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Is Separation of Church and State Possible?

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Introduction

The past few decades have seen more debate over gay rights than ever before. From sodomy laws to civil unions, the Supreme Court and the legislature have created and then repealed numerous laws related to homosexuality. This paper will not only explore these laws and their impact on gay rights in the United States, but it will look to a much deeper-rooted problem.

Anyone who has a rudimentary understanding of the Constitution and the Bill of Rights would instinctively think "equal protection" when discussing a laws constitutionality and gay rights. Although a completely appropriate approach, this paper will take a different one. When the Hawaii Supreme Court appeared close to reaching a

decision that would legalize the recognition of gay marriage in other states, a federal controversy erupted.[1] This fear led to the creation of the Defense of Marriage Act ("DOMA"). DOMA defined marriage as a legal union between one man and one woman as husband and wife.[2] Congressional debate about the proposed legislature focused on the sanctity of the institution of marriage and a moral/religious belief that tradition must be protected.

In 1996, after much controversy, DOMA ("the Act") became effective.[3] The constitutionality of the Act was brought into question right from its inception, but it was not until this year, 2013, that the Supreme Court of the United States granted certiorari and decided the Act's fate. In *United States v. Windsor*, the Supreme Court declared DOMA unconstitutional for a variety of reasons.[4] There is no question that DOMA's definition of "marriage" and "spouse" did not provide equality to a class of people that should have been afforded that protection under the Constitution. However, the real question is how did Congress enact a federal statute that was solely predicated on religious and moral beliefs?

The Supreme Court's opinion in *Windsor* briefly addressed but failed to acknowledge a larger, much broader issue, the inability to separate church and state.[5] "Separation church and state" is a famous ideology that refers to the First Amendment. The United States government cannot establish a religion, nor can it interfere with anyone's practice of his or her religion. The idea that religion and state should be

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[1] Marisa Nelson, *The IRS Moves Toward Income Tax Equality for Same-Sex Couples Doma Despite*, 45 U.S.F. L. REV. 1145, 1148 (2011).
[2] *Id.*
[3] Andrew Koppelman, *Doma,* Romer, *and Rationality*, 58 DRAKE L. REV. 923, 933 (2010).
[4] United States v. Windsor, 133 S. Ct. 2675 (2013).
[5] *Id.*

separate is great in theory, but is it truly possible? Through this country's history, countless courts, including the Supreme Court of the United States, have allowed moral ideology to dictate what is and is not constitutional.

This paper will begin with a brief history of the phrase "separation of church and state" and then a brief history of the gay rights movement in the United States. Three main courts will be analyzed in detail: *Romer v. Evans, Beher v. Lewin* and *Winsor v. United States*.[6] In looking at these cases, this paper will analyze how laws created out of some moral/religious ideology, with a large focus on the DOMA, were eventually deemed unconstitutional.

"Separation of Church and State"

I find it natural to look to the Fourteenth Amendment's Equal Protection Clause or the Fifth Amendment's implied equal protection requirement when analyzing gay rights in the United States. The cases discussed in this paper have continually used the same rationale; the courts have looked to equal protection for providing homosexuals with the rights conferred by the Constitution. While looking at the Fourteenth Amendment in regards to this discussion is both valid and appropriate, I would like to use a different approach in analyzing the United States' decisions related to homosexuality. Instead, this paper will look to the First Amendment in discussing how these laws and judicial opinions relate to the infamous ideology of "separation of church and state."

"Separation of church and state," although a major theoretical framework in the United States, is not found in the United States Constitution. The ideology of separating church and state is encompassed within the First Amendment; "Congress shall make no

[6] *See generally,* Baehr v. Lewin, 74 Haw. 530 (1993); Romer v. Evans, 517 U.S. 620 (1996); United States v. Windsor, 133 S. Ct. 2675 (2013).

law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[7] The text of the First Amendment can be looked at in terms of the Establishment Clause and the Free Exercise Clause. The government cannot establish a religion, nor can it interfere with anyone's practice of his or her religion.

Political parties in the United States, namely conservatives/republicans and democrats/liberals, differ in their interpretation of the First Amendment. Although the United States' policies towards religion are more inclusionary than those of countries such as Turkey, there are still inconsistencies due to the conflicting ideology of conservatives and liberals.[8] Conservatives tend to support state accommodation of religion, whereas liberals predominantly believe in a separation between church and state.[9] Despite their different views, both conservatives and liberals share the in the ideology of protecting passive secularism.[10] Both groups oppose an assertive exclusion of religion but have conflicting views on things such as school prayer.[11] This conflicting view is a result of a disagreement on what exactly the Establishment Clause and the Free Exercise Clause truly mean.[12] Conservatives look at banning school prayer as a violation

[7] U.S. CONST. amend. I.
[8] AHMET T. KURU, SECULARISM AND STATE POLICIES TOWARD RELIGION: THE UNITED STATES, FRANCE, AND TURKEY, 70 (2009).
[9] *Id.* at 53.
[10] *Id.* at 54.
[11] *Id.* at 55.
[12] *Id.*

of freedom or religion.[13] Liberals, on the other hand, see it as an establishment of religion.[14]

In comparing the United States to Turkey, the Turkish state's policies towards religion have historically been significantly more exclusionary that those of the United States.[15] Turkish state's policies towards religion are conflicting to say the least.[16] There are restrictive policies towards Islam, yet the state operates public Islamic schools.[17] The state pays the salaries of the state's Directorate of Religious Affairs.[18] Given the relationship between the state and religion, specifically religion in schools, it would appear as though Turkish state policies favor Islam. However, the predominance of assertive secularism indicates that Islam is not favored but rather an excluded religion.[19]

In Turkey organized prayer is banned in both public and private schools.[20] Turkish state's policy of operating Islamic public schools is not to support Islam, but rather control it.[21] In the founding period of the Republic the state confiscated the Islamic foundation's financial sources and that is why the state pays the salaries of the Directorate of Religious Affairs.[22] While Turkey's efforts are put towards controlling the Islamic religion, the United States has historically fought a much different battle, finding a line between separating the state from the church. The passive secularism of the United States is superior to the assertive secularism of Turkey in that the United States does not

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[13] *Id.*
[14] *Id.*
[15] *Id.* at 198.
[16] *Id.* at 166.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 199.
[20] *Id.* at 166.
[21] *Id.* at 167.
[22] *Id.*

attempt to exclude a religion. However, passive secularism is the reason that the debate between political parties in the United States in interpreting the First Amendment dates back to its establishment and still continues today.

