WHEN HARRY MET LARRY AND LARRY GOT SICK: WHY SAME-SEX FAMILIES SHOULD BE ENTITLED TO BENEFITS UNDER THE FAMILY AND MEDICAL LEAVE ACT

I. INTRODUCTION

The 1990s began as a decade of reform in the employment arena. Congress passed a number of acts and statutory amendments in an effort to eradicate discrimination in the workplace. The "Americans with Disabilities Act" (ADA),[1] passed by Congress in 1990, was enacted to provide people with mental or physical impairments[2] the fair chance to utilize their skills in the workplace with reasonable accommodations.[3] The ADA further prohibits employers from discriminating against individuals by denying them the opportunity to prove their ability to work.[4] Closely following this Act was the passage of the "Civil Rights Act of 1991,"[5] which was meant to address the need for, "additional remedies

1. Pub. L. No. 101-336, 104 Stat. 327 (1990).

2. 42 U.S.C. §12102(2) (2000). The Act defines a disability as, "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." *Id.* Therefore, under this definition even if an individual does not actually have such a mental or physical impairment, he may qualify under the Act if he is regarded by others as having such an impairment. This sweeping and proactive measure reflects Congress' intention not only to stop discrimination against those with disabilities, but also to change negative perceptions about the abilities of those with disabilities. In fact, Congress states that the purpose of this Act is to, "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."
Id. §12101(b) (1).

3. *See id.* §12101(a)(8)-(9).

4. *Id.* §12112(b)(5)(B). The Act requires employers to provide reasonable accommodations, if necessary, for such employees to perform their job functions and if they are capable of performing these functions with reasonable accommodation, then an employer cannot refrain from hiring them just because they require these reasonable accommodations. In this way, the Act levels the playing field and gives those with disabilities equal opportunity to work and perform their job adequately. *See* SAMUEL ESTREICHER & MICHAEL C. HARPER, EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW 515-17 (2000).

5. 105 Stat. 1071 (1991). This Act was an amendment to Title VII of The Civil Rights Act of 1964, which sought to provide equal employment opportunities and prohibited discrimination in the workplace on the basis of race, color, religion, sex, or national origin. 78 Stat. 255 (1964).

under Federal law . . . to deter unlawful harassment and intentional discrimination in the work place."[6] Like the ADA, the Civil Rights Act of 1991 also attempted to level the employment playing field by demanding that employers judge individuals for their work product and not their skin color, religion, sex, or creed.

Finally, in 1993 Congress passed the long debated Family and Medical Leave Act (FMLA),[7] the stated purpose of which was to, "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."[8] The FMLA was prompted by findings that the number of single parent or dual income households, where both spouses work, leaves no one to care for chil-

6. Pub. L. No. 102-166, 105 Stat. 1071 (codified in 42 U.S.C. § 1981 nt. (2000)). Elizabeth Roth argues that the legislative history of the Act suggests that sex was initially added by conservatives in an attempt to prevent the legislation from passing, on account of being too radical. Elizabeth Roth, *The Civil Rights History of "Sex": A Sexist, Racist Congressional Joke*, 2 LAW. PRAC. MGNT., Sept. 1993, at 26. She explains that, "[i]t became clear as the debate progressed that those who were openly hostile to the Civil Rights Act supported the sex discrimination amendment, apparently hoping to derail the entire bill." *Id.* In fact, Representative Edith Green of Oregon pointed to the irony at work in the debates over adding sex by noting that, "[T]hose gentlemen of the House who are most strong in their support of women's rights this afternoon probably gave us the most opposition when we considered the bill which would grant equal pay for equal work just a very few months ago. I say I welcome the conversion and hope it is of long duration." *Id.* at 28. *See* Camille Hebert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 821-22 (1997) (explaining that the debate over adding the term "sex" indicates bad motive on the part of those proposing the amendment); *see also* BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 3 n.2 (1992) (arguing that sex was a last minute addition to the Amendment by those who wished to see it fail).

However, despite their attempts to interfere with the passing Civil Rights Act of 1964, this monumental piece of legislation was passed by both houses and signed into law by President Johnson on July 2, 1964, with the added term "sex." And although it was indeed "ahead of its time," this Act is now a cornerstone of our non-discriminative practices. *See generally* Hebert, *supra* at 822 (showing how courts have accepted analogies between sex and race discrimination cases).

The 1991 amendment to the Civil Rights Act of 1964 includes the Glass Ceiling Act of 1991, 105 Stat. 1081 (codified in 42 § 2000e nt.), which was designed to address discrimination that women and minorities face in the workplace in terms of placement at the management level (or other high ranking positions), and the Government Employee Rights Act of 1991, 105 Stat. 1088 (codified in 42 U.S.C. § 1201), which extends the Civil Rights Act to cover officers and employees of the House of Representatives, instrumentalities of Congress, and agencies of the legislative branch. 2 U.S.C. § 60*l* (2000). It also allows for a greater award of damages to be collected by permitting punitive damages. 42 U.S.C. § 1981a.

7. The FMLA took much compromise to reach its final version, allowing for 12 weeks of unpaid leave for a variety of medical and family related reasons. For an overview of the different propositions offered in Congress, beginning in 1985 and culminating with the passage of the Act in 1993, see Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 58-67 (1994).

8. 29 U.S.C. § 2601(b)(1) (2000).

dren.[9] This forces Americans to, "choose between job security and parenting,"[10] a choice that can feasibly have devastating effects on children, and moreover, on American society at large. In particular, Congress found that the burden of choosing between career and childcare has historically fallen on women, and that the results of this choice have been the apparent and significant gender discrimination in the workplace.[11] Therefore, the FMLA was particularly geared towards, "minimiz[ing] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender neutral basis; and to promote the goal of equal employment opportunity for women and men . . . ."[12]

Because of its gender-neutral language, the FMLA was the first piece of federal legislation to recognize that both men and women are capable of sharing equally in family care responsibilities. Unlike its predecessor, the Pregnancy Discrimination Act,[13] which only acknowledged that discriminating against a woman because she was pregnant constituted discrimination on the basis of sex for purposes of the Civil Rights Act,[14] the FMLA afforded men and women equal opportunity to take family and medical leave. Under the FMLA, an employer would

9. *See id.* § 2601(a).

10. *Id.*

11. *See id.* § 2601(b)(5). Many women can attest to being forced to make this choice and, at times, even having such a choice made for them because an employer would not want to hire a married woman who could likely become pregnant and need time off. *See* Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1047 (1994) (explaining that the predominant view of including women in the working world, up until relatively recently, was not an inviting one). In fact, in 1971, the Supreme Court, "suggested in dicta that an employer could lawfully refuse to hire a woman with preschool-aged children, although it hired similarly situated men, if the employer could show that the existence of 'conflicting family obligations' was 'demonstrably more relevant' to a woman's job performance that a man's." *Id.* (citing Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971)). This attitude reflects the battle that women faced when trying to seek employment outside of the home.

12. 29 U.S.C. § 2601(b)(4)-(5).

13. 92 Stat. 2076 (1978) (codified in 42 U.S.C. § 2000e(k) (2000)). Cynthia L. Estlund argues that a combination of statutory Acts like Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act, along with social, economic and technological changes, have opened doors for women in the workplace and allowed them opportunities to advance that were not available to them in the past. Cynthia L. Estlund, *Papers of the Joint Japan-U.S.-E.U. Project on Labor Law in the 21st Century: Work and Family: How Women's Progress at Work (and Employment Discrimination Law) May be Transforming the Family*, 21 COMP. LAB. L. & POL'Y J. 467, 468 (2000). However, while these acts may be partially responsible for allowing women to gain a foothold in the working world, it was the FMLA that allowed both men and women the opportunity to regain a foothold in the world of the home. *See* Malin, *supra* note 11, at 1052.

14. 42 U.S.C. § 2000e(k).

violate the Act and be subject to a civil law suit for discriminating against an employee who took the leave allotted under the law, regardless of their gender.[15] Therefore, what truly distinguished the FMLA was the fact that a father was now permitted to take up to 12 weeks off to care for a newborn or adopted son or daughter, without fear that his job would be jeopardized. Childcare no longer resided exclusively in the female domain.[16]

By enacting the FMLA, Congress took a crucial step forward on the evolving path towards gender equality, and sought to play their part in society's struggle to eradicate certain socially engineered gender stereotypes about women and men that have persisted throughout history. However, this path to progress came to a screeching halt in 1996 with the passage of the "Defense of Marriage Act" (DOMA).[17] DOMA defined marriage, for the purpose of federal legislation as "between a man and woman" and required that the word "spouse" only refer to a husband or wife of the opposite sex.[18] In limiting the term marriage to only include a man and a woman, Congress reverted back to archaic gender stereotypes that had segregated the spheres of men and women for so long - by insisting that men may only marry women and women may only marry men. But what Congress failed to realize in passing DOMA, was that forcing gays and lesbians to conform to the traditional (heterosexual) view of proper sexuality, is just like forcing a woman to remain in the home and conform to the traditional view of woman as caregiver, wife, and mother; a view the FMLA sought to change.[19]

15. 29 U.S.C. § 2617. An employer who violates this Act by interfering with an employee's exercise of his rights or discriminating against an employee for exercising his rights under the Act may be liable to such employee for, "damages equal to the amount of any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee." *Id.* § 2617(a)(1)(A)(i). The employee may also collect interest on the amount calculated and liquidated damages. *Id.* § 2617(a)(1)(A)(ii)-(iii).

16. In fact, Congress stated in their findings that, "it is important for the development of children and the family unit that fathers *and* mothers be able to participate in early childrearing and the care of family members who have serious health conditions." *Id.* § 2601(a)(2) (emphasis added). In addition, while the Act does permit individuals to take leave to care for ill parents, it does not permit one's spouse to take leave to care for his or her sick parent-in-law. *Id.* § 2612(a)(1)(c). As Donna Lenhoff and Claudia Withers point out, this Act encourages men to take on a more active role in family care (beyond financial support) and attempts to shape a more "gender equal" society.Lenhoff & Withers, *supra* note 7, at 49-50.

17. 1 U.S.C. § 7 (2000).

18. *Id.*

19. *See* Lenhoff & Withers, *supra* note 7, at 49 ("By granting both female and male employ-

The FMLA allows both men and women the opportunity not only to pursue a career, but to choose the option of caring for family members as well. It gives families the freedom to structure themselves as they see fit, by allowing men and women to choose who will take leave for family issues, rather than being forced to conform to traditional notions of woman as homemaker and man as breadwinner.

This note will show that the natural extension of the FMLA's progressive attitude is that men and women should be able to gain access to the legal, social and economic benefits that a family structure has to offer, regardless of their sexual orientation. The findings and the purposes of the FMLA hold true, regardless of whether a family has a mother and father, two mothers, or two fathers. Gay and lesbian families need to balance the demands of the workplace with the needs of the family, just like heterosexual families. They, too, require job security when taking reasonable leave in order to adequately care for their families. Therefore, logic dictates that gays and lesbians should be entitled to claim the benefits of the FMLA, just like their heterosexual counterparts.[20]

Our argument is divided into four sections. Section II discusses the goals of the FMLA and why this progressive piece of legislation gave both men and women the legal authority (and employers the legal obligation) to acknowledge and address family matters without sacrificing their jobs. Congress explained that such legislation was necessary in light of the changing family structure, whereby the astronomical increase in single parent and dual income households left no one in such situations with the family as their sole, primary responsibility.[21] We assert

ees the right to family and medical leave, the FMLA may help to change society's perception of child care, elder care, and other dependent care as 'women's work.'"); *see also*, Stephanie C. Bowee, *The Family Medical Leave Act: State Sovereignty and the Narrowing of Fourteenth Amendment Protection*, 7 WM. & MARY J. WOMEN & L. 1011, 1036-37 (2001) ("Congress enacted the FMLA in an attempt to remedy problems of gender discrimination in the workplace that result from anachronistic stereotypes about the role of women within the family . . . and by requiring that leave be available to both genders, Congress remedied gender discrimination by making issues of work and family no longer exclusively 'women's issues.'").

20. This includes both the direct benefits of the FMLA, in taking off the 12 week leave period while still maintaining job security, and the indirect benefits of being able to structure one's family as one sees fit and allocate care giving and income earning responsibilities on an individualized basis.

21. In debates over the enactment of the FMLA, one Senate Report asserted that:

> With men and women alike as wage earners, the crucial unpaid care-taking services traditionally performed by wives . . . has [sic] become increasingly difficult for families to fulfill. When there is no one to provide such care, individuals can be permanently scarred as basic needs go unfulfilled. Families unable to perform their essential function are seriously undermined and weakened. Finally, when families fail, the community is left to grapple with the tragic consequences of emotionally and physically deprived chil-

that not only did the FMLA acknowledge the changing family structure, but that it also allows families to choose their own structure by equalizing gender roles and providing leave opportunities for men and women alike. In addition, the recent Supreme Court decision in *Nevada Human Resources v. Hibbs* [22] reflects the gender neutral purpose of the FMLA, by finding that a man is entitled under the FMLA to take advantage of the allotted time off to care for his injured wife and that gender does not determine entitlement to utilize the Act.

Section III deals with the issue of gay and lesbian families claiming benefits under the FMLA, particularly in light of DOMA, which requires spouses to be of the opposite sex for the purpose of claiming federal benefits.[23] This requirement conflicts with the progressive nature of the FMLA in allowing families to choose which parent will make the home their first priority and which parent will make work their first priority.

Section IV asserts that the real motivation for denying same sex families federal benefits is animus towards gays and lesbians. Such animus is masked in financial considerations and the concern that allowing such families to claim benefits will cost too much. However, we will show that statistically, these financial arguments (which were also made during the debates over the FMLA) do not hold water. And just like such arguments have never before excused mistreating a class of individuals, so too in this case, it cannot justify denying family and medical leave benefits to employees who contribute just as much as their heterosexual counterparts to the federal government in taxes.

Section V analyzes the constitutional claim that in order for the government to comply with the equal protection requirements of the Constitution, it must grant benefits that it bestows on heterosexual couples equally to gay couples who have legally formalized their union, either via a civil union or marriage.[24] The Supreme Court has acknowl-

dren and adults.

Jane Rigler, *Analysis and Understanding of the Family and Medical Leave Act of 1993*, 45 CASE W. RES. L. REV. 457, 460-61 (1995) (quoting S. REP. NO. 103 at 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. at 9); *see also*, Nancy J. King, *The Family Medical Leave Act: An Ethical Model for Human Resource Policies and Decisions*, 83 MARQ. L. REV. 321, 327 (1999) ("The unavailability of traditional caregivers, who were predominantly women not in the workforce, was a key demographic factor supporting the adoption of the FMLA.").

