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Independent Study
Dr. Smaw

“The Right of Marriage for Homosexuals”¹

By Jennifer Finkel

¹ Thank you to Dr. Eric Smaw for his assistance in developing this paper.

I. Introduction

Same-sex marriage is a hotly contentious legal issue, and, unlike any other time before, the stakes concerning homosexual marriage are high. On a prima facie level, it's clear that homosexuals have had their rights and liberties pre-empted. In other words, to deny citizens of the United States, i.e. gay Americans, the right to marry goes against the very principles of liberty and equality upon which the United States was founded. Marriage, we will admit, is a fundamental human right. Even more, we will concur that marriage is an expression of liberty. Yet, we straightforwardly deny these rights to gay people simply because of their sexual orientation. How is it that we, a presumably educated, rational, and concerned citizenry, still act in such a discriminatory way? This paper examines the facts and legal history of gay rights. Here, I offer legal and moral arguments that show there is *de jure* and *de facto* discrimination with respect to gay people. These arguments will show that the only way to correct these problems is to give gay people full fledged rights, once and for all.

II. Bowers v Hardwick

In 1986, in the case of *Bowers v Hardwick*, the US Supreme Court ruled that the Georgia statute (478 U.S. 186) criminalizing consensual sodomy was, in fact, constitutional. As it was, Hardwick received a summons, and was issued a court date, for throwing a beer bottle in a trash-can outside of a gay club. The arresting officer who wrote the ticket issued Hardwick the wrong date, causing him to miss his court appearance. As a result, an arrest warrant was issued for Hardwick. Hardwick then realized that Officer Torick had been to his home to serve the warrant so he immediately paid the ticket. A few weeks afterwards, Torick returned to Hardwick's apartment with a recalled arrest warrant. He was let in by a friend of Hardwick's, and, when Torick entered the bedroom, he found Hardwick and another man engaged in consensual oral sex. Torick arrested Hardwick for sodomy under the Georgia statute. Hardwick decided to sue Bowers, the attorney general of Georgia, claiming the Georgia statute was unconstitutional.

The issue before the Court was whether “the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”² The Georgia Supreme Court upheld the sodomy statute on five grounds. First, the Court reasoned that homosexual sodomy was unconstitutional because there is no fundamental right to engage in homosexual sex. The Court wrote: “none of the fundamental rights announced in this Court’s prior cases involving family relationships, marriage, or procreation bear any resemblance to the right asserted in this case.”³ This, of course, made the issue of homosexual sodomy about family rights, procreation, and marriage, which is quite distinguishable from sodomy. For example, according to the Georgia statute, sodomy is anal or oral intercourse. Family rights, marriage, and procreation, however, primarily concern procreation, childrearing, and custody. These things are obviously different from sodomy. In this way, the Court narrowly tailored the issue of homosexual sex to familial relationships.

Secondly, the Court ruled that Hardwick’s suit was facetious since many states had laws criminalizing sodomy⁴ Here, the Court appealed to history to make its case. For example, the Court wrote: “against a background in which many States have criminalized sodomy and still do, to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is at best, facetious.”⁵

Third, the Court articulated the new rights objection against Hardwick. In other words, the Court ruled that it does not have the power to create a new right, i.e. the right of sodomy for homosexuals. This language suggests that the Court had no interest in reading the Due Process Clause in the Fourteenth Amendment, in a broad way. Even more, the Court said that it would be illegitimate for them to “deal with judge-made constitutional law having little or no recognizable roots in the

² Bowers v Hardwick, 1

³ IBID

⁴ IBID

⁵ IBID

language of the Constitution.”⁶ In this way, the Court established that “there should be great resistance to expand the reach of the Due Process Clauses to cover new fundamental rights; otherwise, the Judiciary necessarily would take upon itself further authority.”⁷

Fourth, the Court’s decision was, in part, grounded on the idea that the state can regulate homosexual activity in the private realm. For example, the Court argued that “homosexual conduct in the privacy of the home does not affect the result.”⁸ In order to show this, the Court found that homosexual activity is neither private nor intimate, and therefore, it is not beyond the reach of state regulation, even under the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. This, of course, makes a statement about the difference between homosexual sex and heterosexual sex: homosexual sex is not protected by privacy and heterosexual sex is protected by privacy.

Lastly, the Court claimed that “sodomy laws should not be invalidated on the asserted basis that majority believe that sodomy is immoral.”⁹ This reasoning was based on the assertion that whatever the majority believes is irrelevant to the validation of laws. Even if the majority believes sodomy laws are immoral, based on the principles of liberty and equality, the Court should not rule according to moral majority. This was the only victory for Hardwick in *Bowers*.