Looking to the early nineteenth-century, republicans ironically believed in keeping religion out of politics.[23] Republicans yearned for a society in which people participated in politics independent of religious beliefs and free of clerical authority.[24] While advocating for a separation between the two, republicans introduced religious objectives into their political stance.[25]

During the mid-nineteenth century educational institutions took to the idea of separating church and state. Henry P. Tappan, President of the University of Michigan, made an effort to appoint professors in a way contrasting the school's well-established tradition.[26] Traditionally, the professors at the University of Michigan were divided among the leading Protestant sects in Michigan.[27] Mr. Tappan strayed from this tradition and chose to appoint professors based on their academic qualifications.[28] Other professionals also began demonstrating an affiliation for separation of church and state. Lawyers and judges turned to Jefferson's "wall" theory in interpreting the First Amendment.[29]

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[23] PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE, 130 (2002).
[24] *Id.* at 132.
[25] *Id.* at 143.
[26] *Id.* at 253.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 259-61.

Late Nineteenth century advocates for separation did not rely as heavily on constitutional rights.[30] These advocates recognized the lack of foundation provided by the Constitution and looked to amendments to establish separation between the church and the state.[31] Anti-Christian secularists campaigned for a constitutional amendment to include separation of church and state in the 1870s and 1880s.[32] Although appearing to be fanatics with a dangerous idea, the attempted movement towards an amendment sparked other secularists to stand behind the principle.[33] It was not until the Twentieth Century, after the failed proposed amendment, that advocates of separation shifted their views regarding separation of church and state changed to one of constitutional interpretation.[34]

The Supreme Court has continuously used the Establishment Clause to justify its decisions in numerous cases. [35] In *Everson v. Board of Education*, the Supreme Court, in defending the idea that the First Amendment of the Constitution warrants separation of church and state, quoted Thomas Jefferson's proclamation of the necessary "wall" between the two.[36] More recently Justices have moved away from that reliance, but the concept still remains an ideal that most Americans continue to believe is provided by the Constitution.[37]

History has continuously demonstrated a need for a separation between church and state. Courts have continued to deem laws unconstitutional when their creation was

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[30] *Id.* at 285.
[31] *Id.*
[32] *Id.* at 287.
[33] *Id.* at 292.
[34] *Id.* at 285, 335.
[35] Marci A. Hamilton, *"Separation": From Epithet to Constitutional Norm*, 88 VA. L. REV. 1433 (2002).
[36] Philip Hamburger, *Separation and Interpretation*, 18 J.L. & POL. 7 (2002).
[37] *Id.*

founded upon a moral belief and served no legitimate purpose other than discrimination. Laws surrounding homosexuality are a the perfect example of why Jefferson believed there needed to be a "wall of separation." While the Supreme Court has noted the inappropriateness of the intent behind federal laws such as DOMA, the Court chose to find these purposes unsuitable in that they did not provide homosexuals with equal protection under the Constitution. Again, while this reasoning is completely fitting, the Supreme Court's opinion, briefly addressed, but failed to truly acknowledge a larger, much broader issue...the inability to separate church and state.

The Slow Progression of Gay Rights

The United States, although one of the more progressive countries when it comes to gay rights, was not always as open-minded. In 2013, the term "gay rights movement" automatically brings to mind the debate of same-sex marriages. However, this movement began long before that was even an issue. While the history of this movement dates back past the 1610 creation of the Virginia Sodomy Law, that is more history than is necessary for the purpose of this paper.[38]

In the United States Illinois was the first state to make serious strives in the movement for gay rights. The United States' earliest gay rights organization was founded in Illinois; the Society for Human Rights was founded in 1924.[39] The 1950's marked are era known as the homophile movement.[40] In an effort to further gay rights, activists started three prominent organizations: Mattachine Society, ONE and Daughters

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[38] WALTER L. WILLIAMS & YOLANDA RETTER, GAY AND LESBIAN RIGHTS IN THE UNITED STATES: A DOCUMENTARY HISTORY, 23 (2003).

[39] William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1082 (1997).