22. 538 U.S. 721 (2003).

23. 1 U.S.C. § 7 (2000).

24. While Vermont is currently the only state to legally perform same-sex civil unions, a number of other states, including Hawaii, New York, California, New Jersey, and Oregon recognize same sex civil unions and domestic partnerships as affording these couples the same benefits marriage offers. *See* Richard Morin & Claudia Deane, *Poll Finds Growing Support for Gay Civil Unions*, WASH. POST, Mar. 10, 2004, at A06 (explaining that, "[a]bout half the country – 51 percent –

edged that gays and lesbians are capable of forming relationships just as heterosexuals,[25] and has also explained that morality cannot be a basis for the law.[26] Therefore, individual opinions about whether or not homosexuality is moral, cannot justifiably fuel the persecution of such individuals and cannot be a legal reason for denying such individuals benefits under the law that have been afforded heterosexuals in similar situations.[27]

favors allowing gay couples to form civil unions with the same basic rights as married couples.").
For an example of how New York has recognized same-sex civil unions performed in Vermont, see Langan v. St. Vincent's Hosp., 765 N.Y.S.2d 411, 418 (Sup. Ct. 2003) (recognizing a civil union between two gay men performed in Vermont as giving the plaintiff standing to bring a wrongful death action against the defendant hospital where his partner died). Further, according to the December 2003 decision of the Supreme Court of Massachusetts in *Goodridge v. Department of Public Health*, Massachusetts now permits same sex marriage as of May 17, 2004. 798 N.E.2d 941, 969 (Mass. 2003). David Buckel, the Marriage Project Director at Lambda Legal, recently stated that:

> For more than six months, same-sex couples in Massachusetts have been getting married, and nobody else's marriage has been affected. Massachusetts continues to have the nation's lowest divorce rate. This is another reminder that when loving, committed same-sex couples are allowed to marry, other couples don't lose rights or respect. The only thing that's different is that loving, committed same-sex couples have the critical protections their families need.

Lambda Legal Says U.S. Supreme Court Declining to Hear Challenge to Same-Sex Couples Marrying in Massachusetts is "Another Reminder that When Same-Sex Couples are Allowed to Marry, Other Couples Don't Lose Rights or Respect" (November 29, 2004) *at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1566 (last visited January 2, 2005). These protections include those provided by both state and federal laws. The leave provided by the federal Family and Medical Leave Act is only one example. For a comprehensive survey of the various employee benefits depending on marital status, see generally, Neal S. Schelberg and Carrie L. Mitnick, *Same-Sex Marriage: The Evolving Landscape for Employee Benefits*, 22 HOFSTRA LAB. & EMP. L.J. 65 (2004) (commenting on the ramifications the *Goodridge* decision will have on employers, not only within Massachusetts, but throughout the nation as well).
Presently, Lambda is suing on behalf of same-sex couples seeking marriage licenses in California, New Jersey, New York and Washington. *Lambda Legal Says U.S. Supreme Court Declining to Hear Challenge to Same-Sex Couples Marrying in Massachusetts is "Another Reminder that When Same-Sex Couples are Allowed to Marry, Other Couples Don't Lose Rights or Respect*" (November 29, 2004) *at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1566. In August 2004, the Superior Court of the State of Washington for King County found in favor of the plaintiffs, same-sex couples suing for the right to marry in the state of Washington. Judge Downing explained that "[t]he denial to the plaintiffs of the right to marry constitutes a denial of substantive due process" and therefore violates the Washington State Constitution. Anderson v. Kings County, 2004 WL 1728447, at *11 (Wash. Super. Aug. 4, 2004). The *Goodridge* decision opened the door to same-sex couples and made it increasingly easier for same-sex couples in other states to counter traditional justifications for unequal treatment of gay and lesbian families.

25. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

26. Romer v. Evans, 517 U.S. 620, 633 (1996).

27. Justice Kennedy, writing for the majority in *Lawrence v. Texas*, recalled that it is the Supreme Court's, "obligation . . . to define the liberty of all, not to mandate our own moral code." 539 U.S. at 571 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)). This view reflects the non-majoritarian role of the court, which is supposed to safeguard against

II. THE FAMILY AND MEDICAL LEAVE ACT: ITS PURPOSES AND GOALS

The Family and Medical Leave Act of 1993 was designed to provide twelve weeks of unpaid leave to employees, when necessary, to take care of family responsibilities.[28] Congress passed this crucial piece of legislation as a response to the rising number of single parent and dual income households that result in having a negative impact on families (and children in particular) who no longer have at least one member with the family as their primary concern.[29] Congress recognized this dangerous reality, and sought to rectify the situation by forcing employers to grant family and medical leave - albeit limited and unpaid - so that employees could address family issues without losing their jobs and, by extension, their necessary income. While tackling the family/employment balance, Congress also sought to equalize the playing field for genders in the workplace by enacting gender neutral legislation that allows either a man or a woman to take leave to deal with family and medical issues, so that taking such leave would no longer be a basis for gender discrimination.[30] This was a dramatic shift from the accepted notion that caring for loved ones was exclusively the woman's responsibility.[31]

---

unfair treatment of minorities simply because the majority disapproves of them. *See generally*, Frank B. Cross, *Perspectives on Judicial Independence: Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L.J. 195 (2003) (explaining how U.S. courts make decisions independent of legislative and public pressure).

28. 29 U.S.C. § 2612 (2000).

29. *Id.* § 2601.

30. *Id.* § 2601(b)(4)-(5).

31. Stephanie C. Bowee states that, "historical gender roles dictate that women bear most of the domestic responsibilities for the family," and that even though men also have families, "social pressure pushes women into assuming more responsibility for family life." Bowee, *supra* note 19, at 1015. In addition, this historical understanding that the proper role for women in society is to take care of the home was perpetuated by nineteenth and twentieth century case law that approved laws prohibiting women access to the workplace because of "their frail nature" and a fear that allowing women to work would lead to the downfall of civilization. *See*, *e.g.*, Muller v. Oregon, 208 U.S. 412, 420-23 (1908); Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383 (1876); William v. Evans, 165 N.W. 495 (Minn. 1917).

In *Bradwell v. State*, the court upheld an Illinois decision declining to grant Ms. Bradwell's petition to be admitted to the bar on the grounds that she was ineligible as a married woman. 83 U.S. 130 (1872). In supporting the State court's decision, Justice Bradley remarked in his concurrence that:

> The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say the identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.

This section asserts that by taking this step in passing the FMLA, Congress was attempting to aide society in breaking free from traditional notions of appropriate gender roles and enabling both men and women to slide freely between these roles and assume equal responsibility in both the workplace and the home.[32]

A. What the FMLA Does

Congress enacted the Family and Medical Leave Act in 1993[33] to address growing concerns of the American family over having to choose between employment and family responsibilities.[34] The Act demands that employers[35] grant twelve weeks of unpaid leave[36] to employees for

Id. at 141. While this antiquated view no longer justifies legislation preventing women from access to the workplace, its effects do remain in our society today and may still lead employers to make employment decisions under the misapprehension that women will not be as loyal to the employer as men because they are divided between work and the home. *See* Rosemarie Feuerbach Twomey & Gwen E. Jones, *The Family and Medical Leave Act of 1993: A Longitudinal Study of Male and Female Perceptions*, 3 EMPL. RTS. & EMPLOY. POL'Y J. 229, 234 (1999). This was precisely what the FMLA sought to address. By allowing both men and women the opportunity to take leave, Congress hoped to combat discrimination against women in the workplace, so that employers would no longer correlate women with the need to take leave for family emergencies.

32. The Supreme Court recognized this gender equalizing purpose of the FMLA most recently in *Nevada Department of Human Resources v. Hibbs*, where the court found that the FMLA was structured to provide both men and women with the opportunity to take leave from work to tend to family responsibilities. 538 U.S. 721 (2003). This case will be discussed at length infra at Section IIC.

33. The FMLA has a long legislative history and was debated by Congress for about eight years, and vetoed twice by President Bush, until it was finally passed in May 1993 as the first piece of legislation that President Clinton signed upon entering office. *See*, President's Remarks on Signing the Family and Medical Leave Act of 1993, 1993 PUB. PAPERS 49 (Feb. 5, 1993).

34. 29 U.S.C. § 2601(a)(3) (2000). President Clinton stated that, "this legislation is a response to a compelling need – the need of the American family for flexibility in the workplace. American workers will no longer have to choose between the job they need and the family they love." President's Statement on Signing the Family and Medical Leave Act of 1993, 1993 PUB. PAPERS 50 (Feb. 5, 1993).

35. The Act defines an employer as one who has fifty or more employees within a seventy-five mile radius. 29 U.S.C. § 2611(4). Therefore, the FMLA does not demand that employers with smaller businesses grant employees any medical or family leave and they are free to dismiss employees for utilizing such leave in an at-will employment setting. However, employers benefit from granting such leave by encouraging loyalty and promoting morale among employees, in addition to avoiding a high turnover rate, since employees will not be forced to quit automatically when faced with certain medical and family emergencies. *See* Kathryn Branch, *Are Women Worth As Much As Men?: Employment Inequities*, *Gender Roles*, *and Public Policy*, 1 DUKE J. GENDER L. & POL'Y 119, 152 (1994) (citing Liza Donaldson, *Nurturing the Bottom Line – It Makes Good Business Sense to be a Family-Friendly Employer*, FIN. TIMES, Apr. 11, 1994, at 11).

36. While the leave is technically unpaid, employers may not terminate an employee's health insurance or other benefits during their absence. *See* 29 U.S.C. § 2614(c). In addition, employers must guarantee that the employee has a job to return to that is comparable to the one he left. *See id.*

various enumerated reasons, including the birth or adoption of a child, personally suffering from a serious medical condition, or in order to care for a spouse or parent who suffers from a serious medical condition.[37] The legislation reflects a compromise between the interests of employers in not having to incur high expenses for granting such leave,[38] and the interests of employees in being able to take time off for family and medical situations without the fear of losing their job.[39]

The FMLA marked a progressive leap on the part of Congress to recognize the individual's dual nature as both a member of the workforce and a member of a family, with allegiance cut in both directions.[40] However, the possible effects of the FMLA are restricted by its

§ 2614(a). *See also* Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 84 (2000).

37. 29 U.S.C. § 2612(a).

38. A major aspect of the debate over enacting the FMLA focused on concerns of employers that granting such leave would impose a heavy burden on them financially. Upon vetoing the legislation in 1989, President Bush argued that, "the federal government should not mandate a rigid leave policy . . .[because] such an issue should be part of employer-employee negotiations." Maureen Porette & Brian Gunn, *The Family and Medical Leave Act of 1993: The Time has Finally Come for Government Recognition of True "Family Values,"* 8 ST. JOHN'S J. LEGAL COMMENT. 587, 592-93 (1993). However, the Commission on Family and Medical Leave, which was established by Congress in the Act to monitor the effects of the FMLA, found that for the most part, the FMLA did not impose a heavy economic threat to employers and, in fact, aided them in minimizing employee turnover costs and improved morale among employees because they did not have to choose between family and work. *See generally* COMMISSION ON FAMILY AND MEDICAL LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES (1996) (hereinafter A WORKABLE BALANCE).

39. Donna Lenhoff and Claudia Withers argue that, "family and medical leave policies create a rare win-win situation [because] they help employees juggle their family and work responsibilities while increasing business productivity." Lenhoff & Withers, *supra* note 7, at 53.

40. This acknowledgment directly counterbalances employers' perceptions that commitment to the job demands freedom from all other concerns. Erin Gielow points out that, "[v]eiled employer retaliation threats and decreased earnings reflect the prevalent workplace attitude that parents are less committed employees: 'Admitting a life outside of work often calls commitment into question.'" Erin Gielow, Note, *Equality in the Workplace: Why Family Leave Does Not Work*, 75 S. CAL. L. REV. 1529, 1535 (2002) (citing Dory Devlin, *For Some Dads*, *Change Isn't As Easy As It Seems*, STAR LEDGER, Apr. 24, 2000, at 55). Gielow posits that despite the Family and Medical Leave Act, men in particular are still socially discouraged from taking leave to participate in care taking responsibilities, and even shamed into using other resources such as vacation time or sick leave to tend to family duties, rather than admit the real reason they are taking time off. But the FMLA functions as any other piece of legislation creating law; it permits both men and women to take unpaid leave for family and medical reasons and provides them with a legal remedy if they are penalized for taking such leave. While some individual members of our society may still adhere to traditional formulations of proper gender roles, the fact that our law recognizes that these roles are no longer binding allows our society as a whole to evolve into a more gender equal one. *See* President's Statement on Signing the Family and Medical Leave Act of 1993, 1993 PUB. PAPERS 50-51 (Feb. 5, 1993) ("The Family and Medical Leave Act of 1993 *sets a standard* that is long overdue in

terms, which only insist that employers provide unpaid leave[41] for a limited amount of time.[42] But, even though this limited scope precludes many from utilizing the leave because of financial constraints, the Family and Medical Leave Commission[43] reports that a large segment of the population has in fact relied on the provisions of the FMLA to take the time allotted to address family issues.[44] Therefore, while it is certainly true that the Act can be improved to allow more to have access to it, the FMLA still goes a long way in protecting American society at large, by acknowledging that employers and employees must work together to ensure the future of this country, both economically and socially.[45]

working America.") (emphasis added).

41. Many argue that the Family and Medical Leave Act does not go far enough to protect employees, particularly because it only makes such leave available to those who can financially afford to do so. *See* Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 422-23 (2001) (arguing that, "the FMLA's provision of unpaid leave renders its protections out of reach of all but the most privileged working women."); *see also*, Twomey & Jones, *supra* note 31, at 229 (pointing to our culture's perceptions that women are more suited to caring for the family, and the fact that financial concerns restrain some from utilizing leave, as hindering the FMLA's full potential to equalize genders in the workplace and provide economic stability for families). However, what these commentators overlook is that the Act was borne from compromise, which demands that each side sacrifice their ideal situation in order to gain some result in their favor. Therefore, while it is certainly true that Congress could have gone farther to protect working Americans and their families, the fact that the FMLA was enacted at all after eight long years of struggle reflects a "meeting of the minds" whereby employers relinquished some of their ability to terminate workers solely for absences due to family and medical emergencies in order to gain a more loyal and cogent workforce and employees relinquished their claim to paid leave provisions and a more expansive time frame for leave in exchange for the peace of mind and security in knowing that at least they will not lose their jobs for choosing to attend to family responsibilities. *See* President's Remarks on Signing the Family and Medical Leave Act of 1993, 1993 PUB. PAPERS 49-50 (Feb. 5, 1993) ("[Family and medical leave] will provide Americans what they need most: peace of mind [because n]ever again will parents have to fear losing their jobs because of their families."). For a more elaborate discussion on how the FMLA resulted from extensive balancing between the needs of employees and employers, see, King, *supra* note 21, at 321.

