Immunities Clause of article IV,<sup>161</sup> the Privileges and Immunities Clause of the Fourteenth Amendment,<sup>162</sup> and the Commerce Clause of article I.<sup>163</sup>

Regardless of the basis of the right, interstate travel is a national concern that states may not infringe on through diverse treatment.<sup>164</sup>

155. *Romer*, 116 S. Ct. at 1627.

156. See *id.* at 1628 (“[The amendment] is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board.”).

157. See FLA. STAT. § 741.212 (1997) (“Marriages between persons of the same sex entered into in other jurisdictions . . . are not recognized for any purpose in this state.”).

158. See U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”).

159. See *id.* art. IV, § 1 (“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 Proceeding shall be proved, and the Effect thereof.”).

160. See *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969) (holding that state denial of welfare benefits to residents of less than one year is unconstitutional).

161. See, e.g., *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870) (“[T]he [Privileges and Immunities] clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union . . .”).

162. See, e.g., *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (“[A]mong the rights and privileges of National citizenship recognized by this court are the right to pass freely from state to state.”).

163. See, e.g., *Edwards v. California*, 314 U.S. 160, 175-76 (1941) (“We are of the opinion that the transportation of indigent persons from State to State clearly falls within [the] class of subjects [immune from regulation by the states].”).

164. See *id.* at 176.

The Supreme Court has noted that “[a] state law implicates the right to travel when it actually deters such travel . . . or when it uses ‘any classification which serves to penalize the exercise of that right.’”<sup>165</sup> The Act implicates this right because same-sex couples legally married in other states would be deterred from traveling to Florida.<sup>166</sup> For example, if one of the parties to the marriage faces a medical emergency, Florida would not recognize the other’s legal rights to make medical decisions for his or her spouse.<sup>167</sup>

The right to interstate travel also includes interstate migration.<sup>168</sup> In *Shapiro v. Thompson*,<sup>169</sup> several states attempted to deny welfare benefits to those residing within the state for less than one year.<sup>170</sup> The Court held that the state may not interfere with the constitutional right to interstate travel by denying legal rights to those who have recently moved.<sup>171</sup>

The Act denies legally married same-sex couples all of the legal rights, privileges, and immunities normally granted to a valid marriage.<sup>172</sup> The Supreme Court has noted that “[i]f a law has ‘no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it is patently unconstitutional.’”<sup>173</sup> Thus, section 741.212, Florida Statutes, is similarly unconstitutional.

#### B. Defense of Marriage and the Full Faith and Credit Clause

The Full Faith and Credit Clause of the U.S. Constitution is an essential part of our federal system of government.<sup>174</sup> The Clause states: “Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State.”<sup>175</sup> The drafters sought to transform several independent sovereign entities into one cohesive nation.<sup>176</sup>

At issue is whether Congress possessed the authority to pass the Federal Act. The second sentence of article IV, section 1 of the U.S. Constitution states that “the Congress may by general Laws pre-

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165. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)).

166. See *Shapiro*, 394 U.S. at 618, 634.

167. See FLA. STAT. § 741.212 (1997) (“[Same-sex marriages] are not recognized for any purpose in this state.”).

168. See *Shapiro*, 394 U.S. at 634.

169. 394 U.S. 618 (1969).

170. See *id.*

171. See *id.*

172. See FLA. STAT. § 741.212 (1997).

173. *Shapiro*, 394 U.S. at 631 (quoting *United States v. Jackson*, 390 U.S. 570, 581 (1988)).

174. See *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-277 (1935).

175. U.S. CONST. art. IV, § 1.

176. See *Milwaukee County*, 296 U.S. at 276-77.

scribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”<sup>177</sup> Congress cites this provision, known as the “Effects Clause,” as legislative authority for the Federal Act.<sup>178</sup>

However, the Full Faith and Credit Clause is firmly inscribed in the U.S. Constitution. Congress may not promulgate legislation that effectively dismisses this constitutional mandate. As professor Laurence Tribe has noted, the Effects Clause “includes no power to decree that, if those official acts offend a congressional majority, they need to be given no effect whatsoever by any State that happens to share Congress’s substantive views.”<sup>179</sup> The intent of the framers of the Constitution was to unify the nation; it was clearly not to continue a relation of several, separate sovereign states with various contradicting laws possessing no effect beyond each state’s border.<sup>180</sup>

Considering the foregoing, the same-sex marriage prohibition created by the Federal Act is beyond the scope of congressional legislative power because the Full Faith and Credit Clause mandates that all states give full faith and credit to the “public acts, records, and judicial proceedings of every other state.”<sup>181</sup> Once one state has sanctioned legal same-sex marriage, all other states should be constitutionally required to uphold the validity of the marriage.

However, the Supreme Court has never addressed whether marriage falls within the scope of the Full Faith and Credit Clause. The Full Faith and Credit decision of the Supreme Court most analogous to marriage is that of a divorce decree. In what was a highly controversial move at the time, the Court, in *Williams v. North Carolina*,<sup>182</sup> overruled a forty year-old precedent<sup>183</sup> and held that North Carolina

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177. U.S. CONST. art. IV, § 1.

178. See H.R. REP. NO. 104-664, at 19 (1996) (“The committee therefore believes that this situation presents an appropriate occasion for invoking our congressional authority under the second sentence of the Full Faith and Credit Clause to enact legislation prescribing what (if any) effect shall be given by the states . . .”).

179. 142 CONG. REC. S5931-01, S5932 (daily ed. June 6, 1996) (letter from Professor Laurence Tribe to Senator Edward Kennedy).