[40] WALTER L. WILLIAMS & YOLANDA RETTER , *supra* Note 38, at 68.

of Bilitis.[41] These groups, although initially small in numbers, fueled the movement.[42] The 1960's furthered this movement with events like, the ONE calling for "A Homosexual Bill of Rights," the first openly gay individual to run for public office and heterosexuals becoming more open about sexuality as a result of medical advances.[43] A major influence on this movement was also the ongoing struggle of African Americans seeking equality.[44] The civil rights movement provided inspiration to those oppressed based on their sexuality.[45] Illinois, again being at the forefront of the movement, adopted the American Law Institute Model Penal Code in 1961, becoming the first state to decriminalize homosexual acts.[46]

In 1969, a historical event known as the Stonewall riots occurred. During this time the police were constantly subjected the Stonewall Inn, a gay bar in New York City, to raids and harassment.[47] On June 27, 1969 patron of the bar decided to fight back.[48] Scholars differ as to the importance of the Stonewall Riots on the gay rights movement.[49] As more and more people felt comfortable admitting and standing up for their sexuality the movement continued to make strides. In 1973, Dr. Howard Brown became the first

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[41] *Id.*
[42] *Id.* at 69.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813, 819 (2001).
[47] G.M. Filisko, *The Stonewall Legacy ABA Commission Creates an Award Commemorating A Key Moment for LGBT Rights*, 99 ABA J., Feb. 2013, at 57.
[48] *Id.*
[49] The Editors, *Introduction: Stonewall at 25*, 29 HARV. C.R.-C.L. L. REV. 277, 280 (1994)(arguing that "if Stonewall has any political meaning, it is to be found in the radical *change* in political orientation it sparked in a gay and lesbian movement that was already two decades old."); Elvia R. Arriola, *Faeries, Marimachas, Queens, and Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots*, 5 COLUM. J. GENDER & L. 33, 68 (1995)(arguing that "as an act of defiance and direct confrontation with the state, the story of the Riots is one of the most important stories in gay history.").

prominent physician to admit to being gay.[50] Homosexuality was, and still is by some, perceived to be an illness. When Dr. Brown, the former chief health officer for New York City, came out he accredited his decision to the demonstrated bravery of the members of the Gay Activists Alliance.[51] 1973 was an important year in the movement because on December 15th the American Psychiatric Association removed homosexuality from the official list of physiatrist disorders.[52] Closing out this progressive decade was Harvey Milk (an openly gay man) making a successful run for political office.[53] More than a quarter of a million people attended Milk's speech at the Gay Freedom Day Parade, the largest gay rights march at the time.[54]

The movement towards equality for homosexuals continued to pick up steam in the 1980's. Wisconsin taking things a step further from decriminalizing homosexual acts, became the first state to outlaw discrimination based on sexual orientation in 1982.[55] Two years later the first municipality, Berkeley, California, offered domestic partnerships benefits.[56] The most notable event of the 1980's was the decision in *Bowers v. Hardwick*, which was overturned in *Lawrence v. Texas*.[57] In *Hardwick,* the issue before the court was whether the act of consensual homosexual sodomy is protected under the

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[50] WALTER L. WILLIAMS & YOLANDA RETTER , *supra* Note 38, at 128.

[51] *Id.* at 129.

[52] Donald H.J. Hermann, *Legal Incorporation and Cinematic Reflections of Psychological Conceptions of Homosexuality*, 70 UMKC L. REV. 495, 537 (2002)("On December 15, 1973, the Nomenclature Committee for the APA voted to eliminate the classification of homosexuality as a mental disorder from DSM-II.").

[53] Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 TULSA L. REV. 95, 124 (2003)("Harvey Milk became that person, winning a seat on the San Francisco Board of Supervisors in 1977.").

[54] WALTER L. WILLIAMS & YOLANDA RETTER, *supra* Note 38, at 149.

[55] William B. Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN'S L.J. 91 (2007).

[56] Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAM. CT. REV. 181, 185 (2012).

[57] Bowers v. Hardwick, 478 U.S. 186 (1986) *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

fundamental right to privacy.[58] The United States Supreme Court upheld the constitutionality of criminalizing oral and anal sex as it relates to consenting homosexual adults, in the privacy of their own home.[59] Scholars have written countless articles analyzing the historical changes in United States sodomy laws, particularly the decision of *Bowers v. Hardwick* and *Lawrence v. Texas*.[60]

While *Hardwick* did not eliminate sodomy laws, it did allow states to repeal their own sodomy laws.[61] In 1992, the Supreme Court of Kentucky found no legislative purpose for the state's sodomy law other than to discriminate against a class of people.[62] The court stated that just because a majority of people finds a certain type of sexual intercourse more offensive does not provide a rational basis for the law.[63] The decision in *Kentucky v. Watson* was important because it declared homosexuals to be a class deserving of equal protection.[64] Very few states continued to keep sodomy laws on the books after this.[65]

The 1990's consisted of two major cases and the enactment of a federal law. In 1993, *Baehr v. Lewin*, a Hawaii Supreme Court case prompted the creation of the

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[58] *Id.* at 190 ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.").

[59] *Id.* at 186 (holding that "the Supreme Court, Justice White, held that Georgia's sodomy statute did not violate the fundamental rights of homosexuals.).

[60] *See generally*, Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Mitchell Lloyd Pearl, *Chipping Away at Bowers v. Hardwick: Making the Best of an Unfortunate Decision*, 63 N.Y.U. L. REV. 154 (1988); Kirstin Andreasen (Spring 2004), *Lawrence v. Texas: One Small Step for Gay Rights; One Giant Leap for Liberty*, 14 J. CONTEMP. LEGAL ISSUES 73 (2004); *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283 (1998); Paula A. Brantner, *Removing Bricks from A Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495 (1992).

[61] WALTER L. WILLIAMS & YOLANDA RETTER, *supra* Note 38, at 206.

[62] *Id.* at 207.

[63] *Id.*

[64] *Id.* at 206.

[65] *Id.*

Defense of Marriage Act in 1996.[66] Also in 1996, the Supreme Court decided another landmark case, *Romer v. Evans.*[67] These three events will be discussed in detail, as they are a main focus of this Article.