42. The Act also limits the type of employee who may take leave by restricting it to those who have been employed by such employer (from whom they are requesting leave) for at least twelve months and have worked for such employer for at least 1250 hours during the past twelve months. 29 U.S.C. § 2611(2) (2000). Such a provision ensures that an employee who is about to take leave has at least some loyalty to the employer's business, having worked there for at least one year (for about 25 hours per week in the year) before taking leave.

43. This Commission was established by the FMLA itself to monitor its use and to ensure that employers comply with the Act. 29 U.S.C. § 2631. *See* Lenhoff & Withers, *supra* note 7, at 48 (explaining the purpose of the Commission).

44. *See generally*, A WORKABLE BALANCE, *supra* note 38. This report canvasses the progress of implementing the FMLA in the workplace and its relative success in providing a more secure job atmosphere for both employees and employers. *Id.*

45. Nancy J. King points out that the FMLA also functions on an ethical level to force employers to internalize the moral consequences of parents not being able to tend to family responsibilities by imposing "moral duties" on employers to provide such leave. In this way, she posits, the

B. What the FMLA Was Meant To Address

The aim of the Family and Medical Leave Act is two-fold; Congress states that its purpose was, "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity . . . [and to] minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons and for compelling family reasons, on a *gender neutral basis*."[46] Therefore, by enacting the FMLA, Congress sought to protect the needs of the family (both economic and emotional) in light of changing social conditions, where working parents are more prevalent,[47] while also attempting to eradicate gender discrimination in the workplace that may result from ill perceived notions that a "woman's place is in the home."[48] By allowing both men and women to take leave for family and medical concerns, the FMLA points to a shift in modern America, where both mothers and fathers are capable of caring for their children and both men and women are capable of earning a livelihood.

1. The Evolution of the Family Structure

Today the word family no longer readily refers to a working husband/father, a stay-at-home wife/mother, and biological children.[49] Rather, the family structure has evolved into one that focuses more on

tension between the employer serving his financial interests and society needing stable well-balanced families is reduced by making, "ethical obligations correlate with legal compliance obligations." King, *supra* note 21, at 327-29.

46. 29 U.S.C. § 2601 (b)(1), (4) (emphasis added).

47. *See* President's Statement on Signing the Family and Medical Leave Act of 1993, 1993 PUB. PAPERS 50 (Feb. 5, 1993) (stating that because "the American workforce has changed dramatically in recent years," it is more necessary than ever for employers to provide family and medical leave to their employees).

48. *See* 29 U.S.C. § 2601 (b)(1), (4)-(5). *See also* Estlund, *supra* note 13, at 467-68 (explaining that as women's roles in the workplace have changed so that they stand on more equal (or even superior footing) with their male co-workers, their roles in the home and within the family structure have changed as well); Lenhoff & Withers, *supra* note 7, at 49 (explaining how the FMLA's "equal opportunity" leave provisions help to eradicate the gender stereotyping notions of family care as "women's work").

49. Mary Patricia Treuthart points out that, "[t]he traditional family with a breadwinner-husband and a homemaker-wife who live with their biological children is certainly an anomaly in America today [because t]he 'typical American family' – a married man supporting a wife and children – is a mere six percent of the total of American families." Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 91 n.1 (1990/1).

community than biology.[50] In addition, the role that each member plays is no longer restricted by archaic traditional notions of a man's or woman's or child's proper place. On the contrary, for the modern family to survive, it must adapt to current norms and structure itself in the way that suits its individual needs the best. Therefore, if such needs demand that a wife/mother go to work and a husband/father stay home with the children,[51] then society must evolve as well, to provide the means for such families to function.

The FMLA is one attempt by Congress to provide such means.[52] Its stated purpose is, "to balance the demands of the workplace with the needs of *families*, to promote stability and economic security of *families*, and to promote national interests in preserving *family* integrity."[53] Here, Congress recognizes that families, and more specifically children, suffer when parents are torn between obligations to their employer and obligations to their family. Therefore, it aims to devise a way for parents to provide for their children physically and emotionally, as well as financially, by allowing either parent to take leave to tend to family matters. In fact, the FMLA makes it possible for, "the talents and desires of each individual, instead of the biological accident of gender [to] decide their appropriate role."[54] In this way, the FMLA succeeds in allowing each family to structure themselves in the way that suits them most efficiently and enables *parents* to choose who will be the primary care giver,[55] rather than cultural stereotypes.[56]

50. *See* Treuthart, *supra* note 49, at 99 (pointing out that the functional family better defines what constitutes a family than the traditional family).

51. Perhaps because the woman is more trained to access a higher paying job or the man is in a field that allows him to work at home more readily than his wife's profession.

52. Kathryn Branch observes that, "although cultural taboos against men taking paternity leave exists, the FMLA is one step towards changing public perceptions of appropriate gender roles and valuation of the family." Branch, *supra* note 35, at 141.

53. 29 U.S.C. § 2601(b)(1) (2000) (emphasis added).

54. Branch, *supra* note 35, at 119. She goes on to discuss the problems with having such gender stereotypes in our society and points out that even though some individuals may be able to, "rise above cultural pressures and claim a role different from that encouraged for their gender, the mere fact that a hurdle can be cleared does not justify its existence [and t]he strong influence of prescriptive gender roles is an unnecessary hurdle barring individual choice and a major factor in gender inequities in employment." *Id.* at 119-20. This argument reflects the concept that progressive laws can help society break free from the binds of archaic misperceptions of a man's or woman's proper place by taking away stigmas associated with choosing a different role.

55. Whether it be the father, the mother or both.

56. Although the FMLA does not yet provide for other types of caregivers to claim leave, such as grandparents, aunts, uncles, etc., it still allows parents to have more of a say in how to structure their individual family unit by operating on a gender neutral basis. *See* Porette & Gunn, *supra* note 38, at 597-600.

2. Eradicating Gender Discrimination in the Workplace

The FMLA uses gender-neutral language so that both men and women can have access to its provisions. By not limiting leave for family matters to women, the Act differs from preceding legislation that relegated family responsibilities to the woman's domain,[57] and therefore, functions better in equalizing the roles men and women play at work and in the home.[58]

Congress explicitly states that its purpose for using gender-neutral language is to, "minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons . . . and for compelling family reasons on a gender-neutral basis and to promote the goal of equal employment opportunity for women and men."[59] Many have attributed this language to Congress' finding that, "due to the nature of the roles of men and women in our society, the primary responsibility for family care taking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men."[60] However, Congress also states as one of its findings that, "it is important for the development of children and the family unit that fathers *and* mothers be able to participate in early childrearing and the care of family members who have serious health conditions."[61] This recognition, that the health and well-being of the family structure demands that both parents be involved in tending to family care taking responsibilities, sets the FMLA apart; even

57. An example of such legislation was the "Pregnancy Discrimination Act" (PDA), which was enacted in 1978 to prevent discrimination of women in the work place because of pregnancy related matters. 42 U.S.C. § 2000e(k) (2000). By focusing on the needs of the family in having one of its members available to tend to responsibilities and concerns, rather than on the temporary disability a woman may suffer as a result of pregnancy and childbirth, the FMLA's "gender neutral approach . . . [succeeds in] separating physical incapacity from childcare responsibility." Bornstein, *supra* note 36, at 83. As we discussed infra Section I-II, it was concerns over the effects that discriminatory practices in the workplace would have on families in general, and not only on women per se, that motivated Congress to encompass both men and women in its leave provisions.

58. Cynthia L. Estlund argues that, "to the extent that the equal employment laws are partly responsible for women's advancement within the world of work, those laws also tend indirectly to shape the allocation of responsibility and power within the home." Estlund, *supra* note 13, at 468. She explains that while the law may not be able to directly shape "intrafamilial relations," legislatures can help the family structure develop by passing laws that affect the roles of men and women outside the home. *Id.* Therefore, a direct correlation exists between the advancement of women (as a whole) in the workplace and the advancement of men (in their involvement as fathers) in the home.

59. 29 U.S.C. § 2601(b)(4)-(5) (2000).

60. *Id.* § 2601(a)(5). *See*, Bowee, *supra* note 19, at 1011 ("Women disproportionately bear family responsibilities because of historical stereotypes.").

61. 29 U.S.C. § 2601(a)(2) (emphasis added).

though it acknowledges that our society still views women as primary caregivers, it points to an ideal where both parents take on this role, regardless of gender.[62]

By taking family concerns out of the domain of women, and allowing both mothers and fathers access to leave, the FMLA "changes the debate about family issues from being a women's issue, to everybody's issue . . . [and] remedie[s] gender discrimination by making issues of work and family no longer exclusively 'women's issues.'"[63] This results in stronger family units because society as a whole, rather than just women, considers the needs of the family, so that family issues do not always take a back seat to employment issues. In this way, employers no longer need to always doubt a woman's commitment to the job because both men and women are permitted to prioritize their families.[64]

C. Nevada Human Resources v. Hibbs: *Breaking Out of Traditional Gender Stereotypes*

In May 2003, the Supreme Court tackled the issue of whether the FMLA did in fact entitle a man to take leave under the Act, in order to care for his injured wife. Ten years after the FMLA – an Act that purportedly sought to equalize the genders in the workplace and eradicate gender based stereotypes and by extension gender based discrimination in the context of employment - was passed, the Supreme Court was

62. Obviously there are circumstances, such as single parent families, that demand one parent assume care taking responsibilities on his or her own. However, where both parents are available, Congress here is making a statement that both mothers and fathers are not only capable of providing care for their families, but indeed should care for their children and other ill family members, and provides the means to do so with this legislation. Angie K. Young states that, "[p]arenting seems to be more a function of practice and opportunity than of maternal instinct" in arguing that if fathers were to take a more active role in childcare from the start, the myth that women are more naturally suited as parents would dissolve. Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality*, *Work/Family Balance*, *and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 124-25 (1998). She cites to, "[e]vidence from parental-leave policies in Sweden [which] show[] that when fathers do take parental leave, they are 'significantly more likely to be perceived as having child care skills that [are] equal to or greater than those of their wives' [and] are also 'more likely to share in . . . specific child-care tasks." *Id.* (quoting Malin, *supra* note 11, at 1058-59).

63. Bowee, *supra* note 19, at 1036-37.

64. While it is true that some employers granted leave on their own without prompting by the federal government, federal legislation relieves the pressure on employers who wish to grant leave but cannot afford to because it would put them at a competitive disadvantage financially compared to those who would not provide such leave. Federal legislation puts everyone on a level playing field by requiring that all employers at least provide this basic leave. *See* King, *supra* note 21, at 329 ("[T]he Family and Medical Leave Act . . . provide[s] an ethical starting point for making . . . human resource decisions.").

called upon to determine the reach of the Act.[65] *Nevada Department of Human Resources v. Hibbs*,[66] represents a realization and acceptance on the part of the Supreme Court that culturally mandated stereotypes about the proper place men and women should hold in society are not justified and therefore, should not be supported by discriminating employer practices. In *Hibbs*, a man brought suit against his employer, the Nevada State Department of Human Resources, claiming that they had violated the FMLA by failing to allow him to take appropriate leave under the Act to care for his ill wife who had suffered extensive injury in a car accident.[67] While the lower court focused primarily on the employer's claim that the FMLA violated the Eleventh Amendment and, finding that it did, granted summary judgment for the employer, the Supreme Court comes to the opposite conclusion and looks more towards the stated purposes of the FMLA in allowing both genders to access family and medical leave and in addressing the need for uniform federal legislation in this area.[68]

The Court looks at the state of family leave laws prior to the enactment of the FMLA. Studies performed in 1990 revealed that:

65. It has taken ten years for a claim that illustrates the gender equalizing purposes of the FMLA to reach the Supreme Court. But upon its arrival, the Court recognized and legitimized Congress' goals by finding that Mr. Hibbs was entitled to take leave under the Act. *See generally* Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

In 1994, shortly after the passage of the FMLA, Donna Lenhoff and Claudia Withers projected that, "in ten years, family and medical leave will be considered fundamental to an employee's decent working environment . . . just as we today consider employees' rights to minimum wages, pensions and other benefits, and a safe work environment free of employment discrimination, to be fundamental to a decent workplace." Lenhoff & Withers, *supra* note 7, at 51. While there is still some work to be done, *Hibbs* symbolizes a major achievement that will hopefully serve as only one of many future stepping stones on the path to attaining a truly equal workplace and home life.

66. 538 U.S. 721 (2003).

67. *Id.* at 725.

68. The Supreme Court concludes that the FMLA does not violate the Eleventh Amendment, which says that states cannot be sued without their consent. However, because this issue is beyond the scope of this Note, we will rely on this conclusion in *Hibbs* and focus primarily on the Court's rationale regarding culturally mandated gender stereotypes and the FMLA's efforts to combat these stereotypes in the workplace. *Id.* at 721.

While the individual states and individual employers may exceed the benefits offered by the FMLA (since unlike ERISA, the FMLA does not preclude additional state action in order to be in compliance), this federal legislation provides a minimum standard, a floor that employers may not undercut. As Nancy J. King puts it, "[t]he FMLA [can be] characterized as a minimum labor standard for leave 'based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment.'" King, *supra* note 21, at 327 (citing Rigler, *supra* note 21, at 480).

> 37 percent of surveyed private-sector employers were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies . . . [And that] parental leave for fathers . . . is rare. Even . . . where child-care leave policies do exist, men both in the public and private sectors, receive notoriously discriminatory treatment in their requests for such leave.[69]

The Court concluded that these findings proved that even in the 1990s, "stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread."[70] These misguided beliefs that women are more suited for the home and men more suited for the workplace[71] — coupled with the fact that more women are finding themselves in the workplace (and that these cultural mores stunt a woman's ability to advance)[72] — indicates a strong need for a federal

69. *Hibbs*, 538 U.S. at 730-31.

70. *Id.* at 730.

71. Martin H. Malin points out that:

> The scientific, sociological, and anthropological evidence does not indicate that mothers are biologically, genetically, or otherwise inherently superior at nurturing and caring for children. Although some men and women are natural caregivers and nurturers, for most people, parenting is something learned by doing. "Fathering (like mothering) depends on practice and opportunity."