180. Compare U.S. CONST. art IV, § 1 (“Full faith and credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State.”), with ARTS. OF CONFED. art. IV, para. 2 (1781) (“Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.”). James Madison expounded that the Full Faith and Credit Clause in the Constitution “is an evident and valuable improvement on the clause relating to this subject in the Articles of Confederation.” THE FEDERALIST NO. 42, at 271 (James Madison) (Clinton Rossiter ed., 1961). He went on to suggest that the Effects Clause would foster national uniformity, stating that “[t]he power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated in any stage of the process within a foreign jurisdiction.” Id.

181. U.S. CONST. art. IV, § 1 (emphasis added).

182. 317 U.S. 287 (1942).

183. See *Haddock v. Haddock*, 201 U.S. 562 (1906).

must grant full faith and credit to a Nevada divorce.<sup>184</sup> The Court recognized that each state has an interest in the marital status of those domiciled within the state.<sup>185</sup> The Court found that the state could alter the “marriage status of the spouse domiciled there, even though the other spouse was absent.”<sup>186</sup> Although dicta, the use of the more general term “marriage status” suggests that both the dissolution of the marital relation and the legal action that brought the relation into being would be entitled to full faith and credit.<sup>187</sup>

Part of the Court’s reasoning looked to the effects of the opposite outcome.<sup>188</sup> Thus, if one party to the marriage receives a lawful divorce in state A, remarries in state A, and then eventually relocates to state B (which does not recognize the state A divorce), that party would be subject to bigamy prosecutions in state B and every other state that does not recognize the divorce, and not subject to bigamy prosecutions in state A or any other state that does recognize the state A divorce.<sup>189</sup> With same-sex marriage, a similar scenario could exist if Florida refuses recognition of a marriage recognized by Hawaii or another state. Should one or both of the parties to the Hawaii marriage relocate to Florida they would be unable to secure a divorce since, pursuant to the Act, they are not legally married within the state of Florida.<sup>190</sup> Should either party enter a valid heterosexual marriage, he or she would be subject to bigamy prosecutions in Hawaii and any state that recognizes the Hawaii marriage, and not subject to prosecution in Florida or any state which does not recognize the first marriage.<sup>191</sup> In both cases, children of the marriage would be considered illegitimate in some states and legitimate in others.<sup>192</sup>

This differentiation among the states is exactly what the Full

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184. See *Williams*, 317 U.S. at 303-04.

185. Not only would Hawaii have an interest in a valid marriage performed within its jurisdiction it may also “determine the extraterritorial effect of its judgment; but it may only do so indirectly by prescribing the effect of its judgments within the State.” *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 269-70 (1980). Therefore, if Hawaii would recognize same-sex marriages with all the legal rights, privileges, and immunities of different-sex marriages, Florida would be obliged to recognize the full scope of legal rights bestowed upon them under Hawaii law.

186. *Williams*, 317 U.S. at 299.

187. See *id.* at 301 (using the general language of “decrees of a state altering the marital status” with regard to inclusion within the scope of the Full Faith and Credit Clause).

188. See *id.* at 300.

189. See *id.*

190. See FLA. STAT. § 741.212 (1997) (“Marriages between persons of the same sex entered into in any jurisdiction . . . are not recognized for any purpose in this state.”).

191. See *Williams*, 317 U.S. at 300.

192. See *id.* at 301 (“if decrees of a state altering the marital status of its domiciliaries are not valid throughout the Union . . . a rule would be fostered which could not help but bring ‘considerable disaster to innocent persons’ and ‘bastardize children hitherto supposed to be the offspring of lawful marriage’” (quoting *Haddock v. Haddock*, 201 U.S. 562, 628 (1906) (Holmes, J., dissenting))).

Faith and Credit Clause was intended to prohibit.<sup>193</sup> In the words of Justice William O. Douglas, "It is a Constitution we are expounding—a Constitution which in no small measure brings separate sovereign states into an integrated whole through the medium of the full faith and credit clause."<sup>194</sup> A valid marriage, and hence a valid same-sex marriage, should be given full faith and credit in every state in the country.

## VII. CONCLUSION

All the arguments against same-sex marriage boil down to two core premises: homosexuality is immoral; and marriage, in this country, has always been defined as a heterosexual union. History shows us many similar arguments that have been made to justify the deprivation of rights to unpopular groups. For instance, many argued that interracial marriage had always been prohibited,<sup>195</sup> African-Americans had always been slaves,<sup>196</sup> and abortion had always been illegal.<sup>197</sup> The argument that same-sex marriage should not be legally recognized because it is not recognized in the United States is as logically and historically ill-founded as any of those arguments. In each of these issues, as with same-sex marriage, there comes a time when change is due; that time is now for legal recognition of same-sex marriage.

The argument that same-sex marriage should not be legally recognized because some feel that homosexuality is immoral does not fare better. Laws based on the values of the majority "raise the inevitable inference that [they are] . . . born of animosity toward the class of persons affected."<sup>198</sup> In a free, pluralistic society the rights, benefits, and immunities of marriage should not be denied to a class of citizens because some believe homosexuality is "wrong." The best advice for one who believes it is wrong to marry a person of the same sex is to refrain from doing so.

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193. See *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276 (1935) (discussing the purpose of the Full Faith and Credit Clause).

194. *Williams*, 317 U.S. at 303.

195. See *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (rejecting the state's argument that the Framers of the Fourteenth Amendment did not intend to make anti-miscegenation laws unconstitutional).

196. See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 404-405 (1856) (justifying American slavery because, at the time of the writing of the Constitution, African-Americans were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges").

197. See *Roe v. Wade*, 410 U.S. 113, 130 (1973) (looking to the history of abortion in other cultures and finding prohibition of abortion unconstitutional regardless of a traditional ban against the practice in the United States).

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