In 2000, Vermont became the first state to legally recognize civil unions.[68] It is hard to believe that the first time a civil union was legally recognized was a mere thirteen years ago. Then in 2003, the Supreme Court held in *Lawrence v. Texas*, that state statutes criminalizing private sexual conduct between consenting adults unconstitutional.[69] Throughout the decade, numerous states followed Vermont's lead in recognizing civil unions; in 2004 Massachusetts became the first state to legalize same-sex marriages.[70] The Massachusetts Supreme Court separating itself from other states by legalizing same sex marriages, rather than civil unions, indicated that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[71] Many states followed Vermont and Massachusetts's lead and allowed same-sex marriages and civil unions. Most recently, Hawaii became the sixteenth state to allow gay marriage.[72]

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[66] Andrea L. Claus, *The Sex Less Scrutinized: The Case for Suspect Classification for Sexual Orientation*, 5 PHOENIX L. REV. 151, 165-66 (2011)("In Baehr v. Lewin, the Hawaii Supreme Court indicated that Hawaii's Constitution might permit same-sex couples to marry. The federal response to this small gain in gay rights was DOMA, which was signed into law in 1996.").

[67] Romer v. Evans, 517 U.S. 620 (1996).

[68] Greg Johnson, *Civil Union, A Reappraisal*, 30 VT. L. REV. 891 (2006).

[69] Lawrence v. Texas, 539 U.S. 558 (2003)(holding that "Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in consensual act of sodomy in privacy of home.").

[70] Greg Johnson, *supra* Note 68, at 892.

[71] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969-970 (2003).

[72] Alan Duke, *Hawaii to become 16th state to legalize same-sex marriage,* CNN (Nov. 13, 2013), http://www.cnn.com/2013/11/12/us/hawaii-same-sex-marriage/. (explaining that "In addition to Hawaii and Illinois, same-sex marriage is legal in 14 states -- California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont and Washington -- as well as the District of Columbia. Colorado and Hawaii allow civil unions.").

Until recently, *Hardwick* and *Lawrence* could be considered the most important Supreme Court cases to address gay rights. *Romer v. Evans* (holding Colorado's state constitutional amendment prohibiting the protection of homosexuals from discrimination violated the equal protection clause) paved the way for *United States v. Winsor* (holding DOMA unconstitutional).

Is Sexual Orientation a Class Worthy of the Strict Scrutiny Standard?

On November 3, 1993, 53.4% of Colorado voters opted to amend the Colorado State Constitution.[73] The adopted Amendment, Amendment 2, precluded the government from enacting measures to protect homosexuals from discrimination.[74] Soon after the adoption of Amendment 2, litigation commenced in the District Court for the City and County of Denver.[75] Plaintiffs alleged that Amendment 2 would subject them to substantial risk of discrimination.[76] The District Court entered permanent injunction enjoining enforcement of amendment and the Colorado Supreme Court affirmed the decision.[77] The Supreme Court of the United States granted certiorari.[78]

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[73] Jason D. Kimpel, *"Distinctions Without A Difference:" How the Sixth Circuit Misread* Romer v. Evans, 74 IND. L.J. 991, 993 (1999).

[74] Romer v. Evans, 517 U.S. at 624 (The amendment reads: "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.").

[75] *Id.* at 623.

[76] *Id.*

[77] *Id.* at 635-36.

[78] *Id.*

Romer v. Evans was the first time the Supreme Court of the United States addressed discrimination based on sexual orientation under the Equal Protection Clause.[79] The State defended Amendment 2 by stating that it put homosexuals in the same position as all other individuals.[80] The Supreme Court held that Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment "because: (1) 'A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense,' and (2) the Amendment did not bear a rational relationship to a legitimate state interest."[81] Amendment 2 violated the Equal Protection Clause because its purpose was to classify homosexuals in order to make them unequal, not to further an appropriate legislative purpose.[82]

Romer was a landmark case for gay rights but only to the extent that it was the first time the court appeared to be sensitive to homosexual constitutional claims; *Romer* did not make homosexuals a suspect class nor did it provide them with any additional rights.[83] Additionally, *Romer* failed to specify the level of scrutiny for classifications based on sexual orientation.[84] Historically, few classifications, such as gender and race, have warranted a heightened scrutiny standard.[85] The test utilized in *Bowen v. Gilliard*, permits heightened scrutiny "when a person (1) has suffered a history of discrimination;

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[79] Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2779 (2005)

[80] Romer v. Evans, 517 U.S. at 626.

[81] William M. Wilson, III, Romer v. Evans: *"Terminal Silliness, "Or Enlighted Jurisprudence?*, 75 N.C. L. REV. 1891, 1892 (1997).

[82] Romer v. Evans, 517 U.S. at 635-36.

[83] Andrea M. Kimball, Romer v. Evans *and Colorado's Amendment 2: The Gay Movement's Symbolic Victory in the Battle for Civil Rights*, 28 U. TOL. L. REV. 219, 236 (1996).

[84] William M. Wilson, III, *supra* Note 81, at 1924.

[85] Jeremy B. Smith, *supra* Note 79, at 2770.

(2) exhibits obvious, immutable or distinguishing characteristics that define him as a member of a discrete group; and (3) shows that the group is politically powerless or a minority, or the statutory classification at issue burdens a fundamental right."[86] Sexual orientation traditionally has not been considered a subject class warranting a heightened scrutiny standard and has rather been subject to a rational basis standard.[87]

Commentators have acknowledged that in *Romer* the court did not use the standard rational basis test, but rather used some sort of heightened rational basis test.[88] The *Romer* decision added to the confusion as to the classification of sexual orientation under the Equal Protection Clause.[89] Although sexual orientation was not explicitly found to be a class worthy of the strict scrutiny standard, *Romer* was a step in the right direction.