Malin, *supra* note 11, at 1054-55 (quoting Pamela Daniels & Kathy Wiengarten, *The Fatherhood Click: The Timing of Parenthood in Men's Lives*, *in* FATHERHOOD TODAY: MEN'S CHANGING ROLE IN THE FAMILY 36, 44 (Phyllis Bronstein & Carolyn P. Cowan eds., 1988)). He asserts that if fathers were given the opportunity to become involved in caring for their children, particularly in the early years, they would perceive themselves and be perceived by others, as more competent parents, thereby breaking the continuing cycle of, "[m]aternal dominance of early child-care responsibilities resulting from perceived greater maternal skill and knowledge." Malin, *supra* note 11, at 1056-58. In addition, he attributes the lack of paternal involvement in child-care to the lack of paternal leave in the United States and points to Swedish studies, where fathers are granted extensive leave upon the birth of a child to facilitate father-child bonding. These studies illustrate his theory that when fathers are given an opportunity to take time off to involve themselves in the care of their children and their family, they utilize it and form a closer relationship with their children and spouses as a result. *Id.* at 1058 (citing LINDA HAAS, EQUAL PARENTHOOD AND SOCIAL POLICY: A STUDY OF PARENTAL LEAVE IN SWEDEN 158 (1992), which indicates a direct correlation between the percentage of time the father takes off to care for the children, as compared with the mother, and the father's involvement in everyday child-care responsibilities).

72. *See* Liz Sly, *Firms Look for Ways to Keep Moms on the Job*, CHI. TRIBUNE, Mar. 19, 1989, at 1 ("Women . . . are joining the work force twice as fast as men and will account for 13 million of the 20.5 million net additions to the labor force in the next decade."). In 1989, 5 years before the enactment of the FMLA, Leslie Bender argued that although firms had begun accommodating women by creating a "mommy track" so that they may balance work and family life, such accommodations only hurt women in the end because, "firms may use [these] choices to legitimate glass ceiling barriers to promotion, firm power, salary and prestige." Leslie Bender, *Sex Discrimination or Gender Inequality?*, 57 FORDHAM L. REV. 941, 943-44 (1989). She also indicated that both women and men "who are primary caregivers . . . [are] often forced to seek alternative career

Family and Medical Leave Act that would allow both men and women to have access to leave in order to tend to family responsibilities and prevent the social and economic inefficiencies that go along with such stereotypes.[73]

Although Congress explicitly discussed the negative effects of gender based stereotypes on women in the workplace, the Court here extends the rationale to men as well, by pointing out that, "[b]ecause employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave."[74] This denial of leave benefits for men not only contributes to the continued discrimination of women in the workplace,[75] but also prevents men from being involved in family care-taking responsibilities, a role they might gladly assume given the opportunity.[76]

choices," because of the lack of flexibility in many areas of the workforce. *Id.* at 943; *see generally*, Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003) (explaining the "maternal wall" phenomenon and the need for a restructuring of the workforce so that family considerations become the norm, not the exception).

73. Federal legislation was particularly necessary because, even though individual states had certain provisions granting leave, gender stereotypes have been so ingrained in American culture that this has dictated a need for the federal government to support a policy that could work to neutralize these stereotypes and provide for equality both at work and in the home. This was evidenced by the fact that, "at the time the FMLA was enacted, States relied on invalid gender stereotypes in the employment context, *specifically in the administration of leave benefits*." *Hibbs*, 538 U.S. at 735 n.11 (emphasis in original). (Internal quotation marks and citations omitted). And while the dissent argues that some states do provide "gender neutral family leave benefits," the majority points out that such states did not consider or implement these "gender neutral family leave benefits. . .[until] Federal family leave legislation was first introduced." *Id.* at 732.

74. *Id.* at 736. *See* Young, *supra* note 62, at 115-17 (revealing how studies show that company leave policies are much more favorable to women than men). Even when company policies do afford men leave on the books, men are still discouraged from taking leave. *Id.* In fact, "[a]ccording to one representative survey of companies providing paternity leaves, over 40 percent of personnel directors indicated that the appropriate amount of time for a father to take off at childbirth was 'no time.'" *Id.* at 117 (citing DEBORAH L. RHODE, JUSTICE AND GENDER 122 (1989)). While employers may still have these personal views on whether or not men should take leave for family matters, the *Hibbs* case indicates such views may no longer be legally implemented into employer practices, since men and women must be able to take advantage of at least the minimal leave the FMLA provides.

75. Such discrimination results because employers assume a woman's first loyalty will be to the home since men do not have the same ability to take leave.

76. Even though society still has not reached a point where men take off for family responsibilities at the rate women do, the *Hibbs* case itself illustrates that the availability of such leave enables those who want it to take it. Perhaps as time goes by, *Hibbs* will encourage more men to utilize their access to family and medical leave rights, enabling them to play a more equal role in the home. Just as Donna Lenhoff and Claudia Withers' prediction that in ten years from the FMLA's passage, "family and medical leave will be considered fundamental to an employee's decent working environment," has come true, so too will Hibbs prove monumental in the furtherance of family and medical leave access to both men and women. Lenhoff & Withers, *supra* note 7, at 51.

The *Hibbs* case makes it clear that gender based stereotypes can no longer be tolerated in our society as a justification for discriminatory practices in the employment arena against either men or women. Both should have the option to tend to family responsibilities without fear of being penalized in the workplace. In addition, the FMLA serves as a remedial measure that pushes our culture toward acceptance of different family structures. It allows families to choose whom they will allocate responsibilities to and not be pressured to conform to traditional stereotypical perceptions of what defines the "proper" role for men or women. By allowing individuals to decide what arrangement suits them and their families best, a more efficient structure results that not only benefits the individual, but the whole of society as well.

III. THE FMLA AND SAME-SEX COUPLES: WHY THE FAMILY AND MEDICAL LEAVE ACT SHOULD APPLY TO CIVILLY UNITED AND MARRIED GAY COUPLES IN SPITE OF THE DEFENSE OF MARRIAGE ACT

Discrimination against gays and lesbians is not covert; rather, it is widely acknowledged, making "[w]omen who love women and men who love men, people who have sex with people of the same sex, people whose primary passionate, sexual, and intimate relationships and identifications are with members of their own sex, are among the most stigmatized, persecuted, and denigrated people on earth."[77] While as Americans we believe that our country supports the basic freedoms of all, alarmingly "[i]n the United States gay men and lesbian women, or people thought or said to be gay or lesbian, can without legal recourse be denied citizenship, employment, or housing; [be] sexually harassed at work; excluded from serving their own country in armed forces; and murdered." [78]

Although the familial structure in the United States has changed dramatically in the last century, gays and lesbians are still denied the same basic rights that are given freely and without pause to their heterosexual counterparts. Slowly, same-sex couples are being recognized as capable of forming loving and long lasting relationships.[79] However, with DOMA still in place, these legal triumphs scarcely affect any federal employment benefits. Consequently, gays and lesbians are denied

77. CATHERINE A. MACKINNON, SEX EQUALITY 1057 (2001).

78. *Id.* at 1058.

79. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003) (finding the Due Process Clause was violated by a statute criminalizing intimate same-sex conduct).

the basic familial rights given to other Americans. These rights include "custody of or contact with one's own children" and denial of "a legal family with a life partner of one's choice."[80]

A. The History of the Defense of Marriage Act

The history of DOMA is wrought with moralistic, religious, and political beliefs, aimed unjustifiably at the gay community, and more specifically at gay marriage. From its inception, DOMA, which was signed into effect discreetly by President Clinton "[a]t midnight on September 21, 1996,"[81] has been the center of much legal debate. The Act states in pertinent part that, "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."[82]

DOMA was the first time in history that Congress ever used its power under the full faith and credit clause, "in a negative manner, that is, stating that a valid same-sex marriage in one state *need not* be given effect in sister states."[83] Thus, while DOMA is meager in size, reading a mere paragraph long, its impact has been one with enormous ramifications for gays and lesbians seeking fair and equal treatment under federal labor and employment benefits laws.[84]

At the time of its passage, "Congress declared that the purpose of DOMA is to deter other states from being compelled to recognize marriages of same-sex couples that were contracted in Hawaii, and to prevent married same-sex couples from becoming eligible for federal entitlements."[85] While the Act was purported "to define and protect the

80. MACKINNON, *supra* note 77, at 1058-59.

81. Barbara A. Robb, Note*, The Constitutionality of The Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263, 265 (1997).

82. 1 U.S.C. § 7 (2000).

83. Heather Hamilton, Comment*, DOMA: A Critical Analysis of its Constitutionality under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943, 946 (1998).

84. Despite the simplicity of the bill, the ramifications were great. The bill not only denied recognition of same-sex marriage, it also barred the states from doing so. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 1095 (2d ed. 2004). Critics of DOMA argued that it was not only "premature," but also "an excessive response even if the problem were imminent." *Id.* Civil rights activist, Rep. John Lewis, went so far as to say that the bill was "mean" and alluded to what he felt was "fear, hatred and intolerance." *Id.* But, as DOMA's legislative history reveals, it "sailed through Congress by margins of 342-67 in the House and 85-14 in the Senate." *Id.*

85. Robb, *supra* note 81, at 268.

institution of marriage,"[86] surely the possibility of awarding same-sex couples the plethora of rights and benefits that are given to married heterosexual couples[87] and the effects such a happening could have on the economy, was not a mere afterthought by Congress.

Congress asserted that DOMA promotes the following interests: "(1) protecting the institution of traditional, heterosexual marriage; (2) advancing traditional notions of morality; (3) protecting state sovereignty; and (4) preserving scarce federal resources."[88] After the passage of DOMA, gay and lesbian couples that choose to enter into marriage are denied coverage from any and all federal statutes that have a marriage and/or spousal component.[89]

A proponent of DOMA, Senator Lott, opened the arguments, stating that, "[t]o force upon our communities the legal recognition of same-sex marriage would be social engineering beyond anything in the American experience."[90] However, it is arguable that most everything in American culture has been a product of social engineering. Although Americans, and more specifically American employers, might not have been ready for all previous acts of Congress that radically thrust equality into society, the acts were passed nonetheless. Such acts, namely Title VII, the ADA, and the FMLA, were passed and subsequently amended; giving equal protection rights to several groups of people long discriminated against by American employers. Congress saw fit to foist new laws and benefits upon American culture in order to promote an evolving landscape of equality. However, when it came time to provide those same

86. Hamilton, *supra* note 83, at 944-45.

87. "The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death." Goodridge v. Dep't of Pub. Health**,** 798 N.E.2d 941, 955 (Mass. 2003). Such benefits include "filing joint income taxes, social security benefits, immigration rights, and veterans' benefits." Robb, *supra* note 81, at 285. Thomas Stoddard notes that,

> Married couples*** * *** are entitled to special government benefits, such as those given surviving spouses and dependants through the Social Security program. They can inherit from one another even when there is no will. They are immune from subpoenas requiring testimony against the other spouse. And marriage to an American citizen gives a foreigner a right to residency in the United States.
>
> Other advantages have arisen not by law but by custom. Most employers offer health insurance to their employees, and many will include an employer's spouse in the benefits package, usually at the employer's expense. Virtually no employer will include a partner who is not married to an employee, whether same-sex or not.

Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Autumn 1989, *reprinted in* ESKRIDGE & HUNTER, *supra* note 84, at 1099.

88. Robb, *supra* note 81, at 288.

89. *See generally* 1 U.S.C. § 7 (2003); Robb, *supra* note 81; Hamilton, *supra* note 83.

90. 142 CONG. REC. S. S10100-01 (daily ed. Sept. 10, 1996) (statement of Sen. Lott).

protections to same-sex couples, Mr. Lott claimed that *that* would have been social engineering.

The constitutionality of DOMA has been critically questioned since its passage in 1996.[91] Consequently, since DOMA's enactment, several states have struck down their anti-gay sodomy laws. More importantly, other states[92] have chosen to recognize civil unions for gay couples who choose to enter into a legally recognized binding union. While we agree that DOMA is unconstitutional, irrational, and based mainly on anti-gay animus, this note will focus on the Defense of Marriage Act and its relation to the Family and Medical Leave Act. As Jeffery Rosenberger stated, "[T]he Defense of Marriage Act has been challenged as unwise as a matter of family law policy."[93] We strongly agree.

B. Why the Purposes of DOMA Contradict the Purposes of the FMLA

Proponents of DOMA recognize that marriage is an integral part of our society because it "encourages responsible procreation and child rearing, is necessary to generational continuity, and represents societal approval of sexual relations."[94] However, it is important to note that despite this rationale, heterosexual couples are still allowed to marry regardless of their ability to procreate, same-sex couples can have a child via artificial insemination or adoption, and, "even DOMA proponents have admitted that a public policy exception based on the traditional role of marriage is undermined, in part, by the fact that greater threats to the institution of marriage, such as divorce and unwed parenthood, currently exist."[95]

91. *See generally* Hamilton, *supra* note 83, at 943 (discussing the constitutionality of DOMA under the Full Faith and Credit Clause.) Hamilton argues that, "while Congress clearly has the power to increase the measure of faith and credit that a state must accord to the laws and judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court." *Id.* at 954. *But cf*. Jeffrey L. Rensberger, *Same-Sex Marriages and The Defense of Marriage Act: A Deviant View of An Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409 (1998). Rensberger explains that:

> The Defense of Marriage Act has been challenged as exceeding the power granted to Congress under the Effect clause. It has also been argued that the Act discriminates against gays. By treating gay marriages differently than heterosexual marriages, the Act is said to violate the equal protection or substantive due process.

Id. at 411. Rensberger, however, concludes that DOMA is in fact constitutional. *Id.*

92. *See supra* note 24 and accompanying text.

