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AFTERWORD — STRAIGHTNESS AS PROPERTY:
BACK TO THE FUTURE — LAW AND STATUS
IN THE 21ST CENTURY

*Berta Esperanza Hernández-Truyol**
*Shelbi D. Day***

I. INTRODUCTION

As is evident from the other works in this Symposium, throughout history in both the United States and the greater Western World, status-based exclusion of individuals and groups from property rights has been central to the existence of political and social hierarchies. Specifically, exclusion based on status — whether it be nationality, culture, race, sex or sexuality — has plagued our history and has been integral in the formation and development of both constitutional and property law regimes. Consequently, both regimes are at best uneven in the grant and distribution of rights and benefits.

A forward-looking examination of the link between status and property law reveals the persistence of the concerns addressed in the three preceding articles. The exclusion of persons from enjoyment of full property rights based on non-normative sexuality status, that is, nonheterosexuality, routinely and systematically denies property rights to an entire category of sexual/social minorities. This denial, contrary to liberalisms' basic goal of equality and justice for all persons, results in injustice and inequality for an entire group of citizens.¹ Although sexual minorities have always been part of our social fabric, it is only recently that issues of discrimination and equality have come to the forefront in the social, psychological, and legal realms.

More specifically, in recent years, the debate over the denial of property rights to same-sex couples has emerged as a key theme in equality

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1. The goal of liberalism is equality and justice — Property plays a central role in human rights, individuality, and freedom and is therefore central in true liberalism.

discourse and will undoubtedly extend into the foreseeable future. At the heart of the debate is whether same-sex couples should be given property rights equivalent to those of married couples who consequently — by tradition, practice, and law — are couples of the opposite sex. Primarily, just as African Americans and women were historically and systematically denied equal property rights and benefits, gays/lesbians are presently denied property rights based purely on status. This occurs primarily through the denial of marital rights, benefits, and protections, and the denial of any alternative means of obtaining them.² In recent years, challenges to these laws have forced scholars and the judiciary alike to begin to explore, redefine, and redetermine the law's proper parameters in this area.

In order to elucidate the history, legal development, and the possible future of liberalism's equality goals in this context, this Afterword begins by reviewing pertinent marriage laws — particularly congressional regulation of marriage. We then examine how state and federal court decisions reveal the changing and evolving social fabric within which the limited definition of marriage, and the closely tied definition of family, play themselves out. An examination of the different "equality" afforded to gays/lesbians and heterosexuals follows. The work, then, describes the relationship between marital status and property rights, explaining the consequences of a narrow legal definition of marriage within shifting social paradigms. The piece concludes that just as there came a time in the liberal republicanism paradigm to recognize its flawed exclusionary origins (of women, African Americans, Native Americans and Mexicans), the time has come to cease the *de jure* creation of a second-class citizenship that denies sexual minorities property rights based on status.

II. LAW AND MARRIAGE

A. Congressional Regulation of Marriage

Marriage is defined both legally and normatively as the union of a man and a woman.³ Congress, in recent years, has refrained from legislating on most matters of state law. However, in the 1996 Defense of Marriage Act⁴

2. See *Baker v. Vermont*, 744 A.2d 864, 884 (1999). These rights include the right to worker's compensation survivor benefits, the right to be covered under the spouse's employer-issued life insurance policy, the right to be covered as a spouse under a private health insurance policy, hospital visitation rights, and rights to receive alimony and property division in the event of a divorce. See *id.*

3. We can see this in various state and federal statutes that define "marriage" as exclusively between a man and a woman. See e.g. Pub. L. No. 104-199, 110 Stat. 2419 [hereinafter DOMA].

4. *Id.*

(DOMA), Congress dove head first into family law regulation — a quintessential province of state regulation — by defining “marriage” to mean “only a legal union between one man and one woman as husband and wife”⁵ and “spouse” to mean “only . . . a person of the opposite sex who is a husband or a wife.”⁶ In doing so, Congress effectively excluded same-sex couples from the legal terms or classifications of “marriage” and “spouse.”⁷

When the Federal government legislated against same-sex marriages, by redefining pertinent statutory definitions to include only opposite-sex couples, it showed its power to control and limit benefits attached to marriage and family. To be sure, in its fervor to further normalize heterosexuality as the exclusive axis on which relationships can be recognized, it has also attempted to address, proactively, the anticipated question of whether same-sex marriages, if recognized in one state, must also be recognized in other states. With DOMA, Congress not only sought to define marriage solely as a heterosexual union,⁸ but also attempted to deny rights — legislating that states are not obligated to recognize same-sex marriages, even if valid in other states.⁹

Historically in the United States, under traditional conflict of laws rules, marriages have been valid in every state so long as they are valid under the law of the state where the marriage was contracted.¹⁰ Similarly, the Full Faith and Credit Clause, in Article IV of the United States Constitution,¹¹ mandates that certain laws be reciprocal and binding across state lines, requiring each State to give “Full Faith and Credit” to the “public Acts, Records, and judicial Proceedings of every other State.”¹² However, a few authorities, using a public policy rationale, argue that recognition of marriages is appropriate so long as doing so does not “violat[e] the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”¹³ Conversely, other authorities, including some courts, use no such public policy

5. *Id.*

6. *Id.*

7. *See id.*

8. Interestingly, its attempt is fatally flawed. The definition requires marriage between one man and one woman. No requirement exists, however, that the parties be one heterosexual man and one heterosexual woman. *See generally* RUTH COLKER, *HYBRID* (1996) (explaining that sexuality can be fluid and even change over time). Thus, there is no assurance, that even under Congress’ attempt with such draconian regulation, that heterosexuality is promoted by the scheme.

9. *See* DOMA, at sec. 3, Pub.L.No. 104-199, 110 Stat. 2419.

10. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 414 (4th ed. 1998).

11. U.S. CONST. art. IV, §1.

12. *Id.* *See* Shannon Duffy, *The National Law Journal* (Nov. 27, 2000) <<http://www.law.com/>> (explaining that although the Full Faith and Credit Clause has not yet been applied to marriage, the argument could be made).

13. DUKEMINIER & KRIER, *supra* note 10, at 414 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1998)).

exception to limit the validity of marriages interstate, favoring the reciprocal approach — reflective of the Full Faith and Credit Clause.¹⁴

Despite contrary precedent, in DOMA, Congress exhibited a virtually unfettered power to grant and deny the fundamental right¹⁵ to, and universal recognition of, marriage and the subsequent control of significant property rights that legally flow therefrom. When it enacted DOMA¹⁶ in 1996, Congress revealed its exercise of political muscle. In limiting the definition of marriage as only between a man and a woman,¹⁷ Section 3 deprives same-sex couples social security, tax, and welfare benefits under federal law.¹⁸

Even more disturbing, Section 2 of the Act provides that no state shall be required to give effect to a same-sex marriage contracted in another state.¹⁹ Thus, Congress effectively overrode the dictates of the Full Faith and Credit Clause with respect to same-sex marriages. Now, even if same-sex marriage or an alternative recognition entitling gays/lesbians equivalent benefits becomes available under state law, DOMA — through Congressional fiat — allows marriage to be classified as null and void outside the territorial boundaries of that particular state.²⁰ Such Congressional action raises serious Constitutional issues, such as whether DOMA deprives same-sex couples significant property rights, equal protection of the laws,²¹ and the right to travel.²²

The legislative proscription against the fundamental right to marry to a whole group of people because of their sexual/affectional orientation is a

14. See DUKEMINIER & KRIER, *supra* note 10, at 414; see also U.S. CONST. art. IV, § 1.

15. See *infra* Part II. B. (developing marriage as a fundamental right).

16. DOMA, Pub. L. No. 104-199, 110 Stat. 2419.

17. See *id.* (defining “marriage” to mean “only a legal union between one man and one woman as husband and wife”).

18. See *id.*

19. See *id.* at sec. 2, Pub. L. No. 104-199, 110 Stat. 2419. “No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.” *Id.*

20. See generally Shannon Duffy, *The National Law Journal* (Nov. 27, 2000) <<http://www.law.com/>>. In July 2000, Vermont gave same-sex couples the right to a civil union — an equivalent legal alternative to marriage. See *id.* A vast majority of same-sex couples who obtained licenses resided in states other than Vermont. See *id.* Thus individual state courts will be forced to rule on the validity of the civil union licenses — outside of Vermont — in the near future. See *id.* Currently, approximately 35 states have “mini-DOMAs” in effect, banning the recognition of same-sex marriages. See *id.* This displays the reach of DOMA and evidences the extent of Congress’ power to regulate and allocate rights and personal choices.

21. How, and to what extent Equal Protection plays into this area of law is complicated and heavily debated. We do not attempt to, nor do we claim to, delve into this argument with the limited space and depth of our discussion within this Afterward.

22. Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and The Right to Travel*, 52 RUTGERS L. REV. 553 (Winter 2000).

fundamentally flawed outlook that denies full personhood to non-heterosexuals. The definition of marriage as the union of a man and a woman — as construed by Congress in the public sector and religious and social organizations in civil society — deprives same-sex couples access to the institution of marriage or an alternative legal structure. With this circular reasoning — denying same-sex couples access to a civil marriage license or a comparable legal status and defining marriage in a way that same-sex couples will never fit — the federal government effectively excludes an entire class of people not only from the deep rooted, historical method of publicly valuing a relationship, but also the bundle of critical legal benefits that flow from marriage.

B. Case Law Developments

Congressional exclusion of same-sex couples from access to marriage, while not surprising as a matter of social statement, is at odds with the concept of marriage as a fundamental right. Throughout history, the Supreme Court has emphasized the value of marriage and routinely struck down legislation that was designed to interfere with or preclude this right. As early as 1923, in *Myer v. Nebraska*,²³ the Court included marriage as a “liberty” protected by the Due Process Clause in the Fourteenth Amendment and concluded that arbitrary legislative activity may not interfere with such liberties.²⁴ Almost twenty years later, in *Skinner v. Oklahoma*,²⁵ the Court first explicitly characterized the right to marriage as a specific fundamental right.²⁶

To be sure, the recognition by the *Skinner* Court of the fundamental nature of marriage bespeaks its importance not only to society in general, but also to individuals and their sense of self. After all, marriage is the outward expression of one’s identity and one’s autonomous choice to associate in the most intimate of ways. Accordingly, not even three decades ago, the Court acknowledged this view of marriage in *Loving v. Virginia*²⁷ by repealing anti-miscegenation statutes prohibiting interracial-marriages.²⁸

The *Loving* Court recognized marriage as a fundamental right — a right of each citizen of this country to make decisions concerning his/her most

23. 262 U.S. 390 (1923).

24. See *id.* at 390-400.

25. 316 U.S. 535 (1942).

26. See *id.* at 541. The *Skinner* Court deemed marriage to be one of the “basic civil rights of [men and women, a right that is] fundamental to the very existence and survival of the race.” *Id.*

27. 388 U.S. 1 (1967).