It is worth noting that while the Court did not say straightforwardly that it relied on a Christian morality, it stipulated that Christianity was in the background for its decision. The Court’s ruling was, in part, based on the origin of sodomy, which has biblical origins. This is confirmed by Justice Burger’s concurring opinion. He appeals to *starre decisis*, in order to argue that sodomy has been condemned firmly in “Judeo-Christian moral and ethical standards.”¹⁰ The problem, here, however, is that this is an appeal to a Judeo-Christian religious interpretation of sodomy and the government is

⁶ *Bowers v Hardwick*, 5

⁷ *Bowers v Hardwick*, 2

⁸ IBID

⁹ IBID

¹⁰ *Bowers v Hardwick*, 9

supposed to separate these spheres.¹¹ Buurger also makes the claim that homosexuality is against human nature, unnatural, and a heinous act that is deeply offensive. But this appeals to the majority opinion regarding homosexuality, which the Court previously rejected.

III. *Lawrence v Texas*

In the 2003 case of *Lawrence v Texas*, the Court decided it was necessary to reconsider the *Bowers* case. As it was, John Lawrence and Tryon Garner were found having consensual anal sex in the private home of Lawrence. Officer Joseph Quinn responded to a weapons call. He entered the apartment of Lawrence where he found Lawrence and Garner engaged in sexual intercourse. They were subsequently arrested under the Texas Penal Homosexual Conduct Statute: 21.06a.

The Court looked at three issues: whether the Texas law was unconstitutional under the Equal Protection Clause; whether Lawrence's conviction was a violation of liberty and privacy under the Due Process Clause; and, whether the *Bowers* ruling should be overruled. The Court ruled that the law was a violation of the Fourteenth Amendment and that *Bowers* absolutely needed to be overturned. As Justice O'Connor said in her concurring opinion, "the Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction."¹² O'Connor also made it clear that "moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause."¹³ *Lawrence v Texas* was a landmark decision that recognized that homosexual sodomy laws are unconstitutional under the Fourteenth Amendment.

What was good about *Lawrence* was that the Court decided to focus on a couple of things that the previous Court ignored in *Bowers*. For example, the privacy of the home was a primary issue. The Court argued that "the liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still

¹¹ US Constitution

¹² *Lawrence v Texas*, 17

¹³ *Lawrence v Texas*, 18

retain their dignity as free persons.”¹⁴ The Court ruled that the Texas statute was unconstitutional on the grounds that homosexuals have the right to privacy under the Due Process Clause of the Fourteenth Amendment. *Lawrence* showed that the Court had a new awareness of liberty as expressed in the US Constitution. Unlike *Bowers*, *Lawrence* established that liberty substantially protects autonomous adults in conducting their private lives, especially pertaining to sex and intimate relationships. The *Bowers* Court used rhetoric to make it seem like allowing sodomy was creating a new right, however, they should have been considering if sodomy falls under the right to privacy. *Lawrence* indicated that this was not a new right but a right that had always existed under the right to privacy and more specifically under the Equal Protection Clause of the Fourteenth Amendment.

As a result of the *Lawrence v Texas* ruling, many states repealed their laws against homosexual conduct. And, the few states that still have sodomy laws follow a pattern of non-enforcement. The judges in *Lawrence v Texas* determined that homosexuals have the liberty under the Due Process Clause of the Fourteenth Amendment to have their privacy. Justice Kennedy delivered the opinion of the Court: “liberty protects the person from unwarranted government intrusions into a dwelling or other private places.”¹⁵ The Court examined the validity of the Texas statute, which criminalized people of the same sex engaging in personal intimate sexual conduct. The Court claimed that “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹⁶

IV. The Case for Homosexuals

Perhaps the most important case for the rights of homosexuals came in the Massachusetts Supreme Court decision in 2003 in *Goodridge v Department of Public Health*. Although, it is only a state case, it serves as an exemplar for change regarding gay rights. In Massachusetts, in November of 2003, fourteen plaintiffs filed suit because of their desires to marry their partners. Each of the

¹⁴ *Lawrence v Texas*, 2

¹⁵ *Lawrence v Texas*, 4

¹⁶ IBID

plaintiffs tried to obtain a marriage license from the city or town clerk's office. Unfortunately, all were denied a license. So, they sued the Department of Health, which denied them their right to a civil marriage. The issue before the Court was whether homosexuals have the right to have a civil marriage.