Hawaii Supreme Court Sparks Federal Concern

The unclear decision of *Romer* opened the door for the Hawaii Supreme Court. In 1993, the Supreme Court of Hawaii held that although the Hawaii Constitution does not provide same sex couples a fundamental right to marry, the statute restricting marriage to a male-female couple is a sex-based classification and is therefore subject to "strict scrutiny" when challenged under the Fourteenth Amendment.[90] The part of the opinion in *Baehr* dedicated to whether or not same-sex couples have a fundamental right to marry is not pertinent to this article.[91] For the purposes of this Article the importance of the

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[86] *Id.* at 2774.
[87] *Id.*
[88] Jason D. Kimpel, *supra* Note 73, at 1012-13.
[89] Jeremy B. Smith, *supra* Note 79, at 2774.
[90] Baehr v. Lewin, 74 Haw. at 530 (1993).
[91] *Id.* at 550-57.

Baehr case was the Court's opinion that strict scrutiny was the applicable test for sex-based classification.

The Court took a statutory approach in analyzing the Article and looked to the plain language of the Hawaii Constitution.[92] Article I, section 5 of the Hawaii Constitution provides 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."[93] In looking to the plain language the Court found the Hawaii Constitution to prohibit discrimination on the basis of sex.[94]

The Court made a comparison to other cases in which equal protection was violated on the base of discrimination. The court looked to *Loving*, a United States Supreme Court case, to justify it's holding.[95] Loving was convicted of violating Virginia's miscegenation laws (banning interracial marriages).[96] The Supreme Court struck down these laws on equal protection grounds stating, "The Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination."[97] Restricting the ability to marry on racial classifications is in direct contrast with the Equal Protection Clause.[98] Restricting rights on account of race when there is no legitimate purpose other than discrimination is

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[92] *Id.* at 563-64.
[93] *Id.* at 562.
[94] *Id.*
[95] *Id.* at 567.
[96] *Id.*
[97] *Id.* at 568.
[98] *Id.* at 569.

a clear violation.[99] In making this comparison, the Court found that restricting ability to marry based on sexual orientation is an inappropriate and illegitimate discrimination.[100] The Court dismissed the idea that the marriage license was denied not because of sex but rather because of the nature of marriage.[101]

Although the Supreme Court of Hawaii did not declare the statute unconstitutional, the implications of attempting to force the district court to apply strict scrutiny makes this case a landmark that will go along side those like *Lawrence*. On remand, the state's burden of demonstrating a compelling state interest and demonstrating that the statute is so narrowly drawn as to avoid infringing on constitutional rights will be an extremely different burden to overcome.[102] Being the first case to require courts to apply a strict scrutiny standard when looking at the denial of a marriage license to a same-sex couple was an immense victory for gay rights.[103]

The Defense of Marriage Act

As a reaction to the Hawaii Supreme Court's decision in *Baehr*, On September 21, 1996, President Bill Clinton signed the Defense of Marriage Act ("DOMA").[104] As discussed above, the court in *Baehr*, held that restricting marriage to male-female relationships is a sex-based classification and therefore must be subjected to "strict scrutiny" when it is challenged under equal protection.[105] Under a strict scrutiny test the alleged discrimination would require the state to have the almost impossible burden of

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[99] *Id.*
[100] *Id.*
[101] *Id.* at 571.
[102] ROBERT M. BAIRD & STUART E. ROSENBAUM, SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE, 228 (1997).
[103] *Id.*
[104] Marisa Nelson, *supra* Note 1 at 1148.
[105] Jeremy B. Smith, *supra* Note 79 at 2771.

demonstrating a compelling state interest.[106] The federal government chose to enact DOMA in an effort to avoid requiring a state to meet the strict scrutiny test when an equal protection claim is alleged.[107]

The House of Representatives gave two reasons for the creation of the Defense of Marriage Act.[108] First, the Act was believed "to defend the institution of traditional heterosexual marriage."[109] The second purpose of the Act was to protect States' rights in formulating their own policy as to the legal recognition of same-sex unions, without any implications from the federal government.[110] Section 2 of the Act, titled "Powers Reserved to the States," provided that no State was required to credit another state's issuance of a marriage license if it was related to a same sex relationship.[111] Section 3 of the Act, for purposes of federal law, defines the words "marriage" and "spouse" to reiterate that they refer only to heterosexual couples.[112]

The Committee indicated that it was both appropriate and necessary for Congress to protect the foundation of traditional heterosexual marriage.[113] It was argued that society has an interest in protecting this institution because of its interest in encouraging

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[106] Andrew Koppelman, *supra* Note 3 at 933.

[107] 1 U.S.C.A. § 7 ("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."); 28 U.S.C.A. § 1738C ("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.").

[108] H.R. REP. 104-664, 2, 1996 U.S.C.C.A.N. 2905, 2906.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] H.R. REP. 104-664, 12, 1996 U.S.C.C.A.N. 2905, 2916.

procreation.[114] The Committee used "an interest in children" to inappropriately justify an unconstitutional act.[115] The ability of a person to procreate has never been a prerequisite to marry in any state.[116] "The sterile and the elderly" have never been deprived of the right to marry.[117] In opposition of DOMA Mr. Abercrombie stated, "The title of the bill is puzzling. What are we defending marriage against: divorce, domestic violence, adultery? Can anyone name a single married couple whose union would be strengthened or defended against harm by this legislation?"[118] The Committee dismisses the arguments that not all married people can or intend to procreate, and that there are greater threats to the institution of marriage than those presented by same-sex marriage, namely divorce, without providing any credible justification.[119]

Congress' Use of Religion and Morality to Debate DOMA

In an effort to better understand the reasoning behind the passage of DOMA, I looked to Congressional Reports. To say that what I found was shocking and appalling would be a severe understatement. While there was substantial debate on things such as the economic effects of DOMA and whether or not the right to define marriage should fall within the purview of the States, the amount of statements made by members of the House of Representatives and the Senate that were based on a religious/moral belief was

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[114] H.R. REP. 104-664, 13, 1996 U.S.C.C.A.N. 2905, 2917.
[115] *Id.*
[116] Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 389 (D. Mass. 2010) *aff'd sub nom. Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012)("Moreover, an interest in encouraging responsible procreation plainly cannot provide a rational basis upon which to exclude same-sex marriages from federal recognition because, as Justice Scalia pointed out in his dissent to *Lawrence v. Texas,* the ability to procreate is not now, nor has it ever been, a precondition to marriage in any state in the country.").
[117] *Id.*
[118] 142 Cong. Rec. H7441-03, 1996 WL 388606.
[119] H.R. REP. 104-664, 12, 1996 U.S.C.C.A.N. 2905, 2917.

astonishing.