28. See *id.* at 12; see also *Baehr v. Lewin*, 852 P.2d 44, 84-85 (Haw. 1993) (holding that, on its face and as applied, the Hawaii marriage statute denies same-sex couples the right to marry as did anti-miscegenation statutes in *Loving*).

intimate relations.²⁹ The Court further concluded that the deprivation of the right to marry violates the Due Process Clause of the Fourteenth Amendment.³⁰ Applying strict scrutiny review, the Court held that any racial regulation of marriage required the government to show that the regulation served a compelling interest to achieve a narrowly tailored end using the least restrictive means possible.³¹ The Court reasoned that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women]."³² Most recently, in *Roe v. Wade*,³³ the Court recognized marriage as an extension of liberty.³⁴ It is significant that this right to liberty dates to the Declaration of Independence.³⁵ The Declaration, made in the spirit of liberalism and during the apogee of liberal theory, guarantees all persons "life, liberty and the pursuit of happiness."³⁶

Moreover, in the domestic sphere, familial status traditionally fits within the confines of the marital relationship. Courts, as well as society, tend to define family as stemming from a marital relationship, such that family and marriage are almost synonymous. These norms hold true in property and estate/trusts regimes where conveyances of property flow through, devise, and transfer from and within the familial relationship, centered around the mother/father patriarchal relationship.³⁷

29. See *Loving*, 388 U.S. at 12.

30. See *id.*

31. See *id.* "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations." *Id.* The *Loving* Court established that

At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny' [citation omitted] and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

Id. at 11.

32. *Id.* at 12.

33. 410 U.S. 113 (1973).

34. See *id.* at 152-53 (finding that marriage, an unenumerated fundamental right, falls within the right to liberty and under the umbrella of the fundamental right to privacy). While the right to privacy is not explicitly stated in the Bill of Rights, the language of the Ninth and Fourteenth Amendments support the notion that fundamental rights are not limited to those explicitly stated and that marriage falls under the penumbra that creates a zone of privacy. See *id.*; see also *Zablocki v. Redhail*, 434 U.S. 374, 383-85 (1978) (finding a law precluding issuance of marriage licenses invalid and recognizing the "right to marry" as a fundamental right).

35. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

36. *Id.*

37. For example, descent and distribution laws not only allow but indeed mandate certain percentage distribution to a surviving spouse.

The same principle of family as a basic organizing structure of society holds true in the international context where international human rights documents recognize the family as the basic architectural component of society.³⁸ As such, privacy in family life is expressly protected, as is the freedom to choose one's life partner.³⁹

Notably, both domestically and internationally, the composition of the household and conception of "family" is changing. In fact, the traditional notion of "family" with a wage-earning father at the "head of the household," a stay-at-home mother, and children has become the exception rather than the norm.⁴⁰ As discussed in Part IV, this change in the composition of a household or "family"⁴¹ has resulted in the growing need for a broader, more diverse and inclusive definition of "family." Consequently, and in light of the established nature of marriage as a fundamental right, it seems appropriate to revisit socio-legal conceptions of marriage and family.

Furthermore, the prohibition of same-sex marriages is, in many ways, analogous to race-based regulations of marriage. As previously stated, the law in *Loving* was a status-based prohibition that served only to preclude interracial marriage — something apparently deemed "undesirable" by the majority. But, the regulation in *Loving* did not survive constitutional

38. For example, the International Covenant on Civil and Political Rights denies "arbitrary or unlawful interference" with privacy. I.C.C.P.R., March 23, 1976, art. 17, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966). The European Convention on Human Rights states, "Everyone has the right to respect for his [or her] private and family life . . ." Eur. Conv. for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, art. 8, 213 U.N.T.S. 221, E.T.S. 5. Similarly, the Universal Declaration of Human Rights provides, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence." U.D.H.R., Dec. 10, 1948, art. 12, G.A. Res. 217A (III), U.N. Doc. A/810.

39. See *Lustig-Prean & Beckett v. United Kingdom*, Eur. Ct. H.R. 82 (1999) (visited Nov. 20, 2000) <<http://www.echr.coe.int/eng/Judgments.htm>> (requiring "particularly serious reasons" before Article 8 of the European Convention justifies intrusion into the private realm of sexuality); *Norris v. Ireland*, 13 Eur. Ct. H.R. (ser. A) at 186 (1989) (deciding that Ireland's criminal law against male homosexual sex violates Article 8 of the European Convention); *Dudgeon Case*, 4 Eur. Ct. H.R. (ser. A) at 149 (1981) (holding that the United Kingdom's law against homosexual sex a violation of privacy under Article 8 of the European Convention).

40. See SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 18 (1989); see also RICHARD H. CHUSED, *CASES, MATERIALS, AND PROBLEMS IN PROPERTY* 213 (2nd ed. 1999).

41. See CHUSED, *supra* note 40, at 213. "Recent decades have witnessed a dramatic increase in the number of unmarried parents, single parent families, and unmarried cohabitants. Homosexual men and women, even if not greater in numbers than in prior history, have become more willing to publicly discuss their sexual preferences and openly form households." *Id.*; see also OKIN, *supra* note 40, at 18 (explaining that "[m]ore families these days are headed by a single parent; lesbian and gay parenting is no longer so rare; many children have two wage-working parents, and receive at least some of their early care outside the home.").

scrutiny.⁴² Today, similarly situated restrictive statutes precluding marriage to same-sex couples should experience a similar fate.⁴³

III. THE DIFFERENT EQUALITY OF SEXUAL MINORITIES

The government's denial of rights to a particular group of citizens based purely on status as same-sex couples may effect also an infringement of rights under the Equal Protection clause.⁴⁴ *Romer v. Evans*⁴⁵ perfectly illustrates the deprivations that result from such arbitrary governmental regulation. The *Romer* Court recognized that the legislature's use of its power to deny protection based on status results in the exclusion of an entire group from access to certain protections that have been expressly afforded by the municipality.⁴⁶ The enactment challenged in *Romer* was an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum (hereafter referred to as Amendment 2), repealing ordinances that prohibited discrimination on the basis of "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships."⁴⁷ The claim made by proponents of Amendment 2 was, ironically, that the non-discrimination laws were providing special benefits and thus were discriminatory.⁴⁸

The proposal for Amendment 2 was in direct response to the adoption of ordinances by various municipalities that banned discrimination based on sexual orientation.⁴⁹ Seemingly, these municipalities sought to ensure equality⁵⁰ by prohibiting discrimination in public accommodations, specified

42. See *Loving*, 388 U.S. at 12.

43. See *Baehr*, 852 P.2d at 86 (Haw. 1993) (concluding that in harmony with the *Loving* Court's observation "any State's powers to regulate marriage are subject to the constraints imposed by the constitutional right to the equal protection laws").