93. Rensberger, *supra* note 91, at 411-12.

94. Hamilton, *supra* note 83, at 961.

95. *Id.*

As discussed in Section II, two stated purposes of the Family and Medical Leave Act, were, "to balance the demands of the workplace with the needs of families,"[96] and "to entitle employees to take reasonable leave for medical reasons."[97] The FMLA was created on a "gender neutral basis"[98] to eradicate certain socially engineered gender stereotypes about women and men that have persisted throughout history. In compliance with the Equal Protection Clause of the Fourteenth Amendment, the FMLA "minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons."[99] A main function of the FMLA is to prevent employers from using family medical leave as a means to discipline employees or discriminate against them.[100]

With the passage of the Defense of Marriage Act, Congress essentially dissolved all possibilities for gay couples to collect federal benefits, namely employment benefits, as married couples, even if state law chooses to recognize such unions. While those who supported DOMA, voting it into action, denied any anti-gay animus behind the Act, the legislative histories tell a very different story. At the time, there was tremendous fear that, "the State court system of Hawaii would recognize as a legal union, equivalent or identical to marriage, a living arrangement of two persons of the same sex."[101] Congress' fear was more of a premonition, and in fact, now, many more states have followed Hawaii and have had similar rulings on this issue and/or are seeking legislation in this area.[102]

C. DOMA Should Not Apply to the Granting of FMLA Benefits to Same-Sex Couples

An issue for many Americans, male or female, single or married, is finding a proper balance between work and family.[103] The federal government, in an inadequate attempt to promote equality, enacted "[f]amily

96. 29 U.S.C. § 2601(b)(1) (2000).
97. *Id.* § 2601(b)(2).
98. *Id.* § 2601(b)(4).
99. *Id.*
100. King, *supra* note 21, at 330.
101. 142 CONG. REC. S10100-01 (daily ed. Sept. 10, 1996) (statement of Sen. Lott).
102. *See*, *supra* note 24 and accompanying text.
103. *See* Ryiah Lilith, *Caring for the Ten Percent's 2.4: Lesbian and Gay Parents' Access to Parental Benefits*, 16 WIS. WOMEN'S L.J. 125, 125 (2001).

medical leave laws [to] promote ethical human resource decisions."[104] It is estimated that in 1987, "three million lesbians and gay men in the United States raised between eight and ten million children, and in 1998, approximately six to ten million lesbian and gay parents raised as many as fourteen million children."[105]

Interestingly, same sex couples could bring an action under the FMLA, "if they were denied parental leave or if their employer were to 'interfere with, restrain or deny the exercise of or the attempt to exercise' their leave rights."[106] Still, the potential success of such a claim remains undetermined, since no action like this has ever been brought.[107] While a claim brought by a gay or lesbian couple seems meritorious under the stated purposes of the FMLA, as noted infra in Section II.A, DOMA essentially renders such a claim moot. Such a case would die before a court would even get to FMLA analysis, because for the purpose of federal benefits, DOMA already tells us that gay and lesbian couples are not recognized as *really* married under federal law.[108]

It was proffered that, "[t]he Federal Government extends benefits, rights, and privileges to persons who are married, and generally it accepts a state's definition of marriage."[109] While traditionally, family law has been policed by the state, "the passage of the FMLA, and arguably DOMA, indicate a willingness on the part of the federal government to legislate in family law matters."[110] Such willingness, though, comes not out of a desire to protect American families, but rather out of a desire to prevent the possibility of spending federal money on American gay and lesbian families. Without DOMA, Hawaii's decision in *Baer v. Lewin*,[111]

104. King, *supra* note 21, at 321.

105. Lilith, *supra* note 103, at 125-26. Lilith notes, however, that while these numbers are staggering the plight of these gay and lesbian families has been given little attention. She further asserts that:

> [while most articles] about lesbian and gay families tend to focus on gaining legal recognition for parents' relationship (e.g. same-sex marriage, civil unions, domestic partnerships) or on establishing parental rights (e.g. domestic and international adoptions, custody disputes), they do not address the next logical issue: once these partner and parental relationships are formed and recognized (or not recognized, as the case may be), lesbian and gay parents must juggle their familial and work commitments, and the law can either help or hinder them.

Id. at 126.

106. *Id.* at 153. Lilith points out that other claims may also be actionable under the FMLA, such as "workplace hostility" geared toward employees who seek out such leave. *Id.*

107. *See id.* at 153.

108. *See generally* 1 U.S.C. § 7 (2000).

109. 142 CONG. REC.10100, S10103 (1996).

110. Lilith, *supra* note 103, at 156.

111. 852 P.2d 44 (Haw. 1993), *remand sub nom* Baehr v. Miike, 910 P.2d 112 (Haw. 1996).

would have made it possible for gays and lesbians to claim the allotted twelve weeks of unpaid leave under the Family and Medical Leave Act without the fear that their employment would be compromised.[112]

The legislative history of DOMA actually mentions the FMLA as a reason for its passage.[113] Interestingly, "[t]he DOMA House Report indicates that when the FMLA was originally drafted, the term spouse was not defined."[114] Subsequently, the FMLA was amended in order to limit the definition of spouse to mean, "only a husband or wife as the case may be."[115] But the FMLA is not so clear-cut; by saying, "as the case may be,"[116] the Act arguably still keeps itself open to gay couples united in legal same-sex unions. It was only after Congress' definition of the terms "husband," "wife," and "spouse"[117] that the FMLA became completely out of reach to gay and lesbian couples.[118]

This is apparent because "[t]he report also stresses that DOMA is needed in light of this definition, which does not define husband nor wife, in order to restrict application of the FMLA to only traditional married heterosexual couples."[119] However, the purpose of the FMLA was not to protect *traditional* families;[120] rather, it was enacted to protect

112. Pat P. Putignano, Note*, Why DOMA and Not ENDA?: A Review of Recent Federal Hostility To Expand Employment Rights and Protection Beyond Traditional Notions*, 15 HOFSTRA LAB. & EMP. L.J. 177, 200 (1997).

113. *See id.* at 202; H.R. REP. NO. 104-664, at 11 (1996).

114. Putigano, *supra* note 112, at 202-03.

115. 29 U.S.C. § 2611(13) (2000).

116. *Id.*

117. *See* 1 U.S.C. § 7 (2000).

118. *See* Lilith, *supra* note 103, at 125.

119. Putignano, *supra* note 112, at 203.

120. In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) the Court adopted the following analysis:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis . . .

Id. at 736.

The Court further stated that:

> By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the work-place caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the

the changing familial structure prevalent in the United States. If the families of the past century were the same traditional families from centuries before, with men working and women staying at home in traditionally recognized heterosexual marriages, the FMLA would not have been enacted because it would serve little, or no, purpose.

Moreover, the number of gays and lesbians, who declare themselves as such in American census materials, has grown,[121] as has the number of states choosing to recognize same-sex unions.[122] In 2000, the U.S. Census reported a total of 601,209 gay and lesbian families, with gay male families totaling 304,148 and lesbian families totaling 297,061.[123] This figure represents a 314 percent increase since 1990.[124] Still, however, "[t]he Human Rights Campaign estimates that the 2000 U.S. Census count of gay and lesbian families could be undercounted as much as 62 percent."[125] These figures, while measuring both married and unmarried couples, represent exactly the type of familial change recognized by the FMLA ten years ago.

D. Gays and Lesbians Form Families that Deserve FMLA Benefits

The family structure in America is changing.[126] Despite DOMA's restriction on the recognition of same-sex "marriage" for the purposes of

> formerly state-sanctioned stereotype that only women are responsible for family care giving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes . . . [T]he FMLA is narrowly targeted at the fault line between work and family—precisely where sex-based overgeneralization has been and remains the strongest. . .

Id. at 737-38. Therefore, if the purpose of the FMLA was to eradicate "sex-based overgeneralizations" as noted above, then along with the idea that women can have families, be employed, or both, comes the idea that women can love men, or women, or both. Heterosexuality is also an overgeneralization about men, women and the familial structure.

121. *See* Gary J. Gates, *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households*, HUMAN RIGHTS CAMPAIGN, Aug. 22, 2001, at 3.

122. *See supra* note 24 and accompanying text.

123. Gates, *supra* note 121, at 3.

124. *Id.*

125. *Id.*

126. *E.g., id.* at 2. Gates suggests that:

> Studies on the total number of gay and lesbian people in the United States show a range from 2 percent to 10 percent of the population. In the last three elections, the Voter News Service exit poll registered the gay vote between 4 percent and 5 percent. While concluding that the Census 2000 undercounted the total number of gay or lesbian households, for the purposes of this study we estimate the gay and lesbian population at 5 percent of the total U.S. population over 18 years of age, (209,128,094). This results in an estimated total gay and lesbian population of 10,456,405. A recent study of gay and lesbian voting habits conducted by Harris Interactive determined that 30 percent of gay and

federal benefits, the FMLA should still apply to same-sex couples legally joined. It is important, for the purposes of this note, to recognize that the 2000 Census materials refer to gay and lesbian couples as "families."[127] Under the FMLA, all *families*, heterosexual, homosexual, single parent, or otherwise, should be afforded the protections of the Act. State courts are beginning to acknowledge the evidence that gay couples, like heterosexual couples, are capable of forming families.[128] In *Goodridge v. Department of Public Health*,[129] the court conceded that gay couples can in fact raise children and having a set of heterosexual parents is not the only avenue to guarantee an "optimal" child rearing setting.[130] The Court also stated that, "[r]estricting marriage to opposite-sex couples"[131] cannot further the policy of "[p]rotecting the welfare of children."[132]

The Court recognized the adverse and undue burden placed on children from unwed parents.[133] Further, the Court recognized that there is currently a "sizeable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license."[134] The idea that preventing same-sex marriage will help to strengthen the family unit is implausible because, as the *Goodridge* court points out, by restricting benefits to same-sex couples we "penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation."[135]

Similarly, in *Baker v. Vermont*,[136] the Court agreed that, "while accurate statistics are difficult to obtain, there is no dispute that a signifi-

lesbian people are living in a committed relationship in the same residence.

Id.

127. *See id.* at 3.

128. *See*, *e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

129. 798 N.E.2d at 941.

130. *Id.* at 963.

131. *Id.* at 962.

132. *Id.* The court elaborates on this by adding that "[t]he 'best interest of the child' standard does not turn on a parent's sexual orientation or marital status." This is quite interesting since the proponents of DOMA argue that protecting the family structure, namely restricting it to opposite-sex couples only, is the only way to protect the family unit. *See* 142 CONG. REC. S10100 (daily ed. Sept. 10, 1996) (statement of Sen. Lott).

133. "[T]he fact remains that marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to non-marital children." *Goodridge*, 798 N.E.2d at 956-57.

134. *Id.* at 964.

135. *Id.*

136. 744 A.2d 864 (1999).

cant number of children today are actually being raised by same-sex parents, and that increasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques."[137] Gay and lesbian parents are therefore creating families despite the fact that they have no federal backing and are not reaping any federal benefits by doing so. Thus, the idea that same-sex couples are not capable of forming strong familial relationships and/or procreating,[138] is not true.

Recently, in *Lawrence v. Texas*,[139] the Supreme Court overruled *Bowers v. Harwick*[140] and reemphasized what was stated earlier in *Planned Parenthood v. Casey*,[141] that, "our laws and the tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[142] That said, the Court recognized that, "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[143] Gay and lesbian couples are forming families just as heterosexual couples might choose to; and as evidenced by the recent court cases noted above, several states are beginning to recognize their unions.[144] The federal government has been slow and reluctant to follow. If the purpose of DOMA is to protect families, then the Act has failed. An obvious explanation for DOMA is that it was merely a poorly masked attempt to introduce anti-gay animus into the federal realm. DOMA does not protect families; it discriminates against them. Furthermore, if

137. *Id.* at 881.

138. Alec Walen, *The "Defense of Marriage Act" and Authoritarian Morality*, 5 WM. & MARY BILL RTS. J. 619, 631 1997). Senator Byrd argued that, "[i]f same-sex marriage is accepted, . . . America will have said that children do not need a mother and a father two mothers or two fathers will be just as good. This would be a catastrophe." *Id.* Walen counters that Byrd is essentially arguing that if same-sex couples can procreate, "they cannot parent well." According to Walen Byrd's argument is flawed in three respects. First, "procreation is not essential to marriage." Second, "a legal marriage for heterosexual couples does not require any testing of parenting skills." Therefore, as Walen points out, according to this logic, a heterosexual child abuser technically has the right to marry and therefore parent, while gays and lesbians do not. Lastly, Walen points to *Baehr v. Miike,* where the judge held that, "[g]ay and lesbian parents and same-sex couples can provide children with a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children . . . Gay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different sex-couples." *Id.*

139. 539 U.S. 558 (2003).

140. 478 U.S. 186 (1986).

141. 505 U.S. 833 (1992).

142. *Lawrence*, 539 U.S. at 574. The court stated further, that matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.*

143. *Id.*

144. *See supra* note 24 and accompanying text.

DOMA can be said to protect anything, it is federal funds and unjustified (personal) moral beliefs.

IV. DOMA IS NOT ABOUT PROTECTING FAMILIES

At the time DOMA hit the floor, no state recognized same-sex unions,[145] and those who opposed DOMA claimed that it was premature.[146] The Act was imposed primarily out of hostility toward gay and lesbian relationships, not any threat to heterosexuality. Still, it was argued that, "[t]he Defense of Marriage Act is not an attack upon anyone . . . [but] rather, a response to an attack upon the institution of marriage itself."[147] The frailty of this argument is underscored by the lack of evidence that gay and lesbian coupling has any material impact on heterosexual families.[148] Ironically, since the passage of the Defense of Marriage Act, the divorce rate, as well as the number of single parent homes, has grown significantly.[149]

Opponents of DOMA have also commented on the shortcomings of the Act, stating that, "[w]e need a defense against terrorism and a defense against tax increases, not a defense against marriage that will unnecessarily divide the American family."[150] Furthermore, they argue

145. It is important to note, however, that at the time of DOMA's passage, Hawaii was about to become the first state to recognize same-sex unions. Baehr v. Miike, 852 P.2d 44 (1993), *remand sub nom*. Baehr v. Miike, 910 P.2d 112 (1996).

146. ESKRIDGE & HUNTER, *supra* note 84, at 1095.

147. 142 CONG. REC. S10100 (daily ed. Sept. 10, 1996) (statement of Sen. Lott).

148. "Allowing gays to marry would, if anything, add to social stability, for it would increase the number of couples that take on real, rather than simply passing, commitments. The weakening of marriage has been heterosexuals' doing, not gays', for it is their infidelity, divorce rates and single-parent families that have wrought social damage." Economist.com, *Equal Rights: The case for Gay Marriage* (Feb. 26, 2004), *at* http://www.economist.com/printedition/displaystory.cfm?Story_ID=2459758. *But cf.* Sen. Orrin Hatch, *News Room: The Senators Statements* (July 9, 2004), *at* http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1100. Sen. Hatch argues that at this point, as it is now written, "the Constitution requires that barring a rational public policy to the contrary, [my] marriage in Utah must be recognized in Virginia." However, he states that a Constitutional Amendment would be a better idea, because although "DOMA ensures that states would not be compelled under the Constitution to recognize same-sex marriages performed in other states. . . DOMA is under direct assault in a lawsuit filed in Florida court challenging the first prong of DOMA. There is no doubt that a suit will eventually be filed challenging the constitutionality of DOMA's exception to the Full Faith and Credit Clause."

