

The moral and constitutional case for a right to gay marriage

BY [Robert A. Levy](#)

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Following bitter defeats in [California](#), [Maine](#), and [New York](#), the gay and lesbian community has a New Year's victory to celebrate. [New Hampshire](#) joins four other states - [Connecticut](#), [Iowa](#), [Massachusetts](#) and [Vermont](#) - in legalizing gay marriage. And the nation's capital is also onboard. [Washington Mayor Adrian Fenty](#) put it this way: "Marriage inequality is a civil rights, political, social, moral and religious issue."

He covered all the bases, except one: It's a constitutional issue as well.

[Thomas Jefferson](#) set the stage in the Declaration of Independence: "[T]o secure these Rights, Governments are instituted among Men." The primary purpose of government is to safeguard individual rights and prevent some persons from harming others. Heterosexuals should not be treated preferentially when the state carries out that role. And no one is harmed

by the union of two consenting gay people.

For most of Western history, marriage was a matter of private contract between the betrothed parties and perhaps their families. Following that tradition, marriage today should be a private arrangement, requiring minimal or no state intervention. Some religious or secular institutions would recognize gay marriages; others would not; still others would call them domestic partnerships or assign another label. Join whichever group you wish. The rights and responsibilities of partners would be governed by personally tailored contracts - consensual bargains like those that control most other interactions in a free society.

Regrettably, government has interceded, enacting more than 1,000 federal laws dealing mostly with taxes or transfer payments, and an untold number of state laws dealing with such questions as child custody, inheritance and property rights. Whenever government imposes obligations or dispenses benefits, it may not "deny to any person within its jurisdiction the equal protection of the laws." That provision is explicit in the 14th Amendment to the U.S. Constitution, applicable to the states, and implicit in the Fifth Amendment, applicable to the federal government.

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Of course, government discriminates among its citizens all the time. By the 1920s, 38 states prohibited whites from marrying blacks and certain Asians. Until 1954, all states were allowed to operate segregated schools. Thankfully, the Supreme Court invalidated both interracial marital restrictions and school segregation. The court applied the plain text of the Equal Protection Clause despite contrary practices by the states for many years even after the 14th Amendment was ratified in 1868.

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