44. See *id.* at 48. Here, the court reasoned that marriage is a civil right recognized as such by the U.S. Supreme Court for over 50 years and suggested that petitioners have a valid Equal Protection argument where the statute denies same-sex couples' access to marriage. See *id.* However, the court did not address whether gays/lesbians constitute a suspect class for purposes of Equal Protection scrutiny. See *id.* Much controversy and debate – which we will not address as it is beyond the purview of this essay – surround the question of which type of Equal Protection scrutiny should be applied to laws regulating gays/lesbians.

45. 517 U.S. 620 (1996).

46. See *id.* at 635.

47. *Id.* at 624 (quoting COLO. CONST., art. II, § 30b amend. 2).

48. See *id.* at 626. "The State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights." *Id.*

49. See *id.* "What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation." *Id.* at 624.

50. See *id.* In the interest of equality, local ordinances protected "persons discriminated against by reason of their sexual orientation." *Id.* A local ordinance in Denver defined "sexual orientation" as "[t]he status of an individual as to his or her heterosexuality, homosexuality or

transactions and activities, health and welfare services, housing, employment, and education.⁵¹

The State, however, claimed that the amendment, not the local laws, created equality by preventing the grant of special rights.⁵² In reality, gays/lesbians/bisexuals by state law fiat were put in a solitary class with respect to both private and governmental spheres, and denied legal protection or remedy from inevitable discrimination.⁵³ The *Romer* Court explained that the only way a state can discriminate against a non-suspect class⁵⁴ is when “[t]he Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws . . . coexist[s] with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.”⁵⁵ Additionally, to pass constitutional muster, the law must neither preclude a fundamental right nor target a suspect class, and must bear a rational relation to some legitimate end that can be achieved through no better alternate means.⁵⁶

The Court concluded that Amendment 2 was invalid because it failed to meet even a rational basis inquiry and it imposed a broad, across the board disability on an entire class of citizens.⁵⁷ Additionally, the amendment was incoherent with respect to the State’s proffered reasons, and explicable only as discrimination and animus toward the class it intended to affect — gay, lesbian, and bisexual persons.⁵⁸ Rational basis analysis itself seeks to ensure that classifications are not drawn for the sole purpose of disadvantaging the group burdened by the law. The *Romer* Court found that Amendment 2 served to do just that: single out a specified minority and effectively deny it protection.⁵⁹

bisexuality.” *Id.* (quoting Denver Rev. Municipal Code, art. IV, § 28-92).

51. *See id.*

52. *See id.* at 627.

53. *See id.*

54. The *Romer* Court avoided engaging in an analysis to determine which classification sexual orientation fits under. *See id.* at 631-32. However, much controversy exists as to whether sexual-orientation should fit under a more strict standard of analysis because it may be analogous to race, sex or prohibitions based on religion.

55. *Id.* at 631 (quoting *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979)).

56. *See id.* In Equal Protection analysis, it is essential to determine “the relation between the classification adopted and the object to be attained.” *Id.* at 632. This relation gives the Equal Protection Clause substance, “provides guidance and discipline for the legislature” and defines the limits on the laws that it may pass. *Id.*

57. *See id.*

58. *See id.*

59. *See id.* at 633. “If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.” *Id.* (quoting *Railroad Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980)).

The Court found such discriminatory regulations contrary to current jurisprudence and in violation of the Constitution's guarantee of Equal Protection.⁶⁰ To be sure, impartiality and equality for all citizens have become necessary principles that the government and each of its components should embrace, promote, and foster.⁶¹ The *Romer* Court restrained the legislature's attempt to overreach its power and limit the availability of benefits and rights to an entire group.⁶² Expressing particular concern for the harms effected by the amendment,⁶³ the Court noted that regulations such as Amendment 2

raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. '[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.'⁶⁴

Finally, the Court found that the Amendment served only to make gays/lesbians/bisexuals unequal to heterosexuals, a practice specifically prohibited by current law and the Constitution.⁶⁵

Notwithstanding the majority opinion, the *Romer* decision also reveals a fault line in seeking to obtain equal protection for sexual minorities: an attempt by both the courts and Congress to distinguish gays/lesbians/bisexuals from sex and race-based classes by defining

60. See *Romer*, 517 U.S. at 633-34.

61. See *id.* at 633. "Equal Protection of the laws is not achieved through indiscriminate imposition of inequalities." *Id.* (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)).

62. See *id.* at 634. "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." *Id.* The *Romer* Court explained:

We cannot say that Amendment 2 is directed at any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.

Id. "[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment" *Id.* at 635 (quoting *Civil Rights Cases*, 109 U.S. 3, 24 (1883)).