To put it straightforwardly, the Massachusetts Supreme Court ruled that the state could not “deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry.”¹⁷ They argued that the state's constitution “affirms the dignity and equality of all individuals” and “forbids the creation of second-class citizens.”¹⁸ The court noted that moral beliefs are irrelevant in deciding the right for gays to marry. They wrote: “Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral.”¹⁹ Such beliefs, according to the Massachusetts Supreme Court are not important for deciding whether or not gay people should have the right to marry. Rather, our legal “obligation is to define the liberty of all, not to mandate our own moral code.”²⁰ In this way, the Massachusetts constitution is “more protective of individual liberty and equality than the Federal Constitution; [so] it may demand broader protection of fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.”²¹ Therefore, the Massachusetts Supreme Court ruled that they have the capacity to be more tolerant and are better able to protect the rights of individuals, and while this supports their verdict, it is rather ironic.

Nevertheless, the rights of citizens are being violated; and, the Federal government is looking to legitimize it, as this will be seen in DOMA. For example, in Massachusetts, homosexuals were being “barred access to the protections, benefits, and obligations of civil marriage.”²² The Massachusetts Court, however, put a stop to such discrimination. They argued: “a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in

¹⁷ Goodridge v Department of Public Health, 3

¹⁸ IBID

¹⁹ IBID

²⁰ Goodridge v Department of Public Health, 4

²¹ IBID

²² IBID

one of our community's most rewarding and cherished institutions, [and] that exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law."²³

Lastly, the Massachusetts Supreme Court noted that civil marriage is important for both social and economic reasons. Socially, "marriage enhances the 'welfare of the community' ...and anchors an ordered society by encouraging stable relationships."²⁴ In addition, marriage allows for proper care of children and stable, loving families. Economically, marriage bestows a wealth of social and economic benefits to those citizens who wish to enter into such an agreement. It is an esteemed institution that is a "deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family."²⁵ Also, marriage provides people with benefits such as tax breaks. It provides for a sense of economic security and a special way of life to which all citizens should have a right. These benefits are substantial. They undoubtedly affect every aspect of life for a human being. Hence, civil marriage is imperative to the lives of people and the laws should reflect this right. "Without the right to marry—or more properly, the right to choose to marry—one is excluded from the full range of human experience and denied full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship."²⁶ The Massachusetts Supreme Court saw this and found that they must protect individuals from government intrusion by allowing same-sex couples to marry. Marriage is one of the basic civil rights as a human being, and it is imperative that this right be protected and ensured for all individuals. Although the Massachusetts Supreme Court has used the force of reason to be logical and constitutional in allowing same-sex couples to marry, the rest of the United States of America has yet to climb on board.

V. In the Final Analysis

²³ IBID

²⁴ IBID

²⁵ IBID

²⁶ *Goodridge v Department of Public Health*, 9

Generally speaking, homophobia and discrimination against gay people is so widespread because of the sociological conceptual frameworks of America in society. Unfortunately, we have been socialized and trained to believe that certain traits are natural or fundamental. Even more, we think of natural or fundamental character traits as indications of the moral worth of persons. For example, we conceive of men as rational, strong, leaders, and of women as emotional, weak, followers, etc. When men or women act in concert with these conceptions they are considered normal, and, conversely, when men or women break from these conceptions, we consider them abnormal. Our society is grounded on these very foundations. This can be seen in our past. For example, women used to be viewed as the property of their husbands. They didn't have voting rights, body rights, economic rights, etc. Although laws that resulted in *de jure* discrimination have been ruled unconstitutional, there is still *de facto* discrimination. *De facto* discrimination manifests itself in what people do and say, so often, without even realizing that they are enforcing these distinctions between people. Television, books, movies, the media, church, schools, etc. all contribute to how we view homosexuals. Even more, they reinforce oppressive conceptual frameworks. Just as the example above illustrated about the 'natural' traits of women and men, it goes the same for any group: African-Americans, Jews, gay people. For example, as soon as a female demonstrates any kind of 'male quality' she is immediately termed as a 'bitch' or a 'dyke.' When a male displays any kind of these 'female traits,' he is immediately deemed as 'gay.' The conceptual frameworks that we are socialized in, promote *de facto* discrimination. It is not until we break these dichotomies and frameworks down that we can live in a just society. While there are obvious differences between people, as that is what makes us all unique. We are all people! The *Goodridge* decision is imperative because it established the right of homosexuals to marry, albeit on the state level. It seems like the Federal Constitution is best suited to protect the fundamental rights, such as liberty and equality of all citizens of the United States. Ideally, we need either a Constitutional Amendment or a Federal Supreme Court decision like *Goodridge*. If this is done rightly, we can protect the rights of gay people.