The House of Representatives Proceedings and Debates of the 104th Congress, Second Session, took place on Thursday, July 11, 1996. Mr. Coburn from Oklahoma, in support of DOMA, stated "I come from a district in Oklahoma who has very profound beliefs that homosexuality is wrong...they base that belief on what they believe God says about homosexuality...what they believe is, is that homosexuality is immoral, that it is based on perversion, that it is based on lust."[120] While the purpose of a representative is to speak on behalf of their constituents, should those constituents' beliefs about what God says regarding homosexuality be relevant to the discussion?

Mr. Buyer, the U.S. Representative from Indiana, justified his support of DOMA on this country being "a society based upon very strong Biblical principles."[121] Jefferson and Madison were most likely rolling over in their graves during this debate. "To lead a Nation at moments of chaos through the storm, you rely on God-given principles for that...we as legislators and leaders for the country are in the midst of a chaos, an attack upon God's principles. God laid down that one man and one woman is a legal union."[122] Id. Allowing same-sex marriage constitutes "chaos"? I think a more appropriate use for the word "chaos" would be in discussing the United States budget crisis that took place that same year, or the three terrorist incidents that took place on United States soil in 1996, or the fact that the high school drop out rate at the time was approximately half a million students ages fifteen through twenty-four.[123] Maybe the "storm" Congress should

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[120] 142 Cong. Rec. H7441-03, 1996 WL 388606

[121] 142 Cong. Rec. H7480-05, 1996 WL 392787.

[122] *Id.*

[123] *See generally*, Michael Wines, *BATTLE OVER THE BUDGET: THE OVERVIEW;HOUSE LAWMAKERS REJECT DOLE PLAN TO REOPEN OFFICES* (Jan. 4, 1996), http://www.nytimes.com/1996/01/04/us/battle-over-budget-overview-house-lawmakers-reject-dole-plan-

have been focusing on is issues that actually have a negative effect on this nation.

Mr. Barr of Georgia, also in support of DOMA stated, "The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit."[124] I am not sure where Mr. Barr's convoluted thoughts are founded, but there is no doubt that he is mistaken as to what is destroying the so-called "family unit." In 1996, there were 2,344,000 marriages.[125] Can you guess how many divorces were filed in 1996? 1,150,000.[126] That means that for approximately ever two marriages there was one divorce in the United States. I wonder if Mr. Barr was aware that 66,800 marriages occurred in Georgia in 1990 and in that same year Georgia saw 35,700 divorces, a higher percentage than the country as a whole.[127] Same-sex marriages would ruin the supposedly sacred family unit? Unfortunately, "self-centered morality" and "the flames of narcissism" were present in the family unit long before the idea of same-sex marriage.

DOMA was also debated in the Senate Proceedings and Debates of the 104th Congress, Second Session, on Tuesday, September 10, 1996. Mr. Byrd, the Senator for West Virginia, chose to quote the bible in supporting DOMA.[128] As discussed earlier, the First Amendment clearly prohibits the government from establishing a religion. So while referencing "God" is inappropriate in Congress, referencing a specific religion's

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reopen-offices.html; *Terrorism in the United States 1996*, FBI (Apr. 24, 1996), http://www.fbi.gov/stats-services/publications/terror_96.pdf; *Dropout Rates in the United States, 1996*, (Dec. 1997) National Center for Educational Statistics, http://nces.ed.gov/pubs98/dropout/98250-07.asp.

[124] 142 Cong. Rec. H7480-05, 1996 WL 392787

[125] *Section 2: Births, Deaths, Marriages and Divorces, Statistical Abstract of the United States 2012*, U.S. Census Bureau, http://www.census.gov/prod/2011pubs/12statab/vitstat.pdf.

[126] *Id.*

[127] *Id.*

[128] 142 Cong. Rec. S10100-02, 1996 WL 511108.

text is in direct conflict with the First Amendment. In quoting the first chapter of Genesis, 27th and 28th verses, stated "So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, be fruitful, and multiply, and replenish the earth . . ."[129]

Many justified DOMA on the basis that marriage and procreation go hand-in-hand. However, the recent increase in age expectancy has resulted in an increase in remarriage among the elderly.[130] Between 1990 and 1994, the population of the elderly increased by eleven, while the population as a whole has increased by only a factor of three.[131] The United States Census Bureau has indicated that in the next century the number of elderly will reach eighty million.[132] With divorce rates and age expectancy both on the rise one can only infer that marriage among the elderly will also continue to rise. After a certain age women are no longer able to conceive a child. Does Mr. Byrd, as well as the other Congressmen that use procreation as a justification for DOMA, believe that we should not issue marriage licenses after a certain age? Of course not, because the real purpose behind DOMA is not procreation, but rather to discriminate based on sexual orientation.