63. See *id.* (explaining that "Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.").

64. *Id.* at 634 (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

65. See *id.* at 635. "A State cannot so deem a class of persons a stranger to its laws." *Id.*

gay/lesbian/bisexual status as conduct-based.⁶⁶ For instance, in his dissent in *Romer*, Justice Scalia conflated status and conduct, urging that identity as a gay/lesbian/bisexual and "homosexual conduct" are so interrelated that status is, in effect, conduct.⁶⁷ He concluded that sexual-orientation is conduct based, and therefore gays/lesbians can obtain equal rights and benefits by simply changing their conduct.⁶⁸ In proposing this analysis, Justice Scalia disturbingly likened gays/lesbians to polygamists and murderers.⁶⁹

More recently, in *Dale v. Boy Scouts of America*,⁷⁰ a majority of the Court seemed to endorse this conflation of status and conduct, and thus reinforce discrimination against homosexuals by allowing the Boy Scouts to exclude a gay leader from the organization. The *Dale* Court, shielding its reasoning behind the First Amendment's protection of expressive association, concluded that simply including a gay man in the Boy Scouts would send a message that would change the message of the organization.⁷¹ Such conclusion is puzzling because precedent would suggest that the appropriate analytical approach would be to uphold the pertinent public accommodation statute.⁷²

In fact, by reasoning that homosexuality is so conduct-based that simply including a gay man changes the Boy Scout's message, a message protected by the First Amendment, the Court effectively reinstitutionalized discrimination. Undeniably, the precedent set in *Dale* affords the government even more power to regulate and discriminate based on

66. See *Romer*, 517 U.S. at 641 (Scalia, J., dissenting).

67. See *id.* (Scalia, J., dissenting).

68. See *id.* (Scalia, J., dissenting).

69. See *id.* at 644 (Scalia, J., dissenting).

70. 120 S. Ct. 2446 (2000).

71. See *id.* at 2458.

72. See *id.* at 2455-56. In similar cases relating to sex, race and anti-discrimination broadly, the Court has routinely found slight infringement on the First Amendment appropriate where discrimination would result. See also *Roberts v. United States Jaycees*, 468 U.S. 609, 623-29 (1984) (finding an antidiscrimination statute valid to ensure women equal access even if incidental abridgement of the First Amendment occurred); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (holding that even if enforcement of the antidiscrimination act did result in some slight infringement of the members' right of expressive association, it was necessary and justified to eliminate discrimination against women); *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988) (concluding that organized discrimination in the selection of membership did not warrant constitutional protection).

sexual/affectional orientation.⁷³ This conclusion is at odds both with changing social structures and with conceptions of equality and liberty.

IV. MARITAL STATUS AS A PROPERTY RIGHT — CHANGING FAMILY, CHANGING NORMS

Beyond an equality-based constitutional analysis, protection of sexual minorities' equality is also significant because of economic considerations. Marital status is valuable in terms of property rights. Congress has attached benefits and protections to marriage to the exclusion of those who are not permitted to be married, namely same-sex couples. In *Turner v. Safley*,⁷⁴ the Court supported marriage as a fundamental right because it is not only a way of expressing public commitment, demonstrating emotional support, and legitimating children, but also of ensuring entitlement to many benefits, including governmental financial assistance and property rights.⁷⁵ For example, the myriad legal benefits and protections incident to marital status include: access to a spouse's medical, life, and disability insurance, hospital visitation and other medical decision-making privileges, spousal support, intestate succession, homestead protections, and many other statutory protections.⁷⁶

Modern diversity of the family structure and composition pose interesting challenges to traditional notions of property law. As one scholar explained,

[s]ignificant differences exist between the property presumptions typically made when people are married and when they are not. Community and marital property regimes, dower and curtesy, homestead laws, intestate succession statutes, and social security survivor benefits, among others,

73. See *Dale*, 120 S. Ct. at 2476 (Stevens, J., dissenting). In his dissent, Justice Stevens explained that,

[t]he only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone — unlike any other individual's — should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label "homosexual." That label, even though unseen, communicates a message that permits his exclusion where ever he goes. His openness is the sole and sufficient justification for his ostracism.

Id.

74. 482 U.S. 78 (1987).

75. See *Turner v. Safley*, 482 U.S. at 95-96 (striking down a state regulation barring the ability of prisoners to marry).

76. See *Baker*, 744 A.2d at 870 (1999).

depend upon the validity of drawing a distinction between married couples and all other couples.⁷⁷

Accordingly, it is encouraging that some courts have begun to acknowledge, accept, and seek to accommodate protection of property rights in light of this shifting family paradigm. Considering the increasingly diverse composition of present day households, more courts and legislatures should be prepared to recognize the ambiguity of the term “family” and to redefine “family” for legal and statutory purposes. Such paradigmatic shifts raise questions regarding who is, or should be, protected and acknowledged as being entitled to “family” benefits under modern property law.

Courts recognize that the constitutional separation-of-powers framework of our liberal democracy locates in Congress the power to name, define, or categorize the nature, reach, and extent of rights. Thus, it is effectively Congress that has the power to afford or recognize gay/lesbian rights including the property rights that flow from the institution of marriage.⁷⁸ But, under separation-of-powers, the courts have the ultimate say in whether any restriction of rights is valid or constitutionally proscribed.

However, as previously noted, in the domestic realm Congress has routinely restricted unmarried persons from receiving property benefits. Even on an international scale, with its broad acknowledgment of the importance and value of family, “the rights to form family structures that permit participants to enjoy numerous governmental benefits, the benefits that are designed specifically for families of choice, namely marriages, are largely unavailable to persons with non-heterosexual orientation.”⁷⁹ Thus the denial of marriage to same-sex couples denies certain families property rights and protections because, statutorily, an entire group is forced into a status of unmarriage and unfamily.