Nevertheless, as it is, the US Constitution needs to be enforced. The Ninth Amendment, for example, states that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”²⁷ This vividly and clearly shows that rights should not be denied to citizens. Moreover, since the right to marry is a fundamental right, to leave some individuals out, is unconstitutional. Gay people are left out of the public institution of marriage, which is problematic because it is unconstitutional and discriminatory.

Traditionally, the federal government has not been involved in marriage. The Tenth Amendment gave this power to the states. It reads: “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”²⁸ Nevertheless, the Due Process Clause of the Fourteenth Amendment protects the liberty of all. It reads that no person shall be “deprived of life, liberty, or property, without due process of law.”²⁹ Of course, given *Goodridge*, and Article four of the Constitution, it seems that all states would eventually recognize same sex marriage. But DOMA prevents this.

In 1996, Bill Clinton signed into law the Defense of Marriage Act. First, DOMA defines the words ‘marriage,’ and ‘spouse’ in order to further its own biased purposes. The law defines marriage as “only a legal union between one man and one woman as husband and wife.”³⁰ It defines spouse as “referring only to a person of the opposite sex who is a husband or a wife.”³¹ The definitions are problematic because they are based on a religious connotation of the word marriage. As I mentioned above, there is a difference between a religious marriage and a civil marriage, and, to use these different marriage ceremonies interchangeably, is to equivocate on the word marriage. It’s fine if a private, religious group wishes to not marry homosexuals, if it is in their faith and belief system. A

²⁷ US Constitution

²⁸ IBID

²⁹ IBID

³⁰ DOMA, 3

³¹ IBID

civil marriage, however, is performed by the state, and the state is required to uphold the principles of liberty and equality. DOMA violates the division of church and state, plain and simple.

DOMA secondly undermines the Full Faith and Credit Clause in the US Constitution. DOMA states that “no State shall be required to give effect to a law of any other State with respect to a same-sex ‘marriage.’”³² This law rests on the idea that each state should “decide for itself whether it wants to grant legal status to same-sex ‘marriage.’”³³ However, the Full Faith and Credit Clause, article IV, section 1 of the US Constitution says, “Full Faith and Credit shall be given in each State to the public Act, Records, and judicial Proceedings of every other State.”³⁴ Section 2 of article IV says, “the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”³⁵ What part of the Constitution is unclear? DOMA is in direct violation of an explicit right in the Federal Constitution! No state has the right or privilege to ignore civil agreements in other states, and yet the federal government passed a law that is unconstitutional.

DOMA also violates the Ninth and Fourteenth Amendments. The federal government passed DOMA in order to block the possibility of Hawaii allowing same-sex marriage. The Congress claimed that the “provision [was] necessary...[since] other states [would be] placed in the position of having to give ‘full faith and credit’ to Hawaii’s interpretation of what constitutes ‘marriage.’”³⁶ DOMA is designed to block and quarantine states from recognizing civil gay marriages in other states. It also is an attempt to block gay marriage in general, as it narrowly defines marriage in a discriminatory and religious way. It is legislating religious morality, and ignoring the rights, privileges, and liberties of citizens.

Homosexual marriage is still illegal in the United States, except in the state of Massachusetts. While some states like New Jersey just passed a law allowing civil unions to gay people, (just as

³² DOMA, 1

³³ IBID

³⁴ US Constitution

³⁵ IBID

³⁶ DOMA, 1

California, Vermont and Connecticut have) as an alternative to marriage, this is still incredibly problematic. Massachusetts seems to be the only state which is rational and unprejudiced.

Unfortunately, the Federal Government has not followed the Massachusetts Court's lead. Contrary to what has been argued civil unions can't solve this problem. For, even if we grant civil unions we are essentially repeating the same mistake made in *Plessy*. Granting civil unions to same-sex couples is just a temporary façade that will only continue bigotry and discrimination. The Massachusetts Supreme Court recognized this and decided that gays should have the right to marry, just as other persons. This, of course, is because civil marriage is a right provided by the government and it is a "wholly secular institution."³⁷ Hence, the difference between civil marriage and religious marriage is this: a civil marriage is public and is applicable to all citizens, whereas a religious marriage is performed in a private institution that necessitates faith and commitment to that religious tradition. A valid marriage can be provided by the state, and therefore to deny certain individuals this right based on religious values, is unconstitutional.