After reading just these few of the many statements in which Congressmen justified their support of DOMA on their constituents' moral beliefs two things should be very apparent. The Unites States government's objectives are misplaced and the government has yet to learn from its mistakes. Mr. Kennedy, the Senator for Massachusetts, said it best, "Marriage is an ancient institution with religious

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[129] *Id.*

[130] Joanna Lyn Grama, *The "New" Newlyweds: Marriage Among the Elderly, Suggestions to the Elder Law Practitioner*, 7 ELDER L.J. 379, 380 (1999).

[131] *Id.*

[132] *Id.*

underpinnings, and I understand that some people have deeply held religious or moral beliefs that lead them to oppose same-sex marriage. But do they seriously believe this bill deserves this high priority?"[133] With all the other issues this nation faces, allowing same-sex marriages to receive federal recognition should not be our government's main focus. Tradition should be upheld by leaving decisions regarding marriage to the States.

The United States government has a bad habit of allowing history to repeat itself. It is baffling how this country can make so many strides in civil rights while at the same time creating new unconstitutional laws that deprive a different class of people the rights afforded them by the Constitution. Mr. Farr, the Representative from California, said it best. "Women could not own property. There could not be marriage between the races. Many things change over time, Mr. Chairman."[134] Inequality based on a classification is a recurring problem in the United States. Discrimination based on sex, race and sexual orientation has no place in this country. As Mr. Farr correctly pointed out, discriminating based on sexual orientation "is going to change.... It may not be this year and it certainly will not be this Congress, but it will happen. As I said earlier, we can embrace that change and welcome it, or we can resist it, but there is nothing on God's Earth that we can do to stop it."[135] Id. Mr. Farr's statement is the perfect segue into the next discussion of this paper; the events that led to the demise of DOMA.

United States v. Windsor Declares DOMA Unconstitutional

DOMA was found to be unconstitutional by the Supreme Court of the United

[133] 142 Cong. Rec. S10100-02, 1996 WL 511108
[134] 142 Cong. Rec. H7441-03, 1996 WL 388606
[135] *Id.*

States in *United States v. Windsor*, which was oddly enough a tax case.[136] Two women, who were married lawfully in Canada, were residing in New York when one of the women passed away.[137] Thea Spyer, the deceased spouse, left her estate to her spouse, Edith Windsor.[138] Windsor, the surviving spouse, was denied the estate tax exemption that exists for surviving spouses because according to DOMA she was not a "spouse."[139] After paying the taxes, Windsor filed suit requesting a refund and questioning the constitutionality of the DOMA provision, contending that it violated the equal protection guaranteed through the Fifth Amendment.[140] The United States District Court and the Court of Appeals found the provision unconstitutional and the Supreme Court granted certiorari.[141]

While the suit was pending, the Attorney General made it known to the Speaker of the House of Representatives that the Department of Justice would not continue to defend the constitutionality of Section 3 of the Act.[142] The Attorney General justified this decision with the President's conclusion that strict scrutiny should be applied when evaluating classifications based on sexual orientation.[143] Even though the Department of Justice would not be defending Section 3, the Executive Branch will still enforce the Section because there was still an interest in allowing Congress to participate in litigating those cases.[144] The Bipartisan Legal Advisory Group ("BLAG") of the House of

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[136] United States v. Windsor, 133 S. Ct. at 2675.
[137] *Id.* at 2682.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.* at 2679.
[143] *Id.* at 2684.
[144] *Id.*

Representatives intervened in the suit as an interested party.[145] While the Supreme Court also discussed the issue of standing that will not be addressed for purposes of this article.[146] Therefore we look to the Court's rationale on deciding whether or not DOMA is unconstitutional.

The regulation of marriage, historically, has been a matter that was reserved to the States.[147] DOMA departs from this tradition of allowing States to define marriage. The deviation from this tradition was an effort to deprive those individuals in same-sex relationship of the benefits that exist in a federally recognized marriage.[148] The effects of DOMA are those of class disapproval, imposition of a disadvantage and creation of a separate status.[149] The Act was not created for a legitimate purpose, such as governmental efficiency, but rather strictly to impose inequality on a class of people.[150] "The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law."[151] This purpose undoubtedly raises an equal protection issue under the Fifth Amendment.[152]

In allowing same-sex marriages, New York sought to eradicate inequality.[153] New York's intentions are frustrated by DOMA because DOMA relates to no specific

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[145] *Id.*
[146] *Id.* at 2684-89.
[147] *Id.* at 2675.
[148] *Id.* at 2693.
[149] *Id.*
[150] *Id.* at 2694.
[151] *Id.* at 2693-2694.
[152] *Id.*
[153] *Id.* at 2694.

area of federal law but rather "writes inequality into the entire United States Code."[154] Although this particular case is one of tax law, there are over one thousand statutes and regulations that DOMA controls.[155] DOMA's enactment was meant to focus on a same-sex couple's ability to be legally married under federal law, but the unique control DOMA has over such a wide variety of federal laws affects much greater than a same-sex couple's ability to be recognized as married. The rights afforded to married couples in all different areas of the law has allowed DOMA to take away a same-sex couple's equality in a way that does not justify the purpose of the Act.

For example, federal law makes it a crime to "'assault, kidnap, or murder...a member of the immediate family' of 'a United States official, a United States judge, or a Federal law enforcement officer,' 18 U.S.C. § 115(a)(1)(A), with the intent to influence or retaliate against that official, § 115(a)(1)."[156] A spouse is an immediate family member of an officer.[157] According to DOMA, same-sex couples are not afforded this protection in the federal penal code.[158] The alleged purposes of the Act, defending the institution of marriage is insufficient when you look at all the inequality that comes along with attempting to achieve that goal.