Changes at the state level indicate the significance of Congress’ flex of power in its wholesale denial of legal benefits and protections to same-sex couples in “meretricious” relationships. State courts are increasingly faced with questions of the constitutionality of laws and statutes that preclude the right of gays/lesbians to access marriage-related legal rights. Even more,

77. See CHUSED, *supra* note 40, at 213.

78. In both *Braschi* and *Baker*, the court recognized gay/lesbian rights but avoided overstepping the power of the legislature by classifying “marriage” or “family” to include same-sex couples. See *Braschi*, 74 N.Y.2d at 211 (implying that same-sex couples are included within the definition of “family” for purposes of a New York anti-eviction statute (9NYCRR 2204.6(d)); *Baker*, 744 A.2d at 884 (1999).

79. Berta Esperanza Hernández-Truyol, Remarks at the American Society of International Law: 2000 Annual Meeting (April 5-8, 2000) (on file with author).

state courts are having to address these laws and, as a result, some are overturning discriminatory statutes.

For example, because of the extensive property rights as well as the other rights attendant to marital status, in *Baker v. Vermont* the Vermont Supreme Court analyzed and ultimately overturned statutes denying marriage licenses to same-sex couples.⁸⁰ Specifically at issue was whether the State of Vermont could exclude same-sex couples from the public, secular benefits and protections that its laws provide to opposite-sex married couples.⁸¹ The court engaged in statutory and constitutional analysis to ascertain, ultimately, that it is impermissible to exclude same-sex couples from the secular benefits and protections offered to married couples.⁸² Thus, the Vermont Supreme Court concluded that the denial of "marital" benefits vis-a-vis the statutory denial of marriage licenses to same-sex couples was unacceptable.⁸³ The court reasoned that the state cannot deprive same-sex couples of the valuable status-based benefits which flow from a legal marriage.⁸⁴

The *Baker* court held that the state's asserted interests against allowing same-sex marriage was simply motivated by a long history of intolerance of intimate same-sex relationships.⁸⁵ Although the court found historical

80. See *Baker*, 744 A.2d at 867; see also *id.* at 883 (looking to the history of marriage laws and the importance that the Supreme Court, as well as other courts, have placed on marriage; emphasizing the historical recognition of marriage as comparable to a contract with legal and economic benefits).

81. See *id.* at 883-84. The *Baker* court listed many of the benefits that legally flow from marriage, including:

the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions . . . preference in being appointed as the personal representative of a spouse who dies intestate . . . the right to bring a lawsuit for the wrongful death of a spouse . . . the right to workers' compensation survivor benefits . . . the right to spousal benefits statutorily guaranteed to public employees including health, life, disability, and accident insurance . . . the opportunity to be covered as a spouse under group life insurance policies issued to an insured's spouse under an individual health insurance policy . . . the right to claim an evidentiary privilege for marital communications . . . homestead rights and protections [under property law and] . . . the concomitant right of survivorship . . . hospital visitation and other rights incident to the medical treatment of a family member . . . and the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce.

Id.; see also *infra* note 92.

82. See *Baker*, 744 A.2d at 886.

83. See *id.* at 889.

84. See *id.* at 867.

85. See *id.* at 885-86.

feat, civil tradition, or religious outlook insufficient justifications for denial of secular benefits to an entire class of citizens, the court held that Vermont's own legislation undermined the states' interests against same-sex marriage.⁸⁶ The *Baker* Court ultimately concluded that legal protection and recognition of the avowed commitment to an intimate and lasting relationship among same-sex couples is a recognition of common humanity.⁸⁷

Notwithstanding its decision, however, the court, rather than rule that same-sex couples must be allowed to marry, left it to the legislature to define the structure that would constitute the legal vehicle of inclusion for same sex-couples in the panoply of marriage-related rights and benefits.⁸⁸ The court said the legislature could opt to include same-sex couples within marriage laws themselves, establish a parallel "domestic partnership" system, or craft an equivalent statutory alternative.⁸⁹ Significantly, despite the ostensibly progressive decision, one Judge vigorously dissented, noting that anything other than full equality would continue to deny some persons full citizenship status.⁹⁰

In the end, however, regardless of what vehicle is ultimately adopted to afford same-sex couples the full range of public benefits, Vermont has led the way in recognizing the exchanges between status and property rights. The *Baker* court acknowledged that, in light of relevant precedent, marriage laws seemingly transform "a private agreement into a source of significant public benefits protections,"⁹¹ noting specifically the significant increasingly valuable benefit/protection aspect of marriage.⁹² Therefore, the *Baker* court expressly confirmed that valuable property rights attach to marital status and concluded that no citizen could be deprived of such benefits.⁹³

86. See *id.* at 886. Also, Vermont allows same-sex couples to adopt and has instituted laws to protect the children and allow custody in the event of separation. See *id.* at 882.

87. See *id.*

88. See *id.* at 886.

89. See *id.*; see also Shannon Duffy, *The National Law Journal* (visited Nov. 27, 2000) <<http://www.law.com/>>. (explaining that as a result of *Baker*, the Vermont Legislature gave same-sex couples the right to join in civil unions – a legal alternative to marriage).

90. See *Baker*, 744 A.2d at 901-02 (Johnson, J., dissenting); see also Shannon Duffy, *The National Law Journal* (Nov. 27, 2000) <<http://www.law.com/>> (arguing that Vermont's civil union is equivalent to the historical "separate but equal" doctrine). Law Professor Barbara Cox explained her fear that this standard will "encourage heterosexuals to 'believe that [gays/lesbians] are somehow less than they are – [gays/lesbians] don't deserve the same rights.'" *Id.* Professor Cox contends that equality demands allowing "marriage," not just a legal alternative. See *id.*

91. See *Baker*, 744 A.2d at 883.

92. See *supra* note 81; see also *Baehr*, 852 P.2d 44, 84-86 (acknowledging that, on its face, the Hawaii statute precluding same-sex marriage results in the subsequent denial of marital rights and benefits).