149. *See* Economist.com, *supra* note 148, at http://www.economist.com/printedition/displaystory.cfm?story_ID2459758.

150. Log Cabin Republicans, *Log Cabin Challenges Frist [R-TN] on Anti-Gay Constitutional Amendment* (June 30, 2003), *at* http://www.lcrga.com/archive/200306301204.html (last visited Nov. 15, 2004).

that, "[t]he real threat to marriage is a 50% divorce rate, not loving, law-abiding, tax-paying gays and lesbians who simply want basic fairness for their families."[151] Such "basic fairness" for families was supposed to have come in the form of the Family and Medical Leave Act.

A. DOMA Was Fueled By Anti-Gay Animus

The proponents of DOMA, of which there were many, were clear in the "deeper reason for the bill."[152] The House Judiciary explained that, "[c]losely related to this interest in protecting traditional marriage is a corresponding interest in promoting heterosexuality."[153] Looking at the text of DOMA, it is unclear exactly how discriminating against same-sex marriage defends heterosexual marriage in America.

Representative Canady spoke about the social decay that might occur if same-sex marriages were to become commonplace. He asked, "[s]hould this Congress tell the children of America that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same-sex?"[154] From this, one can perceive that a prevalent fear was that a failure to pass DOMA would be equivalent to condoning or supporting homosexual lifestyles. Canady's argument is flawed because despite the modern undercurrent of intolerance toward homosexuality there are still vast numbers of men and women who identify as gays and lesbians. Therefore, "if homosexuals can discover that they are attracted to members of the same sex despite all the pressures to be heterosexual, it stands to reason that heterosexuals would be able to discover that they are attracted to members of the opposite sex in an environment which tolerates homosexual marriages."[155] There is absolutely no reason to believe that being gay is contagious.

Other representatives had similar issues with same-sex marriage. Many argued that the union of a man and man or woman and woman was unnatural and immoral.[156] Representative Tom Coburn summed up the attitudes of his constituents when he claimed that the issue "'is not diversity'—the issue is 'perversity.'"[157] If this is true, then the push for

151. *Id.*

152. ESKRIDGE & HUNTER, *supra* note 84, at 1094.

153. *Id.*

154. Walen, *supra* note 138, at 634-35 (citing 142 CONG. REC. H7491 (daily ed. July 12, 1996)).

155. *Id.* at 635.

156. *See generally* ESKRIDGE & HUNTER, *supra* note 84, at 1095 (quoting multiple pro-DOMA arguments in the House and Senate, illustrating the so-called perversity argument).

157. *Id.*

DOMA was not about *protection* but rather about *prevention*. Representative Barr, the "thrice-married House sponsor,"[158] claimed that, "the flames of self-centered morality are licking at the very foundation of our society: the family unit."[159] If claims that the family unit in America is crumbling are true, how does DOMA stand to help the problem? By not allowing gay and lesbian couples to marry at all, we are weakening *their* family unit. Is a same-sex couple *married* with children not closer to the traditional idea of the family unit than an unmarried same-sex couple with children? Therefore, it should stand to reason that by allowing same sex-couples to marry and obtain federal benefits we would be strengthening those marriages and creating more stable families.

B. The Money Issue: Are Gays and Lesbians Too Expensive?

Currently, there are, "1049 federal laws classified to the United States Code in which marital status is a factor."[160] With the passage of DOMA, the Federal Government was spared the possibility that these laws might apply to same-sex couples. At best, these cost rationales constitute an illogical justification, and at worst, appear as deliberate impositions of budget concerns on one class of people, rather than society as a whole. Many of the statutes aimed at married couples deal with employment benefits, such as healthcare, insurance, pension and retirement plans, Social Security, tax exemptions and several other marital benefits.

It was stated that DOMA, "ensures that for the purposes of federal programs, marriage will be defined by Federal law . . . [because] our failure to do so would open up those programs to all sorts of confusion and claims and court actions."[161] This argument fails because there would be no more confusion on these issues if they were simply left for the states to decide them. The full faith and credit clause gives ample guidance to the states in deciding these matters and, "was included . . . as a means of binding the original separate States into a United States of America."[162]

Ironically, Congress purports that a primary purpose of DOMA was to allow states to decide whether to recognize unions between same-sex couples for themselves. However, at the time their reasoning was premature, since no state had yet recognized such unions. It is apparent that

158. *Id* .
159. *Id.*
160. Hamilton, *supra* note 83, at 945.
161. 142 CONG. REC. S10100-01 (daily ed. Sept. 10, 1996) (statement of Sen. Lott).
162. *Id.* at S10102.

Congress was quick to assemble DOMA as a precautionary measure, an obstacle imposed on gays and lesbians to block their path to equality and safeguard the federal purse from paying benefits to these couples. Importantly, "[t]he precedent created by this bill should alarm anyone who cares about Federal-State relations generally. If Congress invokes the full faith and credit clause to deny effect to unpopular State court judgments, why will it stop at gay marriages?"[163]

Proponents of this bill unequivocally stated their concern about the fiscal effect of gay marriages on federal benefits. It was proffered that, "[t]he Federal Government extends benefits, rights, and privileges to persons who are married, and generally it accepts a state's definition of marriage."[164] This bill was set forth to help the Federal Government, "defend the traditional and commonsense definitions of the American people."[165] The fear was that without such a bill, if Hawaii, or any other State, redefined "marriage" or "spouse," then, "reverberations may be felt throughout the Federal Code."[166]

According to recent statistics, "most employers offer health benefits to heterosexual employees and their families."[167] As stated above, "[a]nother motive for narrowing the applicability of the FMLA to only heterosexual married couples, is to preserve scarce resources, such as employment benefits."[168] Representative Curt Weldon, a co-sponsor of DOMA, said in justifying the Act, "I think it would be wrong to take money out of the pockets of working class families across America and use those tax dollars to give Federal acceptance and financial support to same sex marriage."[169] However, this argument is fallible on multiple levels.

First, it must be noted that gays and lesbians are also tax-paying individuals. If Representative Weldon can argue that heterosexual taxpayers should not be forced to support gay marriage with their tax dollars, gays and lesbians could just as easily argue that they should not be forced to support heterosexual marriage, an institution that they will neither partake in, nor benefit from. Moreover, on a larger, more general scale, Americans have never been able to pick and choose where or how

163. *Id.*

164. *Id.* at S10103.

165. *Id.*

166. *Id.*

167. Judy Morrissey, *Should Employers Offer Health Benefits to Domestic Partners of Gay Employees?*, *at* www.ziplink.net/~glen/compaqplus/domestic.html, (last visited Nov. 15, 2004).

168. Putignano, *supra* note 112, at 203.

169. Walen, *supra* note 138, at 623.

their tax money is spent. Racist Americans cannot prohibit their monies from being distributed to black families, democrats cannot ask that their monies not be used while a republican is in office, and heterosexuals cannot be afforded the right to decide that their taxes not be disbursed to gay and lesbian families.

It is important to note that:

> The Home Economics Association defines a family as "[t]wo or more persons who share resources, share responsibilities for decisions, share values and goals, and have commitments to one another over a period of time. The family is that climate that one comes home to; and it is that network of sharing and commitment that most accurately describes the family unit, regardless of blood, legalities, adoption or marriage.[170]

While married people are generally covered under their spouse's health plans, file joint tax returns, and make important medical decisions for their spouses, gay and lesbian families are denied similar rights even if they have entered into legal civil unions or marriages. It is absurd that, "[l]esbian and gay parents' access to parental benefits are inconsistent and mercurial, leaving lesbian and gay parents dependent upon the whims of employers and subject to layers of incongruous laws."[171]

Proponents of DOMA also argue that it is reasonable to exclude gays and lesbians from FMLA benefits, "[s]ince a disproportionate number of HIV infected people are homosexuals, [and] it is expected that many married gay couples would seek leave under FMLA to care for their HIV infected partner."[172] Through DOMA, Congress seems to condone discrimination of gay and lesbian couples and their families. It is no wonder that many employers have used Congress' rationale in workplace benefits. Such employers use the same cost arguments as a justification for not offering gays and lesbians the same benefits that are offered to their heterosexual employees. Thinking that homosexuals will cost them more in health care contributions, employers simply deny benefits,[173] their main worry being AIDS.[174]

FMLA benefits, however, require only unpaid medical leave. Therefore, it shouldn't matter to an employer whether an employee is

170. Morrissey, *supra* note 167, at www.ziplink.net/~glen/compaqplus/domestic.html.

171. Lilith, *supra* note 103, at 160.

172. Putignano, *supra* note 112, at 203.

173. Morrissey, *supra* note 167, at www.ziplink.net/~glen/compaqplus/domestic.html.

174. *Id.* "In reality, many current domestic partner plans relate that: 'Less than one percent of the workforce participates, AIDS health care benefits costs come to only about one-tenth of a premature baby, gay men do not always get AIDS, and AIDS is not exclusive to gay men." *Id.*

taking such leave to care for a newborn child, a spouse recovering from a major operation or a terminally ill parent. And still, what if a heterosexual employee takes leave to care for a child, spouse or parent who may be ill with AIDS? In such circumstances, this heterosexual employee is still permitted to take leave, while their gay and lesbian contemporaries are not. Furthermore, it has been argued that the number of employees that would actually avail themselves of these benefits is far lower than employers expect.

While there are no FMLA statistics, as these benefits are not available to same-sex couples in civil unions, some employers voluntarily offer health and employment benefits to same-sex domestic partners. One such employer, "Milbank, Tweed estimated their costs to be $137,000 for the year when in fact they turned out to be less than $10,000."[175] Fiscal analysis from other law firms showed similar figures.[176] In fact, a spokesman for The Human Rights Campaign has stated that since 1992 the number of U.S. firms providing these employment benefits has skyrocketed. Many employers provide same sex benefits in order to maintain a competitive edge and retain their gay employees.[177] Studies have shown that extended programs have proven cost effective with "less than 1 percent of employees in a typical company opt[ing] for same-gender partner benefits."[178] These numbers reflect health coverage offered by an

175. *Id.*

176. *Id.*

177. B.A. Robinson, *Employee Benefits & Municipal Registration For Same-Sex Couples: Same Sex Benefits in the Workplace*, *at* www.religioustolerance.org/hom_sseb.htm (last visited Oct. 21, 2004).

178. *Id.* Robinson also points out that many employers, both in the public and private sectors, are offering same-sex partner benefits. The article notes some statistics. According to the Human Rights Campaign, as of mid-2000:

> 3,400 private and public employers in the U.S. provide domestic-partner benefits for lesbian/gay employees. In June 2000, the big three automakers (Daimler-Chrysler Corp., Ford Motor Co., and General Motors Corp.) announced that they would extend benefits starting August 1,2000. On June 22, 2000 the Coca-Cola Company announced that it will extend benefits on January 1, 2001. 99 companies out of the 500 largest companies in the U.S., as listed in the Fortune 500 gave these benefits. This includes six of the top ten companies: General Motors, Ford, IBM, Citigroup Inc., AT&T and Boeing. (15 months later, in late September 2001, the number had grown to about 165.) Other large companies which provide domestic-partner benefits are: American Express, American Airlines, Amoco, Avon, Barnes & Noble, Chevron Oil, Clorox, Coors Brewing, Disney, Eastman Kodak, Gap, General Mills, Hewlett Packard, IBM, Levi Strauss, Mattel, Microsoft, Nike, Nynex, Pacific Telesis, Pillsbury, Proctor and Gamble, Quark, Reebok, Shell, Starbucks Coffee, Sun Microsystems, Time Warner, United Airlines, US Airways, US West, and Xerox. Very few companies have rescinded their extended benefit program: Perot Systems Inc, headed by former presidential candidate Ross Perot, did in 1998. At the time of the Exxon-Mobil merger, December 30, 1999 Mobil's domestic

employer, further emphasizing the point that providing FMLA benefits to same sex families will not prove catastrophic, as the Federal Government purports.

V. IT IS UNCONSTITUTIONAL FOR CONGRESS TO EXCLUDE GAY AND LESBIAN FAMILIES FROM ACCESSING FEDERAL BENEFITS UNDER THE FAMILY AND MEDICAL LEAVE ACT

"Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws."[179] The full force and effect of this clause has been the subject of heated debate since its inception in 1868.[180] Its requirement that state governments grant equal protection to those within their territories, who are similarly situated,[181] has been imputed to the federal government as well.[182] And although the Constitu-

partner benefits program was discontinued. These benefits have become very common within certain economic sectors, including computers, movies, airlines and oil companies.

Id.

179. U.S. CONST. amend. XIV, § 1.

180. Originally, this clause was thought to only protect racial distinctions given the historical context of its creation – the Civil War. *See generally*, Strauder v. West Virginia, 100 U.S. 303 (1879) (holding that although the State may require jurors to be educated individuals, it must individually screen each juror, regardless of their race, and may not generalize by excluding all black citizens for this criteria without first screening each individual to determine whether or not they qualify). Over time, its protection and the standards of review of government action to ensure its protection, have expanded. Today, race and national origin qualify as suspect classes receiving strict scrutiny, whereby the government must show that it had a compelling state interest in passing the discriminatory measure and that the measure chosen to protect that interest was narrowly tailored. Subsequently, categories such as gender and illegitimacy qualified as suspect classes receiving heightened scrutiny, the standard that shall be discussed in Section V.A. Classifications that are not suspect, are nevertheless subject to rational basis review, whereby the government must show that it is protecting a legitimate state interest with measures that are rationally related to protecting that interest. For a more elaborate discussion on the different levels of review under the Equal Protection Clause, see Kevin H. Lewis, Note, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 179-81 (1997).

181. *See*, *e.g.*, State v. Atkins, 549 N.W.2d 159, 163 (1996) ("As a general matter, the Equal Protection Clause requires the government to treat similarly situated people alike.") (citing Cleburne v. Cleburne Living Ctr., Inc. 473 U.S. 432 (1985)).