The Supreme Court indicated that DOMA tells the world that a same-sex marriage is a "second-tier marriage" "unworthy of federal recognition."[159] Not only does the Act contradict the Court's decision in *Lawrence*, in which the Supreme Court found that an individual's sexual and moral decisions are protected by the Constitution, but it

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[154] *Id.*
[155] *Id.*
[156] *Id.* at 2694-2695.
[157] *Id.*
[158] *Id.*
[159] *Id.* at 2694.

also humiliates children.[160] As discussed above, the Act's alleged purpose was to protect children. By calling these marriages unworthy it does just the opposite. As the Court points out, tens of thousands of children are reared by same-sex couples', the Act makes it difficult for these children to live their lives by questioning the integrity of their parent's life choices.[161]

Not only are the children being raised by same-sex couples being harmed emotionally by DOMA, but also financially.[162] "It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses."[163] The Act also reduces or denies the benefits afforded children with a deceased parent.[164] A student's ability to receive financial aid is calculated by considering a parent's income, but this does not apply to same-sex couples, because according to DOMA they are not "spouses."[165]

After discussing all of the impacts the Act has on a same-sex couple and their children, the Supreme Court found DOMA to be unconstitutional "as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."[166]

Is "Separation of Church and State" Possible When Laws Look to Morality?

While the decision in Winsor was a victory for homosexuals, that was made possible through equal protection. The broader issue to take away from that decision is

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[160] *Id.*
[161] *Id.*
[162] *Id.* at 2694-2695.
[163] *Id. (citing* 26 U.S.C. § 106; Treas. Reg. § 1.106–1, 26 CFR § 1.106–1 (2012); IRS Private Letter Ruling 9850011 (Sept. 10, 1998)).
[164] *Id.* (*citing* Social Security Administration, Social Security Survivors Benefits 5 (2012) (benefits available to a surviving spouse caring for the couple's child), online at http://www.ssa.gov/pubs/EN–05–10084.pdf.).
[165] *Id.* at 2695.
[166] *Id.*

the legislature and the judicial courts inability to separate church and state. Can there truly ever be separation of church and state when laws are constantly predicated on moral beliefs? The United States Constitution was adopted in 1787 with the original text of the preamble reading, "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." The first Amendment was later adopted in 1791, as one the ten amendments that comprised the Bill of Rights. As discussed above, the First Amendment includes the Establishment Clause, in which the government cannot adopt a religion.

The phrase "life, liberty and the pursuit of happiness" dates back even further, 1776, the adoption of the Declaration of Independence. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Constitution, the Bill of Rights, and the Declaration of Independence are such vital documents in dictating how the United States should treat individuals and limits the government so that each individual has the right to "life, liberty, and the pursuit of happiness" without instilling a designated religion and that religion's beliefs.

Through this county's history, countless courts, including the Supreme Court of the United States, have allowed moral ideology to dictate what is and is not constitutional. Now some will argue that laws against things like murder are based on a moral belief that murder is wrong. However, the difference is that Christians, Muslims, Atheists and every other religious group can all agree that murder is morally wrong.

There are no conflicting views by groups as a whole. Additionally, the government has a legitimate reason for making murder illegal, as it is for the betterment of our society. Moral laws prohibiting a couple's intimate conduct within the privacy of their own home and their ability to marry has no real legitimate purpose.

It is dumbfounding that women were not afforded the right to vote in this country until 1920. It seems outrageous that women were afforded that right less than one hundred years ago. What is even more outrageous is that "separate but equal" was not overturned until 1954. It is unfathomable how an entire country could follow laws that were so blatantly unconstitutional for so long. So how is it possible that after seeing the error of their ways, in 1986, the Supreme Court of the United States still managed to find constitutionality in making consensual homosexual sex in the privacy of one's home a criminal act?

In *Hardwick* Chief Justice Burger's concurring opinion stated, "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[167] Chief Justice Burger's statement is in direct conflict with the Supreme Court's previous use of Thomas Jefferson's notion of separating church and state. By denying individuals the right to happiness, whatever sexual orientation that may be, within their own home with a justification dependent on "moral teachings" the Supreme Court is ignoring the First Amendment. Although not adopting a specific religion, justifying judicial decisions about homosexuality on the basis of morality (which can be found in countless established religions) is in essence establishing a set of religious beliefs.

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[167] Bowers v. Hardwick, 478 U.S. 186, 197 (1986) *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

As a nation we should be ashamed that everyone reading this Article was alive when the decision in *Hardwick* was rightfully overturned. In overturning *Hardwick*, Justice Kennedy interpreted the First Amendment correctly when he wrote; "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."

Sodomy laws are only one example of this country's inability to separate church and state. This year, 2013, the Supreme Court finally found DOMA's provisions denying same-sex marriages federal recognition. Overturning one injustice after another and yet we still cannot manage to separate our religious beliefs from the law. As Mr. Mcdermott so clearly put it, "Marriage is about two people coming together to love and support each other. Why should Congress interfere in this very personal decision? It was less than 30 years ago that our courts ruled it unconstitutional for the States to ban marriage between persons of different ethnic backgrounds. Have we learned so little in the last 30 years?"[168]

Conclusion

There is no way to eradicate morality from government. Morality will always play a role in the creation of laws. But with that moral duty comes the obligation to give each and every person equal protection under the law. Yes, the bible may say negative things about homosexuality, but it also has much to say on divorce and remarrying. Would it be appropriate to create a federal law banning divorce or the ability to remarry? As a society we are free to make our own choices and the moral implications, if any, are strictly our own burden. When laws are created for no legitimate purpose other than to discriminate against a class of people because some find that group's personal choices

[168] 142 Cong. Rec. H7441-03, 1996 WL 388606

immoral, those laws will be overturned. If history has taught us anything it is that although it may not completely be possible, some form of separation between church and state is necessary.