93. See *Baker*, 744 A.2d at 884.

Similar to *Baker*, but focusing on the “family” relationship of the partners rather than on marital status, the New York Court of Appeals in *Braschi v. Stahl Associates*⁹⁴ addressed the question of whether the surviving life partner of a same-sex couple who was sharing an apartment, should be included within the term “family” for purposes of applying rent control laws.⁹⁵ After an objective examination of the relationship of the parties, the court found that the surviving partner was entitled to seek protection under the statutory definition of “family.”⁹⁶ Not surprisingly, the court failed explicitly to acknowledge the couple as “family,” and instead simply determined that their lives were sufficiently interwoven socially, financially, and personally such that they “could reasonably conclude that these men were much more than mere roommates”⁹⁷ This implicit functional definition of family, which took a pragmatic approach in interpreting a statute so as to expand family-based rights to same sex couples, effectively acknowledges the value — personal, social, and economic — that flows from status.

Moreover, in *Zablocki v. Redhail*,⁹⁸ Thurgood Marshall explained that it would “make little sense to recognize a right to privacy with respect to other matters of family life and not with respect to the decision to enter into a relationship that is the foundation of the family in our society.”⁹⁹ However, in DOMA, Congress did just that by refusing to recognize some form of legal familial status for same-sex couples, thus denying same-sex couples the opportunity to receive reciprocal benefits, create a familial

94. 74 N.Y.2d 201 (N.Y. 1989).

95. *See id.*

96. *See id.* at 214.

97. *Id.* at 213.

98. 434 U.S. 374 (1978).

99. *See id.* at 388-91. Justice Marshall’s opinion reiterated past precedent has determined that “the right to marry is of fundamental importance for all individuals,” specifically relying on *Loving*. *Id.* at 384. Further, Justice Marshall noted that

it is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child-rearing, and family relationships [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.

Id. at 386; *see also Loving*, 388 U.S. at 12 (finding anti-miscegenation statutes unconstitutional because marriage is a fundamental right, protected by the Constitution); *see also Griswald v. Connecticut*, 381 U.S. 479, 484-85 (1965) (establishing the right to marry as part of the penumbra of guarantees in the Bill of Rights which create a zone of privacy). According to the *Griswald* Court, the marital relationship lies “within the zone of privacy created by several fundamental constitutional guarantees.” *Id.* at 485.

setting, and have the same securities and benefits as opposite-sex couples. This approach is not only inconsistent with the evolution of alternative family structures as some courts, as discussed above, have readily acknowledged, it inappropriately denies valuable property rights.

V. CONCLUSION: SHIFTING THE STRAIGHTNESS AS PROPERTY PARADIGM

By refusing to recognize “marriage” beyond the legal union between a man and a woman, and defining “spouse” as a person of the opposite sex, the government effectively institutionalizes status-based discrimination against an entire class of people. This approach abridges marital-based property rights, along with deprivation of privacy, liberty, and basic human rights. Congress, thus, forces gays/lesbians into a second-class citizenship role and confirms the value of “straightness” as property.¹⁰⁰ The *Romer* and *Baker* courts recognized that denial of equal rights to gays/lesbians based on status alone results in the denial of public benefits and protections afforded to other groups. Specifically, by denying marriage to same-sex couples, absent any equivalent alternative, the government denies economic benefits to couples who are equivalent in all respects except the sex of the parties involved in the relationship.

The regulation of and denial to same-sex couples of equal benefits and rights is a reflection of the powerful hierarchical system that permeates property law. Liberal theory forms the foundation of the protection of property rights. Embodied in both the French Declaration of the Rights of Man and the U.S. Declaration of Independence, republican liberalism sought to protect individual autonomy and freedom. This resulted in the framing in our Constitution of the plethora of negative rights of persons — rights with which the government shall not interfere. One of the great ironies of liberalism, however, was its coexistence with slavery and with laws treating women of all colors as chattel. Its legacy today coexists with the unfreedoms of sexual minorities who remain *de jure* second class citizens deprived of valuable property rights and benefits. Unreformed liberalism, then, results in the exclusion of sexual minorities from enjoyment of public benefits because of their individual and private choice of partners — a choice recognized and revered as a fundamental right. This incoherent application of liberalism renders marriage a power-based, universalized hierarchy. Moreover, without a paradigm shift, the status quo — much like

100. See Hernández-Truyol, *supra* note 79 (explaining that, “The U.S. approach . . . wholly ignores the social reality and consequences of it[s] actions in denying individuals the right to equality, privacy, dignity and family life. The U.S. approach renders sexual minorities less than full actors in society relegating them to second class citizenship, in many stages but particularly in this discussion in the military society.”).

it did with women and slaves in the apogee of liberal theory — effectuates overt discrimination, this time based on homophobia and “heteropatriarchy.”¹⁰¹

Interestingly, in anticipation of the Court’s use of its own values and biases to determine whether a fundamental right is infringed, the Court has set limitations on Congressional acts that exclude individuals from enjoying such rights.¹⁰² The Court has recognized that the realm of ethics and morality are areas best left to the individual and his/her subjective desires so long as there is no breach of law.¹⁰³ Thus, the constitutional system of checks and balances¹⁰⁴ makes it the judiciary’s job to regulate the legislature via judicial review when legislation denies individuals or groups constitutional rights and privileges. With respect to regulations affecting sexual minorities, while it is Congress’ responsibility, in the first instance, to create statutes and regulatory provisions, it is the Court’s obligation to ensure that such regulations do not violate the Constitution.