182. The court reads into the Due Process Clause of the Fifth Amendment, which applies to the federal government, a guarantee of equal protection. *See*, *e.g.*, Nguyen v. INS, 533 U.S. 53, 59 (2001); Nicole Richter, Note, *A Standard for "Class of One" Claims Under the Equal Protection Clause of the Fourteenth Amendment: Protecting Victims of Non-Class Based Discrimination From Vindictive State Action*, 35 VAL. U. L. REV. 197, 205-06 (2000) ("While the Fourteenth Amendment does not apply to the Federal Government, the Due Process Clause of the Fifth Amendment is interpreted to provide the same protection against discriminatory classifications by the Federal Government.").

tion does not impose an affirmative duty on either the federal or state governments to provide any protection to its citizens from private individuals, it does demand that where the government opts to provide protection, it provide it equally.[183] Therefore, in order for the government to comply with this equal protection requirement, it must treat those who are "similarly situated" the same, and may only treat differently those individuals who are not so similarly situated in relation to the purpose of the law.[184]

A. Denying Gay and Lesbian Families Access to FMLA Benefits Constitutes Gender Discrimination

The Supreme Court dictated in *Craig v. Boren*[185] that for classifications based on gender to "withstand constitutional challenge . . . [they] must serve important governmental objectives and must be substantially related to achievement of those objectives."[186] The purpose of this heightened standard of review is to flush out unequal treatment of women or men based on archaic and outmoded stereotypes about the proper roles men and women must play in society.[187] Unlike discrimination based on race or national origin, where the court looks for a bad purpose or discriminatory intent on the part of the legislature in treating

183. *See generally* DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189 (1989) (stating that even though the purpose of the Due Process Clause of the 14th Amendment was to, "protect the people from the State, not to ensure that the State protected them from each other . . . [t]he state may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause"). *Id.* at 196, 197 n.3.

184. *See* Yoav Sapir, *Neither Intent Nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127, 157-58 (2003) (explaining that there is no requirement that such individuals be "identically situated," but rather only "similarly situated" and that when individuals are "not equals . . . it may be just to treat them unequally").

185. 429 U.S. 190 (1976).

186. *Id.* at 197. The Court in this case determined that the State of Oklahoma had not shown how its legislation, deeming the drinking age for females to be 18 while the drinking age for males was 21, achieved its interest in reducing traffic accidents and therefore held that the statute "invidiously discriminate[d] against males 18-20 years of age." *Id.* at 204. Instead, the Court insinuated that even the statistical data the State provided to justify the higher purchasing age of males was inherently tainted by gender stereotypes and generalizations about men and women and the way they are treated in society. *See id.* at 202 n.14.

187. *See*, *e.g.*, Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 726 (1982) (demanding that classifications based on gender must be "determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women").

those of different races or national origins differently,[188] in claims of gender discrimination, the court looks to whether the distinction was motivated by stereotypical thinking about what the proper role for each gender should be.[189]

While it is true that there are very real differences between the genders, and that these differences may place men and women in different categories that might legitimately be treated differently, generalizations about men and women that are based on inaccurate stereotypical notions cannot be deemed legitimate.[190] Therefore, even though the government may treat men and women differently because of biological differences between the sexes,[191] it may not use the traditional roles of man as the stronger, more dominant figure, and woman as the weaker, more dependent sex, to justify differential treatment.[192]

The same holds true for the various subclasses of each gender. An illegitimate classification does not have to affect all members of the class in order to qualify as unconstitutional gender discrimination. For example, in *Caban v. Mohammed*,[193] the Supreme Court struck down as unconstitutional a New York statute that differentiated between unwed

188. *See*, *e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (striking down an anti-miscegenation statute that banned interracial marriage between whites and any other race on the grounds that, "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification"); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 362 (1886) (finding a statute that required Board consent in order to have a building made out of wood in the city area of San Francisco unconstitutional). The Court in *Yick Wo* found that:

> The necessary tendency, if not the specific purpose, of [such an] ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital.

Id. at 362.

189. *See Hogan*, 458 U.S. at 725 ("Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.") (citing Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) (plurality opinion)).

190. *See* Alison E. Grossman, Note, *Striking Down Fetal Protection Policies: A Feminist Victory?*, 77 VA. L. REV. 1607, 1613 (1991) ("Because 'false' stereotypes do not reflect actual differences in ability between the sexes, differential treatment based on such stereotypes is unjustified.").

191. *See* Nguyen v. INS, 533 U.S. 53, 64 (2001) ("[T]he use of gender specific terms [in this case] takes into account a biological difference between the parents [whereby t]he differential treatment is inherent in a sensible statutory scheme, given the unique relationship of the mother to the event of birth.").

192. *See generally* United States v. Virginia, 518 U.S. 515 (1996) (where the court determined that the State may not bar women from attending a rigorous "citizen-soldier" training program by relying on overbroad generalizations about the mental and physical frailties of women as compared to men).

193. 441 U.S. 380 (1978).

mothers and unwed fathers for purposes of consenting to the adoption of their children, finding that it "treat[ed] unmarried parents differently according to their sex."[194] The Court rejected the State's argument that, "the distinction is justified by a fundamental difference between the maternal and paternal relations – that 'a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does.'"[195] So even though not all men or all women were affected by the statute, the court still found that it classified individuals based on their gender and therefore, applied heightened scrutiny to the regulation.[196]

The Court reached the same conclusion in *Mississippi University for Women v. Hogan*,[197] where the court deemed unconstitutional MUW's policy of not admitting Mr. Hogan, who was otherwise qualified but for his sex, to its nursing program for credit.[198] The Court rejected the validity of the State's argument that, "[its] primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action."[199] Instead, the Court pointed out that by barring men from enrolling in the Nursing School, it "perpetuate[d] the stereotyped view of nursing as an exclusively woman's job"[200] – a view that, according to officials from the

194. *Caban*, 441 U.S. at 388. The statute required maternal consent to the adoption of her children born out of wedlock, a requirement that could only be overcome by proving the mother's unfitness as a parent. *Id.* at 385. On the other hand, there was no mutual requirement to obtain paternal consent for the adoption of illegitimate children, regardless of the relationship the natural father had with his children. *Id.* at 386-87. In essence then, this statute created a presumption of fitness on the part of the mother where no presumption existed for the unwed father. *Id.* at 386. In this case, both parents were applying for the adoption of their children by their individual spouses. *Id.* at 383. The Surrogate Court rejected Mr. Caban's petition because the natural mother withheld consent and he failed to prove she was unfit and that the best interests of the children prevented such adoption. *See id.* at 387-88. However, Mrs. Mohammed's petition was granted despite the fact that Mr. Caban withheld consent, even though she did not offer any proof as to his fitness as a parent. *See id.* at 384. In fact, Mr. Caban had a very close relationship with his children, a relationship he had maintained since their birth even after his relationship with their natural mother ended. *See id* at 382-83.

195. *Id.* at 388. The court found that this justification, based on the stereotype that mothers, because of maternal instinct, have a closer and more important relationship with their children than fathers, was too broad a generalization and was clearly disproved in this case because Mr. Caban and Mrs. Mohammed lived together with their children "as a natural family for several years [and a]s members of this family, both mother and father participated in the care and support of their children." *Id.* at 389. Therefore, this was not a case where the father neglected his parental duties and "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care [of his children]." *Id.* (quoting Quilloin v. Walcott, 434 U.S. 246, 256 (1978)).

196. *Id.* at 388.

197. 458 U.S. 718 (1982).

198. *See id.* at 733.

199. *Id.* at 727.

200. *Id.* at 729.

American Nurses Association, has "depressed nurses' wages."[201] In addition, the Court pointed out that the State's objective in excluding men from the program in order to provide a beneficial atmosphere of learning to women, was thwarted by the fact that the School permitted men to audit all the classes for no credit.[202]

Finally, in the seminal case of *United States v. Virginia*,[203] the Court established that the justifications for excluding women from an intensive "citizen-soldier" training regimen must be based on more than just, "overbroad generalizations about the different talents, capacities, or preferences of males and females,"[204] and that the State "may not rely on 'overbroad' generalizations to make 'judgments about people that are likely to . . . perpetuate historical patterns of discrimination.'"[205] In addition, the Court pointed out that the State may not deny the benefits associated with attending the Virginia Military Institute (VMI) to those women who wanted to attend the program and subject themselves to the demanding curriculum and who were capable of "meet[ing] the physical standards [VMI] now impose[s] on men."[206] Even if "most women would not choose VMI's adversative method . . . it is also probable that 'many men would not want to be educated in such an environment.'"[207] The State may not assume that just because most women would not opt to participate in such a program, *no* women are *capable* of participating.

Just as the Court has found that discrimination against subclasses of unmarried fathers,[208] or men who want to attend nursing school,[209] or women who want to attend a rigorous training program to receive their university education,[210] all qualify as gender discrimination for purposes of the Equal Protection Clause (because the distinction between the gen-

201. *Id.* at 729 n.15.

202. *Id.* at 730.

203. 518 U.S. 515 (1996).

204. *Id.* at 533.

205. *Id.* at 542 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)). The Court cites to a number of works by renowned medical academics from the 19th century, when VMI was first instituted, to explain the notion that VMI's adversative method and educational approach was ill suited for women. *Virginia*, 518 U.S. at 536-37 n.9. However, as the court points out, the idea that pursuing academics would cause a woman to, "lose . . . the habit of menstruation and suffer numerous ills as a result of depriving her body for the sake of her mind" is by today's standards and understanding of human physiology, preposterous. *Id.* (quoting C. MEIGS, FEMALES AND THEIR DISEASES 350 (1848)).

206. *Id.* at 541 (quoting United States v. Virginia, 976 F.2d 890, 896 (4th Cir. 1992)).

207. *Id.* at 542.

208. Caban v. Mohammed, 441 U.S. 380 (1978).

209. Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

210. United States v. Virginia, 518 U.S. 515 (1996).

ders is based on outdated gender stereotypes), the same holds true for discrimination against the subclasses of gay men or lesbian women.[211] This is particularly the case with regard to marriage.[212] The purpose of heightened scrutiny when it comes to gender discrimination is to root out discriminatory legislation that is based solely on antiquated gender stereotypes. What more antiquated stereotype than that a woman must be the central figure in the home and can only find fulfillment in forming a relationship with a man and bearing his children, or that a man can only complete himself by taking a woman as a wife to have his children?[213] To deny federal benefits under the Family and Medical Leave Act to men or women who do not fit neatly into the pre-determined roles society has set out for them to play, to require them to unnaturally comply with traditional norms that are predicated on nothing more than antiquated stereotypes, is unconstitutional gender discrimination and nothing more.

211. *Cf.* B.J. Chisholm, *The (Back)door of Onacle v. Sundowner Offshore Services, Inc.: "Outing" Heterosexuality as a Gender Based Stereotype*, 10 LAW & SEXUALITY 239, 254 (2001) ("Discrimination against a subclass of either sex, denominated 'sex-plus' discrimination, has been held . . . to constitute sex discrimination . . .").

212. The arguments for and against homosexual marriage are beyond the scope of this note. Rather, we are arguing that given the presence of homosexual marriage/civil unions, denying federal benefits to these couples, who are similarly situated to their heterosexual counterparts, is unconstitutional. *See generally supra* note 24 and accompanying text.

213. As mentioned above, heightened scrutiny is applied in cases of gender discrimination not to rule out "supremacy" of any particular class, but rather to ensure that the government has not based its differential treatment of the sexes on antiquated stereotypes and inaccurate overbroad generalizations. Biological differences that may rank one sex supreme over the other are not in question. Therefore, arguments that gay marriage is not the same as interracial marriage – prohibitions against which were deemed unconstitutional because they promoted White Supremacy - are flawed because the goals of equal protection in race cases and gender cases are different. Richard F. Duncan attempts to diffuse the argument that prohibiting gay marriage violates the Equal Protection Clause by showing how the "Loving Analogy" is inadequate because anti-miscegenation laws were premised on the notion of White Supremacy and maintaining the "racial integrity" of whites. Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239, 241(1998). However, the argument that, "[m]arriage laws apply the same equal standard to each gender – neither men nor women may marry a person of the same gender," *Id.*, is flawed under a gender discrimination analysis just as it was flawed under a race discrimination analysis because requiring either men or women to conform to heterosexual standards of proper gender roles in the context of marriage constitutes impermissible stereotyping.

B. Even if Failing to Apply the FMLA to Gay and Lesbian Couples is not Gender Stereotyping, it is Still Merely Based on Anti-Gay Animus and Discrimination Against Gay People

"If 'status based enactment[s] divorced from any [particular] factual context' raise equal protection concerns, it is because they stigmatize the burdened group or class as second-class citizens, unworthy of treatment on a par with others."[214] In order for a law to pass muster under the Equal Protection Clause[215] it must be proven that the purpose of the law is not to stigmatize individual groups of people.[216] If the courts are unwilling to grant gay and lesbian families heightened scrutiny, certainly under rational basis review it is extremely difficult to dispute the fact that the exclusion of gay and lesbian families from federal benefits programs like the FMLA, under DOMA, is purely based on anti-gay animus.

Under the Equal Protection Clause, state and federal governments may not "deny to any person within its jurisdiction the equal protection of the laws."[217] Classifications under the Equal Protection Clause are not forbidden. However, the Clause does guarantee that such classifications, "may not be based on impermissible purposes or be used to arbitrarily burden a particular group of individuals."[218] By not granting gay and lesbian families equal benefits under the FMLA, the federal government is burdening and stigmatizing the gay community simply because they are gay.

It can be explained that, "'[t]he essence of any stigma lies in the fact that the affected individual is not treated as an equal. Inequalities that stigmatize belie the principle that people are of equal ultimate worth."[219] Arguments have been made, asserting the idea that by expanding the federal laws to include same-sex marriages as valid, we are opening up a Pandora's box, and will soon be forced to recognize "any

214. Joseph S. Jackson, *Persons of Equal Worth: Romer v. Evans and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 492 (1997).

215. U.S. CONST. amend. XIV, § 1.

216. *See, e.g.*, Jackson, *supra* note 214, at 492. Jackson explains certain situations in which laws are status based *but* with a purpose. For example, "[t]he blind are not stigmatized by laws barring them from driving, precisely because such laws can be justified by reasons having nothing to do with the worth of blind people." *Id.* However, Jackson adds that other laws, namely a law requiring blacks and whites to use separate bathrooms, "rests on the proposition that blacks are not equal to white persons." *Id.*

217. Lewis, *supra* note 180, at 178-79.

218. *Id.* at 179. *See also* Jackson, *supra* note 214, at 453.