Even more, to deny gay people the right to marry is not only immoral, but unjust. Gay marriage is a question of justice and injustice. It is not about which particular group is being discriminated against. It is a matter of certain individuals being denied their rights as autonomous adults. All autonomous individuals should be legally protected to be able to marry anyone they choose. Justice ought to be upheld and ought to protect the rights of its citizens. Denying autonomous, rational, and consenting adults the right to marry, conflicts with the core American principles of liberty and equality. It is time for public action and rational discourse to get to the heart of this issue. Think about it in this way: America is founded on a supposed deliberative democracy. So, to squelch the voices of gay marriage advocates and to avoid discussing the issue publicly is undemocratic. Public discourse will allow positive change and bring justice, as people will come to see their deep-seeded discriminatory beliefs. Let those who have a problem with gay marriage speak

³⁷ Goodridge v Department of Public Health, 7

up and try and rationally defend their position. There needs to be rational, public discourse on this issue, because the apparent bigotry and discrimination happening in the US, needs a rational explanation. Homosexuals are people, and citizens of the United States. This country stands on the fundamental principles of liberty and equality, and yet the government is openly denying autonomous, rational adults their rights. It is blatant bigotry and intolerance and the time has come for change!

Homosexuals should have the right to marry, just as anyone else, and to deny this right is unlawful. In *Loving v Virginia* in 1967, the US Supreme Court overruled a Virginia statute that prevented interracial marriage. Under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, the Court ruled that to prohibit marriage on the basis of race is unconstitutional. Chief Justice Warren claimed that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”³⁸ The Supreme Court ruled that civil marriage can’t be denied to people as it is a fundamental civil right. The Court said that to deny this right creates “classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, [and it] surely deprive[s] all the State’s citizens of liberty without due process of law.”³⁹ How is *Loving* any different than the gay marriage debate? It isn’t. Prohibiting gay people from marrying is a violation of the Fourteenth Amendment, just as it was determined in the opinion in *Loving*. The US cannot claim to be a liberal state that promotes equality, as long as it continues gay discrimination. When will we recognize that all citizens have inalienable rights regardless of their sex, race, religion or sexual orientation?

Massachusetts remains the only state in the country that allows gay marriages and full state benefits. While some states are making progress, it is still not enough. The New Jersey Supreme Court recently had the opportunity to be the second state in the country to allow gay marriage, but the Court’s ruling in December of 2006 only went so far as to allow civil unions. While they ruled that the

³⁸ *Loving v Virginia*, 3

³⁹ *Loving v Virginia*, 4

state would insure “equality under the laws for all New Jersey citizens by providing same-sex couples with the same rights and benefits as heterosexual couples who choose to marry,”⁴⁰ by calling it a civil union and not a marriage, they are essentially saying the same thing as ‘separate but equal.’ If civil unions and marriages really mean the same and grant the same benefits, then why divide and classify them into two distinct groups? Vermont and Connecticut also both allow civil unions, but again, by calling it something different, it is not fully accepting gays as citizens who are entitled to the full right of marriage. In California, it’s a similar situation, as they allow domestic partnerships, which gives gays in-state marital benefits. Maine and Hawaii give gay couples certain privileges, but it still does not amount to full rights. While a few states are making some progress in the area of gay rights, the laws are not sufficient. The current situation is dismal.

Banning gays from marrying, aside from the social consequences, also precipitates economic inequality. While it’s bad enough that gays can’t adopt children in most states, or visit their spouses if they are sick or dying in the hospital, the US is denying gay couples economic benefits that unequally distributes wealth. Same-sex couples currently aren’t entitled to inheritance benefits. For example, there could be a gay couple that has lived together in a monogamous relationship for over twenty-five years, and if their partner dies, they are not entitled to their property or belongings or anything. The federal government also allows for instance a one time transfer of \$60,000 to your spouse, but gays are denied this right. There is a litany of benefits that gays are denied, simply based on their sexual orientation and lifestyle. The US is currently a homophobic society and if we do not break from this diluted conception of people, we are committing a crime against humanity.

There needs to be serious, rational discourse to explain why, in today’s day and age, the US is still allowing for discrimination. It is clear that prohibiting same-sex couples the right to marry is unconstitutional, unjust, and immoral. Massachusetts remains the only state that allows for gay marriage, and if the government or the citizens of the United States do not do something soon, the

⁴⁰ P.L. 2006, c.103, Assembly No. 3738, State of New Jersey Legislature

guiding American principles of liberty and equality will be shattered. When people begin to take action and engage in rational discourse about this issue, and actualize what it means to be in a deliberative democracy, there will be social justice for gay Americans who wish to marry. Denying autonomous, rationally consenting adults the rights, privileges, and benefits that all US citizens have is unconstitutional and discriminatory. We need to break from this conceptual framework that makes gay people inferior and second-class citizens, and let rationality prevail. As Dr. Eric Smaw has said, “let the unforced force of reason rule.”⁴¹

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⁴¹ Smaw, Eric