The *Baker* decision confirmed an open secret: through definition and regulation, same-sex couples are routinely denied essential public benefits and property rights. Ultimately, the government’s failure to recognize same-sex couples as families, causing them to be excluded from economic and other benefits equivalent to heterosexuals, causes inequality on both international and national levels.¹⁰⁵ Wholly contrary to the human rights idea, pertinent decisions and legislative acts that erode rights based on gay/lesbian status fall short of full human rights protections and reinforce discrimination and hate.¹⁰⁶ In the end, the law supports “the unsupportable position that only some families are real,”¹⁰⁷ thus, denying an entire class basic human, social, and economic benefits and protections that the government statutorily attaches to marital status.¹⁰⁸

The only remotely arguable governmental interest to justify the denial of legal protections and benefits to same-sex couples (through marriage or a functional equivalent alternative) is an interest in promoting morality and

101. See Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflations of Sex, Gender and Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 207 (1996) (arguing that the current Euro-American system is heteropatriarchal).

102. See *Griswald*, 381 U.S. at 486 (overturning a state statute criminalizing the use of contraceptives because it infringed on the fundamental right to privacy).

103. See *id.* at 485.

104. See *id.* See generally U.S. CONST. art. I, § 1 (declaring all legislative power shall be vested in Congress); *id.* art. II, § 1 (vesting executive power in the President); art. II, § 2, cl. 2 (establishing separations of powers as a system of “checks and balances”); art. III, § 1 (declaring judicial power in the Supreme Court).

105. See Hernández-Truyol, *supra* note 79.

106. See *id.*

107. *Baker*, 744 A.2d at 898-99 (Johnson, J., dissenting).

108. See Hernández-Truyol, *supra* note 79.

condemning homosexual sex. However, as the international community has recognized, any private adult consensual activity should be wholly outside the purview of government regulation.¹⁰⁹

Moreover, subjective moral and religious values are inappropriate bases upon which to deny public, secular benefits. Where government regulation is dictated by religious and spiritual practices, the government is out of place; religious and spiritual traditions are inappropriate locations from which to allocate public benefits. By denying public property benefits to citizens solely because of their status, the government blatantly undermines its aim of autonomy of citizens, respect for privacy, and entitlement to property rights and benefits. In labeling gays/lesbians as morally wrong and religiously unacceptable and therefore undeserving of legal recognition and the resulting legal benefits, the government inappropriately conflates the religious sphere with the secular realm.

In *Romer*, Justice Scalia echoed this religious and moralistic basis for status-based discrimination (sexual/affectional orientation) when he likened gays/lesbians/bisexuals to murders, polygamists, and those who are cruel to animals.¹¹⁰ He further expressed that the phenomenon of gays/lesbians/bisexuals, as a class, gaining political support and becoming a politically and socially powerful minority, somehow warrants the denial of equal opportunity and equal protection.¹¹¹ Furthermore, Scalia assumed that efforts to keep gays/lesbians/bisexuals from gaining political and social equality or majority support are sufficient interests to justify discrimination for the purpose of keeping gays/lesbians/bisexuals subordinate to the current majority.¹¹² Here, paternalism and heterosexism are evident in the dissent's desire to keep gays/lesbians/bisexuals (political minorities) from gaining majority support, social-toleration, recognition, and equal treatment — something he apparently finds undesirable.¹¹³

109. See *A.D.T. v. United Kingdom*, (Hudoc Reference: avREF00001743) (visited October 11, 2000) <<http://www.dhcour.coe.fr/>> (overturning, a gross indecency conviction against a British man who had videotapes in his home showing him having consensual sex with four other men on the basis that several precepts contained within Art. 8 of the European convention; the respect for private life, and protection of the rights and freedoms had been violated.); *Toonen v. Australia*, Communication, No. 488/1992, HRC Views of Committee, Mar. 31, 1994, UN Doc. CCPR/C/50/D/488/1992 (upholding a right to sexual privacy for citizens of Australia under Art. 17 of the ICCPR).

110. See *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).

111. See *id.* at 645-46 (Scalia, J., dissenting).

112. See *id.* (Scalia, J., dissenting).

113. See *id.* (Scalia, J., dissenting). Justice Scalia reasoned that

The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities . . . have high disposable income . . . and, of course, care about

Quite appropriately, although highly disturbing, the dissent in *Romer* defines the current issue of gay/lesbian/bisexuals rights as a cultural war.¹¹⁴ While we would rather call it a struggle, tensions indubitably exist. However, these are no different from the tensions that historically have emerged when a subordinated, disempowered group that was regularly, systematically, and *de jure* denied rights, started to demand what they undoubtedly and justly deserved. The main writings in this symposium reflect the struggles of Native Americans, African Americans, women, indigenous peoples, and other ethnic, racial, and religious minorities who claimed their place at the supper table that had long excluded them. Today the struggle is to deconstruct the underpinnings of the current “straightness as property” paradigm.

Congress’ conferral of so much economic value to marriage renders marital status a valuable property right. Consequently, the government’s wholesale preclusion of marriage, equivalent legal recognition, or alternative structure allowing same-sex couples entitlement and access to the benefits that opposite couples are allowed, denies access to a fundamental right that carries with it both emotional and economic value.

Inroads have been made in the private sector to afford property benefits to those outside traditional relations. In the public sector, as evidenced by *Romer*, *Baker*, and *Braschi* — at the federal and state levels respectively, some barriers have started to fall.¹¹⁵ Given the private nature of choosing a life partner, the fundamental nature of that decision, and the benefits that have been created to flow therefrom, a society committed to equality should allow all citizens to enjoy these protections. After all, if we are to be a democratic nation truly seeking equality for all, same-sex couples — the traditionally subordinated minority — should have equal access to rights and benefits that are routinely and indiscriminately afforded to the traditional majority.

homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.

Id.

114. See *id.* at 652 (Scalia, J., dissenting).

115. For example, 25 states, including Colorado, had repealed their antisodomy laws at the time of *Romer*, thus effectively rendering the dissent’s justification without merit. See *id.* at 645 (Scalia, J., dissenting).