219. Jackson, *supra* note 214, at 492. (quoting KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 24, 25-26 (1989)).

form of consensual sexual coupling, no matter how idiosyncratic."[220] While this note does not address this topic in detail, suffice it to say that we do not believe this to be true. It is merely an offensive and vulgar idea that two consenting American adults, bound under the laws of the Constitution of the United States, are denied equality because of the select few who choose to place them into the same category as bestiality and incest. Additionally, the Court in *Lawrence* made sure to point out that the relationship at issue did not "involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."[221] Rather, it was one between two consenting adults. When examining Congress' rationale behind DOMA under a test of rational basis, it becomes apparent that the true motivations behind DOMA cannot stand alone, and are therefore cloaked in anti-gay rhetoric.[222]

"Generally the Equal Protection Clause limits the ability of federal and state governments to classify persons in the creation and application of laws."[223] Under rational basis review, the lowest level of review under the Equal Protection Clause,[224] legislation is upheld if it can be proven that the classification of a particular group is "rationally related to a legitimate interest."[225] When applying this limited level of scrutiny, "courts almost always defer to legislative judgment and uphold laws when using rational basis review."[226] However, in cases where the laws seem to be based merely on "'animus' or 'prejudice,'"[227] against a par-

220. Richard G. Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage*, 16 REGENT U. L. REV. 121, 122 (2004).

221. Lawrence v. Texas, 539 U.S. 558, 578 (2003). It should be noted, however, that the Court in *Lawrence* makes clear that for the purposes of that case, "[i]t does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle." *Id.* The Court went on to comment on the illegitimacy of any law that demeans a person's private conduct under the Due Process Clause. Hence, using the same rationale as the Court, the law should not prohibit gays and lesbians from receiving benefits under the FMLA just because they are gay. *See id.*

222. Wilkins, *supra* note 220, at 122. Wilkins claims that the recognition of same-sex marriage would be "most unfortunate," namely because he believes that "[n]ot all consensual couplings have equal social value, particularly when compared with the historic union know for centuries as 'marriage'." *Id.*

223. Lewis, *supra* note 180, at 178.

224. *See id.* at 179.

225. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985). *See also* Lewis, *supra* note 180, at 178-79. (The "court focuses on whether the law was enacted for any legitimate legislative purpose.")

226. Lewis, *supra* note 180, at 179.

227. *Id.*

ticular group, the Court will examine the legislation more carefully.[228] This seemingly "heightened" level of rational basis review was used in *Romer v. Evans*.[229]

The Court in *Lawrence v. Texas*,[230] examined the *Romer* decision and concluded that:

> *Romer* invalidated an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by 'orientation, conduct, practices or relationships,' and deprived them of protection under state antidiscrimination laws. We conclude that the provision was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose. [231]

The Court in *Romer* concluded that, "the true purpose of Amendment 2 was to make gay [men] and lesbians 'unequal to everyone else.'"[232]

In his dissent in *Lawrence*, Justice Scalia noted the changes the Court made to the rational basis test, saying that they applied an, "unheard-of form of rational-basis review that will have far-reaching implications beyond this case."[233] Scalia also defended *Bowers* as being correct in that, only interests traditionally recognized in American law can be "fundamental" and that the right to engage in consensual sodomy (homosexual or otherwise) is not one of those traditional rights.[234] This idea ignores the concept that, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[235] Historian Richard Morris posited that, "[a] prime part of the

228. *See*, *e.g.*, *Cleburne*, 473 U.S. at 440; Romer v. Evans, 517 U.S. 620, 633 (1996); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (invalidating a legislative regulation because its "purpose [was to] discriminate against hippies."); *see generally*, Lewis, *supra* note 180, at 179 (explaining that "rational basis review does not always mean that the law is immune from scrutiny" especially under these circumstances).

229. *See Romer*, 517 U.S. at 629.

230. 539 U.S. 558 (2003).

231. *Id.* at 574 (citing *Romer*, 517 U.S. at 624, 634. The Court in *Lawrence* clearly restates the idea that, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick should be and now is overruled." Id.* at 578. (emphasis added).

232. Jackson, *supra* note 214, at 495. (quoting *Romer*, 517 U.S. at 635).

233. *Lawrence*, 539 U.S. at 586. Justice Scalia points to a three part approach to "overrule an erroneously decided precedent": "(1) its foundations have been 'eroded' by subsequent decisions; (2) it has been subject to 'substantial and continuing' criticism; and (3) it has not induced 'individual or societal reliance' that counsels against overturning." *Id.*

234. *Id.* at 586.

235. *Id.* at 579.

history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded."[236] Furthermore, "legislation that rationally furthers a legitimate governmental interest may nevertheless be 'rooted in considerations that the Constitution will not tolerate' and therefore fail to withstand equal protection scrutiny."[237]

Justice Stevens, in his concurrence in *Cleburne*,[238] challenged the rigidity of the classifications under equal protection review. He added that, "our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other. I have never been persuaded that these so called 'standards' adequately explain the decisional process."[239] Some have called this new concept "rational basis with a bite,"[240] while others question its very existence.[241] Still, however, following the precedent set forth in *Cleburne*, *Moreno*, *Romer*, and most recently *Lawrence*, Congress' purported purposes for DOMA fail rational basis review.

As noted above in Section III.A, "Congress declared that DOMA advances the following interests: (1) protecting the institution of traditional, heterosexual marriage; (2) advancing traditional notions of morality; (3) protecting state sovereignty; and (4) preserving scarce federal resources."[242] In examining these four interests under rational basis review, it becomes clear that they are not rationally related to a legitimate interest.[243] As discussed, the general rule for rational basis review gives way when the Court finds that the laws rely on an irrational prejudice.[244]

First, Congress' notion that, by refusing to recognize gay marriages, traditional marriages are somehow strengthened, seems absurd. There are several other avenues that Congress could have taken to strengthen

236. U.S. v. Virginia, 518 U.S. 515, 557 (1996).

237. *See* Jackson, *supra* note 214, at 495 (refuting the idea that had the Court found a legitimate governmental interest no animus could have been found) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)).

238. *Cleburne*, 473 U.S. at 451.

239. *Id.*

240. Lewis, *supra* note 180, at 180.

241. *Id.* Lewis explains that "[n]ot all scholars are in agreement that the 'rational basis with bite' category actually exists, and the Supreme Court has never elucidated a specific test for this category." *Id.*

242. Robb, *supra* note 81, at 288.

243. *See* Lewis, *supra* note 180, at 178.

244. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985). The Court opined that, "[t]he short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded." *Id.*

so-called *traditional* marriages; namely, free marital counseling, tax-cuts and other federal benefits for married couples. Moreover, governmental changes to the institution of heterosexual marriage have hurt more than helped. By "[m]aking divorce easier to obtain" it has become a "national norm," and "society is beginning to grasp that the divorce revolution has imposed high societal costs."[245] If this is true, perhaps changes to the institution of heterosexual marriage would be far more helpful than prevention of same-sex marriage.

"Over a century ago, the Court called marriage 'the most important relation in life . . . having more to do with the morals and civilization of a people than any other institution.'"[246] Traditional justifications for a ban on same-sex marriage, such as procreation, have been discredited, although some continue to argue "the unquestionable relationship between marriage and child-rearing."[247] The Supreme Court in *Eisenstadt v. Baird*,[248] held that, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[249] The argument that child rearing is an essential component to marriage falls flat. To illustrate this point, notice that the government does not prohibit barren women from getting married, nor does it prohibit the elderly from marrying, and further the law does not force married couples to, in fact, procreate.[250]

Congress' second argument, that DOMA advances "traditional notions of morality,"[251] holds equally little weight. Traditional notions of morality change over time, as is evidenced throughout case law. In *Loving v. Virginia*,[252] the Supreme Court overturned antimiscegenation statutes in Virginia aimed at "prohibiting and punishing interracial marriages."[253] At the trial court level, the judge stated in his opinion that:

> Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The

245. Wilkins, *supra* note 220, at 135.
246. *Id.* at 129.
247. *Id.* at 130.
248. 405 U.S. 433 (1972).
249. *Id.* at 433.
250. *See* Griswold v. Conn., 381 U.S. 479, 480-81 (1965).
251. *See* Robb, *supra* note 81, at 288.
252. 388 U.S. 1 (1967).
253. *Id.* at 4.

> fact that he separated the races shows that he did not intend for the races to mix.[254]

The Supreme Court, however, chose to recognize 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,"[255] and that, "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[256] And while Justice White, in *Bowers v. Hardwick*,[257] commented that "[t]he law . . . is constantly based on notions of morality,"[258] the Court subsequently, in *Lawrence*, struck down the reasoning in *Bowers*, explaining that:

> [T]he Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of rights and acceptable behavior; and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us . . . to enforce these views on the whole society through operation of the criminal law."[259]

The Court concluded with a quote from *Casey* unequivocally expressing that, "'[o]ur obligation is to define the liberty of all, not to mandate our own moral code."[260]

Congress also argued that DOMA would enhance state sovereignty. This seems implausible after the passage of DOMA. On the one hand, the federal government is saying "do as you please with gay marriage" while on the other, they refuse to recognize those choices. Marriage has always been and remains a job designated to the states. Through the passage of DOMA Congress has done nothing more than usurp a power entrusted to the states.

Congress also asserts that the costs associated with providing benefits to same-sex families would be significant. This assertion, though, has yet to be proven. In fact, as mentioned infra in section IV.B, private

254. *Id.* at 2.
255. *Id.* at 12.
256. *Id.* (citing Skinner v. State of Oklahoma, 316 U.S. 535, 541 (1942)).
257. 478 U.S. 186 (1986).
258. *Id.* at 196.
259. Lawrence v. Texas, 539 U.S. 558, 571 (2003).
260. Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992).

employers who provide gay and lesbian employees with equal familial benefits as their heterosexual co-workers, were surprised at the minimal impact the changes actually had on their companies fiscally.[261] Many employers grossly overestimate the costs of offering same-sex benefits and are surprised when relatively few of their employees sign up for the plans.[262] Many same-sex partners, like many heterosexual spouses, are employed and receive their own benefits. Still, however, there is much confusion and, as many states begin to recognize same-sex unions, the IRS does not.[263] The IRS said that they would not recognize same-sex marriage "as long as the Defense of Marriage Act prohibits the federal government from recognizing same-sex marriages."[264] With the federal government arguing increased costs, it is ironic to note that, "with the so-called marriage penalty, upper-middle-class gays are actually fighting to give Uncle Sam more money."[265] Margaret Hodge, the minister at the Department for Education and Employment, described the struggle for equal benefits clearly, when she explained that, it is "not about political correctness."[266] She emphasized rather, that "economic prosperity depends on [our most] valuable resource: people. That means not discriminating against any sector of the work force."[267]

For the reasons highlighted, it is apparent that Congress' only reason behind DOMA is anti-gay animus, which is not a legitimate governmental purpose under rational basis review. One does not have to delve deeply to find the animus behind DOMA. Reading the Congressional reports makes it apparent. The foundations of equality in this country teach us that:

> [I]f private biases regarding the denigrated worth or status of certain groups are taken into account in the legislative process, the process will violate 'the duty of equal representation that has informed our

261. *See* Robinson, *supra* note 177, at www.religioustolerance.org/hom_sseb.html; Morrissey, *supra* note 167, at www.ziplink.net/~glen/compaqplus/domestic.html.

262. Susanna Person, *Insurers Rethinking What is a Family: Non-traditional Family Members are Getting Access to Benefits*, at http://www.bizjournals.com/jacksonville/stories/1996/06/17/story6.html?t=printable (last visited Mar. 22, 2004). One such company PacifiCare began to extend benefits to gay partners of employees in October 1994. and only 2 percent of the 3,000 eligible employees actually signed their partners up to receive health insurance. *Id.*

263. Jackson McLure, *Taxes: From 'I Do' to W2*, NEWSWEEK, Mar. 29, 2004, at 14.

264. *Id.*

265. *Id.*

266. Rachel Sylvester, Equal Perks at Work for Gay Men and Lesbians, http://www.antipas.org/news_2000/world/equal_perks_gays.html (last visited Mar. 22, 2004).

267. *Id.*

> Constitution from the beginning, and [that] undeniably animates the equal protection clause. The process, in short, will be unfair; the interests of the disfavored groups will not be given equal consideration, and the substantive results the process reaches will be illegitimate in that members of disfavored groups will not have been treated as equals.[268]

VI. CONCLUSION

If we as a society are to live up to the ideals this country was founded on, of equality and liberty for all, then we must recognize that discriminating against any group of people because they break out of certain traditional social norms is wrong, and should not be a basis for denying them the same rights that the rest of society enjoys.[269] More so, if same-sex couples are forming families, and states are recognizing same-sex unions, then under the FMLA (which recognizes that not all families are traditional) why is it permissible for federal law to discriminate against these non-traditional families? Certain rights and benefits are afforded to families by the FMLA, and so, the federal government, under their own rationale for the Act, should not be able to pick and choose which non-traditional families deserve benefits and which do not.

Alana M. Bell[*] *and Tamar Miller*[**]

268. Jackson, *supra* note 214, at 494-95.

269. Proponents of the proposed Employment Non-Discrimination Act, which seeks to prevent sexual orientation discrimination in the workplace, argue that Jeffersonian ideals, upon which this country was founded, of equality and fairness demand that such equality be extended to all groups of people making up our society, and to deny certain individuals such protections is not only a violation of our constitution, but goes against the very fibers that made up this great nation. For further elaboration on this point see Senator Lieberman's comments on the floor of the Senate in support of the Employment Non-Discrimination Act of 2001. 147 CONG. REC. S8466, S8480 (daily ed. July 31, 2001) (statement of Sen. Lieberman).

* Thank you to my co-author Tamar, for without your patience, diligence and friendship this note would not be possible. To Professor James A. Garland - your wisdom and support are unparalleled, and I thank you for being my mentor and for taking on this task. To the entire *Hofstra Labor & Employment Law Journal*, it has been my great pleasure working with you; I have much appreciation and respect for your dedication, attention and hard work. Thank you to Carol Abdelmesseh for her constant feedback and encouragement. Thank you to Jill Isaacs, for the clever title and Alyson Birdie, the other AB; you both make me laugh really hard. Thank you to the Bell family - your love and support in all that I do is truly a blessing. To my parents, Elyse and Mark Bell, thank you. I owe everything to you. Thank you to the Schulman's for all their love and encouragement. Most of all, thank you to my husband, Yitsy Schulman. You are my best friend and my greatest support. I love you with two "F's" (and George and Charlie too).

** First, I would like to thank my co-author Alana for her friendship, hard work and dedication in writing this note. Thank you to Professor James A. Garland, for his constant guidance and countless suggestions and comments, and to Carol Abdelmesseh, our Notes and Comments Editor, for all her

encouragement and advice. To Holly Rich, Ted Franzese, and the entire staff of the *Hofstra Labor & Employment Law Journal*, thank you for your contributions and attention to detail; it has been amazing to work with all of you. Most importantly, I am indebted to my mother, Miriam Miller, and my siblings Eric and Gabrielle, for their unwavering love, support and understanding; to my best friend, Sara Alper Rayvych, thank you so much for always being there for me and putting things into perspective. And last, but certainly not least, thanks to Jill Isaacs for her catchy title.